IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 352 of 2017 (O&M)
Date of decision: 14.11.2017

Pr. Commissioner of Income Tax-I, Chandigarh

….Appellant

Vs.

Smt. Mukhtiar Kaur, M.L.A. Flat No.1, Opposite Punjab Bhawan, Sector-3, Chandigarh.

…..Respondent

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

Present: Mr. Urvashi Dhugga, Senior Standing Counsel for the appellant.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the appellant-revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 12.01.2017, Annexure A.3, passed by the Income Tax Appellate Tribunal, Division Bench, Chandigarh (in short, "the Tribunal") in ITA No. 682/CHD/2016, for the assessment year 2007-08, claiming following substantial questions of law:-

(i) "Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is right in holding that the parties had agreed for pro-rata transfer of land when by virtue of executing the Joint Development Agreement (JDA) read with possession letter and duly registered irrevocable special power of attorney, there was a grant and assignment of all rights in the entire property in favour of Tata Housing Development Company Limited (THDC) and so 'transfer' for the purposes of Section 2(47)(v) of the Income Tax Act 1961 read with Section

2(47)(ii), 2(47)(vi) Explanation below Section 2(47) and Section 269UA had taken place?

(ii) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is right in holding that no possession had been given by the transferor to the transferee of the entire land in part performance of the JDA read with possession letter and irrevocable special power of attorney so as to fall within the domain of Section 53A of the Transfer of Property Act, 1882 completely disregarding the facts that as per the JDA there was a grant and assignment of all rights in the entire property in favour of THDC alongwith handing over of physical and vacant possession?

(iii) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is right 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 so as to fall within the domain of Section 53A of the Transfer of Property Act 1882 when by virtue of the duly registered irrevocable special power of attorney, the developer was in complete control of the property and was in possession thereof including all rights of a defacto owner?

(iv) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is right in holding that the essential ingredients of Section 53A of the Transfer of Property Act, 1882 were not fulfilled on the mere ground that the JDA was not registered when Section 2(47)(v) of the Income Tax Act, 1961 only refers to the contract of the nature referred to in Section 53A of the Transfer of Property Act and the requirement of registration of agreement under Section 53A of the Transfer of Property Act cannot be read into Section 2(47)(v) of the Income Tax Act 1961 read with Section 2(47)(ii), 2(47)(vi), and explanation below 2(47) and Section 269UA?

(v) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is right in holding that the essential ingredients of Section 53A of the Transfer of Property Act, 1882 were not fulfilled when the irrevocable Special Power of Attorney was duly registered and there was no requirement of the JDA being registered?

(vi) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is right in holding that the essential ingredients of Section 53A of the Transfer of Property Act, 1882 were not fulfilled by not appreciating the observations of the Hon'ble Supreme Court in the case of Suraj Lamps and Industries Pvt. Limited Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC) and also the observations of the Hon'ble Supreme Court in order dated 01.07.2014 in the case of Sanjeev Lal etc. Vs. Commissioner of Income Tax, Chandigarh & Anr. in Civil Appeal Nos. 5899, 5900 of 2014 and in the case of Madathil Brothers Vs. Deputy Commissioner of Income Tax (301 ITR 345)?

(vii) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T is right in holding that the possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of the transferee when all possible rights in the property including the right to sell etc. had been given to the builder by virtue of registered special irrecoverable power of attorney?

(viii) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T is right in holding that the assessee was liable to capital gains tax only on portion of plot in respect of which sale deed has been executed and not in respect of the remaining portion of land for which no consideration had been received and in respect of JDA which stood cancelled and incapable of performance when the Hon'ble High Court had accepted the 'transfer' in respect of a portion of the piece of plot on the basis of the JDA dated 25.02.2007 but had not accepted the same JDA in respect of the remaining portion of the land particularly when the JDA and consequential consideration of transfer was for the entire piece of land?

(ix) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T is right in not accepting that there was a transfer of the entire piece of land in terms of Section 2(47)(v) of the Income Tax Act 1961 read with Section 53A of the Transfer of Property Act 1882 particularly when the Hon'ble High Court had treated that transfer has taken place in respect of a portion of the same land?

(x) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T is right in holding that the question of deduction under Section 54F of the Income Tax Act 1961 does not survive when the Hon'ble High Court had itself upheld the 'transfer' in respect of a portion of the said piece of land and has thus upheld the imposition of capital gains tax on account of the income arising from the transfer of the said portion of land?

(xi) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T. is right in holding that the question of deduction under Section 54F of the Income Tax Act 1961, does not survive when there was indeed a valid transfer of entire piece of land(capital asset) and so the issue of invoking Section 54F(subject to the conditions specified therein) for claiming exemption of LTCG still remains alive?

(xii) Whether the Hon'ble I.T.A.T. is right in bifurcating the agreement into different portions and allowing the assessee to pay capital gains tax only when cash or money is received whereas Section 45 of the Income Tax Act 1961 is a deeming provision where capital gain is liable to be taxed in the year in which transfer takes place and there is no provision under the law to allow the assessee to pay capital gains tax beyond the year in which the transfer takes place?

(xiii) Whether the Hon'ble I.T.A.T. is right in not adjudicating on the crucial issue of applicability of Section 2(47)(ii) and 2(47)(vi) of the Income Tax Act 1961 in the case of the assessee as the provisions of Section 2(47)(ii) and 2(47)(vi) also make the assessee liable for capital gains under the Income Tax Act 1961?

(xiv) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T. is right in not considering the contemporaneous documents pertaining to a transaction which have to be read as a whole as held by Apex Court judgment in S.Chathanatha Karyalar Vs. The Central Bank of India Ltd. in AIR 1965 SC 1856 and in the instant case these are "Agreement to Sell", "Possession letter", "Irrevocable Special Power of Attorney" and "Resolution by the members allowing the society to enter into a contract with the developers"?

