

Dr. T. Achyutha Rao Vs. Asst. Commissioner of Income Tax

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Court : Income Tax Appellate Tribunal ITAT Hyderabad

Decided On : Sep-20-2005

Reported in : (2007)106ITD388(Hyd.)

Judge : D Manmohan, B Haldar

Appellant : Dr. T. Achyutha Rao

Respondent : Asst. Commissioner of Income Tax

Judgement :

1. This is an appeal filed by the assessee against the Id. CIT(A)-II, Hyderabad's order dated 17.06.2004 for assessment year 2001-2002.

2. The appellant entered into a development agreement with Sri Housing Private Ltd. on 22.08.97. However, capital gain arising out of the said agreement was disclosed by the assessee in the return for assessment year 2001-2002. Both the assessing officer as well as the CIT(A) has held that capital gain arising out of the development agreement is not taxable in the assessment year under consideration. The appellant is aggrieved by this finding of the assessing officer which has been confirmed by the CIT(A). The grounds raised by the appellant before us are as under: i) The learned Commissioner of Income-Tax (Appeals) erred in holding that the long term capital gains arising out of a transfer of undivided share of land to the developer is not assessable for the assessment year 2001-2002.

ii) The Id. Commissioner of Income-Tax has failed to appreciate the fact that the assessee has not received any consideration during the previous year relevant to assessment years 1998-99 or 1999-2000 to hold that capital gains is assessable during the assessment years 1998-99 or 1999-2000, and, therefore, erred in holding that the long term capital gains is not assessable in the assessment year 2001-2002.

iii) The Id Commissioner of Income-Tax (Appeals) failed to appreciate the fact that the handing over of the possession as per the development agreement is only a license to the developer to enter into the property for the development purposes and it do not amount to transfer as envisaged Under Section 2 (47) of I.T. Act rws 53A of Transfer of Property Act and therefore, erred in holding that the long term capital gains is not assessable in the assessment year 2001-2002.

iv) The Id. Commissioner of Income-Tax (Appeals) failed to appreciate the fact that Sec 2 (47) of I.T.Act rws 53A of Transfer of Property Act can be invoked only where there is receipt of consideration and not merely handing over of possession and, therefore, erred in holding that capital gains is not assessable in the assessment year 2001-2002.

3. Fact of the case is that the appellant together with his brother who were the joint owner of the impugned property entered into a "sale-cum-development agreement" with M/S Sri Housing Pvt. Ltd. on 22.08.1997. "A supplemental agreement" was also entered into on 15.10.97. No objection certificate Under Section 269UL(1) of the Act was issued by the Appropriate Authority on 22.12.97. Relevant clauses of the agreements which are

relevant for the issues to be decided by us are reproduced bellow: i) The apparent consideration in respect of the property mentioned in the schedule is fixed at Rs. 119 lakhs.

ii) The part of the second part shall construct a residential portion of a plinth area of 3000 sq.ft. Including the proportionate common area in the first floor for No. -1 of the party of the first part viz. Achyuta Rao Tekmalla and the cost of the said 3000 sq.ft.

Including the proportionate undivided interest of the land is valued at Rs. 60 lakhs and this will be adjusted towards the balance of consideration payable by the party of the second part.

iii) The party of the first part shall deliver within 15 days from the intimation of sanction of construction of the proposed building, possession of the existing building to the party of the second part for the purpose of construction of the new building and it is specifically understood that delivery of possession would not amount to sale and the sale will be completed only after the delivery of the constructed area of 3000 sq.ft. Of the building in the ground floor to No. -1 of the of the Party of the first part and the payment of the entire sum of Rs. 59 lakhs to the party of the second part.

iv) In lieu of party of the first part delivering possession of the existing building to the party of the second part, the party of the first part will choose a suitable residential accommodation and the party of the second part shall pay rent to the extent of Rs. 7000/- to the owner of such residential building directly from the date of delivery of possession of the premises for construction, till the date of handing over possession of newly constructed residential building i.e. 3000 sq.ft. And also till the entire amount payable to No. 2 of the party of the first part is fully paid.

v) If the party of the second part fails to deliver possession of 3000 sq.ft. to the appellant within 18 months from the date of delivery of possession of the impugned property, the second party shall pay a monthly compensation of Rs. 15,000/- till the time the default continues.

vi) A power of attorney is to be made out in the name of Sri S. Ramakrishna, authorized signatory of the party of the second part for taking all actions required for the construction to be done in the property and the same will be registered.

vii) Party of the first part authorizes the party of the second part to sell all the remaining built- up area other than 3000 sq.ft.

together with relatable land common area etc. as mentioned in cl.v above.

viii) The party of the second part had the right to enter into negotiation with prospective buyers and appropriate all advances and considerations for the same. The party of the first part to do everything that is required to be done for development of the property .

