

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'A' PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.699/PUN/2016
निर्धारण वर्ष / Assessment Year : 2008-09

ITO, Ward 3(3), Pune	Vs.	Shri Amit Murlidhar Kamthe L/H of Shri Murlidhar Kamthe Plot No.17/11, Savitri Bunglow, Madhu Sanchay Society, Karve Nagar, Pune – 411052 PAN: APXPK0778D
Appellant		Respondent

Assessee by
Revenue by

Shri Kishor Phadke
Shri S.P. Walimbe

Date of hearing

12-05-2021

Date of pronouncement

17-05-2021

आदेश / ORDER

This appeal by the Revenue is directed against the order dated 29-01-2016 passed by the CIT(A), Pune-10, Pune in relation to the assessment year 2008-09.

2. The only issue raised in this appeal is against the deletion of addition of Rs.3,12,53,920 made by the Assessing Officer (AO) as 'Short term capital gain' and Rs.2,63,95,026 as 'Long term capital gain'.

3. Succinctly, the factual scenario of the case is that the assessee filed his return declaring total income of Rs.2,94,330/-. The AO noted that the assessee entered into two Development Agreements

for certain land at Sr.No.7/1/2/1/1 at Varale, Tal. Mulshi, District Pune with M/s. Samrat Builders and Developers on 25.01.2008 & 29.02.2008 for a consideration of Rs.2.80 crore and Rs.4.20 crore respectively. No capital gain arising from such transfer of lands was declared by the assessee. On being called upon to explain the position, the assessee submitted that the land in question was subject to Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter called the ULC Act), and an area of 22596.80 sq.mtrs. was declared as surplus land out of the total land as per the above two agreements. Pursuant to such order under the ULC Act, the land was transferred in the name of Government of Maharashtra. Thereafter, the assessee approached the Hon'ble Bombay High Court for deletion of the Government's name from 7/12 extract. That is how, the assessee submitted that neither the land in question was transferred to M/s. Samrat Builders and Developers pursuant to the agreements nor any possession of such land was given. The AO rejected the assessee's claim by observing that the Development Agreements made by the assessee were duly registered with the Addl. Registrar, MABL, which indicated that the assessee had transferred the rights in the land to M/s. Samrat Builders and Developers within the meaning of section 2(47)(v) of the Income-

tax Act, 1961 (hereinafter also called 'the Act'). Taking the cognizance of the provisions of section 53A of the Transfer of Property Act read with section 2(47)(v) of the Act, the AO held that parting with the possession of the land in favour of M/s. Samrat Builders and Developers and also receiving a part of the agreed consideration, amounted to 'transfer' under the Act. Thereafter, he computed short term capital gain and long term capital gain accordingly and included the same in the total income of the assessee. During the course of the first appellate proceedings, the assessee, *inter alia*, submitted copies of Cancellation agreements dated 20.04.2013 of the earlier two Agreements dated 25.01.2008 and 29.02.2008 made with M/s. Samrat Builders and Developers. Since this evidence came into existence after the passing of the assessment order, the Ld. CIT(A) sent the same to AO and invited his comments. In the remand report dated 31.12.2014, the AO came to hold that subsequent Cancellation deeds were not decisive *qua* the income-tax proceedings for the year under consideration as the 'transfer' took place during the year under consideration u/s 2(47)(v) of the Act, thereby requiring the inclusion of capital gain in the total income. The ld. CIT(A) got convinced with the assessee's

submissions and ordered to delete the additions, against which, the Revenue has come up in appeal before the Tribunal.