(xv) Whether on the facts and circumstances of the case and in law the Hon'ble I.T.A.T. is right in not considering the "inclusive" definition of 'Transfer' in Section 2(47) and definition of "Agreement to Transfer" u/s 269 UA of Income Tax Act 1961 and relied upon different Acts i.e. 'Transfer of Property Act 1882' & 'Registration Act 1908' to decide the proposition of law that 'Transfer' mandatorily requires Registration and perpetuated the 'mischief' sought to be remedied by the incorporation of clauses (v) and (vi) in Section 2(47) against the Heydon's Rule?

(xvi) Whether on the facts and circumstances of the case and in law Hon'ble I.T.A.T. is right in holding that the provisions of Section 2(47)(vi) of the Income Tax Act were not applicable in absence of registered conveyance deed relying upon the decision of Supreme Court in Alapativerkatraman (57 ITR 108) disregarding the subsequent decision of Supreme Court in Podar Cement Ltd. Holding that the principal of Common law, transfer of property Act and Registration Act were not conclusive for interpretation of provisions of Income Tax Act?

(xvii) Whether on the facts and circumstances of the case and in law Hon'ble I.T.A.T. is right in holding that the provisions of Section 2(47)(ii) are not applicable when all the member of society surrendered their individual rights in the plots together with original purchase deeds in favour of society to be subsequently transferred to Tata Housing Development Company Limited (THDC) leading to extinguishment of rights in the plots?

(xviii) Whether on the facts and circumstances of the case and in law Hon'ble I.T.A.T. is right in holding that there was no accrual of income in respect of remaining portion of land being unregistered when Section 45 of the Income Tax Act,1961 requires taxability in the year of transfer?

(xix) Whether on the facts and circumstances of the case and in law Hon'ble I.T.A.T. is right in redefining the definition of full value of consideration as contained in Section 48 of the Income Tax Act by restricting the capital gain only to the amount of sale consideration received in cash pursuant to execution of the sale deeds dated 02.03.2007 and 25.04.2007 where as full value of consideration also included the monetary value of each flat proportionate to the area of each plot registered?"

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The return of income was filed on 02.12.2013 in response to notice issued under Section 148 of the Act, declaring an income of ₹ 31,33,560/-. Thereafter, assessment was completed under Section 143(3) of the Act on 16.02.2015 by determining total income at ₹ 1,84,16,030/- after making addition of ₹ 1,52,82,465/- on account of income from long term capital gain. At the time of assessment proceedings, the Assessing Officer noticed that a housing society named as Punjabi

Housing Building Society Limited, Mohali consisting of 95 members out of which one of them was assessee also, was formed, which was owner of 21.2 acres of land at Village Kansal, District Mohali. The society entered into a Tripartite Joint Development Agreement (JDA) dated 25.02.2007 with M/s Hash Builders Private Limited, Chandigarh (HASH) and M/s Tata Housing Development Company Limited, Mumbai (THDC), by virtue of which the society would transfer its land for development in lieu of monetary consideration and also consideration in kind to the members of the society. The assessee was also one of the members of the said society owning 500 square yards of land. Total consideration was settled at ₹ 82,50,000/- plus allotment of one flat of 2250 square feet to the assessee. The Assessing Officer computed the capital gain at ₹ 1,83,75,000/- taking into account the consideration receivable in cash at ₹ 82,50,000/- and value of one flat of 2250 square feet at the rate of ₹ 4500/- per square feet for ₹ 1,01,25,000/-. The assessee disclosed capital gain of ₹ 30,92,535/- in her ITR declaring income of ₹ 31,33,562/- in response to notice issued under Section 148 of the Act as the assessee had received ₹ 33,00,000/- only in pursuance of the said agreement. The Assessing Officer made an addition of ₹ 1,52,82,465/- (₹ 1,83,75,000/- minus ₹ 30,92,535/-) on account of capital gain in the case of the assesssee. Aggrieved by the above additions made by the Assessing Officer, the assessee filed an appeal before Commissioner of Income Tax Appeals, [CIT(A)]. Vide order dated 15.03.2016, Annexure A.2, the CIT(A) deleted the addition made by the Assessing Officer of ₹ 1,52,82,465/- on account of capital gain by following the judgment of this Court in the case of ***Sh. C.S. Atwal and others Vs. The Commissioner of Income Tax, Ludhiana and another,*** ITA No. 200 of 2013 (O&M) decided on 22.07.2015 in favour of the assessee. Aggrieved by the order, the department filed an appeal before the Tribunal. Vide order dated 12.01.2017, Annexure A.3, the Tribunal upheld the order passed by the CIT(A) deleting the addition made by the Assessing Officer on account of income from long term capital gains. Hence, the instant appeal by the revenue.

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

4. The matter is no longer res integra. In ***C.S. Atwal's*** case (supra) in ITA No. 200 0f 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 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 25.02.2007 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. It was not controverted that the civil appeal filed by the revenue against the above judgment has been dismissed by the Apex Court in ***Commissioner of Income Tax Vs. Balbir Singh Maini and Others***, (2017) 157 DTR (SC) 273 for the reasons recorded therein.

6. Learned counsel for the appellant has not been able to controvert the applicability of the decisions rendered in ***C.S. Atwal and***

Balbir Singh Maini's cases (supra). The substantial questions of law claimed in this appeal are answered accordingly. Consequently, the appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

November 14, 2017 **(Amit Rawal)**
'gs' **Judge**
Whether speaking/reasoned Yes
Whether reportable Yes