

No capital gains if only licence was given to developer to enter property for construction under JDA: ITAT

FACT OF THE CASE

1. The assessee was a builder and filed its return of income for the assessment year 2006-07. During the year under consideration, the assessee had entered into a Joint Development Agreement (JDA) with a developer to construct an apartment project in respect of land owned by it.
2. As per the agreement, the assessee had transferred 65% share of undivided interest in the above land and, in consideration, received 35% of the built-up area in the apartment project. The assessee also received 10 lakhs as a refundable deposit for handing over the property to the builder.
3. The Assessing Officer (AO) held that there was the transfer of assets within the meaning of Section 53A of the Transfer of Property Act. Thus, he invoked provisions of section 2(47)(v) and computed capital gains.
4. The CIT(A) upheld the order of AO. Aggrieved-assessee filed the instant appeal before the Tribunal.

DECISION OF THE CASE

1. The Tribunal held that the supplementary joint development agreement provides that the developer was granted irrevocable permission and license to enter the scheduled property to construct residential apartments as per the plan to be obtained.
2. It was specifically mentioned that the license so granted shall not be considered possession delivered in part performance of the contract under section 53 (sic. 53A) of the Transfer of Property Act, nor any property right shall be deemed in favour of the developer.
3. A careful perusal of the provisions of section 53A of the Transfer of Property Act would show that the transferee should have taken possession in part performance of the contract and has done the same act in furtherance of the contract.
4. In the instant case, the development agreement clearly specified on that possession of the property was not given, and what was given was only a license to enter the property. Thus, the provisions of section 2(47)(v) did not apply to the assessee. Accordingly, the order passed by the CIT(A) was set aside, and AO was directed to delete the assessment of short-term capital gains.