

Court No. - 33**Case :-** INCOME TAX APPEAL No. - 467 of 2010**ASSESSMENT YEAR 2006-07****Appellant :-** Commissioner Of Income Tax-Ii, Kanpur**Respondent :-** Shri Ziauddin Ahmad**Counsel for Appellant :-** Sc/Shambhu

Chopra,R.K.Upadhyay,Shambhu.Chopra

Counsel for Respondent :- A. Bansal,S.K. Garg**AND****Case :-** INCOME TAX APPEAL No. - 242 of 2010**Appellant :-** Ziauddin Ahmad**Respondent :-** Commissioner Of Income Tax - Ii**Counsel for Appellant :-** S.K. Garg,Ashish Bansal**Counsel for Respondent :-** C.S.C,R.K.Upadhyay,Shambhu Chopra**Hon'ble Tarun Agarwala,J.****Hon'ble Dr. Satish Chandra,J.**

Both the cross appeals have been filed against the order dated 5 March 2010 passed by the Income Tax Appellate Tribunal, Lucknow in I.T.A. No. 499/LUC/2094 for the assessment year 2006-07.

On 22.01.2013, a coordinate Bench has admitted the appeal filed by the Department-appellant (ITA 467 of 2010) on the following substantial questions of law :

"(a) Whether the ITAT was correct in law in canceling the assessment framed u/s 143(3)/147 on account of validity of notice u/s 143(2) in absence of any return, ignoring the fact that the assessee himself had offered in writing for treating one of its earlier returns to be in response to notice u/s 148 of the Income Tax Act, 1961?

(b) Whether the ITAT was correct in law in holding that no capital gain accrued or arose to

the assessee in A.Y. 2006-07 as the transfer did not take place on 30.04.2005 without properly appreciating the facts narrated by the A.O. which wee clearly born out from records?"

The brief facts of the case are that the assessee is an individual and running Excel Hospital Limited. On 13.09.2007, a survey, under Section 133(A) was carried out at the business premises of the assessee. The assessee was examined under Section 131 of the Act as per notice dated 22.09.2007 and his submissions were recorded on 03.08.2007. The assessee was served with a notice under Section 148 on 20.03.2008. In response, the assessee has furnished the necessary documents. On 11.7.2008, the A.O. has intimated the assessee about the reasons recorded for initiating the proceedings under Section 148 of the Act. Finally, on 22.12.2008, the assessment was completed under Section 143(3)/147 of the Act where the capital gain was levied.

The assessee has assailed the assessment order pertaining to the capital gain in an appeal before the CIT(A), which was dismissed. Being aggrieved, the assessee filed an appeal before the Tribunal, who has granted the relief by observing that capital gain is not chargeable for the assessment year under consideration. Being not satisfied, the Department has filed the appeal. The assessee has also filed the cross appeal to assail the validity of the proceedings under Section 147 of the Act.

With this background Shri Shambhu Chopra, the learned counsel for the revenue-appellant relied on the order of the A.O. He submits that assessee was the owner of the Plot Nos. 14/138 and 14/143 Chunniganj, Kanpur measuring 3569 sq. yards and 277 sq. yards. The assessee had entered into an agreement with M/s. Shilpi Builders Limited for the development/construction of a Nursing Home/residential complex and commercial complex without forfeiting his title rights. The land of his brother was also included in the development of entire project called Ratan Esquire

and Excel Nursing Hospital. The agreement was entered in the year 1999, while supplementary agreement was also entered in the year 2002 with the brother. He further submits that since, on the basis of the said agreements, the conditions of chargeability of capital gains tax were found to be attracted on the basis of **completion agreement** dated 30.04.2005, so the capital gain was charged during the assessment year under consideration. He further submits that the proceedings under Section 147 was rightly initiated for the assessment year 2006-07, as **completion agreement** is dated 30.04.2005 and falling within the assessment year 2006-07.

