In absence of registration of agreement as well as possession being handed over, there is no transfer under Section 2(47)(v) of the Income Tax Act

Background

Recently, the Mumbai Bench of Income Tax Appellate Tribunal (Tribunal) in the case of Jawaharlal L. Agicha¹ (the taxpayer) held that no transfer of land had taken place as per provisions of Section 2(47)(v) of the Income-Tax Act, 1961 (the Act). The agreement entered by the taxpayer for development of land clearly stipulated that the possession of the land was to be given to the developer only upon fulfillment of certain conditions i.e. sanctioning of the scheme by Slum Rehabilitation Authority (SRA) and obtaining the 'letter of intent' and other requisite permissions from the competent authorities.

The Tribunal while distinguishing the Bombay High Court’s ruling in the case of Chaturbhuj Dwarkadas Kapadia² observed that it was a case where transfer had taken place, and the only dispute was confined to the year of chargeability. However in the instant case in absence of registration of the agreement as well as possession being handed over, which are essential constituents for invoking provisions of Section 2(47)(v) of the Act, the transaction cannot be construed as a transfer.

Facts of the case

- The taxpayer entered into an arrangement with M/s Shivalik Ventures for all procedural and substantive compliances with respect to these lands and for making arrangement with slum dwellers for their re-location for and on behalf of the taxpayer and for making effective use of land after carrying out requisite development.
- This arrangement was formalised into agreement dated November 7, 2007. Further, as per the agreement, the taxpayer was entitled to receive 130000 sq. ft. of FSI out of total FSI and M/s. Shivalik Ventures was free to use remaining land for its own purpose in lieu of services to be rendered for relocating the slum developers after obtaining permission from the Competent Authorities and making other legal compliances.
- The cost of construction with respect to 130000 sq ft FSI to be given to the taxpayer in pursuance to development of land by Shivalik Venture was determined at INR26 crore. The taxpayer received INR10 crore as advance during Financial Year (FY) 2007-08.

- The Assessing Officer (AO) treated the sum of INR26 crore as sales consideration and after reducing index cost of acquisition computed long term capital gain of over INR25.81 crore and held the same as taxable in the year under consideration.

¹ ACIT v. Jawaharlal L. Agicha (ITA No 1844/Mum/2012)-taxsutra.com
² Chaturbhuj Dwarkadas Kapadia v. CIT [2003] 260 ITR 491 (Bom)
• On appeal by the taxpayer, the Commissioner of Income Tax (Appeals)(CIT(A)) held that development agreement did not give rise to transfer of land and no capital gain accrued to taxpayer during the year and therefore, the amount of advance was treated as not taxable.

• Aggrieved by the order of CIT(A), the Revenue Authority filed an appeal before the Tribunal.

Tax department’s contentions

• The agreement conceded various rights to the developer and for all practical purposes, the land came into control and domain of the developers. The owner of land also executed a power of attorney in favour of the developer to enable it to obtain the Letter of Intent in respect of the said land in the name of the developer. Since all the ingredients of Section 2(47)(v) of the Act were applicable and accordingly even if there was part performance, it amounted to transfer of the asset and therefore, full value of sale consideration was taxable in the said Assessing Year (AY) as capital gains subject to the deduction of indexed cost of acquisition as has been rightly done by the AO.

• Full development rights were transferred and developer was free to execute the same in whatever manner without seeking any approval of the taxpayer and therefore, transfer of exclusive physical position is not necessary for invoking provisions of Section 2(47)(v) of the Act. Also, amendment in Registration Act, 1908 (Registration Act), will not have any effect on the provisions of Section 2(47)(v) of the Act.

• In the said case possession was effectively given and substantial part of consideration was received and it constituted transfer as per Section 2(47)(v) of the Act, and therefore, the AO had rightly held that long term capital gain was taxable during the said AY.

Taxpayer’s contentions

• In absence of registration of documents, provisions of Section 53A of Transfer of Property Act (TOPA) cannot give rise to a valid transfer and consequently provisions of Section 2(47)(v) of the Act also cannot be pressed into service to hold that the asset had been transferred for the purpose of computing taxable amount of capital gains.

