

Mere License to enter into property to carry out development cannot be treated as Transfer in JDA

Smt. Lakshmi Swarupa Vs ITO (ITAT Bangalore)

ITA No. 2278/Bang/2018, Order dated 12/10/2018

Ratio:

The mere fact that development of the property cannot be done without possession cannot be the basis to come to a conclusion that possession was delivered in part performance of the agreement for sale in the manner laid down in Sec.53A of the Transfer of Property Act.

Sections taken into consideration:

Section 53 A of Transfer of Property Act, 1882.

1[53A. Part performance.—

Where any person contracts to transfer for consideration any immoveable 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

*2[***] 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: 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*



Facts of the case:

In the present case, the Appellant is an individual who owns a property in Munnekolala Village, Bangalore. Appellant entered into a registered Joint Development Agreement [JDA] in respect of the property with the Builder. As per the JDA, the appellant and the builder shared area in the project and proportionate undivided share of land wherein the builder would incur all costs of construction of the built-up area. The Appellant did not file return of income for AY 2006-07. Based on the information obtained from the Sub-Registrar's office about the JDA, the AO issued notice u/s.148 of the Income Tax Act, 1961 (Act) to the Appellant. The Appellant did not participate in the reassessment proceedings and therefore the reassessment was completed by the AO u/s.144 of the Act to the best of his judgment. The AO adopted the value of the property as per the value determined by the Sub-Registrar for stamp duty and registration charges and determined Capital gain. Aggrieved by the order the appellant filed an appeal before CIT (A).

Issue before CIT (A):

(i) Whether there was a transfer of property in the AY 2006-07 by virtue of the JDA dated 29.3.2006?

The Appellant pointed out that legal possession of the property was given to the developer on 22.4.2006 and filed a confirmation from the developer in this regard. The Appellant stated that what was given to the developer under the JDA was only a license to enter the property for the purpose of carrying out development, which was not legal possession as contemplated u/s.53A of the Transfer of Property Act. The Appellant had filed a return of income declaring capital gain in AY 2007-08 because the date of transfer was on 16.8.2006 whereby the Appellant agreed to sell the property outright and received considered in a sum of money in lieu of built up area of construction as was originally envisaged

thereof.]

Sec.2(47) of the Income Tax Act, 1961

“Sec.2 (47) “transfer”, in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein ; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in trade of a business carried on by him, such conversion or treatment ; or

(iva) the maturity or redemption of a zero coupon bond; or

(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 (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation [1]: For the purposes of sub-clauses (v) and (vi), “immovable property” shall have the same meaning as in clause (d) of section 269UA;”

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under the JDA.

CIT (A) Verdict:

The CIT (A) held that capital gain tax would be levied on the deemed transfers particularly with reference to the provisions when registration of documents in support of transfer of legal title of immovable properties from transferor to transferee has taken place. It further stated that the underlying principle which emerged from section 53A of TP Act is that the transferor shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession ,and hence the provision contained in section 53A of TP Act is mainly to protect the interest of the transferee who has already performed his right to perform his part of job as per the terms of contract agreed and thereby confirmed the order of the AO holding that there was a transfer within the meaning of S.2 (47)(v) of the Act during AY 2006-07 by virtue of the JDA dated 29.3.2006.

Issue before ITAT:

(i) Whether there was transfer of capital asset by the Appellant during AY 2006-07?

(ii) Whether the capital gain on such transfer can be brought to tax in AY 2006-07?

ITAT’s Verdict:

The hon’ble ITAT made the following observation:

(i)Legal title or ownership is not effectively conveyed to the transferee if no registered deed is executed in respect of the property.

(ii)If no registered deed is executed even after complete transaction by delivery of possession and receipt of consideration, capital gains tax would escape assessment altogether or if such execution of registered sale-deed is postponed, the capital gains tax would also be postponed.

(iii)The possession given in the present case is in the nature of permissive possession and not possession in part performance of agreement for sale.

(iv)The mere fact that development of the property cannot be done without possession cannot be the basis to come to a conclusion that possession was delivered in part performance of the agreement for sale in the manner laid down in Sec.53A of the TP Act.

Acelegal Analysis :

- The transaction is not covered under provisions of Section 53A of the TP Act in case of Joint Development Agreement wherein the landowner hand over possession of land to the developer for development without the intention to transfer ownership to the developer in the land. The clauses in the agreement would decide the fate in each case.
- Where possession of the land is given to the developer by the landowner, without giving right of disposal , sale or otherwise does not fall within provisions of Section 53A of the TP Act and hence not a transfer of property within meaning of Section 2(47)(v) of the Income Tax Act, 1961
- Merely mentioning in the joint Development agreement, that “granting of license to enter the property to carry out its development does not amount to its possession being delivered, in part performance of the agreement for sale, as per Section 53A of the Transfer of Property Act” or it is restricted in some other manner does not mean possession not given. The substance of the agreement is to be seen.