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IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

BEFORE SHRI CHANDRA POOJARI, AM & SMT.BEENA PILLAI, JM

ITA No.988/Bang/2018
Assessment year: 2012-13

Shri N.A. Haris, No.24, Nalapad Chambers, Magarth Road, 1st Cross, Bangalore – 560 025. **PAN: ACXPN 9590R**	Vs.	The Additional Commissioner of Income Tax Range-12, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri N.Thyagaraju, CA
Respondent by	:	Shri Pradeep Kumar, CIT-DR

Date of hearing	:	27.01.2021
Date of Pronouncement	:	15.02.2021

O R D E R

Per Chandra Poojari, AM :

This appeal by the assessee is directed against the order of the CIT(Appeals) dated 03.01.2018 for the assessment year 2012-13.

2. The assessee has raised the following grounds:-

> "1. The order of Learned CIT (Appeals) is erroneous, both on facts and on law.
>
> Commission payment as part of cost of Acquisition
>
> 2. The Learned CIT (Appeals) erred in not adjudicating on this issue, even though a specific ground of appeal was taken in this regard;
>
> 3. The Learned Assessing Officer erred in not considering that the commission was paid to the agent who negotiated on behalf of the appellant for purchase of the property and as such was a genuine payment;
>
> 4. The Learned Assessing Officer erred in not considering that the provisions of law relating to cost of acquisition and cost of improvement does not specify any time frame for making such payments, as mentioned.
>
> Sale Consideration — Commercial Space

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5. The Learned CIT (Appeals) erred in confirming the action of the A.O in adopting the Guidance Value for computing capital Gains for commercial area;

6. The Learned CIT (Appeals) erred in confirming the action of the A.0 in adopting the Guidance Value, without appreciating that the transaction in a Joint Development Agreement is one of exchange of asset and hence the value as incurred by the developer will be the cost of construction and not the market value

7. The Learned CIT (Appeals) erred in confirming the action of the A.O in adopting the Guidance Value, without appreciating that 21.94% transfer of land was against 78.06% construction of building and as such cost of construction should have been considered;

8. The Learned CIT (Appeals) erred in confirming the action of the A.O in adopting the Guidance Value, without appreciating that the cost of construction of flat by the builder is equivalent to the cost of acquisition of flat by the appellant.

9. The Learned CIT (Appeals) erred in not adjudicating on the above issues, raised before him;

10. The Learned CIT (Appeals) erred in not considering the judicial decisions of the jurisdictional Court/ tribunal on the issue, which was placed before him;

Applicability of provisions of Sec. 50C for sale of apartments

11. The Learned CIT (Appeals) erred in confirming the action of the A.O in applying the provisions of Section 50C for flats booked much earlier to the date of sale and applying the guideline value as on the date of execution of sale deed;

12. The Learned CIT (Appeals) erred in confirming the action of the A.O, by ignoring the fact that the prices were agreed and sale agreements were entered into during the time of constructions and not at the time of sale;

13. The Learned CIT (Appeals) erred in confirming the action of the A.O. without appreciating that if the prevailing guideline value on the date of sale deed is adopted for the purpose of arriving the deemed sale consideration, then the guideline value will be much more than the sale consideration.

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14. The Learned CIT (Appeals) erred in not considering the judicial decisions of the jurisdictional Court/ tribunal on the issue, which was placed before him;

Income from Other Sources

15. The Learned CIT (Appeals) erred in confirming the action of the A.0, without appreciating that the appellant had prematurely closed the fixed deposit and the interest paid was reversed on premature closure of Hi

16. The Appellant craves leave to add, alter, amend and delete any of the grounds at the time of hearing.

For these and such other reasons that may be urged at the time of hearing, it is respectfully prayed that the Hon'ble Tribunal be pleased to pass orders granting such relief as it may deem fit in the interest of equity and justice."

