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ITAT/59/2023
IA No.GA/1/2023

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF
INCOME TAX-2, KOLKATA

-Versus-

M/S. EMPORIS PROPERTIES PVT.
LTD., KOLKATA

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 30th March, 2023

Appearance :
Ms. Smita Das De, Adv.
...for the appellant

Mr. J. P. Khaitan, Sr. Adv.
Mr. G. S. Gupta, Adv.
...for the respondent.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 22nd September, 2022 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (the Tribunal) in ITA No.299/Kol/2022 for the assessment year 2014-15.

The revenue has raised the following substantial questions of law for consideration:

- (i) *On the facts and circumstances of the case and in law whether the Hon'ble ITAT holding that the very initiation of revisional proceedings u/s 263 taken against the assessee vide order dated 26/03/2022 is void in the eyes of law and therefore quashed ?*
- (ii) *On the facts and circumstances of the case and in law whether the learned ITAT has failed to examine the provision of Section 43CA of the Income Tax Act, 1961 which are applicable to the case of the assessee and accordingly being the deeming section the proceeds received by the assessee are taxable u/s 43CA ?*
- (iii) *Whether the learned ITAT had erroneously held that there was no conversion of Stock in trade of the land which was offered in the JDA by the assessee after extinguishing 45% of rights to the total sale proceeds ?*

We have heard Ms. Smita Das De, learned standing counsel for the appellant/revenue and Mr. J.P. Khaitan, learned senior counsel assisted by Mr. G.S. Gupta, learned Advocate for the respondent/assessee.

The issue involved in the instant case is whether the Principal Commissioner of Income Tax (PCIT) was justified in invoking his power under Section 263 of the Act and setting

aside the assessment order passed under Section 143(3) read with Section 147 of the Act dated 27th December, 2019.

The assessee had entered into a land development agreement dated 17th September, 2013 for development of land and by virtue of the said agreement, after the construction of the housing complex on the said land, 55% of the constructed area will be allotted to the assessee and 45% to the developer. In the opinion of the PCIT, the Assessing Officer omitted to examine the transaction of transfer of land held as "Stock-in-trade" in the light of the provision of Section 43CA of the Act and this was the only reason for invoking the power under Section 263 of the Act. Firstly, we need to examine as to whether there was any enquiry conducted by the Assessing Officer before completing the assessment and whether the subject issue was taken note of by the Assessing Officer. It has to be borne in mind that the assessment was a re-assessment proceedings under Section 147 of the Act and from the reason furnished from reasons furnished by the Assessing Officer for re-opening the assessment, we find this very issue was the reason for re-opening and there was a proposal to tax the long term capital gains which, in the opinion of the Assessing Officer, had escaped assessment. The assessee submitted detailed reply objecting to the re-opening proceedings. It is

contended that the land was not a capital asset that is not held by them as a fixed asset or investment. Consequently, there was no transfer of any capital asset and handing over possession of the land to the developer pursuant to the Joint Development Agreement. Further it was stated that the land was their stock-in-trade and stock-in-trade is not treated as capital asset under the provisions contained in Section 2(4) of the Act. The assessee submitted their audited financial statement for the financial year 2012-13 to substantiate their claim. Further, it was stated that the profit and loss statement for the year ended 31st March, 2013 clearly indicates that the said land was their stock-in-trade. Further, the assessee submitted that profit from stock-in-trade is chargeable to tax under the heading profit and gains of business and the same will arise in future i.e. for the year of actual sale to the prospective buyer. The assessee also submitted that the reopening of the assessment was bad in law as there was no fresh information in the possession of the Assessing Officer leading him to conclude that income has escaped assessment. The reply given by the assessee along with the documents were examined by the Assessing Officer and the assessment was completed accepting the stand taken by the

assessee. The order passed by the PCIT under Section 263 was the subject-matter of challenge before the Tribunal.

The Tribunal has, after taking note of Sections 43CA, 50C and also the definition of transfer as defined under Section 2(47) of the Act examined the relevant clauses of the Joint Development Agreement. The following clause would be relevant for our purpose:

REPRESENTATIONS AND OBLIGATIONS OF THE OWNER

2. *It is agreed and recorded that the said vested land admeasuring 2 Bighas, 11 cottahs, 12 chittacks ad 36 sq. ft. ad morefully described in the second schedule hereunder written shall always be the property of the owner ad any benefit deriving out of the same shall belong exclusively to the owner and the developer shall have no right title and interest therein. Provided however this shall not preclude the owner to enter into an arrangement with the developer for developing the said vested land on the terms and conditions as may be mutually agreed upon provided the owner is permitted by the Government of West Bengal to develop the said vested land.*

APPOINTMENT

1. *The owner herein hereby appoint the Developer as the builder and/or developer for carrying out the development at the "said premises" as per the sanctioned plan or plan subject to the terms and conditions recorded therein.*

