Cited Here

AARTI SANJAY KADAM vs. INCOME TAX OFFICER

BOMBAY TRIBUNAL

SAKTIJIT DEY, JM & M. K. AGGARWAL, AM.

ITA No. 1190/Mum/2018

Aug 21, 2018

(2018) 53 CCH 0655 MumTrib

(2018) 172 ITD 0362 (Mumbai-Trib)

Legislation Referred to

Section 2(47)(v)

Case pertains to

Asst. Year 2014-15

Decision in favour of:

Assessee

Transfer of immovable property in relation to capital assets—LTCG—Assessee filed return of income—During assessment proceeding, AO noted that in relevant previous year, assessee had sold a land to Shri M and Shri P—Based on such information, a statement was recorded from assessee u/s 131 wherein, it was stated that land under dispute was not sold but had entered into a development agreement on condition that developer would complete such project within 18 months and in return developer would hand over 35% of residential area of project—Assessee also contended that as per said agreement there was no monetary consideration and hence, no capital gain aroused in relevant AY—AO completed assessment after determining LTCG—CIT(A) sustained addition made by AO and held that on entering into said agreement, assessee had transferred immovable property as per s. 2(47)(v)—Held, consideration to be received by assessee in terms of development agreement on transfer of land was 35% of built up residential area—Until project was complete and assessee receives said 35%, it could not be said that assessee had received consideration towards transfer of immovable property—There was some dispute between parties with regard to completion of project and assessee had initiated legal action against developer—When there was uncertainty with regard to fact whether assessee would be receiving even 35% of built up residential area in terms of agreement, there was no question of accrual of LTCG in impugned AY, particularly when nothing had happened with regard to development of project in impugned AY—Merely because assessee had entered into a development agreement, it does not presuppose transfer in terms of s. 2(47)(v)—Assessee's appeal allowed.

Held

The consideration to be received by the assessee in terms of development agreement on transfer of the land was 35% of the built up residential area. Therefore, until the project is complete and the assessee receives 35% of the built up residential area as per the terms of the development agreement, it cannot be said that the assessee has received consideration towards transfer of immovable property. It is a matter of record that there was some dispute between the parties with regard to completion of the project and the assessee has initiated legal action against the

developer. Therefore, when there is uncertainty with regard to the fact whether assessee would be receiving even 35% of the built up residential area in terms of the agreement, there is no question of accrual of long term capital gain in the impugned assessment year, particularly when nothing has happened with regard to development of project in the impugned AY. Merely because the assessee has entered into a development agreement, it does not presuppose transfer in terms of Section 2(47)(v). As per Section 53A of the Transfer of Property Act, 1882, which has been referred to in Section 2(47)(v) of the Act, one of the conditions of transfer is that the developer should also by willing to perform his part of the contract. In the present case it appears from the record that the developer has not fulfilled his part of the contract. Therefore, the conditions of Section 53A of the Transfer of Property Act are not fulfilled. In the absence of any consideration received by the assessee in the impugned AY the assessee cannot be subjected to long term capital gain on execution of development agreement.

(Paras 8&9)

M/s. Fibars Infratech Pvt. Ltd. vs. ITO, ITA No. 477/Hyd/2013.

Conclusion

Merely because the assessee has entered into a development agreement, it does not presuppose transfer in terms of Section 2(47)(v).

In favour of

Assessee

Cases Referred to

Chaturbhuj Dwarkadas Kapadia vs. CIT 260 ITR 491
CIT vs. M /s. Chemosyn Ltd., ITA No. 361 of 2013 dated 11th February, 2015 (Bombay High Court)
ITO vs. M/s. Ronak Marble Industries, ITA No. 3318/Mum/2015 dated 15.03.2017
M/s. Fibars Infratech Pvt. Ltd. vs. ITO, ITA No. 477/Hyd/2013 dated 03.01.2014
CIT vs Shoorji Vallabhdas 46 ITR 144

Counsel appeared:

Dr. P. Daniel for the Appellant.: N. Hemalatha for the Respondent

SAKTIJIT DEY, JM.