3.1. The above agreement was modified as per" Supplemental Agreement", dated 15.10.97. As per this agreement the cost of 3000 sq.ft. of built-up area to be constructed by the party of the second part for the appellant together with relatable land area was valued at Rs. 60.00 lacs. It was also mentioned that proportionate undivided share of land amounting to 2000 sq.ft. will be retained by the appellant.

4. The argument of the Id. Counsel of the appellant is summarized below: i) That the impugned agreement is not agreement to sale. Therefore, there is no transfer on the date of agreement.

ii) Possession has been given for the limited purpose of developing the property. It is a purposive possession and not possession as envisaged in Section 53A of Transfer of Property Act. Therefore, there is no transfer on the date when possession was given.

iii) Undivided share in the land cannot be said to have been transferred prior to the previous year relevant to assessment year under consideration.

iv) As all the terms and conditions mentioned in the agreement were completed during the relevant previous year, capital gains is chargeable in this assessment year only.

v) No consideration in money has been received earlier to the previous year relevant to present assessment year. Therefore, no capital gains arose in earlier years.

vi) Consideration for the transaction cannot be determined in any previous year earlier to the previous year relevant to assessment year 2001-2002.

vii) In view of the facts and circumstances obtained in the present case, the decision of Hyderabad Bench, dated 30.07.2004 in ITA No. 296/Hyd./2003, in the case of S. Raghurami Reddy v. ITO, Ward-I, Proddatur is squarely applicable.

From the above argument of the learned Counsel of the assessee, it appears that the case of the assessee is that the transaction is covered by Clause (i) of Section 2(47) of the Act. It is a transfer by way of sale or exchange. The appellant agreed to transfer his interest in the property in exchange for receiving a built-up area of 3000 sq.

ft. from the developer. Such transaction of the nature of exchange was complete only when the built up area of 3000 sq. ft. was handed over to the appellant. As the possession of 3000 sq.ft. was given to the appellant only during the previous year relevant to assessment year 2001-2002, it is claimed that transfer in relation to agreement dated 22.08.97 read with the supplemental agreement took place only in this year and capital gains is enviable in this year only.

5. Learned Departmental Representative on the other hand submitted as under: i) Transfer as defined in the Act does not require that there should be a sale.

ii) Consideration has been fixed in the agreement at Rs. 119.00 lacs and the other co-owner has received Rs. 2.00 lacs on 04.07.97 and Rs. 10.00 lacs on 22.08.97. As regards the appellant, the consideration in the shape of constructed property as per the agreement has been valued in the agreement itself at Rs. 60.00 lacs.

Appropriate Authority has bifurcated the amount as under: Therefore, this is the full value of consideration bargained for by the parties to the transaction.

iii) Recital in the agreement clearly shows that the developer has acquired right by virtue of the agreement. Therefore, the possession given is absolute and not purposive as claimed by the appellant.

Possession is required to be given within 15 days from the date of the agreement as mentioned in clause-3 of the agreement, which falls in previous year relevant to assessment year 1998-99.

iv) ITAT order relied on by the appellant is distinguishable on the basis of the above facts as also the fact that registration for development agreement was not required in previous year relevant to assessment year 90-91 to which the order pertains, but the same was not the case subsequent to amendment made in 1995. There is a common development agreement in the present case and part performance of the contract is quite obvious from the terms of the agreement and surrounding facts.

v) No objection certificate with reference to the agreement has been issued by the Appropriate Authority on 22.12.1997, which falls in F.Yr. 97-98. By filing the application to the Appropriate Authority, the appellant has accepted that there is a transfer as the definition of transfer given in 269UA(f) is similar to that of Section 2(47) of the Act.

vi) In the above facts and circumstances, it is submitted that transfer as per Section 2(47) of the Act, read with Section 53A of the Transfer of Property act took place earlier to assessment year under consideration.

vii) Even otherwise the transaction will be a transfer as per 2(47)(vi) read with Clause (d) of Section 269UA as

the agreement has enabled the transferee to enjoy the immovable property in-so-far-as advances and consideration received by the developer from the prospective buyers/ buyers of developed property can be utilized as per the developer's will.

It is, therefore, claimed that the transfer took place much earlier to 01.04.2000 as per Clause (v) or (vi) of Section 2(47) of the Act read with explanation thereto.

6. In the rejoinder, the learned Counsel of the appellant contended that in the facts and circumstances of the case the transfer took place during the previous year relevant to A.Yr. 2001-2002 only and the facts of the present case is quite similar to the case of Hyderabad Bench mentioned supra. It was submitted that the appeal of the assessee be allowed.

7. The central issue that we have to decide is as to whether there is a 'transfer' as envisaged in Section 2(47) of the Act read with Sections 53A of Transfer of Property Act, prior to the F.Yr. 2000-2001.

