

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.03.2020

CORAM

THE HONOURABLE MR. JUSTICE M. SATHYANARAYANAN

AND

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

TCA.Nos.42 & 45 of 2019

M/s.Sumeru Soft P.Ltd
No.50, Capital Place
South Boag Road
T.Nagar, Chennai 600 017.

.. Appellant in
both appeals

Versus

The Income Tax Officer
Corporate Ward - 6[4]
Chennai.

.. Respondent in
both appeals

COMMON PRAYER:- Tax Case Appeals filed under Section 260-A of the Income Tax Act, 1961, to set aside the orders of the Income Tax Appellate Tribunal 'A' Bench in ITA.Nos.2101/Mds/2016 and 2484/Mds/2016 dated

08.05.2017 and allow the present appeals.

For Appellant in both
Appeals : Mr.V.S.Jayakumar

For Respondent in
both Appeals : Mr.J.Narayanasamy

COMMON JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN,J.]

(1)By consent, both the Tax Case Appeals are taken up together for final hearing and are disposed of by this common judgment.

(2)The facts narrated in brief, for the purpose of disposal of these appeals, are as follows:-

1. The appellant/assessee Company filed return of income on 30.10.2007 for the Assessment Year 2007-08 admitting total income of Rs.37,91,560/-. Since there was a reason to believe that income has escaped assessment, the assessment was reopened under Section 147 of the Income Tax Act, 1961, [in short "the IT Act"] and a notice under Section 148 of the said Act was issued. The said notice was followed by notices under Sections 143[2]/142[21] of the IT Act.
2. Subsequently, the assessment was completed under Section 143[3] read with Section 147 of the IT Act on 31.03.2005, assessing the total income at Rs.40,28,24,591/-. The appellant/assessee Company,

aggrieved by the said Order of Assessment dated 31.03.2005, filed an Appeal before the Commissioner of Income Tax [Appeals]-15, [in short CIT [Appeals]], by invoking Section 246A[1] of the IT Act.

3. The appellant/assessee Company before the Appellate Authority, contended among other things that the action on the part of the Assessing Officer in bringing to tax, the Long Term Capital Gains, aggregating to a sum of Rs.39,77,60,547/- by applying Section 2[47][v] read with Section 45 of the Act, is *per se* unsustainable for the reason that the appellant/assessee Company had entered into an unregistered Joint Venture Agreement with M/s.Parsvanath Developers Limited, for developing multi-facility complex consisting of IT/ITES parks, commercial, service and residential apartments and pursuant to the said Agreement dated 10.09.2006, a Refundable Security Deposit of Rs.7,02,54,000/- was received during the Previous Year relating to the Assessment Year 2007-08. It was further contended that the status of the said property till date, remains vacant with no developments took place and the Developer has not carried out any activity relating to construction for the reason that the project may not be successful and therefore, the appellant/assessee Company may be called upon to return the Refundable Security

Deposit.

4. The Appellate Authority, had also taken into consideration the Order of Assessment, especially, with regard to the fact that the owners had allowed the Developer to enter upon the project of the land for the purpose of construction and also allowed the Developer to open the site office and also granted some rights to the Developer to raise any loan for development and construction of the project from any Financial Institutions and further taken note of the fact that in the light of the fact that the Assessing Officer has reached the conclusion that the transfer in terms of Section 2[47][v] of the Act took place on the date of execution of the Joint Venture Agreement dated 10.09.2006, followed by the General Power of Attorney dated 12.09.2006, executed by the appellant/assessee Company in favour of the Developer unequivocally granted bundle of possessory rights including the right to mortgage 77.5% of the property and raise loan etc.

5. The Appellate Authority, upon considering the grounds urged by the appellant/assessee Company and the contents of the Assessment Order, found that in pursuant to the Agreement of such a nature, possession is given in part performance of a contract, the liability of

Capital Gains tax will arise upon handing over possession and citing among other reasons, had partly allowed the appeal vide order dated 30.05.2016.