3. The assessee has also filed petition for admission of additional grounds under Rule 11 of the ITAT, Rules, 1963 as follows:-

"a) The Learned CIT(Appeals) as well as the authorities below erred in law and facts in holding that the Sale Consideration amounting to Rs. 40,09,49,500/- is chargeable to tax in the AY 2012-2013 even though there is no transfer of capital assets as per the provisions of section 2(47) of the Act.

b) The Learned CIT(Appeals) as well as the authorities below ought to have appreciated the fact that in the financial year 2011-2012 relevant to the assessment year 2012-2013 the developer has partially handed over the possession of commercial and residential built-up area in lieu of land transferred as per the scheme of JDA dated 08-01-2004 and it cannot, ipso facto, be construed as transfer as per provisions of section 2(47) of the Act.

c) The Learned CIT(Appeals) as well as the Authorities below erred in not following the instructions contained in CBDT Circular No. 14 dated 11.04.1955, wherein the subordinate authorities are bound to assess the correct income as per Law despite the fact that the appellant had inadvertently offered to tax the capital gains on receiving the possession of super built up area in lieu of land transferred as per the scheme of JDA, as the transaction per se cannot be construed as transfer within the meaning of section 2(47) of the Act."

4. The ld. AR stated that these are legal grounds arising out of the orders of lower authorities which were inadvertently not raised before the

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lower authorities and the same may be admitted since there is no involvement of examination or investigation of any facts otherwise on the record of the department and the issues involved goes to the very root of the validity of assessment. Therefore, the ld. AR prayed for admission of additional grounds by relying on the judgment of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. v. CIT, 229 ITR 383 (SC)* and also *Gundathur Thimmappa & Sons v. CIT, (1968) 70 ITR 70 (Mys)*.

5. On the other hand, the ld. DR strongly opposed admission of additional grounds and submitted that there is no reasonable cause for raising these grounds at this stage and submitted the same should not be admitted.

6. We have heard the parties and perused the material on record on admission of additional grounds. The additional grounds raised by the assessee being a legal issue and there is no question of investigation or examination of any new facts otherwise on the record of lower authorities. Being so, we are inclined to admit the additional grounds in view of the judgment of the Hon'ble Supreme Court in *National Thermal Power Co. Ltd. (supra)* for adjudication.

7. The facts of the case are that the assessee is an Individual and for the AY 2012-2013 filed return of income on 30.09.2012 declaring a total income of Rs.43,91,87,250/-comprising of following income:-

Particulars	**Amount (Rs)**
Income from Salary	10,08,317
Income from House Property	1,70,86,222
Income from Business	2,50,000
Income from Capital Gains	40,42,65,241
Income from Other Sources	1,65,77,470
Total	**43,91,87,250**

Subsequently, the assessee filed a revised return of income on 01.03.2013 by revising the total income to Rs.49,98,10,234/-.

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8. The assessee had entered into Joint Development Agreement (JDA) with M/s Brigade Enterprises Pvt Ltd on 08-01-2004 for development and construction of residential flats and commercial space on assessee's land bearing Sy. No.73,74,75,76,77,78,79,80 and 81 at Mahadevapura Village, Kirshnarajapuram Hobli, Bangalore (South). As per the scheme of JDA and supplement agreement dated 27.05.2010, in lieu of land transferred, he was entitled to receive 21.94% share in the constructed area of "Brigade Metropolis" project. Accordingly, the assessee was entitled for the following constructed area:-

Sl.No	Particulars	Area In Sq.ft
1	Residential units meant for resale	5,45,513
2	Residential units retained by the Appellant	34,610
3	Office Space: Summit A and Summit B	2,13,694
4	Shopping Arcade	21,370

9. The assessee's case was selected for scrutiny assessment under CASS and Notices u/s 143(2) and 142(1) of the Act were issued and served. The AO after considering the submissions by the assessee, completed the assessment u/s 143(3) of the Act by making the following additions/disallowances:

a) Disallowance of Commission paid to M/s Bentely Investment amounting to Rs 1 Crore. The Appellant had claimed the commission amount as part of cost of acquisition of the property.

b) The assessee during the FY 2011-2012 received 235063.5 Sq.ft of commercial space as his share of built-up area in the project and determined the sale consideration at Rs.1,500/- per Sq. ft, being the builder's cost of construction. To confirm the cost of construction at Rs.1,500/- per Sq ft, the developer issued a certificate dated 20.09.2014. However, the AO disregarded the submissions of the assessee and adopted Rs.2,200/- per sq.ft as deemed consideration. The value adopted by the AO is based on the guideline value issued by Government of Karnataka in Notification No. CVC/BUD/5/200607 dated 17-04-2007.

