INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI

BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. No.1745/Del/2017
(Assessment Year: 2007-08)

Namita Dutta, F–67, Poorvi Marg, Vasant Vihar, New Delhi – 110 057. **PAN: AENPD3423P**	Vs.	ITO, Ward-72 (2), New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri Ved Jain, Adv.; & Shri Akshit Jain, C.A.;
Revenue by:	Ms. Aman Preet, Sr. DR
Date of Hearing	23/12/2020
Date of pronouncement	28/12/2020

O R D E R

PER Prashant Maharishi A M

1. This appeal is filed by the assessee against the order of the ld. CIT (Appeals)-32, New Delhi, for the Assessment Year 2007-08 dated 09th December, 2016.
2. The assessee has raised following grounds of appeal:-
   i. on the facts and circumstances of the case, the order passed by the learned CIT (appeals) is bad both in law and on facts.
   ii. On the facts and circumstances of the case, the calculation of indexed cost, made by the learned CIT – A amounting to ₹ 610,879 by the CIT (A) against the indexed cost of acquisition of ₹ 5,682,912/– claimed by the assessee, is untenable in the eyes of the law
   iii. on the facts and circumstances of the case, the learned CIT – A has erred by not allowing the claim of the assessee for deduction u/s 54 of the income tax act amounting to ₹ 5,317,088/-.

iv. That the assessing officer has erred in making addition on account of capital gain, during the assessment year 2007 – 08, when no transfer of any capital asset had taken place during the financial year 2006 – 07. The assessing officer has erred in charging capital gain to assessment year 2007 – 08 instead of assessment year 2009 – 10, as the capital asset got transferred during the financial year 2008 – 09.

v. That the assessing officer had erred in charging capital gain to tax in assessment year 2007 – 08 without bringing on record any documents/detail for review to the claim of the assessee for chargeability of income tax in assessment year 2009 – 10.

vi. That the assessing officer had held in ignoring the revised return/competition filed by the assessee during the assessment proceedings, and thereby making the assessment on original return, without affording any reason for the same.

vii. That the learned CIT – A had failed to consider the submissions made by the assessee and has passed the impugned order without appreciating the evidence already placed on record by the appellant company. The learned CIT – A failed to appreciate the merits of the case and pass the impugned order which a premeditated mindset.

viii. That without prejudice to the above, the learned CIT – A/assessing officer has erred in sustaining the addition is without bringing any material or evidence on record to prove the expression, records, materials brought by the assessee are wrong.

ix. That the assessee praise for that the addition of R. 1,03,89,121/– made to the income of the assessee may kindly be deleted.

x. The above grounds of appeal are all independent and without prejudice to one another.

xi. The appellant company further six leave of this honourable tribunal to alter/ements/modify/amplify or withdraw any or all the above grounds of appeal/– or add any further grounds before or at the time of hearing.

3. At the time of the hearing it was noted that the appeal filed by the assessee is late by 40 days. For which assessee has made an application for condonation of the delay stating that the assessee was sick and suffering

from cancer and therefore there was a delay in filing of this appeal. The learned authorised representative repeated the same facts and stated that the delay may be condoned it there is no modify the intention in holding filing the appeal delayed by 40 days.

4. The learned departmental representative vehemently objected to the delay in filing of the appeal and stated that the cause shown by the assessee is not sufficient.

5. We have carefully considered the rival contention and find that the assessee has filed this appeal delayed by 40 days and the reasons mentioned therein is that the assessee was suffering from cancer and therefore, she was forced to attend her health and in that process this appeal was delayed. We do not find any reason to not to condone the delay for the reason shown by the assessee according to us they are sufficient and proper. Therefore we condone the delay in filing of the appeal.