6. The appellant/assessee Company, aggrieved by the said order, filed ITA.No.2101/Mds/2016 and the Revenue, aggrieved by the order, in partly allowing the appeal, filed ITA.No.2484/Mds/2016 before the Income Tax Appellate Tribunal, "A" Bench, at Chennai [in short "the ITAT"].
7. The ITAT, took up both the appeals and given a disposal vide common order dated 08.05.2017, which is impugned in the present Tax Case Appeals.
8. The ITAT, in paragraph No.5.3 of the order, had given a finding that as per the explanation under Section 147 of the IT Act, it is very clear that due to non-disclosure of Capital Gain by the appellant/assessee Company, the income chargeable to tax, had escaped assessment and the appellant/assessee Company did not produce anything before the CIT [Appeals] to show as to how there is no transfer of impugned property in the Assessment Year and how the provisions of Section 247[5] of the IT Act is applicable and consequently, held that the entire re-assessment proceeding is valid and thereby, upheld the action of

the Assessing Officer.

9. The ITAT also recorded a positive finding that there is a transfer under Section 2[47][v] of the IT Act in the Assessment Year 2007-08 for the reason that the possession and control of the property is already vested with the transfer and that apart, the Joint Development Agreement has also not been cancelled and is still in operation. The ITAT also dealt with the issue with regard to the quantification of the Capital Gains and after discussing the same in paragraph No.10, had remanded both the appeals to the Assessing Officer, for fresh consideration as to the computation of the Capital Gain.

10. The appellant/assessee Company, challenging the legality of the order in respect of rejection of the other grounds, filed the present Tax Case Appeals.

(3) The Tax Case Appeals were admitted on 18.01.2019 on the following substantial questions of law :-

TCA.No.42 of 2019:-

1. Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in reopening the assessment u/s.147 of the Income Tax Act, for the assessment year 2007-08 without any tangible materials on record?

2. *Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the transactions in hand envisage a "transfer" exigible to tax by reference to Section 2[47][v] of the Income Tax Act, 1961, read with Section 53-A of the Transfer of Property Act, 1882?*
3. *Whether on the facts and circumstances of the case, the decision of the Hon'ble Supreme Court in the case of CIT V. Balhir Singh Maini in Civil Appeal No.15619 of 2017 arising out of SLP [Civil] No.35248 of 2015 would squarely apply to the case of the appellant for the impugned Assessment Year 2007-08?*
4. *Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that "possession" as envisaged by Section 2[47][v] and Section 53-A of the Transfer of Property Act, 1882 was actually delivered by the appellant during the impugned Assessment Year 2007-08?*
5. *Whether on the facts and circumstances of the case, the Tribunal was right in law in disallowing the expenditure amounting to Rs.7,95,000/- towards brand promotion and advertisement incurred by the appellant for the impugned Assessment Year 2007-08?*

TCA.No.45 of 2019:-

1. *Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the transactions in hand envisage a "transfer" exigible to tax by reference to Section 2[47][v] of the Income Tax Act, 1961, read with Section 53-A of the Transfer of Property Act, 1882?*
2. *Whether on the facts and circumstances of the case, the Tribunal was right in law in remitting the matter to the files of the respondent for the limited purpose of determining the sale consideration and to compute capital gains at 27% share of the constructed area?*

(4)The learned counsel for the appellant/assessee Company has invited the attention of this Court to the judgment rendered by the Hon'ble Supreme Court of India reported in **[2017] 398 IT 531 [SC] : [2017] 251 TAXMAN 0202 [SC] - [2 Judges Bench] [Commissioner of Income Tax V. Balbir Singh Maini]** and would submit that in almost similar facts and circumstances, the Hon'ble Apex Court of India held that the income from the Capital Gain of a transaction which never materialised can be termed as a hypothetical income at best and that being the case, there is no profit or gain which arises from transfer of a Capital Asset which could be brought to tax under Section 45 read with 48 of the Income Tax

Act. It is also submitted that in a latest decision reported in **[2020] 421 ITR 46 [SC] - [3 Judges Bench] [Seshasayee Steels P.Ltd V. Assistant Commissioner of Income Tax]**, the Hon'ble Supreme Court of India also affirmed the above cited decision in **Balbir Singh Maini's case**.