The learned counsel for the Department has read over the following passage from the assessment order :

"The assessee had entered into an agreement on 24.06.1999 with M/s. Shilpi builders for development of his land. Subsequently, after obtaining the sanctioned map from KDA, the parties entered into supplementary agreement dated 29.04.2002 and possession of the land was also handed over to M/s. Shilpi Builders on 01.05.2002 for development of residential cum commercial complex. The perusal of agreement dated 24.06.1999 and 29.04.2002 makes it quite clear that the rights of ownership of the land was with the assessee only and both these agreements were subject to the completion of project. The project was completed and an agreement of completion of project was signed by the two parties on 30.04.2005, when the respective shares were handed over and taken over by M/s. Shilpi Builders and the assessee. The argument of the assess that he hand transferred land on 24.06.1999 is not tenable in any way because even the assessee himself did

not paid any tax on transfer of land in A.Y. 2000-01 relevant to this period. Thus, the intention of the assessee is very clear that the assessee did not desire to pay any capital gain tax. In this case, the assessee has given a license to the developer i.e. M/s. Shilpi Builders for development of a residential cum commercial complex on its land within a period of three years from the date of possession or from the date of obtaining sanctioned map from KDA whichever is later. The assessee did not surrender any of his right of ownership to the developer till completion of the project. The assessee has filed copy of three agreements dated 24.06.1999 [agreement], 29.04.2002 [supplementary agreement] and 30.04.2005 [completion agreement]. The perusal of the above three agreements makes it abundantly clear that the rights of ownership in respect of the share of developers were transferable to the developer only on completion of the project as discussed above in the gist of agreements given above.

Learned counsel for the Department also read over the Para-1 of page-4 of the completion agreement dated 30.04.2005, which is as under :

"AND WHEREAS since the Building is completed and in order to make a proper utilization of shares in the Building Complex has been reallocated and accordingly the possession of the portion fallen into the share of First Party has been delivered to him in the same manner the area fallen into the share of the Second Party is with the Second Party, hence this COMPLETION AGREEMENT."

Learned counsel for the Department submits that from the above, it is very clear that the possession was handed over and taken over by the First and Second Party respectively on 30.04.2005 i.e. the date of completion agreement.

According to the learned counsel, the chargeability of capital gain tax require three basic ingredients :

- 1. Ownership of capital asset. Here the assessee is in ownership of plot no. 14/138 and 14/143 Chunniganj, Kanpur.*
- 2. Transfer of capital asset. The assessee sold/transferred part of his land to M/s. Shilpi Builders as per its completion agreement dated 30.04.2005 as discussed above.*
- 3. Receipt of consideration. The assessee also received consideration in the form of constructed area on 30.04.2005 as per the completion agreement discussed above.*

Thus, the condition of chargeability of capital gain tax are being completed on 30.04.2005 in the F.Y. 2005-06 relevant to A.Y. 2006-07. Thus, the proceedings initiated u/s 148 are valid and capital gain is chargeable in the case of assessee during the A.Y. 2006-07.

It is also a submission of the learned counsel that the basis to charge the Tax in Assessment Year 2006-07 is that the consideration for transfer of capital is the cost of construction, as specified by principal agreement executed on 24.06.1999, has been received in the year of completion of construction as evidenced by completion agreement is 30.04.2005. As per law, the capital gain on transfer of land is chargeable at point of time of completion on the development on 30.04.2005, which is taxable and is falling within the assessment year 2006-07.

Learned counsel for the Department has also relied on the provision of Section 2(47)(v) of the Income Tax Act which is

reproduced as under :

"Any transaction involving the the allowing of the possession of any immovable property to be taken or retained in part performance of contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882).

Learned counsel has also read out Section 53A of transfer of property Act, 1882 which is as under :-

"Where any person contract to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

And the transferee as, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract.

And the transferee has performed or is willing to perform his part of the contract, Then notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

Shri Shambhu Chopra, learned counsel further submits that

these two provisions relate to transfer of immovable property without execution and registration of conveyance deed. On conjoint reading of above 2 provisions 2(47)(v) of IT Act and 53A of TP Act (transfer or Property Act), it transpires that for an act of transfer resulting in the capital gain under the deeming provision of Section 2(47) (v), the transaction leading to the transfer of capital asset shall:-

(i) allow the transfer of possession of the capital asset to the transferee

(ii) of if the transferee is already in the possession of capital asset, it must be retained by him in part performance of contract of transfer.

In the instant case, the transaction is principal agreement, which was executed on 24.06.1999 followed by power of attorney simultaneously executed on same date which together constitute the principal documents of transfer. The terms of these documents allowed the builder to take the possession of capital asset by conferring upon builder the substantial control over the land to be developed including the transferred land. The builder had undertaken the various activities which tantamount to deemed transfer within purview of sec 2(47)(v) of the Act.

Though physical delivery of the land to the builder was declared by supplementary deed executed on 29.04.02, however, as explained, hereinabove, the same had been actually delivered to the builder much before it immediately after sanction of building plan on 24.10.01. It is copiously evidenced by the activities undertaken by the builder for the excavation of site of land, booking of flats on opening ceremony performed on 21.04.02 on which date construction commenced. But the complete ownership was transferred only on 30.04.2005, which falls during the Assessment Year 2006-07 and capital gain was rightly charged during the assessment year under consideration.