6. Brief facts of the case shows that assessee is an Individual. The case of the assessee is re-opened under Section 147 of the Income Tax Act, 1961 (the Act) by issuing notice under Section 148 on 12th March, 2014 as the assessee has not filed the return of income. During the course of search and seizure on Salcon Group of cases, who is a developer of properties on collaboration agreement with the various owners, a copy of Sale deed dated 1st June, 2006 was found which shows that assessee as one of the ventures in collaboration agreement as one of the co-owners of the property No. 67, Poorvi Marg, New Delhi, sold out her 1/3rd share in the property for Rs.56,00,000/-. The total consideration of the property for the full for all three co-owners was Rs.1,68,00,000/-. In response to notice under Section 148 of the Act assessee submitted a computation of total income and has shown capital loss of Rs.82,911/- on sale consideration of Rs.56,00,000/-. The Assessing Officer did not find the same computation proper. According to the Assessing Officer the sale consideration to be paid by the builder to the assessee was in two different modes. The assessee was paid along with other co-owners a sum of Rs.1.68 crores and also consideration of entire basement, ground floor to 3rd floor comprising area of 269.27 sq. mts. And 77.5% un-divided ownership of the plot of land admeasuring 812.5 sq. mts. As per the agreement the builder was allowed to retain the third floor of

269.27 sq. mts. Therefore, the fair market value of the above 3rd floor was also required to be included in the full value of consideration. The fair market value of the above property was determined by the ld. Assessing Officer and found that 3rd floor was sold to third party for a sale consideration at Rs.4.77 crores. The assessee confronted with the same. The assessee submitted that builder has given the cost of construction allocated to the owner as per certificate dated 27.01.2014 of Rs.1,62,00,000/- and, therefore, the total consideration to the above property is Rs.1.68 crores paid by the collaborator and Rs.1.62 crores allocated as a cost by the builder. Thus, the total value of the consideration is Rs. 3.30 crores whereas the share of the assessee is 1/3rd, therefore, the share of sale consideration allocated to the assessee is only Rs. 1.1 crore. The ld. Assessing Officer rejected the contention of the assessee as the collaborator has sold the third floor at Rs. 4.77 crores. Instead of Rs.1.62 crores as the cost allocated by the collaborator the ld. Assessing Officer took Rs.4.77 crores as the fair market value of the construction. Accordingly, the capital gain was worked out by considering the total fair market value of the consideration received at Rs. 5.33 crores. After granting indexation of the cost the capital gain chargeable in the hands of the assessee was considered at Rs.5,14,05,696/-. Total income of the assessee was assessed at Rs. 5,14,84,206/- by the order under Section 143(3) read with Section 148 of the Act.

7. The assessee also contested the above order before the ld. CIT (Appeals). Before the ld. CIT (Appeals) assessee also submitted that during the assessment proceedings the assessee has submitted that the relevant date of transfer of the property is 19.08.2008 that is the date on which the property was constructed and possession of the above property was handed over to the assessee. It was further stated that assessee has submitted revised return for Assessment Year 2009-10 where the sale consideration is taken by assessee at Rs. 1.10 crores and offered the capital gain. The assessee also submitted that the transfer of the property is in Assessment Year 2009-10 and not in Assessment Year 2007-08. Assessee further stated that on computation of the capital gain made by the ld. Assessing Officer

taking the fair market value of the consideration at Rs.5.14 crores is also erroneous.

8. The ld. CIT (Appeals) held that as the collaboration agreement was entered into on 1st June, 2006 and the relevant date of transfer of property was 19.08.2005 on which construction was completed and possession was handed over to the assessee discharging all obligations of the collaboration agreement. Therefore, claim of the assessee is that income was assessable in Assessment Year 2009-10. The ld. CIT (Appeals) held that the date of the collaboration agreement of 1.06.2006 is registered during the year 2006-07 and part payment has also been received in that financial year. Further the buyer an Indian party has also made major part of the payment for 3rd floor on Rs.4.34 crores during financial year 2006-07, therefore, the property had been transferred during others 2006-07 and capital gain is chargeable in assessment year 2007-08 and not in assessment year 2009-10 as claimed by the assessee. This is disputed by assessee before us.

9. With respect to the computation of the capital gain and determining the sale consideration he held that the ld. Assessing Officer has taken the worth of one floor of the property at Rs.4.77 crores and consideration of Rs.56,00,000/- totaling to Rs.5.33 crores as the full value of consideration. He noted that the AO has ignored that the buyer has also purchased right on 22.5% of the land which is the substantial part of the land. Therefore, considering the certificate to the builder, the cost accounted for by the builder in his books, the ld. CIT (Appeals) agreed to consider the sale consideration of Rs. 1.10 crores. Therefore, he computed the long term capital gain at Rs.1,03,08,121/-. This is not disputed before us by revenue.

