

आयकर अपीलीय अधिकरण, 'ए' (SMC) न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' (SMC) BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No. 1705/CHNY/2017
निर्धारण वर्ष /Assessment year : 2009-2010.

The Deputy Commissioner of
Income Tax,
Non Corporate Circle 9(1)
Chennai.

Vs.

Shri. Anil Sheth,
Prop. M/s. Prince Marbles,
No.34, Langs Garden Road,
Pudupet, Chennai 600 002.

(अपीलार्थी/Appellant)

[PAN ADDPA 3880A]
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri.B. Sagadevan, IRS, JCIT.
: Ms. Petchi, C.A.

सुनवाई की तारीख/Date of Hearing

: 07-06-2018

घोषणा की तारीख /Date of Pronouncement

: 11-06-2018

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

In this appeal filed by the Revenue, which is directed against an order dated 28.04.2017 of the Id. Commissioner of Income Tax (Appeals)-10, Chennai, it is aggrieved on a view taken by Id. Commissioner of Income Tax (Appeals) that income of the assessee

was to be considered under the head "business income" and not under "short term capital gains".

2. Facts apropos are that assessee engaged in the business of marbles and granites had entered into a joint development agreement on 23.01.2009 with one M/s. S & S Scapes Pvt. Ltd for development of an plot of land owned by him bearing No.60, Door No.D-6, 2nd Main Road, North Jaganath Nagar, Villivakam, Chennai-49 measuring 3440 sq.ft. As per the joint development agreement, developer was to construct a building and allot 54% of the built up area to the assessee while retaining 46% to itself. Assessee was paid a refundable deposit of Rs.22,00,000/- by the developer. Possession of the property was handed over on the date of joint development agreement for making construction therein. Ld. Assessing Officer was of the opinion that there was a transfer coming within the meaning of Section 2(47) (v) of the Income Tax Act, 1961 (in short "the Act") and assessee was liable to pay tax on capital gains arising from such transfer. A show cause notice was issued to the assessee. Its reply went as under;-

1. *The land at Villiwakkam has been purchased on 14.09.2006.*
2. *The land was given for joint-venture to Mrs. S & S Scapes Pvt Ltd, vide Joint Venture Agreement on 23.01.2009.*
3. *The land was given for' development on 46:54 basis. Therefore 5 flats are given as the share of the Assessee in exchange for 46% share of land given to the builder. This*

, agreement is entered on 23.01.2009.

4. The advance given by the Developer has erroneously offset against the land and there is another error of Rs. 2 lakhs received has erroneously wrongly shown against the land instead of giving credit to the other account and therefore there is a Credit entry of Rs. 2 lakhs shown under Unsecured loans in the Balance sheet drawn on 31.03.2009. (i.e. Asst. Yr. 2009-10).
5. This error was rectified in 2009-10 F. Yr. and the land was shown in the Balance Sheet under Assets column.
6. There is a sale of 1 Apartent on 21.01.2010 which was shown as under project Sales to the tune of Rs. 22,75,000/- (A copy is enclosed). No cost of construction is taken into account whereas the entire sale proceeds received towards sale of apartment is shown in Trading account, i. e., undivided share of land valued at Rs. 2,25,000/- has been shown as the deduction from land and the balance of Rs. 19,75,000/- is shown in Balance Sheet under assets column during the F. Y 2009-10.
7. The undivided share of land sold was shown under long term capital gains during the F. Y 2009-10.
8. Out of Rs. 24,67,490/-, Rs.1,92,490/- is retained by the builder towards E.B and other miscellaneous expenses retained by them and Rs. 18 Lakhs is received and Rs. 7 Lakhs is adjusted against advance payment received from the builder during the F. Y 2008-09.
9. After the advance received from the builder is adjusted to the tune of Rs. 7 Lakhs the balance of Rs. 15 Lakhs is returned to the builder by way of Chq. during the F. Y 2010-11 .. (a copy of ledger is enclosed)
10. The balance of 4 flats was shown under closing stock during the FY 2009-10, 2010-11, 2011-12, 2012-13, 2013-14".

Assessee was also required to explain how its claim for exemption u/s.54F of the Act was justified. Reply of the assessee on this aspect was as under:-

"The property is given for joint development on 23/01/2009 with an agreement to authorize them to develop and construct a new building at plot no. 60, Door no, 0-6, Old no. 60, 2nd Main Road, North Jagannathan Nagar, Villivakkam, Chennai - 600049. The agreement is made with the following terms.