1. This is an appeal by assessee against the order dated 14.11.2017 passed by the CIT(A)-3, Thane for A.Y. 2014-15.

2. There is a delay of 11 days in filing the appeal by the assessee. After hearing the submissions of the assessee we find that there is reasonable cause for the delay in filing the appeal. Therefore, the delay in filing the appeal is condoned and appeal is taken up for hearing.

3. The only effective ground raised by the assessee is as under: -

> "[1] The learned CIT(A) has erred in law and on facts in sustaining the order of the Assessing Officer determining capital gain." Subsequently, vide letter dated 16th April, 2018, the assessee has raised the following additional grounds: -
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> *"1. The Learned CIT(A) erred in confirming that the estimated full value of consideration for the purpose of computation of Capital gains which was in the womb of the future ignoring the position of law that full value of consideration cannot be estimated under Sec. 48 of the Income tax Act, 1961*
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> *2. The Learned CIT(A) erred in confirming that the transaction under Development agreement with S/Shri. Milind Madhukar Kamble and Paparao Laxminarayan Satyam as a transfer u/ s. 2(47)(v) as on the date of entering the agreement.*
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> *3. The Learned CIT(A) erred in confirming the estimation of full value of consideration for the purpose of the Computation of Capital Gain when assessee claimed that Capital gain is not computable as the consideration has neither been received nor accrued during the year under assessment.*

4. The Learned A.O. & CIT(A) erred in applying the valuation u/s. 50C of the Income tax Act, 1961 on the Development agreement and taxing the same as Capital gain.

5. The Learned CIT(A) erred in taxing the Capital gain as the consideration in the form of developed area of 35% is concerned, the same was neither received nor had accrued and hence no occasion to bring it to tax could arise. "

4. The learned counsels appearing for rival parties were heard on admission of additional grounds. After considering the rival submissions and looking at the nature of additional grounds raised we are of the view that the issues raised in the additional grounds are connected with or are ancillary and incidental to the main ground, hence, do not require investigation into fresh facts. That being the case we are inclined to admit the additional grounds for adjudication. As can be seen from the grounds raised the issue in dispute is with regard to addition made on account of capital gain on alleged transfer of an immovable property under a development agreement.

5. The brief facts of the case are that the assessee, an individual, filed her return of income for the assessment year under dispute on 27.03.2015 declaring total income of '2,40,780/-. During the assessment proceedings the AO, on the basis of Annual Information Report available on record, found that in the relevant previous year the assessee has sold a land to Shri Milind Madhukar Kamble and Shri Paparao Laxminarayan Satyam for a total sale consideration of '83,16,000/-. On the basis of the said information a statement was recorded from the assessee under Section 131 of the Income Tax Act, 1961 (hereinafter "the Act") on 09.12.2016, wherein, it was stated that she has not sold the land but has entered into a development agreement on the condition that the developer will complete the project within 18 months and in return the developer will hand over 35% of the residential area of the project. The terms of development agreement did not provide for any monetary consideration to be paid to the assessee by the developer. Thus, it was submitted by the assessee that since the assessee, as per the development agreement, will receive 35% of the built up residential area on completion of the project and there is no monetary consideration, no capital gain arises in the impugned assessment year. A copy of the development agreement was also submitted before the AO. The AO did not agree with the contentions of the assessee. He observed that the assessee has purchased a land on 06.11.2008 for a consideration of Rs.4,75,000/- along with stamp duty, whereas, as per the development agreement the value of the land for stamp duty purpose has been determined at Rs.83,16,000/-. Considering the said value as sale consideration at the hands of the assessee the AO determined the long term capital gain at Rs.75,11,316/-. Though, the assessee challenged the addition made on account of long term capital gain before the CIT(A), however, the CIT(A) also sustained the addition made by the AO holding that on entering into the development agreement the assessee has transferred the immovable property in terms of Section 2(47)(v) of the Act. While doing so he relied upon certain judicial precedents including the decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT 260 ITR 491.

