

Renouncing of right to purchase a property in lieu of a sum was 'transfer'; to be taxed as capital gains

Summary – The Hyderabad ITAT in a recent case of P. Ramgopal Varma, (the Assessee) held that where on account of failure of vendor to act upon agreement to sell, assessee filed a civil suit for specific performance which ultimately resulted in compromise, in view of fact that as per terms of MOU, assessee gave up his claim over property against consideration received, it could be interpreted that assessee had relinquished or extinguished his right over property in terms of section 2(47).

Facts

- The assessee entered into an agreement to purchase a plot for a consideration of Rs. 1.13 crore. As per the terms of agreement of sale assessee paid a sum of Rs. 25 lakhs as advance to the vendor with the understanding to pay the balance sale consideration at the time of registration.
- Since the agreement of sale was not acted upon by the vendor, the assessee filed a suit for specific performance.
- During the pendency of said proceedings, a Memorandum of Understanding was entered into between the assessee and the land owner in terms of which the land owner agreed to pay an amount of Rs. 1.50 crore (including the advance of Rs. 25 lakhs paid by the assessee at the time of agreement of sale) to assessee and assessee on his part agreed to withdraw/relinquish all his claim over the property in question.
- The assessee disclosed said amount as sale consideration received by him for transfer of plot and computed long term capital gain which was accepted by the Assessing Officer.
- The Commissioner opined that amount received by the assessee from the land owner being a windfall gain, should have been assessed as income from other sources and not as long-term capital gain.
- He thus passed a revisional order directing the Assessing Officer to assess the surplus received by the assessee from land owner on settlement of the dispute as 'income from other sources'.
- On appeal:

Held

- The law is fairly well settled that for exercising powers under section 263 two conditions have to be satisfied cumulatively. The conditions are (i) the order sought to be revised must be erroneous, and ii) it must be prejudicial to the interests of the revenue. In absence of both or even any one of these conditions, the exercise of power under section 263 will be without jurisdiction.
- Undisputedly, the assessee has entered into an agreement of sale with the vendor, for purchase of a plot. In part performance of the agreement of sale assessee also paid Rs. 25 lakhs to the vendor as advance. As it appears, the vendor did not fulfil his part of the contract, for whatever may be the

reason, in finalizing sale of the property in favour of the assessee, this compelled the assessee to approach court of law for establishing his right.

- Ultimately the dispute was settled amicably through a MoU, as per the terms of which the vendor agreed to pay the assessee an amount of Rs. 1,50,00,000 and the assessee agreeing for giving up all claims over the property. It is evident from the order sheet entry made by the Assessing Officer as well as assessee's reply in response to the query made by the Assessing Officer that the Assessing Officer has made specific enquiry in respect of the transaction relating to the purchase of plot and also examined all related materials.
- From these facts, one can safely infer that Assessing Officer has passed the assessment order after conducting necessary enquiry and with proper application of mind. Even the Commissioner neither in the show cause notice nor in the order passed under section 263 has alleged lack of enquiry or non-application of mind by the Assessing Officer. In this context, it needs to be examined, whether the decision of the Assessing Officer to assess the receipts as capital gain is erroneous and prejudicial to the interests of revenue. For this purpose it is relevant to look into the meaning of the expression 'transfer' as envisaged under section 2(47).
- As can be seen from the said provision, relinquishing or extinguishing one's right over a capital asset also amounts to transfer. It is a fact on record that assessee has not only entered into an agreement of sale for purchase of plot but has also paid an amount of Rs. 25 lakhs to the vendor. Thus, in this process the assessee acquired right, though may be to a limited extent, over the property in question. Therefore, when the assessee, as per terms of the MoU, gave up his claim over the property against consideration received, certainly it could be interpreted that the assessee had relinquished or extinguished his right over the property.
- It is highly improbable that the vendor would have agreed to settle the dispute by paying a huge amount of Rs. 1.5 crores for a pittance unless the assessee had acquired some right over the property. Considered in the aforesaid perspective, a view could be taken that there was a 'transfer' of capital asset within the purview of section 2(47) attracting capital gain and which view has been taken by the Assessing Officer in this case.
- Therefore, when the Assessing Officer had enquired into the matter, applied his mind to the materials on record and the view taken by him on the assessability of the receipt was one of the possible views, the assessment order passed by him could not be considered to be erroneous and prejudicial to the interests of revenue. Only because the Commissioner considers the receipts as windfall gain and in his opinion such receipt has to be assessed as income from other sources, the assessment order cannot be held to be erroneous and prejudicial to the interests of revenue so as to empower the Commissioner to revise it under section 263.
- In the aforesaid view of the matter, there is no hesitation in holding that the exercise of power under section 263 in the present case is not justified. Accordingly, the impugned order passed under section 263 is quashed.
- In the result, assessee's appeal is allowed.