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IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND SMT. P. MADHAVI DEVI, JUDICIAL MEMBER

ITA No.1057/Bang/2010
Assessment year : 2007-08

M/s. Jaico Automobile Engineering Co. Pvt. Ltd., 9/19, II Stage, D.K. Industrial Area, Mahadevapura, Bangalore – 560 048. **PAN: AAACJ 5640J**	Vs.	The Asst. Commissioner of Income Tax, Circle 11(5), Bangalore.
APPELLANT		RESPONDENT

ITA No.1133/Bang/2010
Assessment year : 2007-08

The Asst. Commissioner of Income Tax, Circle 11(5), Bangalore.	Vs.	M/s. Jaico Automobile Engineering Co. Pvt. Ltd., 9/19, II Stage, D.K. Industrial Area, Mahadevapura, Bangalore – 560 048. **PAN: AAACJ 5640J**
APPELLANT		RESPONDENT

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Assessee by	:	Shri S. Parthasarathi & Smt. Sheetal Borkar, Advocates
Revenue by	:	Shri Farahat Hussain Qureshi, CIT-II(DR)

Date of hearing	:	12.04.2012
Date of Pronouncement	:	30.04.2012

O R D E R

Per N.K. Saini, Accountant Member

These cross-appeals by the assessee and the department are directed against the order dated 30.06.2010 of the CIT(Appeals)-I, Bangalore.

2. Since the issues involved are common and the appeals were heard together, so these are being disposed of by this consolidated order for the sake of convenience.

3. First, we will deal with the appeal of the department in ITA No.1133/Bang/2010.

4. Following grounds have been raised in this appeal :

> "1. The Order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and circumstances of the case.
>
> 2. The learned CIT (A) has erred in deleting the addition made on account of unaccounted scrap sales to the extent of Rs. 10,00,000-00 out of the total addition of Rs.25,76,253-00 made on this account, without a proper basis and without appreciating the facts and circumstances under which the additions were made by the Assessing Officer.
>
> 3. The learned CIT(A) has erred in deleting the addition made on account of unaccounted scrap sales without considering the fact that the alleged unaccounted scrap sales was found in the

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course of survey and the assessee could not produce any evidence for the argument that the same is included in the scrap sales already shown in the books of accounts.

4. Without prejudice to the above, the CIT(A) is not correct in holding, after considering the facts and statement of Sri Ajmera, who was interrogated during the course of survey, that the Assessing Officer has not disputed the statement of Sri Ajmera.

5. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT (A) be reversed in so far as the above mentioned issue is concerned and that of the assessing officer be restored.

6. The appellant craves leave to add, to alter, to amend or to delete any of the grounds that may be urged at the time of hearing of the appeal."

5. From the above grounds, it is gathered that the only grievance of the department relates to the relief allowed to the assessee out of the addition made by the AO on account of unaccounted scrap sales.

6. The facts of the case in brief are that the assessee was engaged in the business of bus body building and fabrication. The return of income was filed on 31.01.2008 declaring a total income of Rs.6,52,46,566, the said return was processed u/s. 143(1) of the Income-tax Act, 1961 [hereinafter referred to as "the Act" in short"] on 18.03.2009.

7. A survey u/s. 133A of the Act was conducted in the business premises of the assessee on 22.02.2008, consequent to the survey and material found at the time of survey, the case was selected for scrutiny. The Assessing Officer pointed out that during the course of survey, details of scrap sales were found, but the assessee out of total scrap sales, recorded only sales worth Rs.31,45,974 and the balance sales of

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Rs.25,76,253 was not accounted for in the books. The AO asked the assessee for explanation, one of the employee of the assessee viz., Mr. S.K. Ajmera replied as under:-

> " Out of the above amounts, Rs. 10 lakhs has already been included in the sales shown for the financial year 2006-07. The details of the same will be furnished in your office shortly."

8. The AO observed that the assessee did not furnish any evidence to substantiate its claim that Rs.10 lakhs of the above sale had already been offered to tax in the earlier years. He accordingly added a sum of Rs.25,76,253 to the income of the assessee considering the same as unexplained income.

9. The assessee carried the matter to the ld. CIT(Appeals) and the submissions made before him as incorporated in para 15 of the impugned order read as under:-

> " With regard to the impugned addition account of the alleged scrap sale, the assessing authority had alleged that in the course of survey, it was found that details towards scrap sales were amounted to Rs.25,76,253/- which, according to him, was not accounted for in the regular books of accounts. The assessing officer also had observed that the scrap sales to the tune of Rs.31,45,974/- had been recorded in the books of accounts, It was also observed that Sri S.C.Ajmeera, on interrogation, has submitted that out of Rs.25,76,253/-, the appellant company had declared Rs. 10.00 lakhs which included the scrap sales shown in the books of accounts. However, the assessing officer alleged that there was no proof provided by the appellant company to accept the statement of Sri.Ajmeera. Having held, the assessing officer had made the addition of Rs.25,76,253/-.
>
> In this regard, it is submitted that undisputedly the appellant company had declared scrap sales to the tune of Rs.31,45,974/- in the books of accounts and offered for taxation. The alleged unaccounted scrap sales was found in the course of