• Various clauses of the agreement clearly suggest that no possession whatsoever has been given by the taxpayer to the developer. The land still remains under domain and control of the taxpayer. The physical possession is not retained by the taxpayer, and therefore, no question arises of handing over its physical possession to the developer. Since no physical possession has been given by the taxpayer to the developer, this transaction cannot be tested under the provisions of Section 2(47)(v) of the Act.

• Various strings were attached and there were various fetters on the legal rights of the taxpayer as well as the developer for making free use of the land, in view of the admitted fact that said land was occupied by the slum dwellers and therefore, it was subjected to various regulations imposed by slum development authorities and land could not have been used for development in absence of letter of intent. The Developer would be in position to make use of the land only after the issuance of requisite permissions from SRA.

• Various legal fetters exist upon the rights of the taxpayer for making use of impugned land for his own purpose and therefore, when the taxpayer himself did not have absolute legal rights, these could not have been transferred to the developer and therefore, no transfer of the impugned land could be said to have taken place by the said development agreement which was not more than an understanding in regard to the proposed transfer which was to come into effect only when proper scheme was sanctioned by the SRA and other requisite legal compliance in this regard were made.

Tribunal’s ruling

Possession of property to the developer

• By virtue of various clauses of the agreement, possession shall be given to the developer only upon fulfillment of certain conditions i.e. sanctioning of scheme by SRA and obtaining the ‘letter of intent’ and other requisite permissions from the Competent Authorities.

• Since till date no permission or scheme has been granted by SRA, there could not have been any question of parting with the physical possession by the taxpayer with the developer. Even otherwise, physical possession is held by
the slum dwellers. Apparently, the taxpayer could not have given physical possession to the developer. Under these circumstances, even the very applicability of provisions of Section 2(47)(v) of the Act becomes doubtful on such type of transaction having such peculiar features.

**Interplay of Section 2(47)(v) of the Act, Section 53A of TOPA and Section 17(1A) of the Registration Act, 1908**

- The rules of interpretation viz. ‘Haydon’s Mischief Rule’ and ‘Doctrine of Legislation by Incorporation’ should be applied in their respective chronology and relevance. Thus, for the sake of completeness, first we should apply the Doctrine of Legislation by Incorporation, and after applying the same, once the law before us becomes complete, then we should interpret the provisions so combined by applying Haydon’s Mischief Rule.

- The provisions of Section 2(47)(v) of the Act should be read in toto. When Section 2(47)(v) of the Act talks about contract of the nature referred to in Section 53A of the TOPA, then the conditions attached in Section 53A should also be read along. One of the main requirements of Section 53A of TOPA is for registration of the document as per the provisions of Section 17(1A) of the Registration Act 1908. Thus, registration of the document becomes one of the essential ingredients to invoke provisions of Section 2(47)(v) of the Act.

- Subsequent to insertion of clause (v) to Section 2(47) of the Act, amendments have been made in Section 53A of TOPA as well as Section 17(1A) of Registration Act for mandating the requirement of registration of the documents. Clause (v) of Section 2(47) was drafted by the legislature in the light of pre-amended provisions of Section 53A and 17(1A). Thus, in our view, when there is a drastic ‘change’ in the source legislation [i.e. Sections 53A and 17(1A)], it would be unwise, unsafe and contrary to cardinal principles of jurisprudence, to ignore the said ‘change’ while reading the dependent legislation [i.e. clause (v) of Section 2(47)].

- Reading the interplay between various sections of different legislations in a manner which results into choosing some part of the interplay while leaving the other that too as per our discretion would, at times, prove to be risky and may not be found to be universally acceptable in legal parlance.

- There are several stages or events arising in a Joint Development Arrangement (JDA) made between owner of land and the developer. Whether the transfer has, in substance, taken place, can be determined by analysing the interplay and effect of all these stages/events combined and put together. For example, possession may be given for various purposes, viz. possession given to a contractor, or to a tenant also, but such an event in itself cannot be regarded as ‘transfer’ of land. Possession of land may also be handed over to licensee only for the purpose of development of real estate on land. Here again, it shall not give rise to ‘transfer’.

