IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF DECEMBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR

I.T.A.No.475/2016

BETWEEN :

1 . THE PR. COMMISSIONER OF INCOME TAX
C.R.BUILDING, ATTAVARA
MANGALURU-575 001

2 . THE ASST. COMMISSIONER OF
INCOME TAX, CIRCLE-1 (1),
C.R.BUILDING, ATTAVARA,
MANGALURU-575 001 ...APPELLANTS

(BY SRI K.V.ARAVIND, ADV.)

AND :

SMT.SAROJINI M. KUSHE
P.V.S. BEEDIES PVT. LTD.,
KODIALBAIL, MANGALURU-575 001
PAN: ADUPK 2615C ...RESPONDENT

(BY SRI A.SHANKAR, SENIOR COUNSEL A/W
SRI A.MAHESH CHOWDHARY, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 27.04.2016 PASSED IN ITA NO.989/BANG/2014, FOR THE ASSESSMENT YEAR 2011-2012 PRAYING TO 1.

FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. 2. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BENGALURU IN ITA NO.989/BANG/2014 DATED 27.04.2016 CONFIRMING THE ORDER OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASST. COMMISSIONER OF INCOME TAX, CIRCLE-1(1)(1), MANGALURU.

THIS APPEAL COMING ON FOR HEARING, THIS DAY, ***S. SUJATHA, J.***, DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' for short) challenging the order dated 27.04.2016 passed by the Income Tax Appellate Tribunal, Bangalore Bench "A", Bengaluru ('Tribunal' for short) in ITA No.989/Bang/2014 relating to the Assessment Year 2011-12.

2. This appeal was admitted by this Court to consider the following substantial question of law;

"Whether on the facts and circumstances of the case and in law, the Tribunal was right in holding that the guidance value is the sale consideration for computing capital gain when the terms and conditions of the agreement specify the value of consideration and when the provisions of section 48 specify the "full value of consideration" is received or accrued?"

3. The respondent – assessee is an individual deriving managerial remuneration from M/s PVS Beedies (P) Ltd. The assessee filed return of income for the assessment year under consideration declaring the total income of Rs.28,39,420/- and subsequently filed revised return of income declaring the income of Rs.1,02,10,700/- including an additional income of Rs.73,71,275/- on account of the capital gain.

4. The assessee had entered into a Joint Development Agreement ('JDA' for short) with M/s R&S Turnkey Contractors Private Limited for development of 84 cents of land. As per the JDA dated 21.10.2010, the

assessee was entitled to 30% of the total saleable super built up area. In the supplementary JDA dated 26.5.2011 the sharing ratio was revised to 26.89% and 73.11% between the assessee and the developer. The assessing officer had brought to tax Rs.5,68,19,443/- as capital gains by adopting cost of construction as sale consideration based on JDA between the assessee and M/s R&S Turnkey Contractors Private Ltd.

5. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) which came to be allowed directing the assessing officer to adopt fair market value basing on the Government records as deemed consideration for the purpose of calculation of capital gain. Being aggrieved by the order of the Commissioner of Income Tax (Appeals), the Revenue preferred an appeal before the Tribunal. The Tribunal placing reliance on the decision of its Coordinate Bench in the case of M/s ***Shankar Vittal***

Motor Co. Ltd., held that variation of the capital gain should be appropriate to adopt fair market value/asset as deemed consideration, but not the cost of construction, upholding the order of the Commissioner of Income Tax (Appeals). Hence, this appeal by the Revenue.

6. Learned counsel appearing for the Revenue argued that the Tribunal has grossly erred in holding that the guidance value has to be adopted for computing the capital gains when the terms and conditions of the agreement specify the value of consideration. Referring to Section 48 of the Act, it was argued that "full value of consideration" has to be interpreted with reference to cost of construction. Section 50C was also referred to. It was agued that Section 50D of the Act which has come into effect from 1.4.2013 is not applicable to the facts of the present case.

7. Learned Senior counsel representing the respondent – assessee submitted that for the assessment year under consideration, there is no provision in the Act which contemplates as to how full value of consideration has to be determined when an assessee entered into a JDA. Placing reliance on ***CIT v. B.C.Srinivasa Setty, reported in (1981) 128 ITR 294 (SC)*** submitted that there can be no capital gains arising on entering into JDA during the assessment year under consideration, as the Act does not contemplates the method of computation of capital gains. Alternatively, learned Senior Counsel submitted that the guidance value of the extent of land which is transferred to the developer, prevailing as on the date of transfer would be deemed to be consideration accrued to the assessee as on the date of the transfer. Referring to Section 50D of the Act it was submitted that where the value of the consideration is not ascertainable as on the date of the

transfer, as in the present case, the same market value of the capital asset shall be deemed to be the full value of consideration received or accruing as a result of such transfer. This provision indicates that the same is clarificatory in nature. Reliance was placed on ***CIT v. Podar Cement (P) Ltd., reported in (1997) 226 ITR 625 (SC)*** and ***CIT v. Vatika Township (P) Ltd, reported in (2014) 367 ITR 466 (SC).*** It is also argued that when the entire issue being revenue neutral, no addition is required.

8. We have carefully considered the rival submissions made by the learned counsel appearing for the parties and perused the material on record.

9. Section 45 of the Act reads thus:

> ***"Capital gains.***
>
> *45. (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise*

provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place."

Section 48 of the Act reads thus:

*"**Mode of computation.***

48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;

(iii) in case of value of any money or capital asset received by a specified person from a specified entity referred to in subsection (4) of section 45, the amount

chargeable to income-tax as income of such specified entity under that sub-section which is attributable to the capital asset being transferred by the specified entity, calculated in the prescribed manner:

Provided……"

10. On combined reading of these provisions, any profits or gains arising from the transfer of a capital asset with the exception as saved in Sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H shall be chargeable to income tax under the head capital gains and by legal fiction it is deemed to be the income of the previous year in which the transfer took place. The mode of computation as prescribed under Section 48 would indicate that the income chargeable under the head capital gains shall be computed by deducting the following amounts from the full value of consideration received or accrued as a result of the transfer of the capital asset. [1] expenditure incurred wholly or exclusively in connection with such transfer [2] cost of

acquisition of the asset and the cost of any improvement thereto. Special provision for full value of consideration in certain cases is dealt by Section 50C which reads as under:

> ***"Special provision for full value of consideration in certain cases.***
>
> *50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer:*
>
> ***Provided** ....."*

Section 50D of the Act reads thus;

"***Fair market value deemed to be full value of consideration in certain cases.***

50D. Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer."

11. Now the main controversy revolves around the determination of full value of consideration. The expression 'full value of consideration' has been dealt by the Hon'ble Supreme Court in the case of ***Commissioner Of Income-Tax, West V/s. George Henderson And Co. Ltd. [(1967) 66 ITR 622 (SC)]*** as under:

"It is manifest that the consideration for the transfer of capital asset is what the transferor receives in lieu of the asset he parts with, namely, money or money's worth and, therefore, the very asset transferred or parted with cannot be the consideration for the transfer. It follows that the expression "full consideration" in the main part of section 12B(2) cannot be construed as having a reference to the market value of the asset transferred but the expression only named the full value of the thing received by the transferor in exchange for the capital asset transferred by him. The consideration for the transfer is the thing received by the transferor in exchange for the asset transferred and it is not right to say that the asset transferred an parted with is itself the consideration for the transfer. The main part of section 12B(2) provides that the amount of a capital gain shall be computed after making certain deductions from the "full value of the consideration for which the sale, exchange or transfer of the capital asset is made". In case of a sale, the full value of the consideration is

the full sale price actually paid. The legislature had to use the words "full value of the consideration" because it was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money. If it is therefore held in the present case that the actual price received by the respondent was at the rate of Rs.136 per share the full value of the consideration must be taken at the rate of Rs.136 per share. The view that we have expressed as to the interpretation of the main part of section 12B(2) is borne out by the fact that in the first proviso to section 12B(2) the expression "full value of the consideration" is used in contradistinction with "fair market value of the capital asset" and there is an express power granted to the Income-tax Officer to "take the fair market value of the capital asset transferred" as "the full value of the consideration" and "fair market value of the capital asset transferred" and it is provided that if certain conditions are satisfied as mentioned in the first proviso to section 12B(2), the market value of the asset

transferred, though not equivalent to the full value of the consideration for the transfer, may be deemed to be the full value of the consideration. To give rise to this fiction the two conditions of the first proviso are : (1) that the transferor was directly or indirectly connected with the transferee, and (2) that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 12B. If the conditions of this proviso are not satisfied the main part of section 12B(2) applies and the Income-tax Officer must take into account the full value of the consideration for the transfer.

Fourthly, a related objection has been raised in Para 9 of your letter dated 02.06.2014. You have stated that, "full value of consideration cannot be construed as having a reference to the market value of the asset transferred.""

