

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17TH DAY OF JULY 2015

PRESENT

THE HON'BLE MR. JUSTICE VINEET SARAN

AND

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

ITA NO.426 OF 2009

BETWEEN

1. THE COMMISSIONER OF
INCOME-TAX,
55/1, SHILPASHREE,
VIDYARANYA COMPLEX,
VISHVESHWARANAGAR,
MYSORE-507 008
2. THE ASST. COMMISSIONER
OF INCOME-TAX,
CIRCLE-9(1), JEEVAN SAMPIGE,
3RD FLOOR, SAMPIGE ROAD,
MALLESWARAM,
BANGALORE – 560 003. ... APPELLANTS

(BY SRIYUTHS K.V.ARAVIND & G.KAMALADHAR – ADVS.)

AND

M/S.KHIVRAJ MOTORS,
10/2, KASTURBA ROAD,
BANGALORE – 560 001. ...RESPONDENT

(BY SRIYUTHS A.SHANKAR & G.VENKATESH-ADVS.)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961 PRAYING TO:

- i. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN.
- ii. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, BANGALORE IN ITA NO.1110/BANG/2008, DATED 31-3-2009 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-9(1), BANGALORE, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS ITA COMING ON FOR FINAL DISPOSAL THIS DAY, **ARAVIND KUMAR .J.** DELIVERED THE FOLLOWING:

JUDGMENT

Revenue is in appeal assailing the order of the Income Tax Appellate Tribunal (ITAT) passed in ITA No.1110/Bang/2008 dated 31.03.2009 whereunder the appeal filed by the Revenue questioning the order of the CIT (Appeals), came to be dismissed by accepting the plea of the respondent-assessee and allowed the appeal of the assessee which was allowed, came to be confirmed.

2. The assessee is a firm and was in occupation of the premises No.135/1, Residency Road as a tenant for long numbers of years, having taken on lease from Sri.Mohd. Musa Sait Wakf. On account of the said land lord intending to develop the said property, assessee was approached for vacating the same and after negotiation, land lord offered portion of the built area to tenant in lieu of tenant surrendering his tenancy rights and as agreed upon. Pursuant to the said negotiation, a memorandum of understanding (MOU) was entered between the parties on 17.9.1999 whereunder it was agreed that the first party (landlord) would execute deed of lease with regard to 18% of undivided share in the property in question and proportionate super built area for a period of 65 years in favour of tenant. In furtherance of said memorandum of understanding, the necessary permissions/approvals were taken and thereafter a Tripartiate agreement was entered into on 23.08.2001 between the parties i.e. the land lord (1st

party), the tenant (assessee-2nd party) as well as the developer (3rd party).

3. Assessee filed his Return of Income for the assessment year 2005-06 in which it was declared that assessee has received 22,100 sq ft. of built up area in the commercial complex, which was also pursuant to the MOU and the agreement referred to herein supra. Capital gains was arrived at Rs.1,76,88,000/- by taking the cost of construction of 22,110 sq.ft. at Rs.800/- per sq.ft. by the Assessee. However, the Assessing Officer, after obtaining information from the builder with regard to the cost of construction which was indicated by the builder to be at Rs.19,42,79,237/-, adopted the same for the purposes of arriving at the correct capital gains and accordingly made certain additions by adopting the value as indicated by the builder. Thereafter a tax demand was raised on the assessee, who being aggrieved by the said order of assessment filed an

appeal before the CIT (Appeals). Appellate Commissioner after having noticed that the dispute was with regard to calculation of value of gross consideration received by the assessee held that advertisement cost, extra amounts paid to land lord and the assessee are not part of actual cost of construction. Hence, the capital gains as shown and calculated by the assessee came to be accepted and addition of Rs.53,26,567/- made by the Assessing Officer came to be deleted.

4. Revenue carried the matter in appeal before the Tribunal which did not find favour and accordingly it was held that Long Term Capital Gains arrived at by the assessee is fair which does not require interference and the addition made on this amount which was deleted by the CIT (Appeals) came to be confirmed vide order dated 31.3.2009, which is under challenge in this appeal.

5. We have heard the learned Advocates i.e. Sri.K.V.Aravind, learned counsel appearing for the Revenue and Sri.A.Shankar, learned counsel appearing for the assessee.

