

Capital gain accrues on relinquishment of rights in land to developer to get constructed area

Summary – The Bangalore ITAT in a recent case of N.S. Nagaraj, (the Assessee) held that where assessee divested possession of land to developer and in lieu of that assessee would receive consideration in form of 50 per cent constructed area, capital gain accrued to assessee on account of transfer of land

Facts

- The assessee along with his brother were the owner and in possession of land. They entered into a joint development agreement with 'APL'. The assessee and his brother had given an irrevocable license to the developer to enter and develop the property. They have also executed a power of attorney in favour of the developer to enable the developer to get sanction site plans, license and other approvals for the development of entire scheduled property. The developer was authorized to avail loans and financial facilities from the financial institutions.
- The Assessing Officer was of the view that the assessee had surrendered their rights to the extent of 50 per cent in the land in lieu of 50 per cent constructed area, whose cost was to be borne by the builder. Thus, in the opinion of the Assessing Officer, transfer of the land has taken place within the meaning of section 2(47)(v) and the assessee was assessable for long term capital gain.
- The Commissioner (Appeals) on an analysis of the agreement had held that no transfer of the asset in the case of the assessee as on the date of entering into joint development and executing the power of attorney taken place. Therefore, capital gain was not assessable.
- On second appeal:

Held

- The dispute between the assessee and the revenue is that on execution of the joint development agreement, no transfer has taken place. The assessee has just exchanged the assets.
- The reading of the agreement would suggest that the owners, *i.e.*, the assessee and his brother have executed an irrevocable license in favour of the builder to enter into the scheduled property and develop the same by putting up the construction. They have also executed the power of attorney. The owner has further authorized the builders to sell, transfer its constructed area to their clients.
- Thus, the assessee has divested the possession of the land to the developer and in lieu of that, he along with his brother would receive consideration in the shape of 50 per cent constructed area.
- They have not agreed for jointly doing the business, neither builder shown such an intention. The assessee had relinquished his rights in the land upon which developer has incurred cost of construction and develop the property. In lieu of the relinquishment of rights in the land which ultimately would vest in the developer, the assessee and his brother would receive 1.50 lakhs sft of

the constructed area. The year in which the area would be given to the assessee is immaterial. The moment the owners have handed over the possession to the developer a right to receive the developed area would accrue to the owners. It is a consideration in kind, which has a value, which can be worked out.

- The Commissioner (Appeals) was not justified in holding that no capital gain has accrued to the assessee on account of transfer of land. The order of the Commissioner (Appeals) is set aside and that of the Assessing Officer is restored.