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survey which was nothing but the sales made for which the amounts were received. It may be noticed that the various dates of sale recorded vary from April to December 2006 and January 2007. The party to whom such sales were made, had also been noted. It may kindly be appreciated that the sales have been recorded in the books of accounts were also with the same party. In other words, all these sales have been recorded in the books of accounts which form part of the total sales of Rs.31,45,984/- as declared. The variations in dates were only on account of the dates of dispatch or delivery and the dates on which the amounts were received. In the circumstances, the impugned addition as made are totally uncalled for and the same was required to be deleted. In the alternative, the statement of Sri Ajmeera should have been given credence to and at least Rs. 10.00 lakhs should have been allowed out of Rs.25,76,253/- and if at all any addition was required, it could only be in respect of the balance."

10. The ld. CIT(A) after considering the submissions of the assessee restricted the addition to Rs.15,76,253 by observing in para 15.1 of the impugned order as under:-

" After considering the facts and statement of Sri Ajmera, not disputed by the A.O, addition is restricted to Rs.15,76,253/-. Appeal is partly allowed."

11. Now both the parties are in appeal. The department is in appeal against the relief of Rs.10 lakhs, while the assessee is in appeal against the sustenance of addition of Rs.15,76,253.

12. The ld. CIT(DR) strongly supported the order of the AO and further submitted that the assessee did not furnish any evidence in support of its claim that a sum of Rs.10 lakhs was offered for taxation in another year, so there was no option left with the AO, except to reject the claim of the assessee and to make the addition.

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13. In his rival submissions, the ld. counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the order passed by the ld. CIT(A) on this issue is a non-speaking order because no cognizance has been given to the submissions made by the assessee and no reason has been given while confirming the addition of Rs.15,76,253.

14. We have considered the submissions of both the parties and carefully gone through the material available on record. In the present case, it is noticed that the ld. CIT(A) in para 15 of the impugned order has reproduced the submissions made by the assessee and finding has been given in para 15.1 of the impugned order, which we have already reproduced in the former part of this order. From the observations of the ld. CIT(A) given in para 15.1, it is clear that no reason or basis has been given while allowing the relief of Rs.10 lakhs and sustenance of addition of Rs.15,76,253. In fact, the order passed by the ld. CIT(A) is a non-speaking order because while concluding the issue, the ld. CIT(A) has not given the reasons and also had not rebutted the contention of the assessee.

15. It is well settled that the order/judgment unsupported by reason is not a judgment in the eyes of law. It is also true that the reasons are the link between the material on record and the conclusion thereafter by the Court/Appellate authority. In our view the Ld. CIT(A) should have properly considered the arguments of the assessee as well as findings given by the Assessing Officer and thereafter he should have made independent findings either in favour or against the assessee. Considering the entire facts, we are of the opinion that the Ld. CIT(A) had not passed a proper

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order in the eyes of law. At this stage, we may refer to the decision of ITAT Ahmedabad Bench in the case *of Gujarat Themis Biosyn Ltd. Vs. J.C.I.T., (2000) 74 ITD 339 (Ahd)*. The ITAT Ahmedabad Bench, while interpreting the provisions of section 250(6) of the I.T. Act, 1961 held as under:

> "The provisions of section 250(6) provides that the appellate orders of the Commissioner (Appeals) are to state the points arising in the appeal, the decision of the authority thereon and the reasons for such decision. The underlying rationale of the provisions is that such orders are subject to further appeal to the Tribunal. Speaking order would obviously enable a party to know precise points decided in his favour or against him. Absence of the formulation of the point for decision for want of clarity in a decision undoubtedly puts a party in quandary. Section 250(6) expressly embodies the principle of natural justice and such a provision is clearly mandatory in nature. The impugned order passed by the Commissioner (Appeals) in violation of the provisions of section 250(6) could not, therefore, be sustained."

16. The ratio laid down by the ITAT Ahmedabad Bench in the aforesaid referred to case is squarely applicable to the facts of the present case.

17. The Hon'ble Punjab & Haryana High Court in the case of *CIT V Palwal Cooperative Sugar Mills Ltd. (2006) 284 ITR 153* has held as under:

> "Every judicial/quasi judicial body / authority must pass a reasoned order which should reflect the application of mind of the concerned authority to the issues / points raised before it. The requirement of recording reasons is an important safeguard to ensure observance of the rule of law. It introduces clarify, checks the introduction of extraneous or irrelevant considerations and minimizes arbitrariness in the decision making process. Another reason which makes it imperative for quasi judicial authorities to give reasons is that their orders are not only subject to the fight of the aggrieved persons to challenge them by filing statutory appeal and revision but also by filing writ petition under article 226 of the Constitution. Such decisions can also be challenged by way of appeal under article 136 of the Constitution of India. The High Courts have the power to issue writs of certiorari to quash the

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> orders passed by quasi judicial authorities / Tribunals. Likewise in appeal the Supreme Court can nullify such order / decision. The power of judicial review can be effectively exercised by the superior courts only if the order under challenge contains reasons. If such order is cryptic and devoid of reasons, the courts can not effectively exercise the power of judicial review."

