IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.161 of 2014 (O&M)
Date of decision: July 31, 2015

Bikramjit Singh Gill

……Appellant

Vs.

Commissioner of Income Tax, Bathinda

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. Divya Suri, Advocate and
Mr. Madhur Sharma, Advocate for the appellant.

Mr. G.S.Hooda, Advocate and
Ms. Urvashi Dhugga, Advocate for the revenue.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.161 and 322 of 2014 as the issue involved in both the appeals is common. However, the facts are being extracted from ITA No.161 of 2014.

2. ITA No.161 of 2014 has been filed by the assessee-appellant under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 11.9.2013, Annexure A.3 passed by the Income Tax Appellate Tribunal, Amritsar Bench Amritsar (in short, "the Tribunal) in ITA No.406(ASR)/2013 for the assessment year 2008-09.

3. Briefly, the facts as narrated in ITA No.161 of 2014 necessary for the decision of the controversy involved may be noticed. The appellant, an individual is a member of M/s Defence Services Cooperative House Building Society Limited (in short, “the Society'), Mohali consisting of various members. The society is owner of 27.3 acres of land in Village Kansal in District Mohali. The members of the society had been allotted plots measuring 500 and 1000 square yards. The appellant is having a plot measuring 500 square yards. A resolution was passed by the Executive Committee of the society that all the members would surrender their rights in the property to the society and the society would enter into an agreement on behalf of the members with M/s Tata Housing Development Company Limited (THDC) and HASH Builders (P) Limited (HASH) to develop 27.3 acres of land owned by the society. On 27.4.2007, the society entered into tripartite Joint development Agreement (JDA) with HASH and THDC to develop the land and it was agreed that in lieu of grant of development rights, the developers will pay a monetary consideration of ₹ 80 lacs to be paid in installments as per time schedule prescribed in clause 4 of the JDA and additionally one built up flat measuring 2250 square feet in the project to be given to each individual member of the society having plot size of 500 square yards in the land owned by the society. On 25.2.2007, the appellant member having plot of 500 square yards received part of the entire consideration. The members of the society issued an irrevocable power of attorney in favour of the developers to undertake various acts in furtherance of JDA. First sale deed was executed for registration of 3.08 acres of land by the society in favour of THDC. On 25.4.2007, second sale deed for

transfer of 4.62 acres of land was registered by the society in favour of THDC against payment of second installment of ₹ 18 lacs received by each member having plot size of 500 square yards. Original return of income was filed by the appellant on 26.9.2008 for the assessment year 2008-09 declaring income of ₹ 2,72,496/- which was processed under section 143(1) of the Act. The sources of income were shown as salary and business income. On 7.1.2010, revised computation of income was filed by the appellant during the assessment proceedings declaring income of ₹ 22,50,730/- which included capital gains on the consideration of advances and part payment under the JDA. On 17.2.2010, notice under Section 148 of the Act was issued to the appellant. The appellant filed written reply to the notice on 26.3.2010 stating therein that revised return already filed on 1.1.2010 be treated in response to the notice. On 5.5.2010, the appellant filed computation of income before the Assessing Officer declaring income of ₹ 22,50,730/- from salary, business income and long term capital gain. On 27.12.2010, Annexure A.1, assessment order was passed for the assessment year 2008-09 under Section 143(3) of the Act at an amount of ₹ 1,78,09,240/- wherein the Assessing Officer brought the following consideration receivable by the appellant under the JDA to tax under the head 'capital gains':-

i) Monetary consideration of ₹ 80 lacs (though only ₹ 32,00,000/- actually received till date)
ii) One furnished flat measuring 2250 square feet at the rate of ₹ 4500/- per square feet worth amounting to ₹ 1,01,25,000/-.

Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) (CIT(A) on 9.6.2011. Pursuant to a Public Interest Litigation, this court in CWP No.20425 of 2010 stayed construction/development of the project. On 28.1.2011, the society issued letter to HASH for payment of third installment in accordance with clause 4.1(iv) of the JDA. On 4.2.2011, HASH stated that the third installment would become due only after obtaining permission to commence construction. On 11.5.2011, the society sent legal notice stating that time was the essence of the JDA and delay was attributable to the developers in obtaining necessary approval from the competent authority. The society gave 30 days time to the developers to make the payment of the third installment. On non receipt of the payment on 13.6.2011, the society passed a resolution to terminate the attorney issued in favour of the developers. On 31.10.2011, the society cancelled the power of attorney issued in favour of the developers. Vide order dated 26.3.2012, this court in CWP No.20425 of 2010 directed the developers to obtain additional permission under the Punjab New Capital (Periphery) Control Act, 1952. Vide order dated 14.5.2012, this Court in CWP No.18253 of 2009 ordered stay of construction in the entire catchment area of Sukhna Lake as per survey of India record which also covered the project under consideration. The court also ordered for demolition of any structure after 11.3.2011. Status quo was granted by the Apex Court vide order dated 22.5.2012 wherein the court directed that no construction should be undertaken in the area in question. Vide order dated 7.3.2013, Annexure A.2, the CIT(A) dismissed the appeal filed by the appellant relying upon the order passed in the appeal of Shri Nirmal Singh Kahlon, another member of the society. Not satisfied with the order, the appellant filed appeal before the Tribunal. Vide order dated 11.9.2013, Annexure A.3, the Tribunal dismissed the appeal upholding the order passed by the Assessing Officer and affirmed by the CIT(A) bringing the entire consideration receivable to tax under the JDA. Hence the instant appeals.

4. We have heard learned counsel for the parties.

5. The Tribunal had adjudicated the appeals of the assessees relying upon the order dated 29.7.2013 passed by it in the case of ***Charanjit Singh Atwal vs. ITO, Ward No.VI(I) Ludhiana*** in ITA No.448/CHD/2011 against which ITA No.200 of 2013 was filed in this Court. In the said appeal alongwith connected appeals, the following issues emerged for consideration and adjudication:-

(i) scope and legislative intent of Section 2(47)(ii), (v) and (vi) of the Act;

(ii) the essential ingredients for applicability of Section 53A of 1882 Act;

(iii) meaning to be assigned to the term "possession"?

(iv) whether in the facts and circumstances, any taxable capital gains arises from the transaction entered by the assessee?

After considering the relevant statutory provisions and the case law, the conclusions arrived at by this Court in the said appeals vide judgment dated 22.7.2015 read thus:-

1. Perusal of the JDA dated 25.2.2007 read with sale deeds dated 2.3.007 and 25.4.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.
2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.2.2007 so as to fall within the domain of Section 53A of 1882 Act.
3. The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a

transferee.

4. Further Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.2.2007 having been executed after 24.9.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2 (47)(v) of the Act does not apply.
5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.2.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee appellants shall remain bound by their said stand.
6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section 54F of the Act would not survive any longer and has been rendered academic.
7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed."

The substantial questions of law were answered and appeals disposed of accordingly.

6. It was not disputed between the learned counsel for the parties

that the issue involved herein is squarely covered by the aforesaid judgment.

Accordingly, the present appeals are disposed of in the same terms.

(Ajay Kumar Mittal)
Judge

July 31, 2015
'gs'

(Fateh Deep Singh)
Judge