IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B" : DELHI

BEFORE SHRI BHAVNESH SAINI, J.M. AND SHRI O.P. KANT, A.M.

I.T.A.No.4334/Del./2018
Assessment Year 2010-2011

M/s. Elegant Infraworld Pvt. Ltd., 6, Toder Mal Lane, Ground Floor, Bengali Market, New Delhi – 110 001. PAN AABCE5689B	vs.	The Income Tax Officer, Ward-1(2), Aayakar Bhawan, CGO-I, Near Hapur Chungi, Ghaziabad. PIN – 201 001.
(Appellant)		(Respondent)

For Assessee :	Shri Akhilesh Kumar & Shri Vipin Garg, Advocates
For Revenue :	Ms. Shaveta Nakra Dutta, Sr. DR

Date of Hearing :	03.01.2019
Date of Pronouncement :	11.01.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A), Muzaffarnagar, Dated 30.03.2018, for the A.Y. 2010-2011 on the following grounds :

1. Because the Ld CIT(A) has erred on facts and law in confirming the addition of Rs.2,27,47,792/- as

short term capital gain by erroneously holding the Date of Transfer to be 01.06.2009 (A.Y.2010-11) while the Date of Transfer as per law is 30.01.2009 (A.Y.2009-10) on which date i.e. 30.01.2009, the property being agricultural land was not a capital asset u/s 2(14) of the Income Tax Act and thus was out of purview of Sec. 45 of the Income Tax Act.

2. *Because the Ld CIT(A) has erred on facts and law in confirming the addition of Rs.2,27,47,792/- as short term capital gain by committing grave error on facts and law in not allowing the sum of Rs.1,50,00,000/- being expenditure incurred wholly and exclusively in connection with the impugned transfer u/s 48 of the Income Tax Act*

2. Brief facts of the case are that in this case return was filed on 26.09.2010 claiming loss of Rs.1,79,729/-. The A.O. noticed that assessee has sold agricultural land admeasuring 2.6941 hectare and the profit earned out of the sale proceeds amounting to Rs.77,47,792/- was

transferred to reserve and surplus. The assessee furnished copies of purchase deeds and sale deeds of the land and on going through the same, A.O. noticed that the lands in question have already been declared as non-agricultural land on 12.02.2009 and 14.05.2009 respectively. The assessee submitted before the A.O. that the possession of the aforesaid land was duly delivered to M/s Archit Steel (P) Ltd. on 30.01.2009 on payment of Rs.2.75 Crores towards total consideration of Rs.3.72 Crores. Copy of Agreement to Sell and possession letter, executed on 30.01.2009 are filed for consideration.

2.1. The A.O. found contradiction in the explanation of assessee. It was noted that balance-sheet filed by the assessee stands in contrast to fresh untenable claim of assessee. The assessee itself has shown the impugned sold land as its asset in the balance-sheet as on 31.03.2009, therefore, how possession could be given to the purchaser on 30.01.2009. It was also noted that the impugned land comprise part of its asset as on 01.04.2009 and it was also forming part of its audited balance-sheet as on 31.03.2009.

Besides, the assessee had also shown that agricultural land was sold during the year under consideration and the profit earned out of the sale proceeds amounting to Rs.77,47,792/ was transferred to the reserve and surplus. The A.O. also noted, Director of the assessee company was Smt. Meenu Garg whereas Director of M/s. Archit Steel (P) Ltd., is Shri Pradeep Garg. Smt. Meenu Garg is wife of Shri Pradeep Garg. Therefore, documents could be brought into existence conveniently. The discovery of actual dates of issuance of non-judicial stamp would have unearth the veracity of the claim of assessee. The A.O. also noted that in the sale deed it is mentioned that possession is given at the time of sale i.e., on 30.05.2009. The A.O. also noted that unless the instrument is fully stamped, it cannot be taken into evidence and that Agreement to Sell is not a registered document. The assessee also claimed deduction of Rs.1.50 crores out of the sale consideration of Rs.3.72 crores on account of surrender of rights payable to Mr. Ashok Jain. However, the claim of assessee was not accepted and found to be an afterthought, therefore, the amount of Rs.1.50

crores paid to Shri Ashok Jain and shown as cost of improvement/transfer charges was disallowed. The A.O. computed the short term capital gain by taking the sale consideration of Rs.3.72 crores and after deducting cost of acquisition of Rs.1,44,52,208/- computed the short term capital gain of Rs.2,27,47,792/-.