18. The Hon'ble Supreme Court in the case of *Mangalore Ganesh Beedi Works Vs. CIT and another (2005) 273 ITR 56* has held as under:

> "Though in an order of affirmation in an appeal u/s 260A of Income Tax Act, 1961 repetition of the reasons elaborately may not be necessary, the arguments advanced / points urged have to be dealt with. Reasons for affirmation have to be indicated, though in appropriate cases they may be brief."

It has further been held :

> "Recording of reasons is a part of fair procedure. Reasons are the harbinger between the mind of the maker of the decision in the controversy and the decision or conclusion arrived at. They substitute subjectivity with objectivity. Failure to give reasons amounts to denial of justice."

19. As we have already pointed out that in the present case, the ld. CIT(A) has not recorded any reason in support of his decision, therefore, the failure to give reasons amounts to denial of justice as per the ratio laid down by the Hon'ble Supreme Court in the aforesaid case, therefore, the present case requires readjudication at the level of the AO. Considering the totality of the facts as narrated hereinabove, we are of the opinion that this issue requires readjudication at the level of the AO because one of the reasons for making the addition was that the assessee did not furnish any evidence to substantiate its claim that the income had already been offered to tax in the earlier years. However, in the present case it is not clear as to

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whether the earlier record which was available with the AO had been considered while taking a view that no evidence was produced by the assessee. We therefore deem it appropriate to set aside this issue back to the file of the Assessing Officer for fresh adjudication in accordance with the law, after providing due and reasonable opportunity of being heard to the assessee.

20. Now we will deal with the appeal of the assessee in ITA No.1057/Bang/2010. Following grounds have been raised in this appeal:

> "1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) ought to have allowed the traveling expenses as claimed by the appellant in full and refrained from upholding the disallowance of Rs.1,68,371/-.
>
> 2. The learned Commissioner (A) ought to have appreciated that the traveling expenses incurred by the wife of the Managing Director of the company along with him was essentially required for the business purpose and was liable to be allowed as held in various judicial pronouncements relied upon and cited before him.
>
> 3. The learned Commissioner (A) ought to have appreciated that the interest expenditure incurred by the appellant was exclusively for the purpose of business and no part of the loan was borrowed having been diverted towards non-business purpose.
>
> 4. The learned Commissioner (A) ought to have appreciated that no part of the loan borrowed had been provided to the relatives of the Directors to justify the disallowance as the company had sufficient non-interest bearing funds for such advances.
>
> 5. On the facts the learned Commissioner (A) ought to have accepted the submissions and also evidence placed before him and ought to have refrained from upholding the disallowance as made by the assessing authority.
>
> 6. The learned Commissioner (A) ought to have deleted the addition towards alleged unaccounted scrap sales in full.

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7. The learned Commissioner (A) ought to have accepted the explanations offered by the appellant and appreciated that no part of the scrap sales was unaccounted to justify the upholding of the impugned addition to the extent of Rs. 15,76,253/-.

8. The learned Commissioner (A) erred in upholding the computation of capital gains on the transfer of immovable property to M/s.Gopalan Enterprises in the manner as determined by the assessing authority.

9. The learned Commissioner (A) ought to have appreciated that the sale consideration for the sale of immovable property was only Rs.9 crores and the balance Rs.5 crores was towards development of the area, out of which the profit derived by the appellant was offered for taxation and in the circumstances the capital gains as determined by the assessing authority was opposed to law and the impugned addition in this regard was liable to be deleted.

10. Without prejudice the capital gains computation as computed by the assessing authority was upheld by the learned Commissioner (A) is required to be sustained, then the expenditure towards cost of improvement as claimed by the appellant was required to be allowed in full.

11. The learned Commissioner (A) further ought to have appreciated that the capital gains as computed by the assessing authority having been sustained, the additional income offered out of Rs.5 crores consideration by the appellant in its total income is liable to be deleted.

12. The learned Commissioner (A) erred in upholding the computation of capital gains in respect of alleged transaction with M/s.IDEB.

13. The learned Commissioner (A) ought to have appreciated that the joint development agreement proposed with IDEB had not been effected and the agreement entered into between the parties were not acted upon and consequently there was no transfer for justifying the computation of capital gains in the case of the appellant.

14. On the facts the learned Commissioner (A) ought to have appreciated that the cases cited had no application on the peculiar facts of the transaction and there being no transfer' as contemplated U/s.2(47) of the Act, no capital gains was liable to be computed for the relevant assessment year.

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15. Without prejudice the learned Commissioner (A) ought to have appreciated that on real income theory as propounded by the Hon'ble Supreme Court there was no income under the head 'capital gains' computable for the relevant assessment year to justify the impugned addition and accordingly he ought to have deleted the impugned addition in full.

16. Without prejudice the disallowances are excessive, arbitrary and unreasonable and ought to be deleted in toto.

17. The learned Commissioner (A) erred in confirming the interest levied u/s.234B, 234C and 234D of the Act.

18. For these and other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be allowed."

21. Ground Nos. 1 to 5 relates to the disallowance of the travelling expenses incurred by the wife of Managing Director.

22. The facts related to this issue in brief are that the AO during the course of assessment proceedings noticed that the assessee had debited travelling expenses of Rs.82,58,364 in its books of accounts and the details of travelling expenses revealed that an amount of Rs.1,68,371 was stated to have been incurred for personal purposes, the AO disallowed the same u/s. 37 of the Act.

