IN THE INCOME TAX APPELLATE TRIBUNAL
**HYDERABAD BENCHES "A" : HYDERABAD**

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA.No.548/Hyd/2013
Assessment Years 2008-2009

| | | |
|---|---|---|
| Smt. K. Krishnaveni<br>Hyderabad.<br>PAN ADOPK8059L | vs. | I.T.O. Ward 1(2)<br>Hyderabad. |
| (Appellant) | | (Respondent) |

For appellant : Shri PMS Kamaraju
For respondent : Shri P. Somasekhar Reddy

Date of Hearing : 04.11.2013
Date of pronouncement : 27.11.2013

**ORDER**

**PER SMT. ASHA VIJAYARAGHAVAN, J.M.**

This appeal is filed by the assessee against the Order passed under section 263 of the I.T. Act, 1961 of the Commissioner of Income Tax, Hyderabad dated 18.02.2013 for the assessment year 2008-2009.

2. Brief facts of the case are that the assessee filed return of income for the assessment year 2008-2009 admitting taxable income of Rs.1,69,920/- and agricultural income of Rs.11,53,010/-. Scrutiny assessment was completed on 23.12.2010. During the course of scrutiny assessment proceedings, the Assessing Officer found that the assessee who owned land of 772 sq. yards at Phase I and II at KPHB Colony, Kukatpally, Hyderabad entered into a development agreement with M/s. Chekri Projects Pvt. Ltd. on 15.3.2008. During the course of the assessment proceedings, the assessee has submitted her reply to a notice issued under section 142(1) stating that as consideration cannot be determined and received by the assessee in F.Y. 2007-08, it did not amount to transfer of the assessee's land to the developer, that the transaction was outside the ambit of section 2(47) consequent to which

there was no question of taxation of capital gains in the assessment year 2008-09. The Assessing Officer accepted the contention of the assessee and completed the assessment under section 143(3).

3. Subsequently, the CIT, Hyderabad issued notice under section 263 of the Act. The CIT stated that the Assessing Officer has not examined the correctness of the working of capital gains given by the assessee during the assessment proceedings and he failed to compute the correct capital gains arising out of the development agreement entered by the assessee with M/s. Chekri Projects Pvt. Ltd. The assessee made written and oral submissions before the CIT against the notice under section 263 of the Act.

4. Aggrieved, the assessee is in appeal before the Tribunal against the Order passed by the Commissioner of Income Tax Under Section 263 of the Act and has raised the following grounds of appeal :

*1)"On facts and under the circumstances of the case, the order passed by the Commissioner of Income-tax under Sec.263 of the Act to set aside the assessment order under Sec.143 (3) for the Assessment Year 2008-09 was not in accordance with law because the assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of the revenue.*

*It is apparent from the notice under Sec.263, the Hon'ble CIT has relied upon the record which was before the AO and which was duly examined by him. The record which is the basis for the notice under Sec.263 was in fact the result of inquiry by the AO which the Appellant had furnished written replies with supporting documents, which also the CIT has referred to. The revisionary order passed by the CIT amounts to change of opinion or a review which is not within the amplitude of the power under Sec.263.*

*It is settled law that the Revisionary authority cannot substitute his mind to that of the Assessing Authority. Therefore, our contention is that the revisionary order passed by CIT is not correct in law.*

*2)On facts and circumstances of the case, the Commissioner was wrong in making order under Sec.263 directing the AO to compute the capital gains for the Assessment Year 2008-09 in respect of a development agreement entered on 15.3.2008 but only registered on 2.4.2008. Until the agreement was*

*registered, nothing was done in pursuance of the agreement and thus does not attract capital gains tax in the Assessment Year 2008-09.*

*3)The CIT has failed to appreciate the fact that the explanation offered by the Appellant before the AO at the time of assessment under Sec.143 (3) regarding the plot no. 1 transferred in development agreement is a long term capital asset and consequently the gains are long term. The plot no. 1 was purchased in November 2003 and period of holding exceeded 36 months before the date of development agreement and it cannot be treated as short term capital asset.*
*4)On the facts and under the circumstances of the case, the CIT has wrongly stated in the revisionary order under Sec.263 that the payment of interest for purchase of land is admissible neither as cost of acquisition nor as cost of improvement. In this connection, the contention of the Appellant was that the land was purchased in 2003 with borrowed funds and so interest paid on such borrowings also should be considered as cost of acquisition and also eligible for the benefit of indexation.*
***5)*** *Any other ground that may urge at the time of hearing".*