6. Sri.K.V.Aravind would contend that Tribunal has committed an error in proceeding to decide the matter on merits when the assessment order itself was set aside by the Commissioner in exercise of his power under Section 263 of the Income Tax Act (for short hereinafter referred to as 'the Act' for short) with a direction to the Assessing Officer to redo the same. As such the Tribunal ought to have held that appeal by the assessee before CIT (A) itself had become infructuous and accordingly it should have allowed the appeal filed by the revenue. He would further contend that Assessing Officer, on the basis of 18% of the project cost of Rs.19.43 crore, had arrived at the capital gains which came to be deleted by the Appellate Commissioner

which was without taking into consideration the additional expenditure incurred by the assessee and also not noticing the fact that agreement which was relied upon by the assessee was subject to MOU and the issue regarding cost of construction was not required to be examined inasmuch as it is the percentage of constructed area i.e., 18% of super-built area to which the assessee was entitled which was to be taken into consideration and it was this precise exercise which was undertaken by the Assessing Officer and the mode adopted by the Assessing Officer and same having not been disturbed by the Appellate Commissioner, said Authority could not have allowed the appeal by assessee by accepting the method of calculation as done by the assessee which was based on a clause in the agreement relating to valuation which indicated the cost of construction at Rs.800 per sq.ft. and contends same is erroneous. He further submits that on these grounds the substantial questions of law formulated be

considered in favour of the Revenue and against the assessee.

7. Per contra, learned counsel for the assessee would support the orders passed by the Appellate Commissioner as well as the Tribunal and contends that in the return of income filed by the assessee, the valuation as indicated in the agreement dated 23.8.2001 clearly indicated the basis for calculation of capital gains and the cost of construction having been indicated at Rs.800/- per sq ft., proportionately in respect of 18% of total construction to which the assessee was entitled was calculated and adopted for the purposes of long term capital gains and it is not the value of construction which was adopted by the builder which would be the basis and hence he submits that finding recorded by the Appellate Commissioner as well as the Tribunal is not liable to be interfered. He would also submit that under Section 45 of the Act, the

computation of capital gains is to be made and for the said purpose Section 48 of the Act requires to be looked into which would indicate that for the purposes of arriving at the valuation, it is full value of consideration as agreed to between the parties which has to be taken into consideration. Hence, he submits that substantial questions of law be answered in favour of the assessee by rejecting the appeal of the Revenue.

8. This Court has admitted the appeal to consider the following two substantial questions of law:

- a) *Whether the Tribunal was correct in proceeding to decide the matter on merits when the assessment order, subject matter of the appeal was set-aside by the Commissioner of Income Tax under Section 263 of the Act with a direction to the Assessing Officer to redo the same and consequently the appeal before the Tribunal has become infructuous?*
- b) *Whether the Appellate Authorities were correct in holding that the addition of Rs.53,26,567/- made by the Assessing Officer on the basis of the 18% of the project cost of Rs.19.43 crores is liable to be deleted without taking into*

consideration the additional expenditure incurred by the assessee for extra amenities?

9. We have heard learned counsel for the parties and perused the records.

RE.SUBSTANTIAL QUESTION OF LAW NO.1:-

10. Insofar as this question of law is concerned, we are of the considered view the said issue is no more *res integra* in view of the fact that in ITA NO.775/2009 we have answered the same in favour of the assessee and as such it does not detain us long to hold that answering said question of law would only be a repetition. In the said appeal, which was also between the same parties, the question has been answered in favour of the assessee and accordingly it is answered.

RE. SUBSTANTIAL QUESTION OF LAW NO.2: -

11. Assessee in the instant case in the return of income filed has adopted the cost of the built area of

22,112 sq.ft. at Rs.800/- per sq.ft. and arrived at the value of Rs.1,76,88,000/- for the purposes of long term capital gains. Besides this, Rs.20,00,000 paid by the developer towards non-refundable deposit has also been included, which was also reflected in the agreement dated 23.8.2001. Accordingly, the same was also offered for long term capital gains. However, the Assessing Officer without rejecting the said calculation adopted by the assessee has proceeded to calculate the long term capital gain on the basis of the information that was received from the developer/builder whose books of accounts indicated that cost of construction was Rs.19,79,237.54 and in view of 18% of super built area that was agreed to be handed over to assessee, the assessing officer proportionately apportioned the cost of construction to the assessee. The proportionate project cost which was assigned to the assessee was arrived at by the Assessing Officer at Rs.3,49,70,263/- and accordingly, the additions came to be made.