(5) The learned counsel for the appellant/assessee Company would submit that in the light of the ratio laid down in **Balbir Singh Maini's case** that the income from the Capital Gain on a transaction which never materialised, at best, can be termed only as a hypothetical income and that the assessee did not acquire any right to receive income.

(6) *Per contra*, Mr.J.Narayanasamy, learned Standing counsel appearing for the respondent/Revenue would submit that in the light of the concurrent findings recorded by the authorities below and that the judgment of the Hon'ble Apex Court in **Balbir Singh Naini's case** [cited supra], also came into being subsequently, prays for dismissal of these appeals.

(7) This Court has carefully considered the rival submissions and also perused the materials placed before it.

(8) It is relevant to extract paragraph Nos.23, 27 and 28 of the decision reported in **[2017] 398 IT 531 [SC] : [2017] 251 TAXMAN 0202 [SC] - [2**

Judges Bench] [Commissioner of Income Tax V. Balbir Singh Maini]

which reads thus:-

"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, and 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.

27. In the facts and circumstances of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.

28. In the present case, the assessee did not acquire any right to receive income, inasmuch as

such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assesseees by the developers and therefore, the assesseees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act."

- (9) It is the submission of the learned counsel for the appellant/assessee Company that he is not pressing the substantial question of Law No.5 in TCA.No.42/2019. Insofar as Substantial Question of Law No.1 in TCA.No.42/2019 is concerned, viz., in reopening the assessment under Section 147 of the IT Act, the same depends upon facts and circumstances of each case and therefore, it cannot be construed as a Substantial Question of Law. Insofar as Question No.2 in TCA.No.45/2019 is concerned, a perusal and reading of the impugned order would disclose that it is a case of conditional remand with some observations.

- (10) In the light of the ratio laid down in ***Balbir Singh Maini's case [cited supra]***, as affirmed in the Judgment reported in ***2020 [421] ITR 46 [SC] [3 Judges Bench] - Seshasayee Steels' case***, the questions as to the transfer exigible to tax with reference to Section 2[47][v] of the Income

Tax Act, 1961 read with Section 53-A of the Transfer of Property Act, 1882, is remanded to the Assessing Officer for fresh consideration and adjudication and the Assessing Officer shall complete the said exercise in accordance with law as expeditiously as possible.

(11)The Tax Case Appeals are disposed of accordingly. No costs.

[M.S.N.,J]

[A.Q., J]

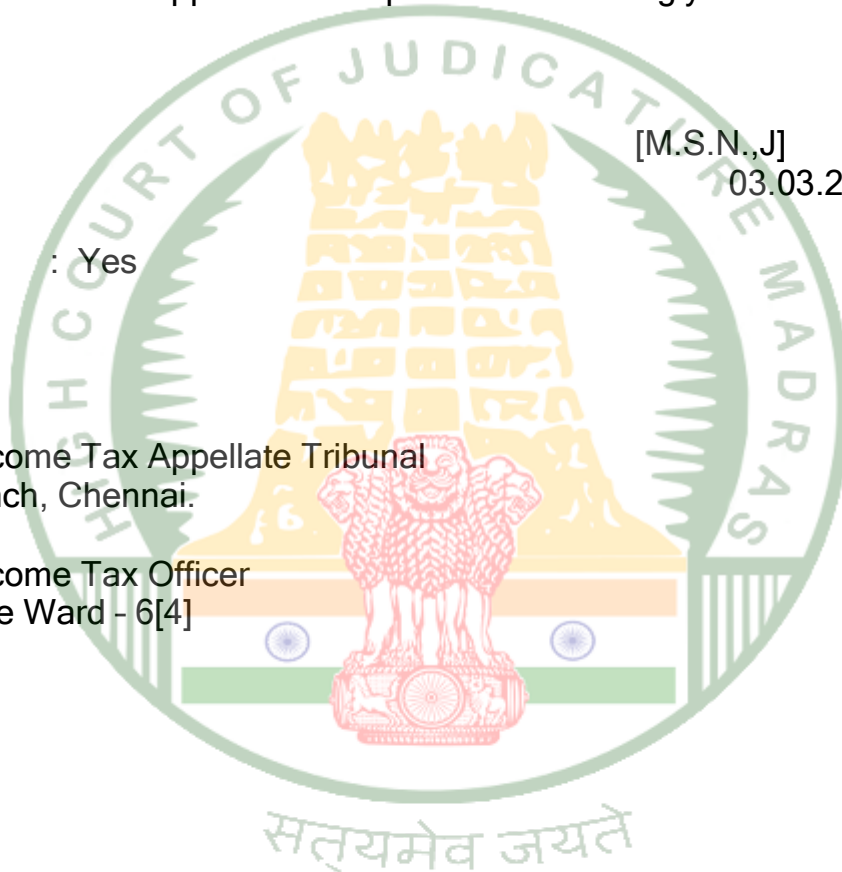
03.03.2020

AP
Internet : Yes

To

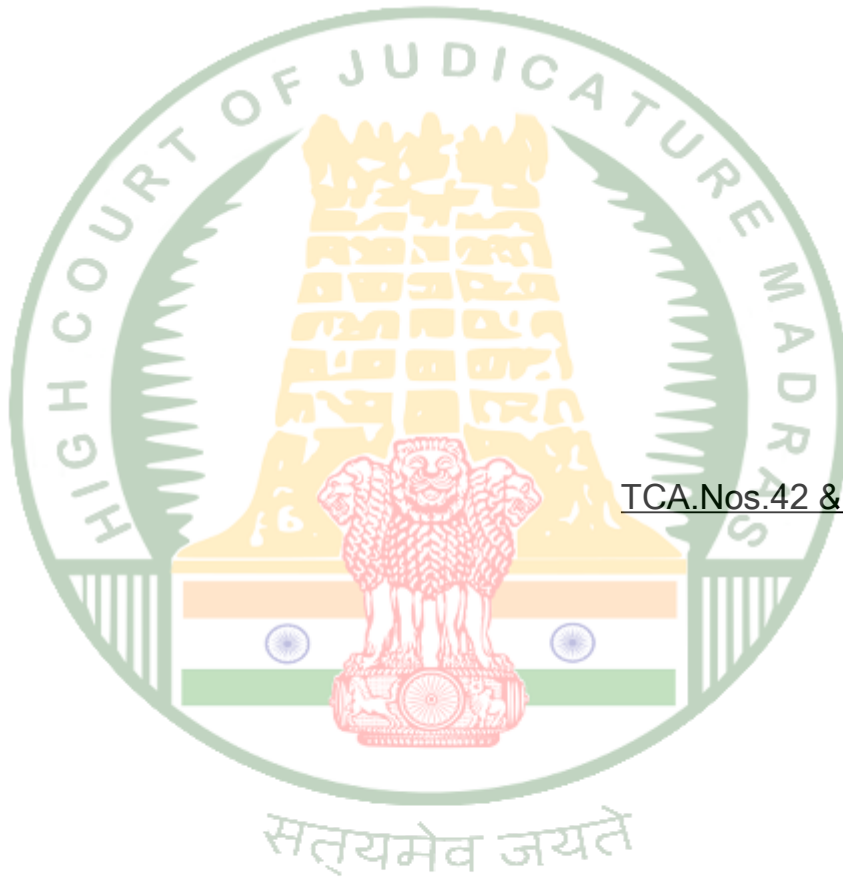
1.The Income Tax Appellate Tribunal
"A' Bench, Chennai.

2.The Income Tax Officer
Corporate Ward - 6[4]
Chennai.



WEB COPY

M.SATHYANARAYANAN, J.,
AND
ABDUL QUDDHOSE, J.,
AP



TCA.Nos.42 & 45 of 2019

WEB COPY

03.03.2020