

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

**BEFORE SHRI B. RAMAKOTIAH, ACCOUNTANT MEMBER
AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No. 213/Hyd/2014
Assessment Year : 2008-09**

Asst. Commissioner of Income-
tax, Central Circle – 5,
Hyderabad

Sri P. Venkateswara Rao,
Hyderabad
PAN – AEJPP5631D

(Appellant)

(Respondent)

Revenue by
Assessee by

Shri P. Soma Sekhar Reddy
None

Date of hearing
Date of pronouncement

10-09-2014
24-09-2014

ORDER

PER SAKTIJIT DEY, J.M.:

This appeal of the department is against the order dated 30/12/13 of the CIT(A), Hyderabad pertaining to AY 2008-09.

2. At the time of hearing of appeal no one appeared for the assessee, though it appears from record that the notice intimating the date of hearing was served on assessee-respondent in advance. In view of the aforesaid we proceed to dispose of the appeal ex parte-qua-assessee-respondent on hearing learned DR.

3. The only effective ground of the department reads as under:

“On the facts and in the circumstances of the case, and in law, the CIT(A) erred in holding that capital gains on account of development agreement entered into by the assessee with M/s Amsri Devleopers Pvt. Ltd. on 04/05/07 did not arise in AY 2008-09.”

4. Briefly the facts are, assessee is an individual deriving income from salary. A search and seizure operation was conducted in case of Venigalla Anand Prasad and others on 07/10/09. During search and seizure operation as alleged by the department, certain documents, books of account and other related information belonging to assessee were found and seized. On the basis of these incriminating materials notice u/s 153A was issued to assessee. During assessment proceeding, AO noticed that assessee had purchased 4.225 acres of land vide document No. 3512 dated 28/03/05 at Bowrampet, RR District for Rs. 6,50,100. Out of the aforesaid land he has sold 1 acre land to M/s Varun Constructions for a consideration of Rs. 1 crore through agreement of sale-cum-GPA dated 12/03/07 and balance 3.227 acres was given for development to M/s Amsri Developers Pvt. Ltd. along with 33 others vide document No. 7110 dated 04/05/07. AO noticed that the land purchased and sold by assessee was contiguous to the land purchased and similarly transacted by Bhavya Constructions Pvt. Ltd., Shri Anand Prasad and other individuals, who all like assessee were the investors in M/s Bhavya Constructions a company set up by Shri V. Anand Prasad. He noticed that all these persons had jointly entered into a development agreement with M/s Amsri Developers for development of their land totaling to 123 acres and 05 guntas. He noted that M/s Amsree Developers has paid refundable security deposit in furtherance of the development agreement. As per the registered document, the entire value of the project was Rs. 720 crores with a sharing ratio of 35% to the land owners on the built up area and undivided land. AO on the basis of statement recorded from V. Anand Prasad, M.D. of Bhavya Constructions Pvt. Ld. and referring to ratio laid down in judicial precedents held that there is a transfer of capital asset u/s 2(47)(v) of the Act and proceeded to compute short term capital gain at Rs. 7,68,02,439. Being aggrieved of the assessment order so passed assessee preferred appeal before the CIT(A).

5. Before the CIT(A), assessee took a specific plea that there cannot be any transfer u/s 2(47)(v) of the Act as the development of the project has not taken place due to failure on the part of the developer to perform his part of the contract. It was submitted that assessee was paid only Rs. 41,92,500 @ Rs. 13 lakh per acre comprising of refundable deposit of Rs. 15,000 and advance of Rs. 12,85,000 per acre. Assessee also contended that as no steps were taken by the developer to start development activity there was a complete breach and breakdown of the development agreement, which led to assessee and others filing a civil suit for cancellation of the development agreement, which is pending before Additional District Judge, RR District as OS No. 903/12. Thus, it was submitted by assessee that as development agreement has not been acted upon, the conditions of section 53A of the TP Act, has not been fulfilled and as such there cannot be any transfer as envisaged u/s 2(47)(v) of the Act. In this context, assessee relied upon a number of decisions of different Courts and Tribunal. CIT(A) after considering the submissions of assessee in the context of facts and materials on record as well as the ratio laid down in judicial precedents came to the conclusion that there being no steps taken by developer to perform his part of contract under the development agreement, it cannot be said that the conditions of section 53A of TP Act read with section 2(47)(v) of the IT Act has been fulfilled. The observations of learned CIT(A) in this regard are extracted for the sake of convenience:

“15.0. In the instant case, it is evident that the development agreement cum GPA was signed and the developer was allowed possession to do his part of the deal/contract. However, the developer did not take any action and finally, the appellant along with the other land owners filed a petition in court seeking cancellation of the development agreement. (O.S.No 903 of 2012).

16.0. The issue or the question now is, whether the development agreement, which is clearly not operational, should be still insisted and considered as being valid enough to fasten the capital gains liability on the

appellant? As on the date of assessment order, the appellant had drawn attention to the non performance of contract by the developer and the contemplation of filing of suit. The suit was subsequently filed in 2012. This only reinforced and provided evidence to the argument of the appellant that there is no progress on the development agreement and the agreement is itself in limbo and is being repudiated.