12. Learned counsel for the Revenue argued that Section 50C is applicable where the consideration is

less than the guidance value and as such the same is not applicable to the facts of the present case. Similarly, Section 50D is also not applicable which has come into force with effect from 01.04.2013; thus, cost of construction would be the appropriate mode. However, we are not inclined to accept the arguments of the Revenue in entirety for the reason that the entire issue is revenue neutral. The Tribunal has categorically observed that "even otherwise, if any capital gains to be accrued in favour of assessee after receiving the possession of the property, certainly that would also be subject to capital gains." It is thus clear that in the event the assessee were to dispose of the built up area, on any part thereof, after receipt of the same from the developer, it would have to necessarily pay tax on the capital gains in the year of such sale and the cost of such built up area to be reckoned for the purpose of indexation which would be proportionate to the fair market value of land. At this juncture, it would be

beneficial to refer to the judgment of the Hon'ble Apex Court in the case of ***Commissioner of Income-tax V/s. Excel Industries Ltd., [(2013) 358 ITR 295]*** wherein the Hon'ble Apex Court has observed thus:

> *"**32.** Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."*

Similarly, in the case of ***Commissioner of Income-tax V/s. Bilahari Investment [P.]. Ltd., [(2008) 215 CTR 201 (SC)]***, the Hon'ble Apex Court has observed thus:

> *"**20.** As stated above, we are concerned with assessment years 1991-1992 to 1997-1998. In the past, the Department had accepted the completed contract method and because of such acceptance, the assessees, in these cases, have followed the same method of accounting, particularly in the context of chit discount. Every assessee is entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method. Further, in the present cases, we find from the various statements produced before us, that the entire exercise, arising out of change of method from completed contract method to deferred revenue expenditure, is revenue*

neutral. Therefore, we do not wish to interfere with the impugned judgment of the High Court."

13. In the present case, Assessing Officer has adopted the rate of Rs.1600/- per square feet merely based on the letter given by the developer which is not supported with any particulars. It cannot be ruled out the possibility of the developer giving an inflated figure to suit his requirements in order to gain minimum tax on his profits by inflating his costs. As such, the basis for determination of full value of consideration by the Assessing Officer based on the letter of the developer cannot be appropriate. No doubt at the relevant period, no provision was available in cases where the consideration received or accruing as a result of transfer of a capital asset by an assessee is not ascertainable. Section 50D inserted by Finance Act, 2012 with effect from 01.04.2013 would throw some light on the said issue. As per the memorandum to Finance Bill, 2012,

the reasoning for inserting Section 50D of the Act is as under:

> *"Capital gains are calculated on transfer of a capital asset, as sale consideration minus cost of acquisition. In some recent rulings, it has been held that where the consideration in respect of transfer of an asset is not determinable under the existing provisions of the Income-tax Act, then, as the machinery provision fails, the gains arising from the transfer of such assets is not taxable.*
>
> *It is, therefore, proposed that where in the case of a transfer, consideration for the transfer of a capital asset(s) is not attributable or determinable then for purpose of computing income chargeable to tax as gains, the fair market value of the asset shall be taken to be the full market value of consideration."*

Even in terms of this provision, cost of construction would not be the appropriate method to arrive at the full market value of consideration.

14. In ***Seshasayee Steels [P.] Ltd., V/s. Assistant Commissioner of Income Tax, Company Circle VI[2], Chennai [(2020) 115 taxmann.com 5 (SC)]*** while considering the provision of Section 53 of the TP Act in the context of capital gains under the Income Tax Act, it has been held thus:

> *"**11.** In order that the provisions of Section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of Section 53A can be said to be attracted on the facts of a given case.*

12. *On a reading of the agreement to sell dated 15.05.1998, what is clear is that both the parties are entitled to specific performance. (See Clause 14)*

13. *Clause 16 is crucial, and the expression used in Clause 16 is that the party of the first part hereby gives 'permission' to the party of the second part to start construction on the land.*

14. *Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, Section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone."*

15. It was argued by the learned counsel for the assessee that when the scheme of the Act does not contemplate the method of computation, no capital gains could be computed, placing reliance on ***B.C.Srinivasa Setty*** supra. It appears to overcome this aspect, a machinery provision has been introduced by way of Section 50D of the Act. Though the said provision has come into effect from 1.4.2013, it certainly throws some light on the mode of computation under Section 48 of the Act. In the circumstances, we are of the considered opinion that the guidance value of the land or the guidance value of the building would be appropriate mode to determine the full value of consideration in the case of a transfer where consideration for the transfer of a capital asset is not attributable or determinable. Hence, guidance value adopted by the Tribunal cannot be faulted with.

16. Though the Tribunal in ***ITO, Ward-7(2), Bangalore V/s. N.S.Nagaraj [(2014) 52 Taxman 211]***, has held that full consideration would be the cost of construction incurred by the builder on the assessee's share of constructed area, because the assessee would receive the constructed area in view of the land share, the same not having been challenged, we are not inclined to subscribe to the same, for the reasons stated in the preceding paragraphs. Moreover, in that case, Commissioner of Income Tax [Appeals] has held that no capital gains accrues to the assessee on account of transfer of the asset. Having regard to the facts and circumstances of the case, the Tribunal having exercised its discretionary power adopted the guidance value of the land as the mode for determination of full value of consideration, the same being not perverse or arbitrary, we are not inclined to interfere with the impugned order.

17. As the issue relates to pure question of facts, no substantial question of law arises for our consideration.

Accordingly, appeal stands dismissed.

SD/-
JUDGE

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