

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2314/Bang/2016
Assessment Year: 2006-07

M/s. Anugraha Shelters (P) Ltd. 310, 3 rd Floor, Rear Entrance Swiss Complex No.33, Race Course Road Bangalore 560 001 PAN NO :AAECA9517H	Vs.	Deputy Commissioner of Income-tax Circle-11(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Jinita Chaterjee, A.R.
Respondent by	:	Shri Swaroop Mannava, D..

Date of Hearing	:	18.11.2021
Date of Pronouncement	:	22.11.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 21.3.2014 passed by Ld. CIT(A)-1 Bangalore and it relates to assessment year 2006-07. The grounds of appeal urged by the assessee give rise to the following two issues:-

- a) Validity of reopening of assessment
- b) Assessment of capital gain of Rs.1,00,74,435/- upon entering joint development agreement.

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2. The facts relating to the case are stated in brief. The assessee is a builder. It filed its return of income for the year under consideration on 30.11.2006 declaring loss of Rs.83,677/-. The return was processed u/s 143(1) of the Income-tax Act,1961 [the Act' for short].

3. Subsequently, it came to light of the A.O. that the assessee has entered into a joint development agreement with M/s. Vastu Structures Pvt. Ltd. on 29.12.2005 for construction of an apartment project in respect of a land owned by the assessee admeasuring 9600 sq.ft. at Kammanahalli Village, Begur, Hobli. As per the above agreement, the assessee has agreed to convey or transfer 65% of share of undivided interest in the above said land and in consideration thereof, agreed to receive 35% of the built up area in the apartment project. The assessee also has received Rs.10 lakhs as refundable deposit for having handed over the property to the builder. It was noticed that the assessee has not declared any capital gain in the return of income filed by the assessee for AY 2006-07. The A.O. took the view that capital gains income has arisen to the assessee on account of above cited Joint Development Agreement. Since the assessee has not declared capital gain, the AO reopened the assessment u/s 147 of the Act by issuing notice u/s 148 of the Act on 30.3.2013.

4. Before the A.O., the assessee contested the reopening of assessment. The assessee also submitted that the above said land has been held as stock in trade by the assessee and not as "capital asset". The A.O. took the view that the assessee has purchased the land for investment purposes. Accordingly, he held the same as capital asset. By invoking provisions of section 2(47)(v) of the Act, the A.O. held that there was transfer of asset within the meaning of

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section 53A of the Transfer of Property Act. In this regard, the A.O. placed reliance on the decision rendered by Hon'ble Karnataka High Court in the case of CIT Vs. Dr. T.K. Dayalu 202 Taxman 531. Accordingly, he computed short term capital gain of Rs.1,00,74,435/- and assessed the same in the hands of the assessee.

5. Before Ld. CIT(A), the assessee challenged both validity of reopening of assessment and assessment of short term capital gain in the hands of the assessee. The Ld. CIT(A) upheld the validity of reopening of assessment and also assessment of short term capital gain. Aggrieved, the assessee has filed this appeal before us.

6. The Ld. A.R. submitted that the assessee herein has entered into Joint Development Agreement on 29.12.2005 and also executed a General Power of Attorney on the very same day in favour of the developer M/s. Vastu Structures Pvt. Ltd. He submitted that the assessee has not received any consideration on the date of entering Joint development agreement. It has received only a refundable deposit of Rs.10 lakhs and the said fact is mentioned in the Joint development agreement. The Ld. A.R. further submitted that one of the main conditions for attracting provisions of Section 53A of the Transfer of Property Act is that the possession of property should have been take over by the transferee. However, in the joint development agreement, it has been specifically mentioned that possession of the property was not given in part performance of the contract u/s 53 of the Transfer of property Act. It is submitted that the developer was granted irrevocable permission and license to enter the property for the purpose of construction of residential apartments, which cannot be considered as giving of Possession of land. Accordingly, she

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submitted that the provisions of section 53A of the Transfer of Property Act shall not apply to the facts of the present case and hence section 2(47)(v) of the Act is also not applicable.

7. The Ld. A.R. further submitted that the A.O. has assessed the income under the head “Capital gain”. She submitted that the assessee is holding the property as stock in trade only in its books of accounts and hence the A.O. was not justified in treating the stock in trade as capital asset and assessing the capital gains. Accordingly, the Ld. A.R. submitted that the Ld. CIT(A) was not justified in upholding the assessment of short term capital gains. The Ld A.R placed her reliance on the following case law:-

- (a) Smt. Kavitha Kamlesh shah vs. ACIT (ITA Nos.1508 & 1509/Bang/2016 dated 25-06-2021)
- (b) M/s Agnus Holdings P Ltd vs. DCIT (ITA Nos.410/Bang/2016 dated 01-09-2021).

8. The Ld. D.R. on the contrary submitted that the assessee has transferred the property under Joint development agreement and hence the decision rendered by Hon’ble Karnataka High Court in the case of Dr. T.K. Dayalu (supra) shall squarely apply to the facts of the present case.