17.0. *The basic works in any development project are (a) Clearing of land and survey of land (b) Formation of roads and drainage (c) demarcation of villa plots (d) Application for land usage conversion (e) Preparation of plans and drawings (f) Filing of such drawings for approval of municipal authorities (g) Filing of application for environment clearance since it is a project of more than 100 acres (h) grant of such approvals and (h) construction work.*

18.0 *Not a single work of the above was done even till 2011 or even to date according to the appellant. This lack of progress and unwillingness of developer led to the appellants and other land owners seeking judicial remedy of cancellation of development agreement so that they would be free of the developer and can proceed to deal with someone else or to deal with the land in whatsoever manner they deem fit.*

19.0 *The Civil Suit filed in the Court of District Judge, Ranga Reddy in OS No.903/2012 is seen. The relevant extract from the suit are given below:*

Clause (2) *The names of Plaintiffs (appellant and the other 33) were mutated in the revenue records as per pattadars and possessors. The possession and enjoyment of the plaintiff is evident from the pahanis and other revenue records.*

Clause (3) *The developer made the plaintiffs believe that the entire project would be completed within a period of 36 months from the date of obtaining construction permission from concerned authorities.*

The Development Agreement cum GPA empowers the developer to take appropriate decision with regard to the demarcation of area and take necessary action for application/approval of plan.

Clause (4) *The developer failed to make an application for permission and approval - he thereby committed default in discharge of his obligation under development agreement.*

Clause (5) *It is submitted that more than 5 years have elapsed since the date of the development agreement, but absolutely there is no initiation of any work by the defendant NO.1 (developer) relating to submission of plans, leave about progress.*

Clause (5) A legal notice was sent to defendant on 12.02.2012 and the notice or cancellation of development agreement cum GPA was sent on 23.06.2012

Clause (6) In the reply to notice dated 12.02.2012, the defendant no.1 (developer), came up with a lame excuse that survey and demarcation is to be done, to cover up its inexcusable lapses. The defendant also made alleged claims of protected tenant but failed to give any details with regard to alleged claim by these 'protected tenants' and the extent of land involved in such proceedings. The plaintiffs are not aware of any such proceedings initiated by any such tenants.

The defendant (developer) in its anxiety to show some kind of performance obtained land use certificate of HUDA and tried to project the same as requisite permission.

The defendant did not invest any amount over the project.

The defendant ought to have completed entire project by end of December, 2011.

Defendant miserably failed to commence the project within 5 years of date of development agreement.

Clause (7) The defendant nO.1 (developer) is liable to pay damages for breach of contract. An amount of Rs.13 lakhs per acre was furnished as security for performance guarantee of the development agreement. It is submitted that as the developer failed to perform its obligations, the deposit is forfeited.

20.0 The website of M/s AMSRI Developers was seen in course of appeal proceedings. Even as on 28th December, 2013, The website had two distinct classes of projects (a) Ongoing-under which 3 projects were listed and (b) Proposed projects-under which 9 projects were listed with the present project under discussion, being listed at SI.No.8 as AMSRI GLOBAL VILLAGE. The classification by the developer itself as "proposed", as distinct from "ongoing" is significant.

21.0 On further clicking the project on this website, the only description available is - "The project is being implemented at Bowrampet, Hyderabad, adjacent to Outer ring road as an integrated township spread over an area of 260 acres. This is proposed as a modern township complete with residential, commercial, retail, entertainment and schooling facilities for the residents." The copies of website pages (2 nos.) are overleaf.

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The built up area details are mentioned as : - "to be announced" The approximate SFT price is also given as "to be announced".

22.0 *The above lends credibility to the stand of appellant that there was no willingness or part-performance on part of the developer during the relevant previous year or even for next 4 years finally leading to collapse of the agreement when a Suit seeking its cancellation is filed and is presently in court.*

23.0 *It is also seen that apart from the Rs 13 lakh per acre that the appellants and others received as refundable security deposit, there was no further payment. Since 2007 May, there was no further movement and no willingness of the developer to do his part of the deal could be seen. I am therefore constrained to hold that no capital gains arise to the appellant in the year 2008-09 based on this development agreement which turned out to be a non-starter. **Consequently, there is no income to be taxed as capital gains on account of the development agreement.** This ground of appeal is thus allowed."*

6. We have considered the submissions of the parties and perused the orders of the revenue authorities on this issue. As can be seen from the observations made by CIT(A), he has given specific finding of fact that development agreement has not been acted upon by the developer till date. Therefore, he has concluded that as there is no willingness or part performance of contract by the developer, which has resulted in filing of civil suit seeking cancellation of the development agreement, it cannot be said that there is transfer of capital asset as envisaged u/s 2(47(v) read with section 53A of the Act. This finding of fact arrived at by CIT(A) has not been controverted by the department by bringing on record documentary evidence or through any other mode to prove that development activity under the development agreement has been started by developer. In the aforesaid factual position, since there is failure on the part of the developer to perform his part of the contract, it cannot be said that there is transfer of capital asset merely because assessee has entered into development agreement with the developer. In the aforesaid view of the matter, we do not find any infirmity in the order of CIT(A), which is accordingly upheld by dismissing ground raised by revenue.

7. In the result, appeal of revenue is dismissed.

Pronounced in the open court on 24/09/2014.

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Hyderabad, Dated: 24th September, 2014

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Copy to:-

- 1) *The ACIT, Central Circle -5, 8th Floor, Aayakar Bhavan, LB Stadium Road, Basheerbagh, Hyderabad- 500 004*
- 2) *Sri P. Venkateswara Rao, F.No. 402, 6-2-10, Temple View Residency, Lakdikapul, Hyderabad.*
- 3) *CIT(A)-VII, Hyderabad*
- 4) *CIT(Central, Hyderabad*
- 5) *The Departmental Representative, I.T.A.T., Hyderabad.*