23. The assessee carried the matter to the ld. CIT(A), who confirmed the action of the AO by observing that the wife of the M.D. accompanied him to take care of his health as an attendant and not out of any obligation having direct nexus with the business activities of the assessee, therefore such expenditure could not be treated to have been incurred wholly and exclusively for the purpose of business of the assessee company. Now the assessee is in appeal.

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24. During the course of hearing, the ld. counsel for the assessee at the very outset stated that this issue is squarely covered by the earlier decision dated 22.03.2012 of this Bench of the Tribunal in assessee's own case in ITA No.1056/Bang/2010 for the A.Y. 2006-07, copy of the said order was furnished.

25. In his rival submissions, the ld. CIT(DR) could not controvert the aforesaid contention of the assessee.

26. After considering the submissions of both the parties and material available on record, it is noticed that similar issue having identical facts was also involved for the A.Y. 2006-07 in ITA No.1056/Bang/2010 in assessee's own case, in the said year vide order dated 23.03.2012 the matter has been remanded back to the Assessing Officer for fresh adjudication and the relevant findings have been given in para 9 of the aforesaid referred to order which read as under:-

> "9. We have considered the submissions of both the parties and carefully gone through the material available on record. In the present case, it is noticed that the AO made the disallowance by observing that the directors and their spouses travelled abroad and that travel was personal in nature. On the other hand, the claim of the assessee is that the director of the company travelled for business purposes and his wife accompanied him. In the present case, the facts are not clear as to whether the director traveled for the business purposes, even there is contradiction in the stand taken by both the parties since the AO mentioned that the expenses were incurred for directors and their spouses, while claim of the assessee is that the wife of one of the director accompanied him because he was suffering from various diseases. The ld. CIT(A) confirmed the action of the AO by observing that the inherent element of enjoyment and entertainment to wife from such trips could not be ruled out. But nothing is brought on record to substantiate the above observations. We therefore considering the totality of the facts as discussed herein above and particularly in the absence of clear

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> facts brought on record, think it appropriate to remand this issue back to the file of the Assessing Officer to be adjudicated afresh in accordance with law, after providing due and reasonable opportunity of being heard to the assessee."

27. So, respectfully following the aforesaid referred to order dated 22.03.2012 in ITA No.1056/Bang/2010 for the A.Y. 2006-07 in assessee's own case, the issue is remanded back to the Assessing Officer for fresh adjudication in accordance with the law, after providing due and reasonable opportunity of being heard to the assessee.

28. The next issue vide ground Nos. 6 & 7 relates to the sustenance of addition of Rs.15,76,253 on account of unaccounted scrap sales. This issue, we have already adjudicated in the former part of this order while adjudicating the departmental appeal in ITA No.1133/Bang/2010 and the matter has been remanded back to the Assessing Officer for fresh adjudication. Therefore these grounds of the assessee's appeal stands disposed of in the same manner as has been done while deciding the departmental appeal and our findings given therein shall apply mutatis mutandis.

29. Vide ground Nos. 8 to 11, the grievance of the assessee relates to the computation of capital gains on the transfer of immovable property to M/s. Gopalan Enterprises.

30. The facts of the case related to this issue in brief are that the AO noticed that during the course of survey u/s. 133A of the Act on 22.2.2008 conducted in the business premises of the assessee, it was found that the assessee had received ₹ 14 crores from M/s. Gopalan Enterprises. He also

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noticed that the assessee originally entered into an agreement on 11.8.06 for sale of property consisting of land and industrial building for an amount of ₹ 19,44,38,720, however the deal could not materialize and revised agreement was entered into on 29.11.2006 for an amount of ₹ 14 crores due to reduction in area of land and building. The AO pointed out that the said sale agreement was split into two parts i.e., ₹ 9 crores towards land and ₹ 5 crores towards sale of improvement and a separate agreement was entered into for sale of improvement. The AO also pointed out that the assessee offered to tax a capital gain of ₹ 5,55,31,547 which was worked out as under:-

"Consideration

a) Value of consideration for Land	: Rs. 7,20,00,000
b) Value of consideration for Bldg	: Rs. 1,80,00,000

TOTAL	: Rs. 9,00,00,000

Cost

a) Value of Land	: Rs. 1,39,78,550
b) Value of Building as per Bldg Block (reduced from block of asset)	: Rs. 1,80,00,000
c) Indexed cost of land	: Rs. 1,42,47,093
d) Brokerage and Legal charges	: Rs. 22,21,360
Capital Gain	: Rs. 5,55,31,547"

31. The AO observed that the assessee had shown expenditure of ₹ 1,63,70,521 on the amount of ₹ 5 crores and the balance amount was

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offered to tax and that Shri S.K. Ajmera, G.M. (Finance) was asked to furnish supporting evidence for the expenditure during the course of survey, but no supporting evidence was produced. The AO considered the expenditure as huge amount of expenses for fencing of the land and asked the assessee to furnish the necessary gate pass entries for the purchases. He also noticed that at the time of survey, no such entry relating to the said purchases was found in the register maintained by the assessee for the purpose of tracking entry, use and exit of material. The explanation of the assessee before the AO was as under:-

> "The above materials were used for fencing, compound wall and other related purposes. Since these materials have been specifically purchased for project, no store records have been maintained by the assessee. As the same has been used for the business, it may be allowed as an expense."