5. The learned Counsel for the assessee Shri PMS Kama Raju submitted that the Order of the Assessing Officer is neither erroneous nor prejudicial to the interests of the Revenue and hence, the Commissioner of Income Tax cannot assume jurisdiction under section 263 (1) of the Act. The learned Counsel for the assessee submitted that the Assessing Officer had made thorough enquiry to which the assessee had furnished written submissions with supporting documents with respect to the issue of capital gains and it is merely a change of opinion by the CIT which is not within the amplitude of the power under section 263 of the Act. The learned Counsel for the assessee further submitted that the revisional authority cannot substitute his mind to that of the Assessing Officer and the assessment order passed cannot be termed as 'erroneous' in as much as the Assessing Officer has passed the order after application of his mind on the very same issue after considering the information and explanation filed. The assessee relied on the decision of the Apex Court in the case of Malbar Industrial Co. 243 ITR 83 (S.C.), CIT vs. Gabriel India 203 ITR 108 (Bom.) CIT vs. Arvind Jeweller 259 ITR 502 (Guj.) CIT vs. Sunbeam Auto Ltd. 332 ITR 167 (Del.), New Cyberabad City Projects (P) ITA. No. 570/Hyd/2013 dated 7th March, 2013, Sun Minerals vs. Addl.

CIT ITA.No.741/H/2012 dated 19.10.2012.

6. The next argument of the learned Counsel for the assessee is that the Commissioner was wrong in invoking jurisdiction under section 263 directing the Assessing Officer to compute the capital gains for the assessment year 2008-09 in respect of a development agreement entered on 15.3.2008 but registered only on 2.4.2008. Until the agreement was registered, nothing was done in pursuance of the agreement and hence, capital gains tax is not attracted in the assessment year 2008-09. According to section 2(47)(v) 'Transfer' includes '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 s. 53A of the Transfer of Property Act, 1882 (4 of 1982)". The definition of 'transfer' not merely prescribes allowing of possession but to be retained in part performance of a contract of the nature referred in s. 53A of the Transfer of Property Act.

7. With respect to development agreement, the learned Counsel for the assessee submitted that although the development agreement was entered on 15.03.2008, possession of the property has not been handed over to the developer till the date of registration i.e. 02.04.2008. The learned Counsel submitted that this is one of the most important considerations on account of which section 53A of the Transfer of Property Act becomes inapplicable and the said section requires delivery of possession as an essential ingredient which is absent in the present case. It was pointed out that at best, the developer merely had the right to enter the property but does not have the right of legal possession exclusive of the owner, that is, the assessee. The learned Counsel for the assessee further submitted that the requirement of section 53A of the Transfer of Property Act is that the transferee (developer) must have performed or be willing to perform his part of the contract which is known by a series of development works under taken by the developer. The learned Counsel further submitted that as the registration had taken place on 2.4.2008

and the Developer has not started any work relating to development of the property viz., survey of the land, putting up hoardings plus establishment of sales office and carrying out site development work, Landscaping, sales promotion, execution of construction and completion of project etc. before the end of the financial year i.e. 31.3.2008, admittedly, there is no progress in the development agreement in the assessment year under consideration. Therefore, it was submitted that there was no development activity in the project during the assessment year under consideration and cost of construction was not incurred by the developer. Hence, it is to be inferred that no amount of investment was made by the developer in the construction activity during the assessment year 2008-09. It was argued that in the assessment year under consideration, it is not possible to say whether the developer prepared to carry out those parts of the agreement to a logical end. Neither the consideration passed before the said financial year nor is the possession handed over. Further, the learned Counsel for the assessee submitted that assessee has not received any amount as a part of sale consideration. For all practical purposes, the possession in this case is coupled with actual registration or aftermath as the development agreement entered at the fag end of the year and registration had taken place immediately at the beginning of the next financial year and for some reason, the developer may back out from the transaction before the registration is completed, hence, there is uncertainty that exists regarding the consideration and possession of property at the point of entering into development agreement which shall be resolved upon registration or thereafter.

8. The learned Counsel for the assessee further submitted that ingredients of section 53A of the Transfer of Property Act do not get fulfilled and this fact is also overlooked by the CIT. Therefore, capital gains cannot be said to accrue during the assessment year 2008-09. However, the learned Counsel for

the assessee submitted that the assessee does not deny transfer. The only dispute is whether the transfer took place during the accounting year ended 31.3.2008. In otherwords, dispute confined only to the year of chargeability.

9. The Learned Counsel for the assessee relied on the decision in the case of CIT vs. Atma Prakash & Sons (2008) 175 Taxman 499 (Del.), ACIT vs. Mrs. Geetadevi Pasari (2006) 104 TTJ 375, DCIT vs. Asian Distributors Ltd. (2001) 119 Taxman 171 (Mum.), Ms. K. Radhika vs. DCIT (2011) 47 SOT 180 and S.Raghurami Reddy, Proddutur vs. ITO in ITA.No.296/Hyd/2003 dated 30th July, 2004.