To support his arguments, the learned counsel for the

appellant has relied upon the ratio laid down in the case of **Jasbir Singh Sarkaria, In re [2007] 294 ITR 196 (AAR)**, where it was observed that :

"...Possession" contemplated by clause(v) of section 2(47) need not necessarily be sole and exclusive possession. So long as the transferee is, by virtue of the possession given, enabled to exercise general control over the property so as to make use of it for the intended purpose, the mere fact that the owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of the agreement does not introduce incompatibility. The concurrent purpose of the owner who can exercise possessory rights to a limited extent and for a limited purpose and that of the buyer/developer who has a general control and custody of the land can very well be reconciled. Clause(v) will have its full play even in such a situation. There is no warrant to postpone the operation of clause(v) and the resultant accrual of capital gains to a point of time when the concurrent possession will become exclusive possession of the developer/transferee after he pays full consideration. Possession given to the developer need not ripen into exclusive possession on payment of the instalments in entirety for the purpose of determining the date of transfer. It is enough if the transferee has, by virtue of that transaction, a right to enter upon and exercise acts of possession effectively pursuant to the covenants in the contract. That amounts to legal possession."

Similarly, he relied upon the ratio laid down in the case of **Chaturbhuji Dwarkadas Kapadia vs. CIT (260) ITR 491**

(Bom), where it was observed that :

"....Section 2(47)(v) read with section 45 indicates that capital gains was taxable in the year in which such transactions were entered into even if the transfer of immovable property is not effective or complete under the general law..."

Lastly, he justified the order passed by the CIT(A).

On the other hand, Sri S.K. Garg assisted by Shri A. Bansal, learned counsel for the assessee has produced the copy of the agreement, where it was shown that the total area was transferred in the year 1999. The learned counsel submits that the possession of the property was given in the year 1999 as per the agreement. To this effect, the CIT(A) has asked the remand report from the Assessment Officer. The Assessment Officer has filed contradictory remand report where the admissibility of additional evidence adduced under Income Tax Rule 46A was discussed. Section 156(A). The A.O. has not contradicted the written submission adduced by the assessee despite opportunity given by him by the CIT(A). Nevertheless the CIT(A) upheld the addition, but the Tribunal has examined the material on record and rightly deleted the addition. According to learned counsel, no capital gain on transfer of land by the assessee to M/s. Shilpi Builders is applicable during the assessment year under consideration, for the reason that the land in question got transferred from the assessee to M/s. Shilpi Builders on execution of original agreement on 24.6.1999 or on 24.10.2001, when the building plan was sanctioned by the Kanpur Development Authority.

It is also a submission of the learned counsel for the assessee that original agreement was executed on 24.6.1999. Memorandum of understanding between the assessee and M/s. Shilpi Builders Limited was also executed on 24.6.1999. Power of Attorney was executed by the assessee in favour of Shri Atma Ram Khatri on 24.6.1999 itself and supplementary agreement between the

assessee and M/s. Shilpi Builders Limited drafted on 29.4.2002, but executed on 1.8.2002 and claiming the same as executed only for confirming the handing over of the land to M/s. Shilpi Builders Ltd. prior to drafting of the supplementary agreement and pleaded that so far as transfer of land from the assessee to the builder is concerned, the assessee having handed over the physical possession of land as well as having executed a power of attorney in favour of builder and having received substantial amount in consequence of the original agreement, the assessee had transferred almost all the rights in the land, except title, to the transferee and therefore, capital gain had not accrued or earned during period relevant to assessment year 2006-07.

He also read out the clause 2 of the agreement, which is as under :

".....the words used in this clause are "has delivered" and not "is being delivered" or "is delivered" which confirms the assessee's claim that this agreement was only to confirm the acts having been done in the past and not acts done in the present. He, therefore, submitted that possession of land covered by plot No. 14/138 and part of land covered by plot No. 14/143 had been transferred to the builder on 24.6.1999...."