Undisputed fact in the present case is that there is a common development agreement for both the co-owners. Full value of consideration for the transfer has been mentioned in the original agreement as Rs. 119.00 lacs, Rs. 60.00 lacs for the appellant and Rs. 59.00 lacs for the other co-owner. In the supplemental agreement dated 15.10.97 the same has been reduced to 92.00 lacs by excluding the value of undivided share of land relating to 3000 sq.ft. of built-up area, possession of which is required to be handed over to the appellant by the developer within 18 months from the date of handing over of possession of the impugned property to the developer as per the terms of the agreement. Rs. 12.00 lacs has been paid to the other co-owner in F.Yr.97-98. Possession of the property has been handed over to the developer earlier to the previous year relevant to assessment year under consideration. There is a provision of giving registered irrevocable power of attorney to the M.D. and authorised signatory of the developer in the agreement itself. The developer has all right to dispose of the developed property and also to utilise advance and sale consideration from the same other than 3000 sq. ft of built up area and relatable land. The appellant in no way is concerned with the development and sale of such developed property. There is no terms in the agreement to revoke it. The developer was ready and willing to perform his part of the contract. No objection certificate from the Appropriate Authority has been obtained during F.Yr.97-98.

7.1 Section 45 of the Act clearly stipulates that capital gain is chargeable in the previous year when the transfer of the capital asset takes place. Therefore, what is relevant for determining the year of chargeability is not the receipt of consideration. Consideration automatically accrues as soon as transfer takes place. What is to be seen is whether the impugned property has been transferred or not and whether all relevant figures for computation of capital gains like "full value of consideration" for such transfer etc. is ascertainable or not.

Where any person contracts 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 has, 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 the contract, though required to be registered, or, 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 under the terms of the contract.

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

It is clear from the above that in order to attract Section 53A of T.P.Act following conditions must be fulfilled:

ii) The contract should be in writing and signed by the transferor and the transferee; v) The transferee should be ready and willing to perform his part of the contract.

In the present case, all these conditions are fulfilled much before 01.04.2000. There is no right left to the transferor other than the right to receive the consideration for the transfer in the manner laid down in the contract and to get certain compensation in the form of rent reimbursements etc. Thus, the transaction entered into by the parties through the agreement is a transaction as envisaged under Section 53A of the Transfer of Property Act.

7.3 Now we will consider Section- 2(47) of the Act. The section reads as under: (v) 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 (4 of 1882); or (vi) any transaction...) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation.- For the purpose of Sub-clause (v) or (vi), 'immovable property' shall have the same meaning as in Clause (d) of Section 269UA. It is quite clear from the facts mentioned above that the transaction comes within the scope of Section 2(47)(v) of the Act read with explanation thereto. AS argued by the learned D.R., it can be even be considered as covered Under Section 2(47)(vi) read with explanation thereto.

7.4 In the agreement under consideration in page 4 it has been clearly mentioned as under: The apparent consideration in respect of the property mentioned in the Schedule is fixed at Rs. 119 lakhs. Out of this sum, the party of the second part shall pay a sum of Rs. 59 lakhs... to.... Dr.

Sarveswara Rao in the following manner:....

The party of the second part shall construct a residential portion of a plinth area of 3000 sq.ft. including the proportionate common area in the first floor for No. -1 of the party of the first part viz. Achyuta Rao Tecmalla and the cost of the said 3000 sq.ft.

Including the proportionate undivided interest of the land is valued at Rs. 60 lakhs and this will be adjusted towards the balance of consideration payable by the party of the second part.

This consideration payable to the appellant has been subsequently reduced to Rs. 33 lakhs as per the supplementary agreement.

7.5. Para 10 of the agreement states that " The parties of the first part undertake not to revoke, modify or alter this agreement and not to deal with the sale of superstructure and undivided share and interest in the scheduled mentioned property except residential plinth area of about 3000 sq. Ft....

7.6. The agreement also stipulates that the developer will arrange for alternative accommodation for the appellant and the other co-owner from the date the possession of the impugned property is handed over to it or bear expenses towards rent at Rs. 7000/- per month till the built up area of 3000 sq.ft. Is handed over to the appellant and full consideration is paid to the other co-owner as stipulated in the agreement. It also stipulates that if the above built up area is not handed over to the appellant within 18 months from the date of delivery of possession of the impugned property to the developer Rs. 15,000/- per month shall be paid by the developer to the appellant till the date of handing over the possession of 3000 sq.ft. of built up area to the appellant.

7.7. From the above it is abundantly clear that the facts of the case under consideration is entirely different from the case of S. Raghurami Reddy decided by the Hyderabad Bench on which reliance has been placed by the learned Counsel of the assessee. This is also not a case of transfer by sale or exchange, in-so-far-as the consideration is mentioned in the agreement and receiving possession of the 3000 sq.ft.

of built up area is only a mode of receiving that consideration in addition to the right to have alternate

accommodation during the period specified in the agreement. Transfer can be by any mode as enumerated in Section 2(47) of the Act or otherwise. In the present case transfer as per Section 2(47)(v) took place earlier to 01.04.2000 as is evidenced by the agreement and surrounding facts. As per the discussion made above, we are of the considered view that transfer as per Section 2(47) of the Act did not take place during the previous year relevant to assessment year 2001-2002.

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