10. Assessee is aggrieved with the order of the ld. CIT (Appeals). So far as he has held that the transfer of the above property took place in Assessment Year 2007-08 instead of Assessment Year 2009-10 as claimed by the assessee. This is covered as per Ground Nos. 4 & 5 of the appeal.

11. The learned Authorized Representative submitted the fact of the case and submitted that the ld. CIT (Appeals) in para No. 5.8.2 at has wrongly mentioned that collaboration agreement was registered. He submitted that such agreement is never registered. He further referred to para No. 5.8.1 of the order and stated that the ld. CIT (Appeals) is also incorrect that the date

on which construction was completed and possession was given to the assessee which is 19.08.2005, but in fact it is a typographical error and the correct date is 19.08.2008. Based on this he relied upon the decision of the honourable Supreme Court in the case of Balbir Singh Maini and submitted that the facts of this case are identical to the facts of the case before Hon'ble Supreme Court. He reiterated that collaboration agreement is unregistered and the date of handing over of the possession of the property is 19.08.2008. Therefore, the transfer of capital asset took place in Assessment Year 2009-10 and not in Assessment Year 2007-08. Thus, he stated that the ld. CIT (Appeals) is at error in holding that the capital gain is chargeable to tax in Assessment Year 2007-08.

12. He further submitted that the assessee has correctly offered long term capital gain in Assessment Year 2009-10. He took us to page No. 39 of the paper book to show the computation of long term capital gain offered by the assessee. He submitted that there is no difference in the sale consideration, there is no divergence in the cost of acquisition but assessee has claimed in that year the deduction under Section 54 of the Act of Rs.54,00,000/- being 1/3rd share of Rs.1,68,00,000/- invested by the assessee in the above property. He, therefore, submitted that capital gain has already been taxed in Assessment Year 2009-10.

13. The ld. Departmental Representative vehemently supported the order of the ld. CIT (Appeals) and stated that the transfer took place in Assessment Year 2007-08 and hence the ld. CIT (Appeals) is correct in holding so.

14. We have carefully considered the rival contentions and perused the orders of the lower authorities. The ld. AR has categorically stated that the collaboration agreement dated 1.06.2006 was not at all registered and the construction house was handed over by the collaborator on 19.08.2008 to the assessee, the only issue involved in this appeal is that whether the transfer took place in Assessment Year 2007-08 as claimed by the Revenue or in Assessment Year 2009-10 as claimed by the assessee. With respect to the registration of the collaboration agreement the honourable Supreme Court in paragraph number 20 in Balbir Singh Maini's case has held that:-

> **"20.** The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like

the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in *Shrimant Shamrao Suryavanshi* (*supra*), that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not

taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question."

15. In the case mentioned above, the Hon'ble Supreme Court held that the execution of unregistered Joint Development Agreement with an irrevocable Power of Attorney in favour of the Developer does not result in the "transfer" for capital gains liability.

16. Thus as the agreement in the present case is not registered one, it does not have any impact in the eye of law for the purpose of Section 53A of the transfer of property act and similarly for defining transfer Under the income tax act. Therefore In the present case, the Collaboration Agreement was never registered. Therefore, the presumption of delivery of possession to the Collaborator cannot be assumed on signing the Collaboration Agreement, i.e., in AY 2007-08.

17. Even otherwise the assessee has offered the above capital gain in assessment year 2009 – 10, which is the property for the assessment of the transfer of capital asset and consequent capital gain in view of the decision of the honourable Supreme Court as stated above.

18. In view of above facts we allow ground number 4 and 5 of the appeal of the assessee.

19. In view of our decision for ground number 4 & 5 of the appeal of the assessee, all other grounds become merely academic, therefore they are not adjudicated.

20. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 28/12/2020.

-Sd/-	-Sd/-
(H. S. SIDHU)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 28/12/2020

MEHTA

Copy forwarded to

1. Appellant;

2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi