

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

S.No.	ITA No.	AY	Appellant	Respondent
1	981/H/18	2010-11	Telukunta Srinivasa Rao (HUF), Secunderabad. PAN – AAAHT7950G	Income-tax Officer, Ward – 10(5), Hyd.
2	1284/H/18	-do-	Telukunta Shyam Rao (HUF), Sec'bad PAN – AADHT 0015M	-do-
3	1099/H/18	-do-	Telukunta Amarnath (HUF), Sec'bad PAN – AADHT 0398F	-do-
4	1283/H/18	-do-	Telukunta Shiva Kumar (HUF), Sec'bad. PAN – AADHT 0 17K	-do-

Assessee by: Shri Kiran
Revenue by: Smt. K.J. Divya

Date of hearing: 19/09/2018
Date of pronouncement: 10/10/2018

ORDER

PER BENCH:

These appeals are filed by the Assessee, who are family members, against orders of CIT(A) - 6, Hyderabad, all dated, 19/03/2018. As issue is identical in all these appeals, they were clubbed and heard together, therefore, a common order is passed for the sake of convenience.

2. Briefly the facts as taken from T. Srinivasa Rao (HUF) in ITA No. 981/Hyd/2018 are, the assessee along with other family members had entered into an agreement with M/s Saptagiri Construction for development of the property bearing No. 9-1-219/232, St. Mary's Road, Secunderabad and

for construction of a multi-storeyed commercial complex consisting of shops, showrooms, offices, parking places and other commercial units etc., vide 'Agreement for Development-cum-GPA' that was got registered vide document No. 40/2000 dated 10/01/2000.

2.1 As per the above agreement cum GPA it was agreed that the developer would bear all the expenses including construction and other costs that may arise from time to time. It was agreed that after completion of the said construction the land lords would get 45% of the built-up area, as earmarked in the sanctioned plan, free of cost in lieu of utilisation of the land owned by landlord. The Developer would retain the remaining 55% of the built-up area. As per the terms and conditions of the Agreement for Development-cum-GPA and subsequent Supplementary Agreement dated 17/01/2000 and other oral settlements the landlords were supposed to receive the constructed area of their share in the financial year 2009-10 relevant to the A.Y 2010-11. Though the original agreement had been entered into on 10/01/2000 and token amounts of advances was received as per clause-30(a) to (e) of the Agreement the Developer was to get the land vacated from the occupants like residential portions, part of petrol pump etc. and if necessary the developer was to provide alternative accommodation elsewhere to the occupants for getting possession of the land for carrying on development activity on the said land. The developer therefore did not immediately take possession of the said land and had commenced the same after getting the land vacated in the year 2003. According to the Assessing Officer, as agreed, the developer completed the construction and was ready to handover the completed 45% share of the landlord in the financial 2009-10 which was seen from the developer's letter

dated 22/12/2009 addressed to the land lords (assessee) that mentioned settlement amounts to be paid and stated that the construction of the portion allotted to landlords was complete and requested the landlords to take possession of the completed share (i.e.45%) of the built-up area. Thus, according to the Assessing Officer, though there was an agreement in the year 2000, the construction work was completed in F. Y 2009 - 10 and therefore capital gains arising, if any, in the hands of the landlords were assessable to tax only in the AY 2010-11.

2.2 In view of the above observations, the AO issued a notice u/s. 148 to the assessee and later a letter was issued, asking the assessee to show cause as to why the Capital Gains arising on account of transfer of property in question, should not be taxed in view of the provision of Section 50C of the I.T. Act, 1961. In response to the said notice, the assessee submitted its objections, which are as under:

“(a) The transfer of 55% of the land was effected on 10/01/2000 subject to the construction and handing over of 45% of the constructed area and such construction is not complete even now.

(b) The transfer, if any, as per the Development Agreement was already effected on 10/01/2000 as held by the High Court of Andhra Pradesh in the case of Sri Potla Nageswara Rao and is assessable for the assessment year 2000-2001.

(c) No further transfer is required to be made after the Development Agreement was entered into by the owners in favour of the Developer.

(d) The sale document was neither executed by the appellant nor is required to be executed by the appellant and is invalid.

(e) The Developer did not execute the Development Agreement in its true terms and, therefore, the matter was referred to the Arbitral Tribunal.

(f) The Arbitral Tribunal, after considering all the facts, held that the Development Agreement was entered into on 10/01/2000 and that the constructed area as specified in such Development Agreement has to be handed over to the owners.

(g) It was submitted before the Assessing Officer that in view of the directions of the Arbitral Tribunal, the sale document executed by the Developer as a General Power of Attorney is not a valid document. In view of this the transfer either takes place on 10.01.2000 or on the date of completion and handing over the constructed area.”

2.3 The AO did not find the reply of the assessee to be acceptable. According to him, in the final award, it was mentioned that though the construction was not in accordance with the terms and conditions of the Development agreement, the developer was ready to handover the possession on the said date as intimated by it in its letter dated 22/12/2009. Since the builder was ready to handover the said construction and the construction work was completed in the F.Y. 2009-10 and was ready to be taken possession of by the land lord, capital gains arising if any, in the hands of the landlords were assessable to tax only in the assessment year 2010-11. According to the Assessing Officer, alterations/additions/deletions if any, in keeping with the development agreement to the existing completed construction were subject matters of appeal etc. and were not relevant for determining the capital gains.

2.4 The Assessing Officer observed that the proposed construction consisted of 108,000 sq. ft. which the builder and the land lord had agreed to share in the ratio of 55:45. The land lords belonged to two families Viz. Telukunta and Dandoo, each having equal share of the land transferred. Hence, out of the total built-up area, both Telukunta and

Dandoo families got 50% share each i.e. 50% of 48,600 sq. ft. which came to 24,300 sq. ft. each. The assessee, a member of Telukunta group, owned 4.16% of the land lords' portion. In view of the same, sale consideration attributable to its share was proportionately worked out by adopting the value of the completed construction as per the SRO rates. Taking the cost per square feet at Rs.2,100/- as per SRO in the year 2009, the Assessing Officer recalculated the cost of constructed area at Rs.5,10,30,000/- (Rs.24,300 x 2100). Alternatively, he also took the consideration value of the land foregone i.e. 55% of 4534 sq. yards i.e. 2493.7 sq. yards at Rs.11,96,97,600/- by taking the SRO value of the land as on 2009 at Rs. 48,000 per sq. yard. Telukunta's family share being 50%, the consideration to be considered in their hands was taken at Rs.5,98,48,800/-. As the amount of Rs.5.98 crores was higher than cost of construction of Rs. 5.10 crore, the Assessing Officer calculated the Long Term Capital Gains by adopting Rs.5.98 crore as full value of consideration. After deducting indexed cost of acquisition of Rs.47,28,055/- and cost of the structure in the year 2000 of Rs. 12,00,000/- as given by the assessee (Telukunta's share 50% of 12 lakhs : Rs. 6,00,000/-) which after indexation came to Rs.9,74,808/-, long term capital gains were taken at Rs.5,41,45,937/-. As the assessee's share was 20%, long term capital gains falling to its share were computed at Rs. 1,08,29,187/-. The assessee had filed return of income of Rs. 1,62,648/-. After allowing the basic exemption, the total income was assessed at Rs. 1,08,31,835/-.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

4. The CIT(A) upheld the validity of reopening of assessment made by the AO u/s 147 of the Act as well as upheld the computation of long term capital gains done by the AO.

5. Aggrieved by the order of the CIT(A), the assessee is in appeal before us raising the following grounds, which are common in all the appeals under consideration:

"1) The order of the learned Commissioner of Income-tax (Appeals) is erroneous both on facts and in law.

2) The learned Commissioner of Income-tax (Appeals) erred in deciding the appeal without providing proper opportunity; particularly when the appeals of the other co-owners were also pending before the learned Commissioner of Income tax (Appeals).

3) The learned Commissioner of Income-tax (Appeals) erred in holding that there was any transfer of property during the year by the appellant in favour of Saptagiri Constructions without considering the fact that no transfer was effected during the year.

4) The learned Commissioner of Income-tax (Appeals) ought to have seen that the sale deed executed by Saptagiri Constructions was a sale of the property by the said concern as General Power of Attorney on its own and not on behalf of the appellant.

5) The learned Commissioner of Income Tax (Appeals) erred in confirming determination of capital gain at Rs.1,08,29,187/- without considering the fact that there was no transfer of property during the year.

6) Any other ground or grounds that may be urged at the time of hearing."

6. Before us, the Id. AR of the assessee submitted that similar issue came up for consideration before the coordinate bench of this Tribunal in the case of other family members in ITA No. 1583/H/17 and others for AY 2010-11, vide consolidated order dated 25/05/2018, a copy of the same is on

record. He submitted that the decision in the said order may be followed in these cases also.

7. On the other hand, Id. DR relied on the orders of revenue authorities.

8. Considered the rival submissions and perused the material on record. We find that the issue in dispute is squarely covered by the decision of the coordinate bench in the other family members case (supra) wherein the coordinate bench has held as under:

"8. Considered the rival submissions and perused the material on record. We notice that the assessment was reopened by issue of notice u/s 148 on 29/03/2016 and the reason for reopening was submitted by AO vide letter dated 20/06/2016 (we notice that the assessee letter reference was mentioned as 18/04/2014, whereas the actual letter reference was 18/04/2016), there is a typographical mistake committed by AO). The reasons recorded by AO to reopen the assessment was as under:

"On verification of the letter of the developer M/s Saptagiri Constructions letter dt: 22.12.2009 it is noticed that the builder was ready to handover the possession of construction space to the land lords in the FY 2009-10 relevant to the AY 2010-11. Therefore there was simultaneous transfer of possession of 55% of land by the assessee to the builder and possession of 45% of built-up are by the builder to the assessee in FY 2009-10 in terms of section 2(47) of the Income Tax Act, 1961 read with section 53A of the Transfer of property Act. On verification, it is noticed that the assessee has not filed his ROI for the A. Y 2009-10. In the view of the above, the income under the head Capital Gains chargeable to tax on account of transfer of the said land has escaped assessment within the meaning of Sec.147 of the Income Tax Act, 1961".

It is clear that the main reason for reopening/initiating the proceedings are the letter of the builder, in which, it is stated that the buildings are ready for occupation as per the Joint Development Agreement (JDA). It was also brought to the notice in the initial state itself that the

building constructed by the developer are not as per the norms agreed and subsequently subject to litigation. The final order of the Arbitral award was also submitted before the AO. It clearly shows that the building constructed by the developer is not as per approval and the same was not accepted by the assessee nor possession was taken.

8.1 Before us, the question raised is, in the case of 'JDA' transaction, at what point of time, capital gain arises. It is settled law that in the year in which the possession of the property is passed on to the developer is the year in which the provision of capital gains get attracted. In the case of Potla Nageswara Rao (supra) the Hon'ble AP High Court held as under:

"The element of factual possession and agreement are contemplated as transfer within the meaning of the aforesaid section. When the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the assessment year when the agreement was entered into and possession was given. Here, factually it was found that both the aforesaid aspects took place in the previous year relevant to the assessment year 2003-04."

From the above decision, when the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the AY when the agreement was entered into and possession was given. Therefore, in the given case, the assessee has entered into 'JDA' in the year 10/01/2000 and possession was handed over for development. But due to occupation of the property by the tenants, the developer was able to vacate the tenants only in the year 2003. Hence, it can be construed that the actual vacant possession was handed over to the developer only in 2003. Therefore, the actual transfer took place in the year 2003. The provisions of capital gains are attracted in the year 2003. Hence, the stand of the AO to charge the capital gains in the year 2010-11 is not proper. Secondly, the reason for bringing to tax in the year 2010-11 was the letter of the developer to announce that the building is ready for occupation without complying to the 'JDA' and approval norms. Even though the same was brought to the notice of the AO, according to us, the reason for reopening the assessment is on faulty ground.

8.2 In our considered view, the income chargeable to tax falls only in the AY 2003-04 and not in AY 2010-11. Therefore, the assessment completed u/s 144 r.w.s. 147 is held to be not in accordance with law, hence, the same is quashed.

8.3 Since, the assessment itself is quashed, the other grounds raised by the assessee are not required to be adjudicated at this stage. Therefore, the ground raised by the assessee in this regard is allowed.”

As the issue in dispute is materially identical to that of the said cases, following the decision drawn therein, we set aside the order of CIT(A) and allow the grounds raised by the assessee.

8.1 As the facts and grounds raised in all other appeals are identical to that of ITA No. 981/Hyd/2018 in the case of T. Srinivasa Rao (HUF), following the conclusions drawn therein we allow the grounds raised in these appeals as well.

9. In the result, all the appeals under consideration, are allowed.

Pronounced in the open court on 10th October, 2018.

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Hyderabad, dated 10th October, 2018

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Description	Date	Intls	
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S.No.				
1.	Draft dictated on			Sr.P.S./P.S
2.	Draft placed before author			Sr.P.S/PS
3	Draft proposed & placed before the second Member			JM/AM
4	Draft discussed/approved by second Member			JM/AM
5	Approved Draft comes to the Sr.P.S./PS			Sr.P.S./P.S
6.	Kept for pronouncement on			Sr. P.S./P.S.
7.	File sent to the Bench Clerk			Sr.P.S./P.S
8.	Date on which file goes to the Head Clerk			
9.	Date of Dispatch of order			

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4	Shri T. Shiva Kumar (HUF), Plot No. 18, Radhika Colony, West Marredpally, Hyderabad – 500 026.
5	ITO, Ward – 10(5), IT Towers, AC Guards, Hyderabad
6	CIT(A) - 6, Hyderabad
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