To support his arguments, he relied upon the ratio in the case of **Sanjeev Lal vs. CIT and Another [2014] 365 ITR 389(SC)**, where it was observed that :

"Date of agreement to sell to be taken as date of transfer of original asset"

He further relied upon the ratio in the case of **Sunil Siddharthbhai vs. CIT [1985] 156 ITR 155 (SC)**, where it was observed that :

"....In its general sense, the expression "transfer of property" connotes, the passing of rights in

property from one person to another. In one case, there may be a passing of the entire bundle of rights from the transferor to the transferee. In another case, the transfer may consist of one of the estates only out of all the estates comprising the totality of rights in the property. In a third case, there may be a reduction of the exclusive interest in the totality of rights of the original owner into a joint or shared interest with other persons. An exclusive interest in property is a larger interest than a share in that property. To the extent to which the exclusive interest is reduced to a shared interest, it would seem that there is a transfer of interest...."

Lastly, he justified the impugned order passed by the Tribunal.

We have heard both the parties at length and perused the material available on record. From the record, it appears that there was a succession on death of assessee's father Late Khaliluddin Ahmad thereafter by partition with his brother became the owner of following two immovable properties 14/138 and 14/143 Chunniganj, Kanpur, having land area 3569 sq. yard and 277 sq. yard respectively. Both the lands are adjoining and situated within prime location of city. Two separate development agreements were executed with builder for the development of the above land and to gain the maximize its economic return. Assessee entered into development agreements with builder originally with M/s. Shilpi Builder Limited which subsequently, before completion of development project, converted into Ratan Housing Development Ltd. Two separate development agreements had been executed with builder on same date i.e. on 24.06.1999 for each of above lands in question. The development agreements for the land provided the transfer of land to builder. As per the agreements, the Plot No. 14/138 involved the transfer of 60% land to the builder.

On remaining 40% shares of land to be retained for the construction of Nursing Home and three residential flats had to be made by builder at his cost. Thus, there was the transfer of land to the builder in lieu of cost of construction as per specification of the agreement for Plot No. 14/138. Thus, there was transfer of the capital assets. This transfer had taken place at the time of execution of the development agreement on 24.06.1999, whereby the builder had been vested with extensive powers by execution of power of attorney executed on same day i.e. on 24.06.1999 to deal with property for the purpose of development as stipulated by principal development agreement. So far as Plot No. 14/143 is concerned, it did not provide any transfer of land, but this plot was in the name of the brother of the assessee.

This aspect is supported by the fact that the builder had launched its scheme of booking of flats by advertising in various well know newspaper on 20.04.2002 from 1.4.2002. This evidence has also remained uncontroverted by the Revenue before us and therefore, explanation of assessee being plausible, we are of the opinion that had the possession not been given prior to a reasonable period, then the date of launching of the scheme, the builder could not have been in a position to launch the scheme on 21.4.2002 and here we are further of the opinion that demolition of old building and acquiring of the land for construction being not a childish job, was to take sufficient time and therefore, the assessee's plea is that the possession of the land was handed over latest by 23.11.2001 is liable to be accepted.

From the record, it also appears that the land was transferred in all manner except title to the builder by the assessee. The word "transfer" has been defined in Section 2(47) of the Income Tax Act. The clause (v) and (vi) were introduced in Section 2(47) of the Income Tax Act, 1961, with effect from April 1, 1988. They provided that "transfer" includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property

Act, 1882.

The Tribunal in its impugned order has observed that as per terms and conditions of the agreement date 24.06.1999 the transfer was effective from that very day and not in the year of 2005 as wrongly observed by the A.O. We are of the view that the capital gain is applicable in the year when the possession was handed over by the assessee. In the present case, the assessee's all other rights, except title, stood transferred and therefore, the capital gain was to be computed on the basis of transfer and in the year of the transfer. It is evident in the present case that the partial possession was given in the year 1999. The title was transferred on 30.04.2005, so no capital gain could have been accrued on 30.04.2005 for the assessment year 2006-07, as wrongly claimed by the revenue.

In view of the above, we are of the view that the transfer of the land under reference did not take place on 30.04.2005 as claimed by the A.O. or arose during the assessment year 2006-07. Hence, we find no reason to interfere with the order passed by the Tribunal, the same is hereby sustained alongwith the reasons mentioned therein.

Thus, the answer to the substantial question of law (No. 2) is in favour of the assessee and against the revenue. When we have decided the matter strictly on merit, then the technical issue has become academic. Therefore, no answer is required to be answered to the first substantial question of law. For the same reason, the cross appeal filed by the assessee has only an academic value and has become infructuous.

In the result, both the appeals filed by the revenue as well as assessee are hereby ***dismissed***.

Order Date :- 18.12.2014

(Dr. Satish Chandra, J.) (Tarun Agarwala, J.)