

Assignment of leasehold rights couldn't be held as transfer if agreement wasn't registered: ITAT

Summary – The Kolkata ITAT in a recent case of Mallika Investment Co. (P.) Ltd., (the Assessee) held that Unless document is registered, it has no effect in law for purpose of section 53A of Transfer of Property Act 1882 and, therefore, where assessee received certain amount by virtue of an unregistered agreement of assignment of leasehold rights, no case of transfer of property was made out under section 2(47)(v)

Facts

- During the course of assessment proceedings, the Assessing Officer noted that the assessee received certain amount by virtue of an unregistered agreement of assignment of the leasehold rights.
- The Assessing Officer held that since the consideration was paid during relevant assessment year and the possession was also handed over during the relevant year, there was deemed transfer of 'capital asset' within the meaning of section 2(47)(v) read with section 53A of the Transfer of Property Act, 1882.
- The Commissioner (Appeals) confirmed the order of Assessing Officer.
- On second appeal:

Held

- In the facts of the present case the admitted fact is that the document in question which is an agreement of assignment of property wherein the assessee who had held only the leasehold rights was not registered till 31-3-2008. This being the factual position, it is noted that the position which existed earlier that an agreement of sale which fulfilled the ingredients of section 53A of T. P. Act, 1882 was not required to be executed through a registered instrument, has changed by the Registration and other related Law (Amendment) Act 2001.
- Amendments were made simultaneously in section 53A of 1882 Act and sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment the words 'the contract, though required to be registered, has not been registered, or' in section 53A of 1882 Act have been omitted. Simultaneously, sections 17 and 49 of Registration Act, 1908 have been amended, clarifying that unless the documents containing the contract to transfer for consideration any immovable property (for the purpose of section 53A of 1882 Act) is registered, it shall not have any effect in law; other than for being received as evidence of a contract for specific performance or as evidence of any collateral proceedings not required to be effected by a registered instrument.
- The effect of the amendment brought in by the 2001 Act to the Registration Act as well as the simultaneous amendment in section 53A of the Transfer of Property Act is that on and after the

commencement of the Amendment Act of 2001, if a contract for transfer is executed but not registered, then it shall have no effect in law for the purpose of section 53A of Transfer of Property Act like in this case by no stretch of imagination an agreement for assignment (the leasehold rights) cannot be held as transfer of an immovable property.

- In any case, the instrument/document (assignment of leasehold rights) is not registered, then it shall in no way be held as transfer by roping in section 53A of T. P. Act, 1882 as erroneously done by Assessing Officer since after the amendment Act 2001, unless the document is registered have no effect in law for the purpose of section 53A of Transfer of property Act. In any event, since the agreement in question is not registered, 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, the Commissioner (Appeals) as well as the Assessing Officer erred in referring to the expression 'of the nature referred to in section 53A' in section 2(47)(v) in order to arrive at the impugned conclusion. However, any profit or gain arising from the transfer of a capital asset is chargeable to tax under the head "capital gain" and is deemed to be the income of the financial year in which the transfer took place.
- Capital asset is defined under section 2(14) which means property of any kind held by an assessee whether or not connected with his business or profession. The term capital asset has an embracing connotation and includes every kind of property as generally understood except those that are expressly excluded in the definition. So too, expression property includes every conceivable thing, right or interest. And so, if the capital asset is transferred as envisaged under section 2(47) of the Act, then it has to be taxed as per law.
- So, in the light of the aforesaid discussion, the issue of taxing the consideration in respect of assignment of leasehold rights need to be *de novo* carried out by the Assessing Officer untrammelled by the finding/observations of the Commissioner (Appeals) while deciding the appeal of the assessee. Needless to say, opportunity to be granted to the assessee before passing a speaking order in accordance to law. Appeal of assessee is allowed for statistical purposes.
- In the result, the appeal by the assessee is allowed for statistical purposes.