4. We have heard both the sides through Virtual Court and gone through the relevant material on record. In order to decide the issue in appeal, it would be apt to have a glance at the factual panorama of the case in a little more elaborate manner. The assessee entered into the first agreement with M/s. Samrat Builders and Developers on 25.01.2008 for development of 1H 60R land. The land, subject matter of the agreement, was sourced by the assessee in three lots, namely, the first 80R land on 22.07.1992, next 40R on 10.12.1994 and last 40R on 24.04.1998 from Dabhade family by registered sale deeds. A copy of the Agreement in vernacular language along with its English translation has been placed on record. Clause 2 of the Agreement states that the vendor (i.e. the assessee) has “assigned the rights of development to the developer”. Clause 4 of the Agreement states that: “As a part of this development agreement, vendor has given right and license to the Developer to enter into the said property as a licensee”. Para 3 of the preamble of the Agreement clearly states that the vendor and the co-owner Dhabhade families had filed returns u/s 6(1) of ULC Act and vide an order passed by the Competent Authority, the vendor and co-

owner have been declared as holders of excess land 22596.80 sq.mtrs. It has also been mentioned that an appeal has been filed against such order, which is pending adjudication. As per this Agreement, total consideration under clause 3 has been stated to be Rs.2.80 crore. It is further mentioned that a sum of Rs.11 lakhs, Rs.20 lakhs and Rs.1 crore was paid to the assessee vide cheques dated 13.12.2007, 14.01.2008 and 25.01.2008 respectively. The balance amount was agreed to be paid within stipulated period. Thus, it is clear from the Agreement that the Developer was allowed to enter into the property as a licensee and not as an owner and further a part of such piece of land stood declared as excess land under the ULC Act at the material time.

5. The second Agreement dated 29.02.2008 was entered into between M/s. Samrat Builders and Developers on one hand and the members of Dabhade family on the other with the assessee as a Consenting party for development of 2H 41R land for a total consideration of Rs.4.08 crore. The source of 2H 41R land consisted of 40R land acquired by the assessee from Dabhade family members by means of a separate development agreement dated 16.03.2007 and remaining 2H 1R land acquired by the assessee from Dabhade family under a registered development agreement on

18.02.2008. Thus, total area of two parcels of plots comes to 2H 41R which the assessee gave for development. As the property was, in fact, not earlier transferred in the name of assessee, the second Agreement with M/s. Samrat Builders and Developers was entered with Dabhade family members and the assessee as a 'Consenting party'. A copy of the Agreement in vernacular language along with its English translation has been placed on record. Clause 2 of the Agreement states that the vendor has: "assigned the rights of development to the developer". Clause 4 of the Agreement states that: "As a part of this development agreement, the Vendor has given a right and license to the Developer to enter into the said property as a licensee". Para 7 of the preamble part of the Agreement clearly states that the vendor, purchaser and the co-owner Kamathe had filed returns u/s 6(1) of ULC Act and vide an order passed by the Competent Authority the vendor and co-owner have been declared as holders of excess land 22596.80 sq.mtrs. It has also been mentioned that an appeal has been filed against such order, which is pending adjudication. As per this Agreement, total consideration under clause 3 has been stated as Rs.4.08 crore. It is further mentioned that a sum of Rs.7 lakhs was paid to the assessee vide cheque dated 03.03.2008. The balance amount was agreed to

be paid within stipulated period. Thus, it is clear from this Agreement also that the Developer was allowed to enter into the property as a licensee and not as an owner and further a part of such piece of land stood declared as excess land under the ULC Act at the material time.

6. Going further, the writ petition filed by the assessee against the order under the ULC Act was dismissed by the Hon'ble Bombay High Court after the repeal of ULC Act. The earlier declared excess land of 22596.80 sq.mtrs., which stood transferred in the name of Govt. of Maharashtra into 7/12 extract on 09.08.2007, got reverted somewhere in 2009-10 and the name of the Government of Maharashtra was removed.