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SPACE ALLOCATION

1. *In consideration of the development of the Housing Complex at the said premises by the Developer at its own costs and*

expenses which includes Owner's Allocation and in consideration of the said premises provided by the owner as envisaged herein it is agreed by and between the Owner and the Developer that the entire constructed area of the said Housing Complex shall be divided and apportioned in the manner as stated hereunder :-

- (i) 55% of the constructed areas of the said Housing Complex together with all the common areas, amenities and facilities therein and together with undivided proportionate share of the land of the said premises appertaining thereto shall belong to the owner hereinafter called the "Owner's Allocation".
- (ii) 45% of the constructed areas of the said Housing Complex together with all the common areas, amenities and facilities therein and together with undivided proportionate share of the land of the said premises appertaining thereto shall belong to the owner hereinafter called the "Developer's Allocation".

SECURITY DEPOSIT & ADVANCE

1. It is agreed and recorded that the Developer shall deposit with the owner a total sum of Rs.10,00,0,000/- (Rupees ten crores) only as an interest free security deposit which shall be paid in the following manner :-
 - (i) A sum of Rs.5,00,00,000/- (Rupees five crores) only shall be paid by 30th September, 2013.
 - (ii) A further sum of Rs. 5,00,00,000/- (Rupees five crores) only shall be paid by 31st January, 2014.
 - (iii) At the time of execution of this presents no payment is being made.
2. It is agreed and recorded that the said interest free security deposit of the said total sum of Rs.10,00,00,000/- (Rupees ten crores) only shall be refunded by the owner to the developer within fortnight from the date of the receipt of the notice of completion of the construction of the said housing complex.

TERMINATION

It is agreed and recorded that in case of failure on the part of the Developer to complete the said Housing Complex and/or hand over Owner allocation with all common amenities and facilities within the stipulated time of 4 (four) years together with grace period of 1 (one) year as provided hereinabove, this agreement shall stand determined and cancelled and the developer shall cease to have any right title interest under this agreement in respect of the said Premises and the Developer shall be entitled to complete the construction of incompleated portions of the said Housing Complex provided however the Owner shall refund the entire outstanding amount of interest free Security deposit and the costs of construction of the said Housing Complex and value of the costs of construction shall be certified by the structural engineer and architects".

From the above clause in the Joint Development Agreement, it is crystal clear that the assessee continued to be the owner of the property throughout the development of the property and there is no transfer of ownership to the developer. This aspect, in our opinion, was rightly noted by the Tribunal. Thus reading of the entire agreement would show that there was no transfer or sale of asset under the Joint Development Agreement rather the agreement was to develop the land making it saleable and in view of the construction of the same, the developer would take a part of the stock-in-trade. Furthermore, in terms of the termination clause if the

developer fails to develop the housing complex and hand over the assessee's allotted area with all common amenities and facilities within the stipulated time of four years together with grace period of one year, the Joint Development Agreement would stand determined and cancelled and the developer shall cease to have any right, title, interest under the Joint Development Agreement and the developer shall be entitled to complete the construction of the incomplete portion of the housing complex provided however the assessee shall refund the entire outstanding amount of interest-free security deposit and the cost of construction of the said housing complex and the value of the construction shall be certified by the structural engineer and architects. Thereafter the Tribunal took note of the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Balbir Singh Maini* reported in [2017] 398 ITR 531 (SC). The said decision is more or less identical to the facts of the case on hand wherein one of the questions which fell for consideration was whether the transaction under the Joint Development Agreement should be envisaged as transfer exigible to tax by reference under Section 4(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882. After taking note of the facts, the Hon'ble Supreme Court held as follows:

"23. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, ad that too for a specific purpose - the purpose being to develop the property, as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction."

As mentioned earlier, the facts of the case in *Balbir Singh Maini* (*supra*) was more or less identical to the case on hand and after reading the Joint Development Agreement, the Hon'ble Supreme Court found that the owner continues to be the owner throughout the agreement at any state purported to transfer rights akin to ownership to the developer. This is exactly the nature of transaction in the case on hand. That apart, the Tribunal also taken note of how the registering authorities have treated the Joint Development Agreement. The registering authorities have not treated the agreement as a deed of conveyance but have calculated the stamp duty by treating the same under Article 4, 5(f) of Schedule 1A of the Indian Stamp Act. The Explanation under Clause (vi) of Clause 5(f) states that the expression "Agreement or Memorandum of an Agreement" if relating to a sale shall include an agreement to sell or any memorandum or acknowledgement in relation to

transfer or deliver of possession of immovable property with an intent to transfer right, interest in, or title to, such property at any future date. This expression was noted and the registering authorities have calculated the stamp duty on the said amount at the fixed rate and not treating it as a conveyance deed.

Thus, we are of the considered view that the Tribunal took note of the factual position and applied the correct legal principle and granted relief to the assessee.

Thus, we find no ground to interfere with the order passed by the learned Tribunal. Accordingly, appeal (ITAT/59/2023) is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (IA No.GA/1/2023) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)