

Oral partition of property under Joint Development Agreement doesn't justify apportionment of cap gain

Summary – The Visakhapatnam ITAT in a recent case of Palla Appala Raju, (the Assessee) held that where property given under development agreement was a self acquired property standing in name of assessee till it was transferred to developer and Assessing Officer without making any enquiry assessed capital gains in hands of assessee and his sons on basis of so called oral partition, Commissioner was justified in setting aside assessment under section 263

Facts

- In the course of survey conducted in the case of firm SR, it came to the notice of the department that the assessee alongwith his three sons had entered into a development with the said firm for transfer of a land for development purpose. In consideration for such transfer of land the assessee and his sons had received certain amount, flats and shops in the building proposed to be constructed. In response to a notice issued under section 148, the assessee filed his return of income declaring certain capital gains. The Assessing Officer completed the assessment accepting the income declared by the assessee.
- Thereafter the Commissioner in exercise of the powers conferred under section 263 called upon the assessment records and found that the assessee had apportioned the capital gains amount amongst himself and three of his sons by stating there was an oral partition between them. However, on going through the registered power of attorney cum GPA as well the information submitted by the assessee alongwith his return of income, it was seen, that the said vacant land was recorded in the name of assessee only. There was no other evidence to show that the land was divided amongst the assessee and his sons. The subsequent agreement executed for construction indicated that the assessee was the owner of the property and the sons of the assessee signed the power of attorney only. The capital gains arising from the transfer was assessable in the hands of the assessee alone. The Commissioner set aside the assessment order with a direction to the Assessing Officer to compute the capital gains in the hands of the assessee by taking into account the entire consideration.
- On appeal by the assessee:

Held

- In the instant case, it is the claim of the assessee that by virtue of an oral partition entered into in the year 1980, the property has been divided amongst the assessee and his three sons. Therefore, the capital gain arising out of the transfer of such land in pursuance to the agreement to sale cum GPA entered into with the developer in Nov. 2003 is to be assessed proportionately at the hands of the assessee and his three sons. As can be seen, apart from reference made in the agreement of sale cum GPA, there is no other documentary evidence submitted by the assessee to establish the fact that the so called oral partition between the assessee and his sons was actually acted upon since the

property in question continued to be recorded in the name of the assessee till it was transferred to developer. Further assessee has not been able to explain as to whether the partition is only restricted to the aforesaid property or to all the properties of the assessee. Therefore, when the facts on record clearly show that the property given under development was a self acquired property of the assessee standing in his own name without any other evidence to corroborate the claim of oral partition of the property between assessee and his sons, such claim is not acceptable merely because a reference to such oral partition has been made in the registered agreement to sale cum GPA. If at all there was a partition long back, there is no reason why the oral partition was not acted upon in letter and spirit all these years by getting the land registered in the names of all the parties. On the contrary, assessee continued to be the absolute owner of the property till it was transferred to developer. The Assessing Officer has not at all examined this issue during the assessment proceedings by making any enquiry or applying his mind. AT least nothing of the sort is evident either from the assessment order or any material brought before us. Considered in the aforesaid perspective, exercise of jurisdiction under section 263 is valid. However, the Commissioner was not justified in straightaway directing the Assessing Officer to consider the entire capital gains at the hands of the assessee. The entire issue requires re-examination by the Assessing Officer. If the assessee can prove by furnishing necessary and cogent evidence that the property in question was actually partitioned, then assessee's claim can be considered. In that view of the matter, the Assessing Officer is directed to consider assessee's claim afresh and take decision after affording due opportunity of being heard to the assessee. In view of the aforesaid direction, other issues relating to adoption of fair market value and claim of exemption under section 54F are left open to be decided afresh depending upon the decision to be taken on assessee's claim of partition.

- The appeal is partially allowed for statistical purposes.