3. The assessee challenged the addition before the Ld. CIT(A). the Ld. CIT(A) called for the remand report from the A.O. and after examining the issue in detail, confirmed the addition on the same reasoning as given by the A.O. The Ld. CIT(A) accordingly dismissed the appeal of assessee.

4. We have heard the Learned Representatives of both the parties and perused the material available on record.

5. Learned Counsel for the Assessee on Ground No.1 submitted that provisions of Section 2(47)(vi) of the I.T. Act are applicable in this case. The date of transfer of property should be taken as 30.01.2009 when Agreement to Sell was executed between the parties and possession of the

property was handed-over to the purchaser, subject to part-payment through banking channel. Therefore, no capital gain arises in the assessment year under appeal because the transaction took place in preceding A.Y. 2009-2010. He has submitted that in the Sale Deed the advance money received at the time of Agreement to Sell have been mentioned which supports the claim of the assessee. He has also referred to Agreement to Sell which copy is filed at page-17 of the paper book and possession letter dated 30.01.2009 (PB-20). Learned Counsel for the Assessee in support of his contention relied upon the following decisions:

(i) Judgment of Hon'ble Jurisdictional Allahabad High Court in the case of Chandra Prakash Jain vs. ACIT (2014) 270 CTR 192 (Alld.), in which it was held as under :

- *"Section 2(47) is definition clause pertaining to transfer in relation to capital asset. <u>The Act being a special Act which consists of specific definition clause in context of capital assets the</u>*

general principles of transfer as contained in the Transfer of Property Act, 1882 shall not be applicable. It is well settled that Legislature can for the purposes of a special Act provide an artificial definition. Further more than the definition being an inclusive definition it had to be given an expensive meaning. [Para 16].

- *In the present case, there is no applicability of section 2(47)(v). Sub-section (v) applies to the transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of the contract. The possession having not been transferred by the agreement dated 7-9-1991, there is no applicability of section 2(47)(v).*
- *The assessees were full owner of the property. By agreement dated 7-9-1991, the assessees transferred their right of owner-ship in favour of purchasers. The Tribunal has noted that no further transaction after agreement dated*

7/9/1991 took between the assessees and purchasers and that was the only transaction, on the basis of which purchasers sold two shops in the year 1995 and obtained possession in the year, 1998 and carried out all developments. The agreement dated 7-9-1991 was thus, clearly covered by the definition under section 2(47)(vi). [Para 21]

- *Further, there is no illegality in the Tribunal's proceeding to examine the case in the light of section 2(47)(vi). All the facts being on record whether transaction is covered by section 2(47)(v) or 2(47)(vi) was well within the domain of the Tribunal while deciding the appeal filed by the department. Thus, the submission of assessee that a new case was made out by the Tribunal cannot be accepted. [Para 26].*
- *In view of the aforesaid, the Tribunal was fully justified in holding that agreement of sale dated*

7/9/1991 amounts to transfer of capital assets by virtue of section 2(47)(vi).”

(ii) Order of ITAT, Chennai A-Bench, Chennai in the case of ITO, Ward-V(1), Chennai vs. Mrs. P.A. Sarala (2015) 154 ITD 168 (Chennai-Trib.), in which it was held as under :

“Where in terms of development agreement, assessee handed over physical possession of property to builder allowing it to enjoy 60 per cent of land in lieu of 40 per cent of constructed area, it was to be concluded that transfer took place in year in which said agreement was entered into.

Where in terms of development agreement, assessee obtained multiple flats in lieu of cost of 60 per cent of land allotted to builder, still her claim for deduction under section 54F was to be allowed.”

(iii) Order of ITAT, Ahmedabad B-Bench, Ahmedabad in the case of Smt. Sapnaben Dipakbhai Patel vs.

ITO, Ward-10(1), Ahmedabad (2016) 73 taxmann.com 288 (Ahmedabad – Trib.), in which it was held as under :

20. Thus, on an analysis of various case laws, it emerges out that clause (v) and (vi) were included in section 2(47) with an intention to cover those cases of transfer of ownership where the prospective buyers becomes owner of the property by becoming a member of company, cooperative society or to include those transactions that closely resembles transfer, but are not treated as such under general law. Under section 2(47)(v) of the Act any transaction involving allowing of possession referred to section 53A of the Transfer of Property Act would come within the ambit of transfer. Even arrangement conferring privileges of ownerships without transfer of title would come within the ambit of section 2(47)(v) of the Act. The whole scheme for introduction of clauses (v) and (vi) in section 2(47) of the Act was that the capital

gain is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law.