10. It was further submitted by the learned Counsel for the assessee that the agreement between the landlord and the developer also contains a clause that the full ownership of the land shall remain with the landlord and only on the completion of the building and on receiving the consideration by way of fully constructed flats, the landlord will transfer its right in the land attributable to the balance flats. In such case, the capital gain shall arise on the completion of the building. This is evident from para nos.7 (a),7(b) and 7(d) and para no.13 of the Development Agreement which read as follows:

*7(a) The Second party shall construct with its own funds and deliver 50% of the super built up area to the first party. The remaining 50% of the super built up area shall be the property of the Second Party and has a right to alienate the same to prospective purchasers after demarking the first party's share of the built-up area along with proportionate land.*

*(b) after completion of the construction of the said Commercial cum Residential Complex, the Second party shall deliver the possession to the First Party of the entire area which the First Party is entitled i.e.*
*50% as its share under this Agreement, ensuring the completion and usage of common amenities such as Lift, Water, Power Supply and Drainage.*

*(d) The Second Party shall present such sale deeds, Conveyance deeds before the registering authority, admit the execution and acknowledge the receipt of the total sale consideration and get the sale deed or deeds registered after allotting and demarking the*

*first party's due share as agreed above.*

*13) Both the parties hereby agree to enter into Supplemental Agreement in the event of any contingency for incorporation or clarification of necessary clauses of this Agreement or to meet needs of the time, but such Supplemental Agreement shall be in conformity with the spirit of this main Agreement.*

11. The learned Counsel for the assessee submitted that in view of the above clauses in the development agreement it can easily be inferred from the foregoing extracts of the development agreement that the transfer had not taken place in the assessment year 2008-09 as the terms necessary to constitute transfer cannot be ascertained with certainty on the date of development agreement. It was pointed out that as on the date of agreement, the land owner's share of built-up area along with proportionate share of land was not demarcated and it is necessary to demarcate and allot the flats and commercial space that fall to the share of the land owner and developer. Hence, there is an uncertainty regarding the consideration to be received by the owner of the land as on the date of agreement.

12. The learned Counsel for the assessee submitted that the share of land owner and developer was demarcated by supplementary development agreement dated 20th September, 2010. It is inferred from the above that the actual transfer had not taken place in the Assessment Year 2008-09. The learned Counsel for the assessee further submitted that the plot No.1 was purchased in November 2003 and period of holding exceeded 36 months even before the date of development agreement and so it cannot be treated as short term capital asset. Further, it was submitted that the assessee had entered into a development agreement for a total land area of 772 Sq Yards of which 336 Sq. yards was purchased in November 2003 which was held by the assessee for more than 36 months. Therefore, the capital gains arising from transfer of this portion of the land will be treated as long term capital gains. The other 336 Sq yards was purchased in 14.06.2006, which is a short term capital asset as the period of

holding did not exceed 36 months and therefore, the capital gains arising from this portion of land shall be treated as short term capital gains.

13. In ground No.4 before us, the learned Counsel for the assessee submitted that the land was purchased in 2003 with the borrowed funds and so interest paid on such borrowings should be considered as cost of acquisition and also eligible for indexation. In support of this argument, the learned Counsel for the assessee relied on the following cases on this issue wherein it was held that interest paid on borrowings for the acquisition of capital asset shall form part of cost of acquisition provided such sum is not already allowed as deduction under any other head of income.

1. CIT vs. Maithreyi Pai 152 ITR 247 (Kar.)

2. CIT vs. Sri Hariram Hotels (P) Ltd. (2010) 188 Taxman 170.

13. The learned D.R. on the other hand relied on the order of the Assessing Officer.

14. We have heard both the parties and perused the material available on record. We are of the opinion that the Order under section 263 passed by the CIT has to be quashed based on the following findings :

1. Possession was not given before registration. Hence, provisions of section 53A will not apply.

2. Section 263 is invoked if the CIT considers that the Order passed by the A.O. is erroneous and prejudicial to the interests of the Revenue.

3. In the present case before us, the assessee has offered the capital gains tax in the next year and there has not been any prejudice to the revenue. Further, the assessee has explained to the query raised during the scrutiny proceedings before the Assessing Officer was answered to the satisfaction of the Assessing Officer. Hence, the Order is not erroneous.

4. Further, as held by the jurisdictional High Court in the case of Spectra Shares & Scrips Pvt. Ltd. vs. CIT (AP) [2013] 354 ITR 59 it has been held as follows :

> *"(f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed."*

15. In view of our above findings, we quash the Order passed by the Commissioner of Income Tax under section 263 of the Act and the assessee's appeal is allowed.

16. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 27.11.2013.

| | |
|---|---|
| Sd/- | Sd/- |
| **(B. RAMAKOTAIAH)** | **(ASHA VIJAYARAGHAVAN)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Hyderabad, Date 27.11.2013

VBP/-

Copy to

| |
|---|
| 1. Smt. K. Krishnaveni, E-24, Madhura Nagar, Hyderabad. |
| 2. Income Tax Officer, Ward No.1(2), Hyderabad. |
| 3. Commissioner of Income Tax, 3rd Floor Annexe, Aayakar Bhavan, Basheerbagh, Hyderabad – 500 004. |
| 4. Addl.CIT, Range-1, Hyderabad |
| 5. D.R. ITAT 'A' Bench, Hyderabad. |