- It is only when the possession is given along with other legal rights to the developer resulting into entitlement of the developer for full use and enjoyment of the property as well as its further sale after converting it into developed units at its full, own and sole discretion, then it may result into ‘transfer’ provided other conditions also suggest so.

- Handing over of the possession has to be necessarily coupled with the intention of transferring the rights of ownership and enjoyment of the property to the developer. Handing over of the possession for the limited purpose of developing the land while still retaining the ownership and control of various legal rights upon the property by the land owner would not fall in Section 2(47)(v) of the Act.

- The land is attached with so many fetters and ifs and buts that it cannot be held as transferred unless various conditions attached to it are duly complied with.
• The developer is not authorised to enjoy/sell his share of property unless he hands over to the owner its share of developed portion of FSI, which in turn was not possible unless all the formalities pertaining to SRA were completed. In fact, the developer, as per terms of the agreement, was to get proper permission for receiving rightful possession of the land only after obtaining all requisite permissions from SRA. Thus, under such peculiar facts and circumstances and applying any provision of law and interpreting the same in any manner, one cannot conclude by any stretch of imagination that the impugned property has indeed been transferred.

• The principle emanating from the decision of the Chaturbhuj Dwarkadas Kapadia is that in the case of a development agreement, if the contract, read as a whole, indicates passing or transferring of complete control over the property in favour of the developer, then the date of contract would be relevant to decide the year of chargeability of capital gains and substantial performance of the contract would be irrelevant. In the said case, the issue was that transfer had taken place, and the only dispute in the said case was confined to the year of chargeability. However, in the instant case neither the possession has been handed over nor the transfer has taken place even till date.

• Applying the ratio of the decision of Chaturbhuj Dwarkadas Kapadia (supra) to the facts of the instant case and compared with the conditions attached thereto as well as real facts and circumstances of the case, it does not transpire that there was clear intendment of the assessee to make transfer of the said land by virtue of this agreement itself.

• Pursuant to amendment in Registration Act, 1908, registration of agreement has been made mandatory to give effect to provisions of Section 53A of TOPA. The development agreement under consideration before us is admittedly not registered. The effect of non-registration after the said amendment has also been analyzed by Hon’ble Punjab and Haryana High Court in the case of C.S. Atwal wherein the Court has held that in the absence of the development agreement between the developer and the owner being registered, the transaction was not a transfer as per provisions of Section 2(47)(v) of the Act.

• Thus, taking into account, totality of facts and circumstances of the case, it can be said that no transfer of the impugned land had taken place during the year before us.

Our comments

Applicability of Section 2(47) of the Act vis a vis transfer of capital asset under a JDA has been a subject matter of litigation before the Courts.

In the instant case, the Tribunal on the basis of facts of the case and after dealing with various decisions on taxability of JDA held that possession is an essential element to be considered for deciding whether transfer has taken place in view of the extended meaning of ‘transfer’ in Section 2(47)(v) of the Act read with Section 53A of TOPA.

Allahabad High Court in the case of Ziauddin Ahmad has held that capital gain would be taxable in the year in which possession is handed over to the developer.

The Tribunal observed that in absence of registration of the agreement, the arrangement would not be construed as transfer by virtue of provisions of Section 2(47)(v) of the Act read with Section 53A of TOPA and Section 17(1A) of Registration Act, 1908. This decision also emphasizes that the taxability of JDA would largely depend on various factors such as the facts of each case, terms of agreement of JDA, the type of asset, period in which the gains are taxable, etc.

3 Chaturbhuj Dwarkadas Kapadia v. CIT [2003] 260 ITR 491 (Bom)
4 C.S. Atwal v. CIT [2015] 59 taxmann.com 359 (P&H)
5 CIT v. Ziauddin Ahmad [2016] 283 CTR 223 (All)
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