

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

**ITA No. 298 of 2017
Date of decision: 29.8.2017**

The Pr. Commissioner of Income Tax-I, Amritsar

.....Appellant

Vs.

**Sh. Sewa Singh Sekhwan S/o Sh. Ujagar Singh, R/o Guru Ram Dass
Colony, Jalandhar Road, Batala.**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL**

Present: Mr. Arun Biriwal, Advocate for Mr. Denesh Goyal, Senior
Standing Counsel for the appellant.

Ajay Kumar Mittal,J.

1. The appellant-revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 02.12.2016, Annexure-3, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No. 602(ASR)/2015, for the assessment year 2007-08, claiming following substantial questions of law:-

- (i) "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in deleting the penalty when the assessee had not fully disclosed the accrued capital gain and addition on this account had been upheld by ITAT and the Hon'ble High Court and the appeal was pending before the Hon'ble Supreme Court?
- (ii) Whether on the facts of the case and in law, the Hon'ble ITAT was right in deleting the penalty when the assessee had not

fully disclosed the accrued capital gain and thereby furnishing inaccurate particulars of income?

- (iii) Whether on the facts of the case and in law, the Hon'ble ITAT was right in deleting the whole amount of penalty of ₹ 35,85,888/- levied by the AO in respect of addition made on account of Long Term Capital Gain by relying on the order of Hon'ble Punjab and Haryana High Court dated 22.07.2015 in the case of ***C.S. Atwal Vs. Commissioner of Income Tax*** whereas the Hon'ble High Court has held that the sale consideration to the extent of amount received are exigible to tax in the instant year and the assessee is bound to pay tax on receipt of further amounts?

2. Briefly, the facts as narrated in the appeal, necessary for adjudication of the controversy involved may be noticed. Return declaring income of ₹ 95,100/- was filed by the assessee on 31.03.2008. The assessee being Member of Punjabi Co-operative House Building Society owned one plot of land measuring 500 square yards in that society. The society entered into Tripartite Joint Development Agreement dated 25.02.2007, with M/s Harsh Builders Private Limited, Chandigarh (HASH) and M/s Tata Housing Development Company Limited, Mumbai (THDC). Through irrevocable Special Power of Attorney dated 26.02.2007, the society transferred the entire land, measuring 21.2 acres to the purchaser/developer party. As per the agreement, the assessee was to be given one flat measuring 2250 square yards each, valued at ₹ 1,01,25,000/- and monetary consideration of ₹ 82,50,000/-. The total consideration for transfer of his share in the capital asset of the society was to the tune of ₹ 1,83,75,000/-. As the Joint development agreement was dated 25.02.2007 and transfer of capital asset under Section 2(47) of the Act, had taken place in the assessment year 2007-08, the entire amount of ₹ 1,83,75,000/- accruing on account of

transfer of asset was chargeable to long term capital gain tax under Section 45 of the Act. In the return filed by the assessee, capital gain was declared only in respect of the sale consideration of ₹ 17,65,000/-. The Assessing Officer calculated capital gain on total consideration of ₹ 1,60,79,890/- and made addition of ₹ 1,59,82,147/- vide order dated 27.12.2010 under Section 143(3)/147 of the Act holding that the case fell within the ambit of Section 2(47) of the Act. Total consideration of ₹ 1,60,79,890/- was held to have accrued to the assessee during the assessment year 2007-08 and chargeable to long term capital gain as provided under Section 45 of the Act read with Section 48 of the Act. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)], but the same was dismissed. The assessee challenged the order passed by the CIT(A) as well as Assessing Officer before the Tribunal. This appeal was also dismissed. Vide order dated 27.03.2014, the Assessing Officer imposed penalty of ₹ 35,85,888/- upon the assessee under Section 271(1)(c) of the Act. Against the penalty order, the assessee filed appeal before the CIT(A). Vide order dated 18.08.2015, the CIT(A) deleted the penalty. Not satisfied with the order, the Department filed an appeal before the Tribunal. Vide order dated 02.12.2016, Annexure-3, the appeal was dismissed by the Tribunal. Hence, the instant appeal by the appellant-revenue.

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

4. The matter is no longer res integra regarding taxability of capital gains arising from the transaction entered by the assessee in the present facts and circumstances. In **C.S. Atwal's** case (supra) in ITA No. 200 Of 2013 decided on July 22, 2015, 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.”

5. Learned counsel for the appellant has not been able to controvert the applicability of the decision rendered in *C.S. Atwal’s* case (supra) that no capital gains on unrealized amount would accrue or arise to the assessee. Once that is so, no penalty under Section 271(1) (c) of the Act would be exigible. No substantial question of law as claimed in this appeal arises. Consequently, the appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

August 29, 2017
‘gs’
Whether speaking/reasoned
Whether reportable

(Amit Rawal)
Judge
Yes
Yes