12. The core issue relates to calculation of gross consideration received by the assessee. A perusal of the assessment order would clearly indicate the calculation in respect of cost of construction made by the assessee has not been rejected by the Assessing Officer. However, he has substituted a different mode viz. adopted different valuation i.e., project cost valuation on the basis of cost of construction indicated by the builder in its books of accounts and same has been taken into consideration as the total project cost. In fact, Appellate Commissioner has noticed that the ledger account of the developer as on 31.3.2005 was also indicating that Rs.1,42,84,405/- was the expenses booked on account of advertisement charges incurred and which had been paid by developer towards cost of construction and developer had also taken into consideration the amounts paid to the assessee for vacating the premises and the amount paid to the land lord towards cost of construction or project. On the said basis it has been

held that these amounts would not form part of cost of construction. The non-refundable amounts paid to the land lord as well as the assessee was to acquire the vacant possession of the property in question and remotely taken up held to be part of cost of construction and so also advertisement cost which had been incurred by the developer. What was agreed to between the parties under the Tripartiate agreement 23.8.2001 was that the assessee was to be given on lease 18% of the undivided share in the land and proportionate super built area. At this juncture it would be apt to note that the valuation as adopted by the parties and agreed to under the Tripartiate agreement with regard to construction reads as under:-

CONSIDERATION:

- (i) The Third party shall pay a consideration of Rs.1,40,00,000/- (Rupees One Crore Forty Lakhs only) to the First party, in the following manner:-
 - (a) Rs.10,00,000/-(Rupees Ten Lakhs only) already paid by Draft No.165938

date 15.09.1997 drawn on Lord Krishna Bank Ltd., payable at Chennai;

(b) Rs.1,30,00,000/- (Rupees One Crore Thirty Lakhs only) on receipt of No-Objection Certificate under Chapter XX-C of the Income Tax Act, 1961, against delivery of possession of the schedule property and against execution of a power of Attorney and /or registration of lease deed as per Clause 15.3 below whichever is later;

VALUATION:

For the purpose of the valuation of the lease of the undivided 50% (Fifty percent) share in the land in favour of the Third Party or anyone nominated by the Third Party is arrived at as under:-

(a) Approximately 50,000 sq.ft. super built-up area i.e., 50% constructed super built up area at the rate of Rs.800/- per sq.ft of the cost of the construction.

Rs.4,00,00,000/-

(b) Consideration

Rs.1,40,00,000/-

Total

Rs.5,40,00,000/-

13. A perusal of the above clause would indicate for the purposes of valuation of the lease of undivided

50% share in the land in favour of the third party (developer) has been arrived at Rupees Four Crore by calculating 50,000 sq.ft. as the super built up area i.e. 50% of the constructed super built area by adopting the rate of construction at Rs.800/- per sq.ft. and accordingly, the total sum payable has been arrived at Rupees Four Crore and the consideration of Rs.1,40,00,000/- paid to the land lord has also been included in the said valuation. In fact it requires to be noticed at this juncture itself that developer has provided certain extra amenities in respect of 18% of super built area to be delivered to the assessee for which the assessee has paid a sum of Rs.90,55,695/- which also came to be allowed by the Assessing Officer.

14. The cost of construction having been agreed upon between parties at Rs.800/- per sq. ft. and same being the full value of consideration which was agreed to between the parties and which was not rejected by

the Assessing Officer by assigning reasons, same ought to have been accepted. We are of the considered view that amount of Rs.1,40,00,000/- paid to the land lord to be accepted as part of actual construction and as such we are of the view that the finding arrived at by the Appellate Commissioner at Paragraph 6 by holding payment of Rs.1.40 crores made to owner and amount paid to assessee to vacate the premises had nothing to do with the construction and it is also held that same is in consonance with the Tripartiate Agreement entered into between the parties and in that view of the matter it is to be held that the Appellate Authorities were correct in holding that the addition of Rs.56 lakh made by the Assessing Officer on the basis of project cost indicated by the developer is liable to be deleted. The Assessing Officer has not gone into the issue of valuation adopted by the assessee, about and with regard to its correctness, the CIT (appeals) has proceeded to delete the additions made by the Assessing Officer on the facts

obtained which we find that there is no infirmity. Said reasoning is just and proper.

15. Hence, we are answering the substantial questions of law in the affirmative i.e. in favour of the assessee and against the revenue.

16. Hence, the following:-

O R D E R

- i) Appeal is hereby dismissed;
- ii) Order passed by Income Tax Appellate Tribunal, Bangalore Bench, Bangalore, in ITA No.1110/Bang/2008 dated 31.3.2009 is hereby affirmed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**