

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

**BEFORE SHRI P. MADHAVI DEVI, JUDICIAL MEMBER AND
D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No. 1348/Hyd/2017
AY: 2007-08**

Santosh Kumar Subbani, Vs. Income-tax Officer,
Hyderabad. Ward – 11(3), Hyderabad.

PAN – AVDPS 7225F

(Appellant)

(Respondent)

Assessee by : Shri B.V. Krishna Rao
Revenue by : Shri Sunil Kumar Pandey

Date of Hearing : 09/11/2020
Date of Pronouncement : 13/11/2020

ORDER

PER D.S. SUNDER SINGH, A.M.

This appeal by the assessee is directed against the order of CIT(A) – 5, Hyderabad, dated 30/05/2017 for the AY 2007-08.

2. All the grounds raised in this appeal are related to taxing the short term capital gains of Rs. 4,38,029/- invoking the provisions of deemed transfer u/s 2(47(v) of the IT Act.

3. Brief facts of the case are that the assessee did not file the return of income for the AY 2007-08. The AO having received the

information with regard to transfer of property through Sale cum development agreement-cum-GPA with M/s 21st Century Investments & Properties Ld.. vide document No. 5126/2007, dated 26/03/2007 issued the notice u/s 148 on 29/03/2014 and in response to which, the assessee filed the return of income on 23/02/2015 admitting the total income of Rs. 74,380/- from other sources and agricultural income of Rs. 1,65,340/-. The case was taken up for scrutiny and details were called for. As per the information received by the AO, the assessee had entered into development agreement-cum-GPA with M/s 21st Century Investments & Properties Ltd., vide document No. 5126/2007, dated 26/03/2007 and transferred the land admeasuring 0.15 guntas at survey No. 343 located at Nizampet Village, RR Dist. The developer has to complete the development within 24 months and the assessee has to receive 5000 square feet built-up area. The assessee before the AO submitted that the developer did not perform the construction activity, and hence, argued that there is no case of capital gains. The AO conducted the enquiries, through Inspector and found that no development was taken place on the said land. However, since, the assessee has handed over the property as per the agreement dated 26/03/200 to the developer, the AO viewed that it was hit by section 2(47)(v) of the IT Act and accordingly, assessed the SRO value of Rs. 11,89,883/-/- as sale consideration and accordingly determined the short term capital gains as under:

Market value of the built-up area including land as adopted by the SRO at the time of registration	Rs. 59,40,000
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of the development agreement	
Market value of the land at the time of registration of the development agreement (Adopted the same value of the land as determined at the time of purchase of the land by the assessee as the SRO has not given the bifurcation of the value land and value of built up area at the time of registration of development agreement.)	Rs. 16,42,310
Market value of the built up area excluding land as adopted by the SRO	Rs. 42,97,690
Market value of the built up area assigned to the assessee as per the development agreement (i.e. sale consideration in lieu of transfer of land)	
Total value of the land admeasuring 1815 sq.yds.	16,42,310/-
Less: Value of land admeasuring 500 sq.yds. retained by the assessee as per development agreement cum GPA	4,52,427
Value of land admeasuring 1315 sq.yds transferred to the developer	11,89,883/-

The short term capital gains is worked out as under:

Sale consideration	Rs. 16,27,912/-
Less: Cost of land sold.	Rs. 11,89,883/-
STCG	Rs. 4,38,029/-

3.1. Against the order of the AO, the assessee preferred an appeal before the CIT(A) and the Ld. CIT(A) dismissed the appeal of the assessee observing that there was exchange of property, which amounted to transfer within the meaning of section 2(47(v) of the Act on 24/03/2006 and the gain resulting from such transfer required to be taxed in the year in which the agreement was entered into coupled

with by giving possession of the property to the developer. Against the order of CIT(A), the assessee is in appeal before the Tribunal.

4. Before us, the Ld. AR of the assessee submitted that the assessee had entered into development agreement with M/s 21st Century Investments and Properties Ltd. for construction of duplex houses and the assessee was to receive the built up area of 5000 sq.ft. He submitted that, however, after entering development agreement, the developer has vanished and no development took place. Though on paper property was given for development, the fact is that no development was taken place and no constructed area was received by the assessee thus the income neither accrued nor received by the assessee and, hence, the Ld. AR argued that the same cannot be treated as transfer within the meaning of section 2(47)(v) of the Act to the capital gains and the same is unjustified. Since there was no real income received by the AO, the Ld.. AR argued that the CIT(A) misguided himself in confirming the addition, therefore, requested to set aside the order of CIT(A) and allow the appeal of the assessee.

5. The Ld.. DR, on the other hand, relied on the orders of revenue authorities and argued that since the assessee has entered into development agreement and given possession of the land to the developer, the capital gains gets attracted, as decided by the Hon'ble Jurisdictional High Court in the case of Potla Nageswara Rao Vs.

DCIT,(ITTA No. 245 OF 2014 Dated 09-04-2014) capital gains required to be brought to tax.

6. We have heard both the parties and perused the material on record. In the instant case, the assessee has entered into development agreement for construction of duplex houses and assessee was to receive the constructed area of 5000 sq.ft by virtue of development agreement. However, after entering into agreement, the developer has vanished and no real development took place till date as verified and confirmed by the AO through the Departmental Inspector. It appears that neither development has taken place nor developed area was received by the assessee. This fact was confirmed by the AO himself. From the above, it is clear that there was no real income except notional income as per the development agreement, which has never been received by the assessee. In the light of the above facts, the question whether the possession is lying with the developer or taken over by the assessee is the issue, which decides the taxability of capital gains. It appears that till date development agreement was not cancelled and no public notice was issued by the assessee for cancellation of development agreement as stated by the Ld. AR during the course of appeal proceedings. Therefore, we are of the considered opinion that the issue is required to be remitted back to the file of the AO with a direction to decide the capital gains after verifying whether the possession is taken back by the assessee or not and the assessee cancelled the development

agreement or not. In case, the possession is taken back by the assessee and there was no development, the assessee succeeds in appeal. Accordingly, we remit the matter back to the file of AO to decided the issue fresh as per the directions given in this order. It is needless to say that the AO must afford reasonable opportunity to the assessee. Accordingly, the grounds raised by the assessee are treated as allowed for statistical purposes.

7. In the result, appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on 13th November, 2020

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMEBR

Sd/-
(D.S. SUNDER SINGH)
ACCOUNTANT MEMBER

Hyderabad, Dated: 13th November, 2020.

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Copy to:

- 1) *Subbani Santosh Kumar, H.No. 3-5-82/16, Vivekananda Nagar, Kukatpally, Hyderabad – 500 072*
- 2) *ITO, Ward – 11(3), 10th Floor, Signature Towers, Kondapur, Hyderabad – 500 084.*
- 3) *CIT(A) – 5, Hyderabad.*
- 4) *Pr. CIT – 5, Hyderabad.*
- 5) *The Departmental Representative, I.T.A.T., Hyderabad.*
- 6) *Guard File.*