6. The learned A.R. submitted, though the assessee has entered into a development agreement on 05.09.2013, which falls within the relevant previous year, however, as per the terms of the development agreement the consideration to be received by the assessee is 35% of the developed residential area in the housing project and there was no consideration in terms of money. He submitted, since the project is not yet complete and the assessee has not received the consideration as per the terms of development agreement, no capital gain was accrued in the impugned assessment year. He submitted, before the departmental authorities the assessee has specifically submitted that as per the terms of the agreement the developer was required to complete the project within 18 months. However, since the developer did not stick to the time schedule and was delaying the project, the assessee initiated legal proceedings and has not received the consideration in terms of the development agreement. Referring to Section 45(5A) of the Act, which has been introduced to the statute w.e.f. 01.04.2018 by Finance Act, 2017, the learned A.R. submitted that the intention of the Legislature is very clear that in the nature of transaction entered into by the assessee, capital gain can only be assessed on completion of the project. In support of his contention the learned A.R. relied upon the following decisions: -

1. CIT vs. M /s. Chemosyn Ltd., ITA No. 361 of 2013 dated 11th February, 2015 (Bombay High Court).

2. CIT vs. Smt. Najoo Dara Deboo, (2013) 38 taxmann.com 258 (Allahabad High Court)

3. ITO vs. M/s. Ronak Marble Industries, ITA No. 3318/Mum/2015 dated 15.03.2017.

4. M/s. Fibars Infratech Pvt. Ltd. vs. ITO, ITA No. 477/Hyd/2013 dated 03.01.2014.

7. The learned D.R. strongly relied upon the observations of the CIT(A).

8. We have considered the rival contentions and perused the material on record. The facts emanating from record reveal that on 05.09.2013 the assessee had entered into a development agreement with two persons for construction of a housing project over the land owned by the assessee. It is also clear from the facts on record that as per the terms of the development agreement the assessee would not be paid any monetary consideration but would receive 35% of the built up residential area on completion of the housing project. Thus, it is a fact on record that at the time of entering into the development agreement the assessee has not received any monetary consideration from the developers. It is also evident from the orders of the department authorities that the assessee, in the course of proceedings, has specifically submitted that though in terms of the development agreement the housing project was supposed to be completed within 18 months, however, the developer did not stick to the time schedule, therefore, the assessee had to initiate legal proceedings against the developer. The aforesaid facts clearly reveal that the consideration to be received by the assessee in terms of development agreement on transfer of the land was 35% of the built up residential area. Therefore, until the project is complete and the assessee receives 35% of the built up residential area as per the terms of the development agreement, it cannot be said that the assessee has received consideration towards transfer of immovable property. It is a matter of record that there was some dispute between the parties with regard to completion of the project and the assessee has initiated legal action against the developer. Therefore, when there is uncertainty with regard to the fact whether assessee would be receiving even 35% of the built up residential area in terms of the agreement, there is no question of accrual of long term capital gain in the impugned assessment year, particularly when nothing has happened with regard to development of project in the impugned assessment year. Merely because the assessee has entered into a development agreement, it does not presuppose transfer in terms of Section 2(47)(v) of the Act. As per Section 53A of the Transfer of Property Act, 1882, which has been referred to in Section 2(47)(v) of the Act, one of the conditions of transfer is that the developer should also by willing to perform his part of the contract. In the present case it appears from the record that the developer has not fulfilled his part of the contract. Therefore, the conditions of Section 53A of the Transfer of Property Act are not fulfilled. In any case of the matter, since the assessee has not received the consideration in terms of the development agreement in the impugned assessment year, question of accrual of capital gain in the year under consideration does not arise. As regards the reference by the CIT(A) to the decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra), it is relevant to observe, the Hon'ble Jurisdictional High Court while dealing with an issue identical to the case of the assessee has explained the true import of the decision rendered in the case of Chaturbhuj Dwarkadas Kapadia (supra) by observing that the ratio laid down in the said decision would not be applicable, since, there is no dispute with regard to the transfer of property taking place as a result of development agreement. The dispute is with regard to quantum of sale consideration to be taken for the purpose of computing capital gain. Proceeding further, the Hon'ble Jurisdictional High Court held that when the terms of development agreement did not provide for any monetary consideration but of built up area on completion of the project, it cannot be said that capital gain has accrued on execution of development agreement even before the project was complete. In this context it will be profitable to look into the observations of the Hon'ble Jurisdictional High Court as extracted below: -