The developers will hold 46% of build up plinth area and give 54% of build up plinth area to the owner of the property i. e. me.

During the F. Y. 2009-10 out of 54% of my share I have sold an apartment and same is shown as Contract receipt in my income and expenditure account, since this is a business transaction and the balance apartments are shown in the closing stock during F. Y. 2009-10.

These apartments, which is of my share is not my residential purpose and it is for sale. Hence it is shown as business income during the F. Y. 2009-10 to the extent of sale made and the balance is shown as closing stock.

During the financial year 2010-11, I have sold my land at plot no. 12/2, 12/3, 12/4 and 12/5 of Kovalam Village, Chenglepet Taluk, Kanchipuram dist. And out of the capital gain I have invested in flat at door no. 100 to 102, Egmore Egmore nungambakkam Taluk, Chennai. This apartment is meant for my residential purpose. Therefore I have claimed exemption u/s 54F during the F. Y. 2010- 11.

Therefore I request you to consider the above facts and request to allow capital gain exemption u/s 54F for the investment made by me for my residential property at Door No.100 to 102, Egmore, Egmore Nungambakkam Taluk, Chennai."

- 3.** However, Id. Assessing Officer was not impressed by the above replies. According to him, there was a transfer when assessee entered into a joint development agreement and handed over possession to the developer. Further, as per the Id. Assessing Officer,

nature of business of the assessee as given in form 3CB submitted by it was "trading of marbles/granites". Ld. Assessing Officer took a view that the gains arising from transfer was short term capital gains and not business income. Total cost of the project as confirmed by the Managing Director of M/s. S & S Scapes Pvt. Ltd was Rs.96,00,000/-. Short term capital gains was worked out by the Id. Assessing Officer as under:-

<i>Total deemed sale consideration of property</i>	=	<i>51,84,000/-</i>
<i>= 54% of 96 lakhs</i>		
<i>Less: Cost of 46% of land purchased</i>	=	<i>10,12,000/-</i>
<i>= 46% of 22 lakhs</i>		
		<i>41,72,000/-</i>

4. Assessee's appeal before Id. Commissioner of Income Tax (Appeals) was successful. As per the Id. Commissioner of Income Tax (Appeals), assessee was declaring its income from the projects under the head business from assessment year 2011-12 onwards. Ld. Commissioner of Income Tax (Appeals) noted that assessee had declared the sale proceeds under the head business income, and was engaged in the business of promoting apartments. Ld. Commissioner of Income Tax (Appeals) took a view that terms of the joint development agreement indicated assessee's intention to do business.

He directed the Id. Assessing Officer to consider the income under the head income from business and not as short term capital gains.

5. Now before us, the Id. Departmental Representative strongly assailing the order of the Id. Commissioner of Income Tax (Appeals) submitted that assessee was never engaged in the business of sale of flats or property. As per the Id. Departmental Representative, the transaction considered by Id. Assessing Officer was the only one entered by the assessee, in relation to any immovable property, upto and including the impugned assessment year. Thus, according to the Id. Departmental Representative, assessee had no intention to do a business in real estate. Further, as per the Id. Departmental Representative, assessee had in its own return claimed to be a trader of marbles and granites. Thus, as per the Id. Departmental Representative, Id. Commissioner of Income Tax (Appeals) fell in error in directing the Id. Assessing Officer to consider the income under the head "income from business/profession".

6. Per contra, Id. Authorised Representative submitted that there was no transfer during the relevant previous year since joint development agreement was not registered. Further, according to her, no power of attorney was executed by the assessee in favour of the

developer. Relying on clause No.25 of the joint development agreement, Id. Authorised Representative submitted that assessee remained the sole owner of the property. According to her, vacant possession was given only for developing the property. There being no transfer, as per the Id. Authorised Representative, there could have been no assessment under the head income from capital gains or any other head. Reliance was placed on the judgment of Hon'ble Apex Court in the case of *CIT vs. Balbir Singh Maini, 398 ITR 531*.

7. We have considered the rival contentions and perused the orders of the authorities below. Fundamental issue which has been raised by the Id. Authorised Representative is that there was no transfer falling within the meaning of Section 2(47) of the Act during the relevant assessment year and therefore there could not have been any income for the assessee under the head short term capital gains or for that matter any other head. Reliance has been placed on the judgment of Hon'ble Apex Court in the case of Balbir Singh Maini (supra). Their lordships in the above case had clearly held that there can be no transfer without registering the document signifying the transfer. What was held by their lordships at para 17 to 28 is reproduced hereunder:-

'17. The relevant sections that are necessary for us to decide the present matter are as under:

Transfer of Property Act

"53A. Part performance. - 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 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 thereof.]