32. The AO did not find merit in the explanation of the assessee by observing in paras 4.11 to 4.14 of the assessment order dated 17.4.09 as under:-

> "4.11 Firstly, as per the original agreement, the total value of land and building measuring 1,38,885 sq. ft. was to be Rs.19,44,38,720/-, while the value of land and building measuring 1,19,049 sq. ft. was drastically reduced to Rs.9,00,00,000/- in the revised agreement, with an additional improvement cost of Rs.5,00,00,000/-, just 3 months later. This clearly shows that the consideration was split into 2 components, and the actually consideration was Rs.14 crores.
>
> 4.12 Secondly, cost of construction of fence around the said piece of land at Rs. 1 ,63,70, 521, is not plausible.
>
> 4.13 Thirdly and most importantly, there were no entries in the gate registers and store registers for either receipt of the steel or use of the steel. This was the case, despite the aforesaid registers keeping track of entry, use and exit of every small item of the

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assessee company. Steel purchases worth Rs.1,63,70,521/- escaping these registers clearly indicates that the steel never entered the premise, nor was it used for business purpose.

4.14 Based on the above, it is clear that the assessee company has made a false claim of expense of Rs.1,63,70,521/- and the same is hereby disallowed.

4.15 The capital gains is recomputed as under:

Total Consideration	Rs. 14,00,00,000
Less: Consideration for Bldg	Rs. 1,80,00,000
Consideration for the Land	Rs. 12,20,00,000
Less: Indexed cost of land	Rs. 1,42,47,093
Less : Brokerage and Legal. charges	Rs. 22,21,360
LONG TERM CAPITAL GAIN	Rs. 10,55,31,547"

33. The AO worked out the long term capital gain at ₹ 10,55,31,547 instead of ₹ 5,55,31,547 offered by the assessee.

34. The assessee carried the matter to the ld. CIT(Appeals) and the submissions made before him as mentioned in para 7 of the impugned order is reproduced verbatim as under:-

" With regard to the capital gains on account of transfer of property consisted of land and industrial building, there was an agreement found dated 11.08.2006 for the transfer for a consideration of Rs.19,44,38,720/-. However, the said transaction did not materialize and a revised agreement was executed on 29.11.2006 for an amount of Rs.14.00 crores due to reduction in the area of land and building. The consideration of Rs. 14.00 crores was split into two parts, i.e., Rs.9.00 crores for the land and Rs.5.00 crores for the improvements. Rs.9.00 crores was further bifurcated into Rs.7.20 crores for the land and Rs. 1.80 crores for the building. Accordingly, the capital gain on land and building was offered at Rs.5,55,31,547/-. With regard to the

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balance Rs.5.00 crores, the appellant company offered the same for taxation as it was for the improvements after the expenditure of Rs. 1,63,70,521/-: The assessing officer was of the opinion that the entire Rs. 14.00 crores was attributable to the land and building and brought to tax the long term capital gains at Rs. 10,55,31,547/-. The appellant company objects to the capital gains as determined by the assessing officer. Undisputedly, the consideration of Rs. 14.00 crores received was for the transfer of the land and building and also towards the cost and development expenses incurred by the appellant company. The appellant company had rightly included the gross receipt of Rs.5.00 crores under the head "Miscellaneous Receipts' and the same was offered to tax after claiming the expenses incurred to the tune of Rs.1,63,70,521/- which had been charged in the Profit & Loss Account. The balance of Rs.3,30,29,479/- was brought as the income of the appellant company for the relevant year. The Director and also the General Manager (Finance) on another occasion had explained that the developmental charges / expenses incurred were towards leveling, boundary work and payment of various taxes on conversion of land which had been charged in the Profit & Loss Account of the appellant company. He had also confirmed that Rs.9.00 crores was received towards the land and building and Rs.5.00 crores was received towards developmental charges. Thus, the appellant had fully explained the transaction and rightly offered the entire income from the transaction for taxation. There was no omission. In the circumstances, the assessing officer should have refrained from recomputing the capital gains in the manner she did. Even assuming that the capital gain is required to be computed as aforesaid, the assessing officer should have given deduction for the expenditure incurred for the development of the land to the tune of Rs.l,63,70,521/-. In the circumstances, the impugned addition as made, is totally uncalled for."

35. The ld. CIT(A) after considering the submissions of the assessee observed that it was beyond imagination that within 3 months the price of immovable property would have gone down from ₹ 1400 per sq.ft. to ₹ 756 per sq.ft. almost half the price and that no prudent businessman would have gone for such a throw-a-way sale. He further observed that no details of construction, expenses of the boundary and fence were furnished by the

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assessee which strengthened the case of the AO that no money was spent for constructing the fence because money of ₹ 5 crores received from M/s. Gopalan Enterprises was actually the sale consideration camouflaged as the development expenses. He further observed that the assessee's business was bus body building and not real estate development and that the assessee would not be having any plant and machinery to venture into the task of land development which was a totally different line of business from that of the assessee. Therefore the receipt of ₹ 5 crores in the name of "development expenses" had rightly been treated by the AO as part & parcel of sale consideration. He accordingly confirmed the addition made by the Assessing Officer. Now the assessee is in appeal.

36. The ld. counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the AO although considered the receipt by the assessee for land development, but had not taken into consideration the expenses incurred by the assessee for land development. He further submitted that the ld. CIT(A) without considering the facts of the case in the right perspective confirmed the action of the AO. It was submitted that the matter may be sent back to the AO for proper examination and verification of the claim relating to the expenses incurred by the assessee for land development.

37. In his rival submissions, the ld. DR strongly supported the orders of the authorities below.

38. We have considered the submissions of both the parties and material on record. In the present case, the AO himself admitted in para 4.11 of the assessment order that the revised agreement was split into two

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parts, the first part related to sale of land for ₹ 9 crores and the second part related to the improvement cost of ₹ 5 crores. It is not the case of the AO that the said agreement was a fake agreement, however the claim of the assessee for expenses on land development was not accepted by the AO. The claim of the assessee was that the expenses were incurred for land development, that claim was not accepted by the AO only on this basis that entries were not made in the register found at the time of survey. But no efforts were made to verify from the persons who received the amount from the assessee on account of steel purchased for the purpose of constructing the compound wall. The ld. CIT(A) also while confirming the addition made by the AO, had not considered the explanation of the assessee and simply stated that the assessee's business was bus body building and not real estate development, but nothing is brought on record to show that the assessee did not enter into agreement for land development. In the present case, the ld. CIT(A) has not given any reason while confirming the action of the AO in considering the receipt of ₹ 5 crores as part & parcel of sale consideration, even when there was a clear agreement relating to sale of land and development of land. We therefore considering the totality of the facts, are of the view that this issue requires fresh adjudication at the level of the AO. Accordingly, we set aside the impugned order of the ld. CIT(A) on this issue and same is remanded back to the AO for fresh adjudication in accordance with law, after providing due and reasonable opportunity of being heard to the assessee.

39. Ground Nos. 12 to 16 are co-related and relate to computation of capital gain in respect of alleged transaction with M/s. IDEB.

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40. The facts relating to this issue in brief are that the AO during the course of assessment proceedings observed that during the course of survey, it was learnt that the assessee had received an amount of ₹ 30 crores from M/s. IDEB Investments Pvt. Ltd. (IDEB) and it was found that the assessee had entered into a joint development agreement with M/s. IDEB on 30.3.07. He further observed that during the course of survey, following three registered agreements/documents were found:

(i) Joint Development Agreement between assessee-company and M/s. IDEB, dated 30.3.2007.

(ii) Agreement for sale between the assessee-company and M/s. IDEB dated 30.3.2007.

(iii) General Power of Attorney executed by the assessee company in favour of M/s. IDEB dated 30.3.2007.

41. The AO discussed the contents of the aforesaid documents in paras 8.4 to 8.6 of the assessment order dated 17.4.09, at the cost of repetition the same are not reproduced in this order. The explanation of the assessee before the AO was that the amount had been received as advance and once the sale deeds get executed, it will be taken as capital gains. The assessee submitted to the AO as under:-

> "The monies so received by the assessee are in the nature of advances only. The capital gain on this transaction shall arise only after the constructed area is physically handed over to the assessee. Further, till date the entire land and building is in the possession of the assessee and has not handed over the physical possession to the developer. The developer has not taken any plan sanction/approval for any construction in the land so given. However, to secure the advances given, the developer has entered into an agreement of sale with the assessee and this does not constitute a sale".

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42. It was further submitted as follows:-

> "The point where the capital gains are deemed to accrue will purely depend on the terms of the Joint Development Agreement. Where the agreement is of such nature that possession is given in part performance of a contract, the liability of capital gains tax will arise on the handing over of such possession to the builder. In case of Jaico, possession is not handed over.
>
> Where the possession is not transferred but deferred until the construction is complete, the liability to capital gains tax will arise in the year in which the developer completes the construction.
>
> Where the landowner and builder execute joint development agreement, if the consideration is receivable in built-up area to be constructed and handed over by the builder to the landowner, it is advisable to avoid the applicability of section 53A of the Transfer of Property Act. This can be achieved by mentioning in the agreements that license is granted to the builder to enter the premises and construct the building. The possession is retained by the landowner, which will be handed over as and when the built-up area is constructed and delivered. By this stipulation, the transfer will take place only in the year in which the built-up area is received and not before.
>
> Hence it is concluded that the Tax incidence on capital gains will arise only when the possession of the built up area is handed over together with occupancy certificate by the developer."

