

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No. 191 of 2017 (O&M)
Date of decision: 08.05.2017

Pr. Commissioner of Income Tax, Jalandhar-I, Jalandhar

.....Appellant

Vs.

Dr. Amrik Singh Basra, Miani Road, Dasuya

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

Present: Mr. Vivek Sethi, Senior Standing counsel for the appellant-Revenue.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.191 and 192 of 2017, as according to the learned counsel for the appellant-revenue, the issue involved in both these appeals is identical. However, the facts are being extracted from ITA No.191 of 2017.

2. The appellant-revenue has filed the instant appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 19.10.2016, Annexure A.3, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No. 572(ASR)/2015, claiming following substantial questions of law:-

- (i) "Whether on the facts and circumstances of the case, the Hon'ble ITAT was justified in deleting the addition made by

AO relying upon the decision of Hon'ble High Court in the case of *C.S. Atwal Vs. CIT* in ITA No. 200 of 2013, when SLP has been filed by the department in the case?

- (ii) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT erred in relying upon the order of Hon'ble High Court and was justified in holding that the transfer of land by members of a Cooperative Society by signing an irremovable Power of Attorney in the name of the Developer and also by signing a Joint Development Agreement (JDA) would constitute 'transfer' within the meaning of section 2(47)(ii) of the Income Tax Act, 1961(the Act) read with Clause (v) and Clause(vi) of the said section so as to attract Capital Gain within the meaning of section 45 read with section 48 of the Act?
- (iii) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT erred in relying upon the order of Hon'ble High Court and was justified in holding that no possession had been given by the transferor to the transferee of the entire land in part-performance of Joint Development Agreement dated 25.02.2007 so as to fall within the scope of Section 53A of the Transfer of Property Act 1882 ignoring the fact that the combined reading of the clauses of the duly registered irrevocable Special Power of Attorney and the JDA would clearly show that the developer was handed over possession of the property whereby the assessee was authorized to enter upon the property not only for the purposes of development but other purposes also, including mortgage and sale of that property?
- (iv) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in relying upon the order of Hon'ble High Court and was justified in holding that in the absence of registration of JDA dated 25.02.2007 having been executed after 24.09.2001, the agreement does not fall under Section 53A of the Transfer of Property Act, 1882 and consequently, section 2(47)(v) of the Income Tax Act, 1961 does not apply to the present case, failing to appreciate the fact that this requirement of registration cannot be read into clause

(v) of Section 2(47) of the Income Tax Act, 1961 because the said provision refers only to the contract of the nature of section 53A of the T.P. Act without going into the controversy whether or not such agreement is required to be registered?

- (v) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in relying upon the order of Hon'ble High Court and was justified in holding that the Society has transferred the land through JDA on a pro-rata basis, and that only the money received against which sale deeds have also been executed could be taxed and the money to be received later cannot be presently taxed ignoring the fact that as per section 45 read with Section 48 of the Income Tax Act, in case of capital gain, the tax has to be paid on the total consideration arising on transfer which include the consideration which has been received as well as consideration which has arisen and became due and may be received later on?
- (vi) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in relying upon the order of Hon'ble High Court and was justified in concluding that the assessee has already terminated the agreement and has revoked the irrevocable Power of Attorney, ignoring the vital fact that the said irrevocable Power of Attorney could not be revoked for any reasons without obtaining specific prior written consent of THDC/HASH and no document showing the consent of THDC for revocation of this irrevocable Power of Attorney was ever been produced by the assessee?
- (vii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in relying upon the order of Hon'ble High Court and was justified in holding that clause (vi) of Section 2(47) of the Income Tax Act, 1961 would not be applicable in this case, ignoring the fact that the developer i.e. THDC/HASH has purchased the membership of the members of the society which would lead to its enjoyment of the property and in that sense, clause (vi) of Section 2(47) would apply to the present case?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.191 of 2017 may be noticed. The respondent-assessee, an individual, filed his return of income for the assessment year 2008-09 on 31.03.2009 declaring total income of ₹ 5,37,247/-. It was processed under Section 143(1) of the Act. The assessee also filed a revised return on 29.12.2009 declaring total income of ₹ 31,24,460/-. Proceedings under Section 147/148 of the Act were initiated by issuing notice under Section 148 of the Act on 01.01.2013 as the assessee had not declared entire long term capital gain arising out of transfer of capital assets i.e. land. The assessment was completed by the Assessing Officer on 28.03.2014 at total income of ₹ 1,54,72,350/-. While completing the assessment, the Assessing Officer computed long term capital gain amounting to ₹ 1,49,25,000/- and added it to the declared income of the assessee. The assessee was one of the members of the Punjabi Cooperative Housing Building Society Limited. The Society consisting of 207 members was the owner of 27.3 acres of land in village Kansal. It had allotted plots measuring 500 square yards to its 65 members, 1000 square yards to its 30 members and 4 plots of 500 square yards each were retained by it. It entered into a tripartite Joint Development Agreement (JDA) dated 27.07.2007 with Hash Builders Private Limited, Chandigarh (HASH) and Tata Housing Development Company Limited, Mumbai (THDC). Under the JDA, it was agreed that HASH and THDC shall undertake development of 27.3 acres of land owned and registered in the name of the society in respect of which it would give development rights in lieu of consideration. The agreed consideration was to be disbursed by THDC through HASH to each individual member of the society having plot size of 500 square yards partly in monetary and balance in terms of built up property. Clause 4 of the JDA