9. We heard the rival contentions and perused the record. We notice that the original return of income has been processed u/s 143(1) of the Act. Even though the AO has reopened the assessment after expiry of four years from the end of the assessment year, yet the proviso to sec.147 is not applicable, since the original assessment was done u/s 143(3) of the Act. The Ld A.R submitted that the assessee has disclosed the assets as “current assets” only in the Balance Sheet. Accordingly, the Ld A.R

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submitted that the AO has not brought on record any fresh material and hence the AO could not have entertained belief that there was escapement of income. However, it is an admitted fact that the Joint Development Agreement was not furnished by the assessee along with return of income and the details of JDA came to the notice of the AO only subsequently. Thus JDA would constitute fresh material. It is a settled proposition of law that the entries made in the books of account will not be deciding factor in so far as Income tax Act is concerned. Hence we are of the view that there was sufficient reason for the AO to entertain the belief that there was escapement of income. Accordingly, we uphold the validity of reopening of assessment.

10. We notice that the assessee has entered into a joint development agreement on 29.12.2005 and on the very same day a supplementary joint development agreement was also entered. Both the agreements have been registered with the registration authorities. The last paragraph in page 4 of the supplementary joint development agreement is relevant here and the same reads as under:-

“The I Party or Owners hereby undertake to convey or transfer at the cost of the II Party or Developers 65% share of undivided interest in the Schedule property to the II party or Developers at their request to their nominees or buyers located by them at rates which may be decided by the II Party or Developers and hereby grant them exclusive rights to construct the residential apartments as per the sanctioned plan to be obtained from the sanctioning authorities based on the approved plan. For this purpose, the I Party or Owner hereby grant them irrevocable permission and license including authority to the II Party or Developers to enter upon the Schedule Property for the purpose of construction residential apartments as per the sanctioned plan to be obtained. The II Party or Developers shall enter upon the Schedule Property for commencing the preliminary work and continue to exercise the said right throughout the construction period until the completion the

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entire project. This license however shall not be construed as possession delivered in part performance under Section 53 of Transfer of Property Act nor any property right shall be deemed to vest in favour of the II Party or Developers, save as expressly provided in this agreement. The I Party or Owners shall not enter into any agreement with any party to sell 65% of undivided share in scheduled property or any part thereof which is allotted to the II Party or Developers except to the nominees of the II Party or Developers or the buyers located by them.”

We notice that the AO has also extracted the above cited clause in the assessment order, but conveniently omitted the a portion of the paragraph highlighted above.

10. A careful perusal of the above said paragraph of the agreement would show that the developer is granted irrevocable permission and license to enter the scheduled property for the purpose of construction of residential apartments as per the plan to be obtained. It is specifically been mentioned that the license so granted shall not be considered as possession delivered in part performance of the contract u/s 53(sic. 53A) of Transfer of property Act nor any property right shall be deemed in favour of developer.

11. We notice that the AO has invoked the provisions of sec.2(47)(v) of the Act, which reads as under:-

“2(47) “transfer” in relation to a capital asset includes

.....

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882).”

The provisions of section 53A of the Transfer of property Act reads as under:-

“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his

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*behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”*

12. A careful perusal of the above said provision would show that the transferee should have taken possession in part performance of the contract and has done same act in furtherance of the contract. In the instant case, development agreement clearly specified on the possession of the property was not given and what was given is only license to enter the property. The question whether granting of such kind of license would amount to “Possession” within the meaning of sec.53A of Transfer of Property Act r.w.s sec. 2(47)(v) of Income tax Act was examined by the Bangalore SMC bench of Tribunal in the case of Smt. Lakshmi Swarupa vs ITO (ITA No.2278/Bang/2018 dated 12.10.2018). The relevant observations made and decision taken by the Tribunal in the above said case are extracted below:-

"4. Clause 1 of the JDA provides as follows:

"1) PERMISSION FOR DEVELOPMENT:

1.1) The Owner is in possession and enjoyment of the Schedule Property. The Owner hereby authorize the Promoter for the purpose of development, to enter upon the Schedule Property and develop the same, however the authority so granted does not in any manner be construed as delivery of possession by the Owner in part performance of this agreement under [Section 53-A](#) of the Transfer of Property Act or under [Section 2\(47\)\(iv\)](#) of the Income Tax Act, 1961.

1.2) The Owner hereby agrees not to interfere or interrupt in the course of construction and development of the Schedule Property and/or commit any act or omission having the effect of delaying or stopping the work that has to be done under this Agreement. However, the Owner shall always be entitled to inspect the progress of the work and type of work which is being done on the Schedule Property."

.....