Reliance was placed on the following judgments of the Hon'ble Madras High Court:-

(i) CIT v. Jeelani Basha, 256 ITR 282
(ii) R. Vijayakshme v. Appu Hotels Ltd. 257 ITR 4

43. The AO however did not find merit in the submissions of the assessee and was of the view that the transfer took place during the F.Y. 2006-07 relevant to assessment year under consideration i.e., A.Y. 2007-08 and hence the capital gain was taxable. The AO worked out the capital gain at ₹ 43,61,72,341. Reliance was placed on the following case laws:-

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(i) Chaturbhuj Dwarkadas Kapadia v. CIT (2003) 260 ITR 491 (Bom)
(ii) Re. Jasbir Singh Sarkaria [2007] 164 Taxman 108 (AAR, New Delhi)

44. The assessee carried the matter to the ld. CIT(A) and the submissions of the assessee as mentioned in para 16 of the impugned order are reproduced verbatim as under:-

"iv) a) Issue of Capital Gains:

The learned assessing officer had alleged that there was transfer of capital asset in favour of M/s.IDEB on account of the joint developmental agreement executed between the appellant company and the said company and has computed the capital gains at Rs.43,61,72,341/-. The facts related to the said transaction are as follows:

The appellant executed three registered agreements / documents with M/s.IDEB which were as follows:

I) Joint Developmental Agreement between the appellant company and M/s.IDEB dated 30.03.2007.

ii) Agreement for Sale between the appellant company and M/s.IDEB dated 30.03.2007.

iii) General Power of Attorney executed by the appellant company in favour of M/s.IDEB dated 30.03.2007.

On a perusal of these documents, the assessing officer was of the opinion that there was transfer of the land, to be developed, to M/s.IDEB during the relevant year in accordance with the provisions of Section 2(47)(v) of the Act and accordingly the capital gain had arisen during the relevant year. For this proposition, he had relied upon the judgement of the Hon'ble High Court of Bombay in the case of Sri.Chathurbuj Dwarakadas Kapadia vs. CIT reported in (2003) 260 ITR 41 and the Authority for Advance Rulings in Jasbir Singh Sarkaria reported in (2007) 294 ITR 196 (AAR).

Consequently, the capital gains had been computed by taking into consideration at Rs.44,49,99,000/- on the basis of the built up area to be given to the appellant company by M/s.IDEB @ Rs.3,000/- per sq.ft., as agreed to in the Joint Development

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Agreement. Thus, the capital gains of Rs.43,61,72,341/- was determined by considering the cost of purchase of the land and the cost of inflation thereon as required u/s.48(2) of the Act.

The appellant objects to the proposal. Undisputedly, there were agreements executed by the appellant company as above. But none of the agreements had been acted upon and the appellant company was continued to be in possession of the land in question. The appellant company, vide its letter dated 30.03.2009, had also brought to the notice of the assessing officer that the full value of the consideration for the transfer was indeterminable when the documents were executed. Accordingly, it was submitted that there was no transfer u/s.2(47)(v) of the Act as contemplated by the assessing officer. Reliance was placed on the judgement of the Hon'ble Supreme Court in the cases of CIT vs. M/s.George Henderson & Co. Ltd., 66 ITR 622, and CIT vs. M/s.Gillander Arbhuthnot & Co., reported in 87 ITR 407. It was submitted that the possession of the land having not been given to the alleged transferee, even the provisions of Section 53A of the Transfer of Property Act was not applicable and accordingly there was no transfer" as provided u/s.2(47) of the Act during the relevant year to subject the transaction to tax under the head 'Income from Capital Gains'.

Section 2(47) (v) of the Act reads as follows:

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

…….

(v) any transaction involving the aIlowing 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"

However, the learned assessing officer by misapplying the ratio cited in the assessment order had come to the conclusion that there was transfer as provided u/s.2(47)(v) of the Act to justify the addition of income by way of Capital Gains. He held that the cases cited by the appellant were distinguishable. In fact the judgement of the Hon'ble High Court of Madras reported in 256 ITR 282 cited was also not considered wherein the significance of the possession had been taken notice by the Hon'ble High Court. It is not anybody's guess that the appellant had given possession of the disputed property to M/s.IDEB during the relevant year. Nor did the revenue bring any evidence to suggest that M/s.IDEB was in possession of the asset in

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pursuance of the various agreements executed. In fact, as stated earlier, the entire transaction was not put through. In the circumstances, it is totally unjustified in computing the capital gains on transaction which did not exist in the relevant assessment year. Thus, the impugned addition is required to be cancelled.

In fact the assessing officer's apprehension that the transaction involving allotting portion of immovable property taken or retained in part performance of the contract of the nature referred to in the provisions of Section 53A of the Transfer of Property Act would mean not a physical possession, but a constructive possession and in this case that the three documents executed by the appellant company would suggest that there was constructive possession with the developer and accordingly the conditions u/s.2(47)(v) would apply. We wish to submit that the above observations of the assessing officer had no sanction of law. Under section 53A of the Transfer of Property Act the possession contemplated is the basis to be taken and retained by the transferee towards part performance of the contract. In this case, the assessing officer had no evidence to suggest that the documents executed had been acted upon and M/s.IDEB had physical constructive possession of the property. When the assessing officer held that there was possession in the hands of the transferee, the onus is upon her to prove the same. No materials in this regard had been brought in the assessment order to suggest that M/s.IDEB had taken possession of the property either physically or constructively. The assessing officer had not even examined M/s.IDEB in this regard. Under the circumstances, the application of Section 2(47)(v) on mere surmises, was opposed to law and consequently the impugned addition is liable to be deleted.

