

No question of taxing capital gain if transaction related to transfer of property didn't materialize: ITAT

Summary – The Pune ITAT in a recent case of Appasaheb Baburao Lonkar., (the Assessee) held that where assessee transferred land but transaction could not be materialized as payments were stopped by purchaser, no profit or gains which could arise from such transfer would be brought to tax under section 45

Facts

- The assessee filed return of income.
- The Assessing Officer received information regarding sale of immovable property by assessee along with 13 other co-owners. It was noticed that the extract of the land submitted by the assessee showed the property was registered in the name of 'S Properties'; therefore, the property was transferred to 'S Properties'. The assessee submitted that he did not receive monetary consideration towards sale of the said property as the cheques which were handed over by the purchaser were stopped for payment and that the cheques were still in assessee's possession. Further, the possession of the property was under dispute and the assessee had obtained injunction from the Civil Court to stop any further transfer of the disputed property by the purchaser. According to the assessee the transfer could not be considered only on the basis of agreement registered because neither possession was transferred nor consideration was received in respect of the land.
- The Assessing Officer rejected contentions of the assessee and held that the land in question stood within the definition of the term 'transfer' as envisaged in the provisions of section 2(47) and, therefore, it would attract long term capital gains. The Assessing Officer also held it to be part performance in view of the provisions of section 53A of the Transfer of Property Act and held the assessee liable to pay tax on long term capital gains on his share of Rs. 55.18 lakh.
- On appeal, the Commissioner (Appeals) confirmed the addition made by the Assessing Officer on account of long term capital gains.
- On the assessee's appeal to the Tribunal:

Held

- Section 2(47) lays down that transfer in relation to capital asset includes various modes of transfer in which under clause (v) it involves a transaction wherein allowing of possession of any immovable property is taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. Under section 53A of the Transfer of Property Act, where any person contracts to transfer for consideration any immovable property in writing, from which the terms necessary to constitute the transfer can be ascertained and the transferee has in part performance of the contract, taken possession of the property or any part thereof, and the transferee has performed or is willing to perform his part of contract, then it is called 'Part

Performance'. So, in part performance, there has to be willingness to perform his part of contract by the transferee and the transferee should have been put in possession in such part performance of the contract and the transferor has agreed to transfer the property for consideration. However, in the facts of the case, before us, though there is a contract in writing between the parties but there is dispute between the parties as to the possession of the said property, wherein the transferor claims that possession has not been given and the transferee claims that the possession has been given but the said possession was subject to encashment of cheques which were issued by the transferee. Since the transferee had stopped payment of cheques issued by him, then the parties approached the Court to decide differences arising between them and the matter is pending before the High Court of Bombay in this regard. In such scenario, it cannot be said that part performance of the contract has been completed.

- The Apex Court in *CIT v. Balbir Singh Maini* [\[2017\] 86 taxmann.com 94/251 Taxman 202/398 ITR 531](#) has held that the income from capital gains on a transaction which never materialized was at best, a hypothetical income.
- The assessee has stated on oath that sellers had never parted with the possession of said land, for which litigation was pending before the High Court. In such circumstances, where the assessee has not received sale consideration and where the possession of land having not been transferred to the purchasers, provisions of section 45 are, thus, not attracted.
- Now, applying the ratio laid down by the Apex Court to the facts of the instant case, wherein the initial contract was between the parties on the ground that the assessee would get permission of other co-owners numbering about 13 so as to transfer immovable asset to the purchasers. This was the basic condition of the said agreement between the parties. Admittedly, the said permission could not be obtained by the assessee and though sale deed was registered, transaction could not be culminated. It is further evidenced by the fact that only sum of Rs. 15 lakhs was paid as against total consideration of Rs. 2.75 crores settled between the parties. As per sale deed, sale consideration was to be paid as per Schedule A to the said agreement, for which post-dated cheques were issued, which were to be encashed as per the conditions mentioned for encashment of cheques. As per the relevant clause of the sale deed, the purchasers had given post dated cheques to sellers and it was their responsibility to see that the postdated cheques get cleared for payment. In view of the said cheques being stopped for payment and the dispute arising between the parties and even the dispute being who is in possession of the said property, reflects that even part performance of the contract has not been settled. Since the transaction has not materialized, no profit or gain which arises from the alleged transfer of capital asset could be brought to tax under section 45, read with section 48. Thus, the grounds of appeal raised by the assessee are to be allowed.
- The appeal is allowed.