> *"7. Grievance of the revenue is that the decision of this Court in* Chaturbhuj Dwarkadas Kapadia (supra) *should apply to the present facts. As pointed out by the Tribunal, the issue before the Court in the above case was to determine the year in which the property was transferred for the purpose of capital gains. In this case the issue is what is the consideration received for the transfer of an asset. Thus, reliance upon* Chaturbhuj Dwarkadas Kapadia (supra) *does not assist the revenue. We specifically asked the revenue whether the decision of the Tribunal in* Kalpataru Construction Overseas (P) Ltd *has been appealed to this Court and to which the answer was "we do not know".*
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> *8. We find that on facts the impugned order of Tribunal has held that no income has been accrued or received of the value of 18000 sq.feet of constructed area under the development agreement dated 16.6.2006. This on account of the fact that the agreement dated 16.6.2006 was not acted upon as it came to be superseded/modified by the Tripartite agreement dated 6.7.2007. This was the position when the return of income was filed. The income accrued and earned under the subsequent agreement dated 6.7.2002 was offered as capital gains in the subsequent years. Therefore, on the application of the real income theory, the Tribunal held that on these facts there would be neither accrual nor receipt of income to warrant bringing to tax to the constructed area of 18,000 sq.ft which has not been received by the respondent-assessee. As observed by the Apex Court in* CIT vs Shoorji

Vallabhdas 46 ITR 144 *:*

> *"Income-tax is a levy on income. No doubt, the Income-Tax Act takes into account two points of time at which the liability to tax is attracted viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book keeping, an entry is made about a 'hypothetical income' which does not materialise.*
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> *Where income tax, has in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account." (emphasis supplied)*

Thus no income has either accrued or received in the form of 18000 sq.feet of constructed area. No occasion to tax the same can arise. The Tribunal on consideration of facts has reached a finding of fact that no income in respect of 18000 sq.ft of constructed area has been accrued or received. This finding cannot be said to be perverse or arbitrary. According to us no substantial question of law arises to warrant interference with the order of the Tribunal. Thus, question nos.1 and 2 are dismissed."

9. Further, in the case of Smt. Najoo Dara Deboo (supra) the Hon'ble Allahabad High Court, while considering identical nature of dispute held that until the assessee receives her share in the built up area of the project on completion, it cannot be said that capital gain has accrued in the year of agreement. The same view has been expressed by the Coordinate Bench in the case of M/s. Ronak Marble Industries (supra). Even otherwise also capital gain cannot be said to have accrued in the impugned assessment year as at the time of entering into the development agreement the housing project has not been conceived or implemented. So, until the project comes into existence it cannot be said that the consideration, which the assessee is to receive in terms of the development agreement exists. That being the case, in the absence of any consideration received by the assessee in the impugned assessment year the assessee cannot be subjected to long term capital gain on execution of development agreement. In this context we rely upon the decision of the ITAT Hyderabad Bench in the case of Fibars Infratech Pvt. Ltd. (supra). Thus, on overall consideration of facts and materials on record in the light of the ratio laid down in the decisions referred to above, we are of the view that the assessee cannot be charged to long term capital gain in the impugned assessment year. Hence, the addition made on account of long term capital gain is deleted.

10. Since we have held that the assessee is not chargeable to long term capital gain in the impugned assessment year, the other ancillary incidental grounds raised by the assessee on computational aspect of long term capital gain are of academic nature, hence not required to be adjudicated.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 21st August, 2018.

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Customized Notes