provided details of the payments. The assessee had been allotted 500 square yards plot in the society. As per the JDA, she was entitled to receive monetary consideration of ₹ 80,00,000/- and one furnished flat of 2250 square feet. The assessee actually received proportionate amount of ₹ 32,00,000/- received during the year under consideration. The Assessing Officer vide his order dated 28.03.2014, Annexure A.1, passed under Section 143(3) of the Act held that since as per the JDA, there was grant and assignment of various rights in the property by the assessee in favour of THDC along with handing over physical and vacant position, the same tantamount to transfer. The Assessing Officer applied the provisions of Section 2(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882 (in short, “the 1882 Act”) which provides that any transaction involving allowing the possession of the immovable property to be taken or retained in part performance of contract of the nature referred to in Section 53A of the Act of the 1882 Act shall be treated as transfer for purposes of the Act. Since the JDA was signed on 27.04.2007 i.e. during the previous year relevant to the assessment year 2008-09, the Assessing Officer computed chargeable capital gains in that year. It was also held that there was transfer within the meaning of sub sections (ii) and (vi) of Section 2(47) of the Act. The Assessing Officer concluded that the assessee was liable to tax during the assessment year under consideration on the entire amount received/receivable in future under the head capital gains and thus made net addition of ₹ 1,49,25,000/- on account of long term capital gains taxable in the hands of the assessee. Aggrieved by the order, the assessee filed an appeal before the Commissioner of the Income Tax (Appeals) [CIT(A)]. Vide order dated 27.08.2015, Annexure A.2, the CIT(A) deleted the addition of ₹ 1,49,25,000/- relying upon the judgment of this Court in the case of

C.S. Atwal and others Vs. The Commissioner of Income Tax, Ludhiana and another, ITA No. 200 of 2013 decided on 22.07.2015. Not satisfied with the order, the revenue filed an appeal before the Tribunal. Vide order dated 19.10.2016, Annexure A.3, the Tribunal dismissed the appeal filed by the revenue holding that the case of the assessee was clearly covered by the decision of this Court in ***C.S. Atwal*** case's (supra). Hence, the instant appeals by the appellant-revenue.

4. We have heard learned counsel for the appellant-revenue.

5. The matter is no longer res integra. In ***C.S. Atwal's*** case (supra) the issue involved in this appeal stands decided by this Court. In the said case, the following issues emerged for consideration:-

- (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 following conclusions were drawn:-

“(1) Perusal of the JDA dated 25.02.2007 read with sale deeds dated 2.03.2007 and 25.04.2007 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 25.02.2007 so as to fall within the domain of Section 53A of 1882 Act.

- (3) The possession delivered, if at all, was as a licensee 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 25.02.2007 having been executed after 24.09.2001, 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 25.02.2007, 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.”

6. Learned counsel for the appellant-revenue has not been able to controvert the applicability of the decision rendered in *C.S. Atwal's* case

(supra). The substantial questions of law claimed in these appeals are answered accordingly. Consequently, both the appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

May 08, 2017
‘gs’
Whether speaking/reasoned
Whether reportable

(Ramendra Jain)
Judge
Yes/No
Yes/No