45. The ld. CIT(A) after considering the submissions of the assessee confirmed the action of the Assessing Officer by observing in para 17 of the impugned order as under:-

"17. I have considered the above. The law on the issue of determination of the date/year of transfer u/s.2(47)(v) of I.T.Act, after plethora of case laws, is fairly settled. There is no dispute at all in the proposition that capital gains arises out of transfer of a capital asset. Such capital asset may be either movable or immovable. Transfer of immovable capital asset can be through

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two modes. The first one is conveyance completed by registration of the document in respect of that immovable property. This is absolute transfer wherein the transferee gets de jure authority of possession, enjoyment and even alienation over such property. The date of registered deed is considered as the date of transfer for all purposes including determination of capital gains in that. This other mode of transfer does not require registration. This is extended meaning of transfer enshrined in Section 2(47)(v) of I.T. Act, the basic requirement of such transfer is that it should be an agreement in writing, even if not registered between the parties, signed by the parties, it should pertain to transfer of property and the transferee should have taken possession over the property. Thus; what is crucial in such case is the transfer of possession over the transferred property to the transferee. As to the year of taxability, if the agreement specifies a date, such date is conclusive as to the taxability of the capital gains from such transfer. If it does not mention the date, such date is to be gathered and inferred from the terms of agreement or acts of the parties to the agreement. If it is a JDA and such JDA only authorized the builder to enter the properties to develop the property and construct flats thereon only it cannot be treated as transfer at all because the effective title and possession over the property still remained with the transferor. However, though the terms of JDA remain silent about the transfer of possession, if it is later on corroborated by an irrevocable power of attorney authorizing the developer to deal with different persons and authorities to carry on the activity of construction on the property, in such case it has to be construed that possession had been handed over legally over the property to the developer by the owner-seller and the date of execution of the such power of attorney is conclusive for determining the year of taxability of the capital gains arising out of such transfer of the immovable capital asset."

46. The ld. CIT(A) further observed that three deeds registered on the same day i.e., 30.3.07 were found in the course of survey u/s. 133A(1) of the Act conducted on 22.2.08 which itself demonstrate that the assessee had an intention to translate the terms of agreement and the irrecoverable power of attorney or otherwise it had not kept such documents in its safe custody which itself refutes the argument of the assessee that these

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documents are useless. He did not accept this contention of the assessee that those documents could not be considered for assessing the capital gain in the assessment year under consideration because those were not acted upon. Accordingly the ld. CIT(A) confirmed the addition made by the AO. Now the assessee is in appeal.

47. The ld. counsel for the assessee reiterated the submissions made before the authorities below. He further submitted that the agreements found during the course of survey were not acted upon and there was no transfer of assets. It was further submitted that possession of the land was with the assessee and not given to the developer, so there was no transfer. A reference was made to clause 6.7 of the agreement, copy of which is placed at page 31 of the assessee's compilation. It was accordingly submitted that when possession was with the assessee and no transfer took place, there was no question of any capital gain.

48. In his rival submissions, the ld. DR supported the orders of authorities below and further submitted that the assessee had not furnished any detail regarding the refund of alleged advance received, so it cannot be believed that the amount received by the assessee was only an advance and not the amount for sale consideration. He further submitted that it was not examined by the AO as to whether the agreements which were claimed to be cancelled in fact were cancelled, therefore the contention of the assessee cannot be accepted that the agreements found during the course of survey was a mere agreement which was not fulfilled. He accordingly supported the order of the ld. CIT(A).

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49. We have considered the submissions of both the parties and gone through the material available on record. In the present case, it is noticed that clause 6.7 of the agreement clearly stated that the owner will continue to be in possession of the schedule property till such time the developer completes the construction of the said complex and deliver their areas infra. In the present case, nothing is brought on record to substantiate that the possession of the land was delivered to the developer or the land was not in assessee's possession. The claim of the assessee was that amount was received as an advance, would be offered for taxation when the sale deed gets executed. In the present case, it is not clear as to whether the 3 agreements were cancelled or sale deeds were executed in lieu of those agreements, particularly when there is no discussion in this regard either in the assessment order or in the impugned order passed by the ld. CIT(A). Therefore, considering the totality of the facts, we are of the view that this issue requires fresh adjudication since the facts relating to the transfer of the property are not clear. In the present case, nothing is brought on record to suggest that M/s. IDEB had taken possession of the property either physically or constructively. We therefore deem it appropriate to remand this issue back to the file of the Assessing Officer for fresh adjudication in accordance with law, after providing due and reasonable opportunity of being heard to the assessee.

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50. In the result, the appeal by the assessee as well as by the department are allowed for statistical purposes.

Pronounced in the open court on this 30th day of April, 2012.

Sd/- Sd/-

(SMT. P. MADHAVI DEVI) (N.K. SAINI)
Judicial Member Accountant Member

Bangalore,
Dated, the 30th April, 2012.

Ds/-

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.