7. In the meantime, certain differences cropped up between M/s. Samrat Builders and Developers on one hand and the assessee and Dabhade family on the other. When the dispute was going on between the assessee and M/s. Samrat Builders and Developers, the assessee transferred 80R land, out of the land which was subject matter of the earlier Agreement with M/s Samrat Builders, to Akash Erectors Pvt. Ltd., in June, 2010 for Rs.1.00 crore by means of a registered sale deed. A sum of Rs.40.50 lakhs was paid to the assessee through two cheques and the remaining amount was agreed

to be paid in due course. Eventually on 20.04.2013, both the agreements dated 25.01.2008 and 29.02.2008 were cancelled and two separate Registered cancellation deeds were executed. Simultaneous with the Cancellation deeds, a new registered sale deed was also executed transferring total area of 4H 1R land collectively by the assessee, Dabhade family members and M/s Akash Erectors Pvt. Ltd. to the 'eventual buyers': Sh. Rajendra Bhosale and Sh. Vikas Shinde for a total consideration of Rs.4.15 crore with registration entry 1985/2013. Through a Purchase deed dated 20.04.2013, preceding the registered sale deed of the same date, the eventual buyers - Rajendra Bhosale and Vikas Shinde - paid sum of Rs.1.50 crore to Dabhade family, Rs.50 lakhs to Akash Erectors Pvt. Ltd. and Rs.2.15 crore to Kamthe family in lieu of the total transfer of 4H 1R land to them.

8. The above narration of facts clearly discerns that the assessee entered into two Agreements with M/s. Samrat Builders and Developers for development of 4H 1R land in 2008. The Developer was allowed to enter the property mere as a Licensee and not as an owner. The land was subject of litigation under the ULC Act at that point of time inasmuch as a part of the total land was earlier held by the Competent authority to be excess land and as such, the same

was recorded in the name of Government of Maharashtra, which could not have been validly transferred to Samrat Builders. The assessee transferred a piece of such land in the year 2010, after getting clearance of the title, to M/s Akash Erectors Pvt. Ltd. The development Agreements of the year 2008 were cancelled in the year 2013, when a final registered sale deed was executed transferring total of 4H 1R land jointly by the three parties to Rajendra Bhosale and Vikas Shinde on 20.04.2013.

9. The AO has taken cognizance of the definition of 'transfer' u/s 2(47)(v) of the Act read with section u/s 53A of Transfer of Property Act to hold that 'transfer' took place in the year 2008 itself. This section provides that "transfer" in relation to a capital asset, includes '(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)'. We have noted above that the Developer was allowed to enter the property only as Licensee. When title to a part of such property itself was disputed and it vested with Government of Maharashtra at the time of the Agreements in 2008 because of the order of the Competent Authority under the ULC Act, there could have been no question of

allowing the Developer any possession for the enjoyment of property as its owner. If there was no transfer of possession at the material time, the case of the AO invoking section 53A of the TPA to brand the transaction as a `transfer' u/s 2(47)(v), automatically fails.

10. The Hon'ble Apex Court in *CIT VS. Balbir Singh Maini (2017) 398 ITR 531 (SC)* considered a case in which the assesseees were members of Punjabi Cooperative Housing Building Society Ltd. A joint development agreement was entered into between owner, under which, it was agreed that the developers would undertake to develop land owned and registered in name of society. The AO held that since physical and vacant possession had been handed over under the JDA and hence it amounted "transfer" within meaning of Sections 2(47)(ii), (v) and (vi) of the Act. The Tribunal upheld order of the AO and the Hon'ble High Court held that transactions envisaged as "transfer" exigible to tax by reference to Section 2(47)(v) of the Act read with Section 53-A of the Transfer of Property Act. When the matter came up before the Hon'ble Apex Court, it, *inter alia*, held that reading of JDA would show that owner continued to be the owner throughout agreement, and had at no stage purported to transfer rights akin to ownership to

developer. It further went on to hold that income from capital gain on a transaction which never materialized was, at best, hypothetical income. As the entire transaction of development envisaged in the JDA fell through for want of permissions, it was held that no profits or gains “arose” from transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act.

11. The factual panorama of the extant case under consideration is almost similar. Firstly, no possession was given to the developer under the JDA as an owner. Secondly, a part of the land at the material time in 2008 vested in the Government of Maharashtra. Thirdly, the transaction admittedly fell through and a part of the land was eventually sold to M/s Akash Erectors Pvt. Ltd. in 2010 and the remaining part to the ‘final buyers’ in the year 2013, all the parties being at arm’s length. If the transfer did not take place in the assessment year 2008-09 under consideration, there was no question of any capital gain arising there from in such year. We, therefore, approve the view point of the Id. CIT(A) by holding that no transfer took place in the year and hence no capital gain was chargeable to tax.