Income Tax Act

Section 2 - Definitions

In this Act, unless the context otherwise requires, -

(47) "transfer", in relation to a capital asset, includes, -

(i) to (iv) xxx xxx xxx

(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.

45. *Capital gains* - (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

48. *Mode of computation* - The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto:"

18. Section 53A, as is well known, was inserted by the Transfer of Property Amendment Act, 1929 to import into India the equitable doctrine of part performance. This Court has in *Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bhairoba Suryavanshi (D) by LRs. & Ors.*, (2002) 3 SCC 676 at 682 stated as follows:

"16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53- A of the Act. The necessary conditions are:

(1) there must be a contract to transfer for consideration of any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract."

19. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be

resorted to as a right of defence. See *Rambhau Namdeo Gajre v. Narayan Bapuji Dhgotra (Dead) through LRs.* (2004) 8 SCC 614 at 619, para 10. An agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section 53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words "the contract, though required to be registered, has not been registered, or" in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:

"17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A."

"49. Effect of non-registration of documents required to be registered. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

20. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in *Shrimant Shamrao Suryavanshi (supra)*, that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.

21. However, the High Court has held that Section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. We are afraid that we cannot agree with the High Court on this score. Under

Section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression "or in any other manner whatsoever" in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. We have, therefore, to see whether the impugned transaction can fall within this provision.

22. The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The maxim "noscitur a sociis" has been repeatedly applied by this Court. A recent application of the maxim is contained in *Coastal Paper Limited v. Commissioner of Central Excise, Visakhapatnam*, (2015) 10 SCC 664 at 677, para 25. This maxim is best explained as birds of a feather flocking together. The maxim only means that a word is to be judged by the company it keeps. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.

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.

24. The matter can also be viewed from a slightly different angle. Shri Vohra is right when he has referred to Sections 45 and 48 of the Income Tax Act and has then argued that some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset.

25. This Court in *E.D. Sassoon & Co. Ltd. v. CIT*, (1955) 1 SCR 313 at 343 held:

"It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt

owed to him by somebody. There must be as is otherwise expressed *debitum in presenti, solvendum in futuro*; See *W.S. Try Ltd. v. Johnson (Inspector of Taxes)* [(1946) 1 AER 532 at p. 539], and *Webb v. Stenton, Garnishees* [11 QBD 518 at p. 522 and 527]. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."

26. This Court, in *Commissioner of Income Tax v. Excel Industries*, (2014) 13 SCC 459 at 463-464 referred to various judgments on the expression "accrues", and then held:

"14. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In *CIT v. Shoorji Vallabhdas and Co.* [*CIT v. Shoorji Vallabhdas and Co.*, (1962) 46 ITR 144 (SC)] it was held as follows: (ITR p. 148)

"... 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 bookkeeping, an entry is made about a 'hypothetical income', which does not materialise. Where income 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."

15. The above passage was cited with approval in *Morvi Industries Ltd. v. CIT* [*Morvi Industries Ltd. v. CIT*, (1972) 4 SCC 451 : 1974 SCC (Tax) 140 : (1971) 82 ITR 835] in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that: (SCC p. 454, para 11)

"11. ... the date of payment ... does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

16. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount".

17. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

18. Insofar as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement passbook, there was no corresponding liability on the Customs Authorities to pass on the benefit of duty-free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is, therefore, not the income of the assessee."

27. In the facts 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 assessee by the developers and therefore, the assessee has 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.

When the lower authorities were considering the assessee's case they did not have the benefit of the judgment of Hon'ble Apex Court in the case of Balbir Singh Maini (Supra). Unless and until a careful examination of the joint development agreement entered with the M/s. S&S Scapes Pvt. Ltd is made and compared with the joint

development agreement considered by Hon'ble Apex Court in the case of Balbir Singh Maini (supra), we are of the opinion that the question whether any income arose to the assessee, cannot be addressed. In the fitness of the things, we are of the opinion that the matter needs to be revisited the Id. Assessing Officer. We therefore set aside the orders of the lower authorities and remit the issue back to Id. Assessing Officer for denovo consideration.

8. In the result, the appeal of the Revenue is allowed for statistical purpose.

Order pronounced on Monday, the 11th day of June, 2018, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:11th June, 2018

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |