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ITAT No. 225 of 2015
GA No. 4049 of 2015
GA No. 4050 of 2015
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
Versus
INFINITY INFOTECH PARKS LIMITED

BEFORE:
The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE ABHIJIT GANGOPADHYAY
Date : 18th July, 2018.

Appearance:
Md. Nizamuddin, Adv.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Supratik Sarkar, Adv.
Mr. A. P. Gomes, Adv.

The Court : In view of the good grounds shown, the marginal delay of a little over a month in preferring the appeal is condoned and the matter is taken up to be considered on merits.

GA No.4049 of 2015 is disposed of but without any order as to costs.

Two issues are canvassed by the Revenue in this appeal against an order of June 9, 2015 passed by the Income Tax Appellate Tribunal.

According to the Revenue, since possession of the land owned by the assessee was made over to a developer pursuant to an agreement of February 7, 2007 for construction being undertaken thereon, in view of amended Section 2(47)(v) of the Income Tax Act, 1961 read with Section 45 of the Act, capital gains tax ought to have

been paid in assessment year 2007-08. The second issue is as to the treatment of the part of the construction that is owned by the assessee. The Revenue seeks to support the view taken by the Commissioner in course of proceedings under Section 263 of the Act that the building and the office spaces thereat should be treated as current assets and not as fixed assets of the assessee. The Commissioner directed a *de novo* consideration on such aspect by perceiving that a loss in excess of Rs.3 crore had been occasioned to the Revenue upon the building and the office spaces thereat being considered as fixed assets of the assessee instead of treating them as the current assets of the assessee.

The development agreement of February 7, 2007 envisaged that the developer would construct upon the land and in lieu of such work undertaken by the developer, the developer would be entitled to retain 61% of the land and the proportionate constructed area while the balance 39% of the land together with the construction thereon would belong to the assessee. The Revenue refers to Section 2(47)(v) of the Act to suggest that the transfer as between the assessee and the developer took place upon the execution of the agreement and the making over of the possession of the land by the assessee to the developer.

Section 2(47)(v) of the Act provides as follows:

“transfer”, in relation to a capital asset, includes,...any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882...

The Revenue also refers to the statement of objects and reasons accompanying the Finance Act, 1987 pertaining to the amendment introduced, *inter alia*, by clauses (v) and (vi) being inserted in Section 2(47) of the Act.

It may be profitable to notice the reason for introducing such amendment:

“The existing definition of the word “transfer” in section 2(47) does not include transfer of certain rights accruing to a purchaser, by way of

becoming a member of or acquiring shares in a co-operative society, company, or association of persons or by way of any agreement or any arrangement whereby such person acquires any right in any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are a common mode of acquiring flats particularly in multistoreyed constructions in big cities. The definition also does not cover cases where possession is allowed to be taken or retained in part performance of a contract, of the nature referred to in section 53A of the Transfer of Property Act, 1882. New sub-clauses (v) and (vi) have been inserted in section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above.”

There is another side issue which is of no relevance, but that needs to be addressed since the Revenue has referred to the same. It appears that pursuant to a notice issued under Section 148 of the Act, the Assessing Officer wanted to make a reassessment in respect of assessment year 2007-08. The notice and the intention to commence reassessment proceedings were challenged by way of a writ petition in this Court and an interim order was passed in favour of the assessee therein, permitting the reassessment proceedings to continue, but directing the Assessing Officer not to pass any final order therein. According to the assessee, the Assessing Officer was duty-bound to complete the reassessment proceedings within the period envisaged in the statute and even though he passed a final order to complete the proceedings, he did not forward such order to the assessee till after the relevant petition was dismissed by this Court. However, the view taken in the order of assessment passed under Section 143(3) of the Act read with Section 147 thereof, was in favour of the assessee.

The Revenue asserts that such final order passed by the Assessing Officer was void, as it was contrary to the order passed on the pending petition in this Court.

Such argument is of no effect since whether or not such order was bad or void or otherwise, the authority of the Commissioner to invoke his power under Section 263 of the Act remained unaffected by the making of such final order by the Assessing officer. There appears to be some needless discussion on this aspect of the matter in the order impugned passed by the Tribunal.

The relevant Commissioner assumed jurisdiction under Section 263 of the Act on his perception that erroneous findings had been rendered by the Assessing Officer in respect of when capital gains tax was payable and in the assessment of the quantum of allowable depreciation which resulted in prejudice to the Revenue. A notice of hearing was issued by the Commissioner on February 19, 2015. Upon hearing the assessee, the Commissioner passed his order on March 20, 2015.

The Commissioner reasoned that since possession of the land was made over by the assessee to the developer at or immediately upon the execution of the agreement of February 7, 2007, the transfer is deemed to have taken place at such point of time in view of Section 2(47)(v) of the Act. The Commissioner then read Section 45 of the Act to imply that capital gains tax was payable at the relevant point of time and not at a later date when capital gains tax was offered and paid by the assessee. It is the same argument on this score which is repeated on behalf of the Revenue.

Even if the mischief that was sought to be arrested by the amendment as indicated in the statement of objects and reasons accompanying the Finance Act, 1987 is not taken into account, it is evident, on a plain reading of the relevant provision, that transfer would have taken place within the meaning of such provision if such transfer had been made over pursuant to an agreement in such regard notwithstanding the documentation thereof not being completed.

In particular, it is only the kind of possession that is protected under Section 53A of the Act of 1882 which is to be regarded as transfer and the mere handing

over of possession of an immovable property for any other purpose may not fall within the scope of the word “transfer” in Section 2(47)(v) of the Act.

There could be myriad situations. There could be an agreement between a developer and a prospective purchaser of a flat under which the purchaser would make some payment or even the full payment and the developer would promise to construct and make over a flat at a future date. Merely because the consideration is paid and the agreement is executed, it would not imply that a transfer would take place. The transfer in such a situation would take place upon the possession of the relevant flat being made over to the purchaser, irrespective of whether the deed of conveyance is executed or not. In another situation, A may agree to sell an immovable property at an agreed consideration to B, subject to such consideration being paid. If B is then put in possession of the property and a part of the consideration is received, as long as B is willing to discharge B’s obligation under the agreement, A cannot dispossess B from the relevant property notwithstanding the conveyance in respect thereof not being executed. That is the essence of Section 53A of the Act of 1882. The transfer in such a case would be at the time of the possession of the property being made over to the transferee.

When the owner of a land enters into an agreement with a developer for the purpose of developing the land, the terms of the contract would indicate when the transfer would take place. There could be rare situations where the transfer may be simultaneous with the execution of the agreement, but where the owner retains any right in the constructed area that may come up in future, it would scarcely be a case of a transfer taking place at the time of the execution of the agreement. The matter may be viewed from another perspective. Merely because *de facto* possession of the land is made over to a mason or a civil engineer for the purpose of making a construction thereon, it would not imply that possession is made over to the mason or the civil engineer for their enjoyment of the property. Such persons would be in *de facto*

possession under the *de jure* possession of the owner and only for the purpose of undertaking the construction at the land in question.

In terms of the agreement of February 7, 2007, the developer was to get 61% of the land and the proportionate share in the constructed area whereas the assessee was to get the balance 39% of the land and the proportionate constructed area thereupon. Till such time that the construction came up and 39% of the constructed area was made over to the assessee, it could not be said that possession of the balance land, in the sense that the expression carries in Section 2(47)(v) of the Act, had been made over by the assessee to the developer.

It is the undeniable position that under the agreement of February 7, 2007, the land and the construction thereon were to be divided in a certain ratio as between the developer and the assessee. It was also the developer's obligation under the agreement to make the construction or cause such construction to be made on the land. The possession that was made over by the assessee to the developer was not of the developer's share as envisaged in the agreement, but of the entirety of the land for the construction to be made thereon. It is true that the developer could have retained possession of the land and declined to return possession thereof to the assessee since the developer was in physical control thereof. But such resistance of the developer would not have been protected under Section 53A of the Act of 1882. It was only after the apportionment of the areas upon the construction on the land being completed that the developer could have rightfully retained possession of the developer's 61% share and resisted dispossession by discharging his obligation under the agreement and seeking refuge in terms of Section 53A of the Act of 1882 despite the formal conveyance pertaining to the developer's entitlement not having being executed. In any view of the matter, the right of the developer to retain possession and protect such possession under Section 53A of the Act of 1882 could never have arisen prior to the construction being completed and the apportionment effected.

There is also a minor matter of the opening words of Section 45 of the Act of 1961 being given some effect while reading such provision. In terms of Section 45(1) of the Act, the expression “chargeable to income tax under the head ‘Capital gains’”, operates on “Any profits or gains arising from the transfer of a capital asset ...”. There can be no tax payable unless there is any profit or gain that has arisen. It could never have been the Revenue’s case that there was any monetary profit or gain that accrued to the assessee at the time of the execution of the agreement of February 7, 2007.

In the light of the discussion above, the first ground urged by the Revenue does not appeal and the order of the Appellate Tribunal does not call for any interference as it set aside the erroneous view taken by the Commissioner in the order passed under Section 263 of the Act.

As to the second ground, that of depreciation, the key to the issue is found in the information furnished at paragraph 43 of the order impugned herein.

The 39% of the constructed area that was retained by the assessee was in an information technology park and long-term leases were granted in respect of some portions thereof by the assessee and other portions were let out on short-term leases. In respect of assessment years 2004-05 and 2005-06, the matter as to how the depreciation was to be arrived at fell for consideration of the CIT (Appeals) and of the Tribunal. The moot point was whether the land had to be regarded as a current asset which could be dealt with by the assessee in its usual course of business or it had to be treated as a fixed asset of the assessee, probably deriving income. The CIT (Appeals) passed an order on such aspect of the matter on August 20, 2010 and on September 8, 2011 the Tribunal passed its order, holding that the immovable property had to be regarded as a fixed asset of the assessee and depreciation calculated accordingly. Since such issue in respect of the same immovable property had been conclusively dealt with in orders passed by authorities superior to the Commissioner, the Commissioner, in exercise of his powers under Section 263 of the Act, could not have reopened the same

issue. It was a closed chapter and the Assessing Officer's acceptance of the quantum of depreciation based upon the assessee's representation that such asset had to be treated as the assessee's fixed asset could not have been questioned.

Since there is no merit in either issue covered by the Tribunal's order and questioned by the Revenue herein, ITAT No.225 of 2015 and GA No.4050 of 2015 are dismissed.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(ABHIJIT GANGOPADHYAY, J.)

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