9. I have carefully considered the rival submissions. Sec.45 of the Act lays down that profits and gains arising out of transfer of capital asset effected in the previous year shall 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. It is thus clear that there should be transfer during the previous year to attract charge to tax on capital gain. Sec.2(47) of the Act defines "Transfer" for the purpose of the Act. It reads thus:

"Sec.2 (47) "transfer", in relation to a capital asset, includes,--

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein ; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in trade of a business carried on by him, such conversion or treatment ; or (iva) the maturity or redemption of a zero coupon bond; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in [section 53A](#) of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation [1]: For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of [section 269UA](#);

10. The clause that was invoked by the revenue authorities in the case of the Assessee is Sec.2(47)(v) of the Act. Under the general law, transfer of immovable property of the value of rupees one hundred and upwards can take place only by a registered deed. If no registered deed is executed in respect of such property, legal title or ownership is not effectively conveyed to the transferee although transferee might have paid entire consideration and/or obtained possession from the transferor in pursuance of contract of sale. "Transfer" in [section 2\(47\)](#) also envisaged execution of registered deed in such circumstances. Capital gains become liable to be charged to tax only if they arise as a result of "transfer" of capital asset and the date on which they arise is date of "transfer". If as a result of mutual arrangement by parties or otherwise, no registered deed is executed even after transaction is completed by delivery of possession and receipt of consideration, capital gains tax would escape assessment altogether or if such execution of registered sale-deed is postponed, the capital gains tax would also be postponed. In several cases it suited the parties to complete such transactions without execution of registered deed and thereby evade payment of tax on capital gains. It is in order to plug this loophole that cl. (v) was inserted in [section 2\(47\)](#) to lay down that transfer would include any transaction involving allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in [section 53A](#) of Transfer of Property Act. Thus, the Provisions of Sec.53A of the Transfer of Property Act, 1882 stand incorporated into the provisions of the [Income Tax Act](#), 1961. If that be so then the Tax authorities for coming to a conclusion that provisions of Sec.53A of the Transfer of Property Act, 1882 are attracted to a particular transaction have to come to a conclusion the transaction/agreement in question is such that the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee, has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract.

11. In the present case, the clause in the JDA regarding possession clearly states that what is given is not possession contemplated u/s.53A of the [Transfer of Property Act](#) and that it is merely a license to enter the property

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*for the purpose of carrying out development. Further, the subsequent MOU dated 16.8.2006 and delivery of legal possession on 22.4.2006 clearly shows that there was no transfer within the meaning of Sec.2(47)(v) of the Act during the previous year relevant to AY 2006-07. Therefore, invocation of the provisions of Sec.2(47)(v) in the facts and circumstances of the present case on the basis of clause-1 of the JDA, in my view was not proper. **The possession in the present is traced to the joint development agreement which is in the nature of permissive possession and not possession in part performance of agreement for sale. In the present case, there is no document by which the revenue can come to the conclusion that there was delivery of possession. The mere fact that development of the property cannot be done without possession cannot be the basis to come to a conclusion that possession was delivered in part performance of the agreement for sale in the manner laid down in Sec.53A of the Transfer of Property Act. Such possession as I have already held is on behalf of the Assessee and not in the independent capacity of purchaser of the property.***

12. For the reasons given above, I hold that there was no transfer during the previous year relevant to AY 2006-07. Therefore, capital gain on transfer of the property cannot be assessed in AY 2006-07. The assessment of capital gain in AY 2006-07 is therefore held to be bad and deleted.”

13. In the instant case also, we have noticed that the assessee has given permissive possession and not “legal possession” as contemplated within the meaning of sec.53A of the Transfer of Property Act. Hence we hold that the provisions of sec.53A of the Transfer of Property Act are not applicable to the impugned Joint Development Agreement. In this view of the matter, the provisions of sec.2(47)(v) of the Act are also not applicable. Hence the tax authorities are not justified in invoking the above said provision and consequently, the capital gains assessed in the hands of the assessee is liable to be deleted.

14. Before us, the Ld A.R placed her reliance on the decisions rendered by co-ordinate bench in the case of M/s Agnus Holding P Ltd (supra) and M/s Kavitha Kamlesh Shah (supra). We have gone through both these decisions. We notice that the co-ordinate bench has held that the provisions of sec.53A of Transfer of Property Act

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are not applicable in the above said cases, since the “willingness of the developer to perform his part of contract” is absent, which is a mandatory condition laid down in sec.2(47)(v) of Income tax Act and sec. 53A of Transfer of Property Act. We notice that the decision in the above said cases has been rendered on the basis of facts prevailing in these cases.

15. The Ld A.R has submitted that the impugned land has been held by the assessee as “current asset”/stock in trade and not as Capital asset. Accordingly she argued that the provisions of sec.2(47)(v) are not applicable to the assessee. We have already noticed that the entries made in the books of account are not relevant for Income tax proceedings. Further, all facts relating to the above said contentions are not available on record. In any case, we have already held that the provisions of sec.2(47)(v) are not applicable to the assessee. Hence we are of the view that this contention of the assessee does not require adjudication.

16. In view of the foregoing discussions, we set aside the order passed by Ld CIT(A) and direct the AO to delete the assessment of short term capital gains.

17. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22nd Nov, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 22nd Nov, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.