21. Thus, in the present cases, without prejudice to our finding to be recorded on issue No.(iii) in subsequent part of this order, we are of the view that on execution of agreement dated 2.3.2009, when the possession was also handed over, the transfer within the meaning of section 2(47)(v) and (vi) was complete. The parties to the agreement are not challenging the genuineness of the agreements."

(iv) Judgment of Hon'ble Delhi High Court in the case of CIT-XVI vs. Ram Gopal (2015) 372 ITR 498 (Del.). in which it was held as under :

- *This Court, in the decision as Gulshan Malik v. CIT [2014] 223 Taxman 243/43 taxmann.com 200 (Delhi) had the occasion*

to, consider what amounted to acquisition of a capital asset - though in the context of a claim that capital gains had accrued due to the sale of the property. The Court was of the opinion that 'capital asset' has been defined in extremely wide terms. A reference to section 2(47), which defines 'transfer', and particularly its second Explanation to clauses (v) and (vi) *made it clear that possession, enjoyment of property as well any interest in any of transferable capital asset was included within the ambit of 'capital asset'. The Court held importantly that even booking rights or rights to purchase the apartment or to obtain its letter was also capital asset. [Para 5]*

- *In the present case the question is not whether the assessee sold the booking rights and was, therefore, entitled to*

benefit of capital gains. It is, rather, whether his entering into the transaction and acquiring a property amounted to his acquiring a capital asset. In the light of the definitions of 'capital asset' under section 2 (14) and 'transfer' under section 2(47) as discussed in Gulshan Malik (supra), this Court has no doubt that the assessee's contentions were merited. [Para 6]

(v) Judgment of Hon'ble Madras High Court in the case of CIT, Salary Circle, Chennai vs., S.R. Jeyashankar (2015) 373 ITR 120 (Madras), in which it was held as under :

"Where assessee had entered Into an agreement with builder for purchase of undivided share of land and construction, date of allotment of undivided share in land was to be adopted as date of acquisition for computing capital gain instead of date of sale deed."

5.1. Learned Counsel for the Assessee, therefore, submitted that no capital gain could be computed in assessment year under appeal because the transfer took place on 30.01.2009.

6. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and referred to observations of the A.O. as noted above and contended that it was an afterthought story made up by the assessee, therefore, appeal of assessee has no merit.

7. We have considered the rival submissions. The issue involved in the present appeal is, whether the short term capital gain is taxable in assessment year under appeal i.e. 2010-2011. Section 2(47) of the I.T. Act provides the definition of 'Transfer' in relation to capital asset which reads as under :

(47) "transfer" in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment;] [or]

(iva) the maturity or redemption of a zero coupon bond; or]

(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); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

[Explanation 1].—For the purposes of sub-clauses (v) and (vi) "immovable property" shall have the same meaning as in clause (d) c section 269UA.]

[Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always include disposing of or parting with an asset or any interest therein, creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;]"

7.1. Learned Counsel for the Assessee relied upon sub-clause (vi) to Section 2(47) of the I.T. Act which provides transfer in relation to capital asset in respect of any transaction by way of any agreement or any arrangement or in any other manner whatsoever which has the effect of

transfer or enabling the enjoyment of any immovable property. The immovable property has been referred to as per Section 269UA of the I.T. Act which are referred to agreement for transfer would mean an agreement whether registered under the Registration Act or not for the transfer of any immovable property. According to Explanation-2 to Section 2(47) of the I.T. Act, the transfer would include and shall deemed to have always included disposing of or parting with an asset or any interest therein or creating interest in any asset in any manner whatsoever directly or indirectly, absolutely or conditionally, voluntarily or involuntarily by way of an agreement or otherwise. In the present case, the assessee has entered into an Agreement to Sell dated 30.01.2009 (PB-17) with M/s. Archit Steel (P) Ltd., in which it is provided that assessee is absolute owner of the impugned property and assessee has agreed to sell the same to M/s. Archit Steel (P) Ltd., subject to total consideration of Rs.3.72 crores against which assessee has received a sum of Rs.2.75 crores vide cheque 216304 Dated 30.01.2009 and balance amount to be paid at the time of

execution of the sale deed. It is also mentioned in the Agreement to Sell that actual physical and peaceful possession of the impugned property has been delivered by the assessee to M/s. Archit Steel (P) Ltd., Copy of the possession letter dated 30.01.2009 is also filed which confirmed that assessee has handed-over physical possession of the impugned property to the purchaser at the time of execution of the Agreement to Sell. The assessee later on executed two sale deeds registered on 01.06.2009 in favour of purchaser and in the sale deed it is mentioned that advance of Rs.2.75 crores was already given by the purchaser to the assessee. These facts are not in dispute. It would, therefore, prove that there was an Agreement to Sell between assessee and the purchaser which is having the effect of transferring the right and enjoyment in the immovable property in favour of the purchaser. The assessee had entered into an Agreement to Sell and handed-over possession of the impugned property to the purchaser would amount to disposed-of or parted with the asset with all interest therein in favour of the purchaser. According to

definition of Section 269UA it is not necessary that Agreement to Sell should be registered. Therefore, provisions of Section 2(47)(vi) of the I.T. Act are satisfied in the case of the assessee. It is well settled law that entries in the books of account are not determinative criteria to deny the relief to the assessee if the assessee entitled to relief as per law. The Hon'ble Supreme Court in the case of Sutlej Cotton Mills Ltd., vs. CIT , West Bengal (1979) 116 ITR 1 (SC) has held as under :

> *"It is now well settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries which are not in conformity with the proper principles of accountancy, conceal profit or show loss and the entries made by him cannot, therefore, be regarded as conclusive one way or the other. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee."*

7.2. Merely showing the property in question as his assets in the balance sheet as on 31.03.2009 would not disentitle the assessee from relief because the part consideration was received on 30.01.2009 and other legal formalities of execution of sale deed shall have to be done in future and as such under the Civil Law title would remain in the name of assessee unless the sale deed is executed. However, it is not relevant while applying the provisions of Section 2(47)(vi) of the I.T. Act. The part-payment of sale consideration by cheque at the time of entering into an Agreement to Sell would show that Agreement to Sell is not an afterthought. The A.O. did not make any enquiry from the O/o. Stamp Collector to dispute the claim of assessee of purchase of the stamps genuinety. In sale deed Dated 01.06.2009, it is mentioned that possession is handed-over to the purchaser at the time of sale deed which was taken adverse by the authorities below to deny relief to the assessee. However, we may note that such usual writings are made by the Deed Writers in the documents without knowing the contents of the Agreement to Sell. Since the

Agreement to Sell and the possession letter clearly mentioned that possession of the property in question have been handed-over to the purchaser, therefore, subsequent mentioning of possession in the sale deed would be of no consequence. The explanation of assessee is also supported by the fact that substantial payment was made at the time of execution of the Agreement to Sell by way of cheque, otherwise, the purchaser would not make substantial payment without taking possession of the impugned property. Assessee has also filed copies of the invoice and ledger account at page Nos. 22 and 23 of the paper book to show that expenditure were incurred by the purchaser for improvements after taking possession which also support explanation of assessee that possession of the impugned property was handed-over by way of an Agreement to Sell (supra). The Agreement to Sell is not required to be registered as per Section 2(47)(vi) of the I.T. Act because the conditions of this provision are satisfied in the present case. The decisions relied upon by the Learned Counsel for the Assessee squarely apply to the facts and circumstances of

the case, particularly decision of Hon'ble jurisdictional High Court in the case of Shri Chandra Prakash Jain vs. ACIT (supra) to prove that the transfer of impugned property was completed on 30.01.2009 on the day of execution of Agreement to Sell and handing-over possession to the purchaser. Therefore, the transfer in relation to capital asset have completed on 30.01.2009 which pertain to preceding A.Y. 2009-2010, therefore, no capital gain could be assessed in assessment year under appeal i.e., 2010-2011. Considering the totality of the facts and circumstances of the case noted above, we set aside the Orders of the authorities below and delete the entire addition. Ground No.1 of appeal of Assessee is accordingly allowed.

8. On Ground No.2, Learned Counsel for the Assessee made an alternative claim that assessee may be allowed deduction of Rs.1.50 crores being the expenditure incurred wholly and exclusively in connection with the impugned transfer under section 48 of the I.T. Act and also relied upon several decisions in support of the same.

9. Since, we have already held that no capital gain is taxable in assessment year under appeal, therefore, ground No.2 is left with academic discussion and not relevant in assessment year in appeal. Therefore, we do not propose to decide the same.

10. In the result, appeal of Assessee is allowed.

Order pronounced in the open Court.

Sd/-	Sd/-
(O.P.KANT)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 11th January, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'B' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.