12. The Ld. AR submitted that the assessee offered capital gain in its return of income for the A.Y. 2014-15 when 4H 1R land was

transferred on 20.04.2013 to Rajendra Bhosale and Vikas Shinde vide registered sale deed. He stated that the AO has made protective addition in that assessment and the assessee has not denied the taxability on substantive basis in such later year, i.e. 2014-15. Our attention was also drawn towards assessment order passed for the A.Y. 2014-15, a copy of which has been placed on page 260 onwards of paper book. This assessment order dated 20.12.2016 clearly records that additions of long term and short term capital gains were made in the assessment for the A.Y. 2008-09; the CIT(A) deleted the addition and; the appeal against which filed before the Tribunal is pending. Thereafter, it has been recorded that “however, to keep the issue alive as per para 5 discussed above, assessment order passed on the protective basis on this issue”.

13. Having held that no ‘transfer’ took place in the year under consideration and hence no capital gain arose, the natural corollary is that the ‘transfer’ took place in some other year(s) and the resultant capital gains should be charged to tax in such other years. The case of the assessee is that the ‘transfer’ took place in the year 2013, when it transferred the entire land to the eventual buyers and was rightly offered for taxation in such later year, for which protective assessment has also been made by the AO. However, we

find that 80R land was transferred by the assessee to Akash Erectors Pvt. Ltd. in the month of June, 2010, when ULC Act was repealed and the name of the Government of Maharashtra was removed from 7/12 extract between 2009 and 2010. When the assessee transferred 80R land to Akash Erectors Pvt. Ltd., by means of a registered sale deed, it became chargeable to tax *pro tanto* in the previous year relevant to the A.Y. 2011-12 as it fell within the definition of the term 'transfer'. The ld. AR candidly accepted that no capital gain was offered for such assessment year. In view of the 'transfer' taking place in such year to that extent, it is held that the resultant capital gain arising on the transfer of 80R land to Akash Erectors Pvt. Ltd. in the year 2010 should be charged to tax on substantive basis in the assessment for the A.Y. 2011-12 subject to the provisions of Chapter IV-E.

14. As regards the balance transfer taking place in the A.Y. 2014-15 as per the assessee's own version, when he transferred the remaining property (after excluding 80R land transferred to Akash Erectors Pvt. Ltd.) to the eventual buyers, namely, Sh. Rajendra Bhosale and Sh. Vikas Shinde pursuant to transfer of land in the year 2013 along with Dabhade family and Akash Erectors Pvt. Ltd., the capital gain should be charged to tax on substantive basis in the

A.Y. 2014-15. In doing so, the AO will take into consideration all the amounts received earlier from Samrat Builders and Developers and then from Sh. Rajendra Bhosale and Sh. Vikas Shinde. Needless to say, the AO will provide adequate opportunity of hearing to the assessee in determining the correct amount of capital gains for the A.Ys. 2011-12 and 2014-15.

15. Before parting, we want to clarify that the issue under consideration is the taxability or otherwise of the capital gain in the year under consideration. Ordinarily, the matter should have rested with our answer in favour of the assessee for the year under consideration. Since both the parties have extensively argued the issue of taxability in the later year on protective basis and such a discussion is, in fact, a continuation of the impugned transaction from the A.Y. 2008-09 culminating in such later year(s), we have dealt with it in a limited way.

16. In the result, the appeal is dismissed.

Order pronounced in the Open Court on 17th May, 2021.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 17th May, 2021
GCVSR

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A), Pune-10, Pune
4. The PCIT-2, Pune
5. DR, ITAT, 'A' Bench, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,**// True Copy //**

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	12-05-2021	Sr.PS
2.	Draft placed before author	13-05-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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