c) During the FY 2006-2007 and 2007-2008, the assessee and M/s Brigade Enterprises Pvt Ltd had taken booking advances

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> from the prospective buyers and in certain cases had entered into an agreement to sell. Subsequently, on completion of project, sale deeds were executed during the FY 2011-2012 to conclude the transactions entered into by way of agreement to sell in the FY 2006-2007 and 2007-2008. As per the scheme of JDA, the assessee was entitled to 21.94% share in the revenue. The AO brought to tax an amount of Rs.48,82,428 (21.94% share in revenue), being the difference between the value prevailing at the time of agreement to sell/booking date and guideline value at the time of execution of sale deeds.

10. Aggrieved with the above impugned additions, assessee filed an appeal before the CIT(Appeals), who confirmed the additions made by the AO and therefore, the assessee is in appeal before the Tribunal.

11. First we will deal with the additional grounds of appeal raised by the assessee. The assessee in lieu of JDA dated 08-01-2004 was entitled to receive super built-up area of commercial space and residential flats representing his 21.94% share in the Brigade Metropolis Project. The assessee admitted/offered capital gains as and when he received his share of built-up area. As per the scheme of JDA, Sharing Agreement dated 20.02.2006 and Supplement Agreement dated 27.05.2010, the assessee during the FY 2011-2012 has taken over the possession of super built-up area of commercial space Summit A, Summit B and Shopping Arcade measuring 235063.5 Sq.ft in Brigade Metropolis Project. As per the advice of a professional, assessee inadvertently offered the transaction of taking over of possession of built-up area of commercial space measuring 235063.5 Sq.ft as income under the head "Capital Gains" for the FY 2011-2012. The transaction of taking over the possession of super built-up *per se* cannot be regarded as transfer within the domain of provisions of section 45 r.w.s 2(47) of the Act. The legal position of taxing a transaction as income under the head capital gains is that there should be a capital asset, the capital assets has to be transferred within the meaning of section 2(47) of the Act and it has to be chargeable to tax as per section 45 of the Act.

12. The assessee placing reliance on the decision of the Hon'ble Calcutta High Court in the case of *Chunnilal Prabhudas & Co., 76 ITR 566* contended that in lieu of land transferred as per the scheme of Joint

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Development Agreement (JDA) dated 08-01-2004 with M/s Brigade Enterprises Pvt Ltd., has during the FY 2011-2012 taken over the possession of super built-up area of commercial space i.e., Summit A, Summit B and Shopping Arcade measuring 235063.5 Sq.ft. Though the assessee only received capital asset (by way of taking over the possession of the commercial area) in lieu of land transferred, the transactions cannot, *ipso facto*, be construed as transfer as there is no sale, exchange or relinquishment of rights.

13. As held by the Hon'ble Madras High Court in the case of *Cadd Centre 383 ITR 258*, in order to bring a transaction under the ambit of capital gains, the receipt or accrual must have originated in a "transfer" within the meaning of section 45(1) read with section 2(47) of the Act. In the assessee's case though there is receipt in the form of super built-up area of commercial space, the receipt is originated out of the transfer which has taken place during the FY 2004-2005 via JDA dated 08-01-2004 and as such the receipt ought to have been considered in the FY 2004-2005 and not in the FY 2011-2012.

14. The Hon'ble Supreme Court of India in the case of Alapati Venkataramiah vs. CIT (1965) 57 ITR 185 (SC) held as under:-

> "that before section 12B of the Indian Income-tax Act, 1922, could be attracted, title must pass by any of the modes mentioned in section 12B, i.e., sale, exchange or transfer. In the context "transfer" meant effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property could not by itself be treated as equivalent to conveyance of the immovable property"

15. It was submitted that in the case of assessee, the date of transfer stands crystalized on the date of entering into the JDA coupled with GPA. In the FY 2011-2012 the assessee has only acknowledged the possession of the commercial space for the transfer which materialized on the date of JDA.

16. Section 45 of the Act regulates the chargeability of capital gains. As per the provision of section 45(1) of the Act, the income under the head

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"Capital gains" shall be deemed to be the income of the previous year in which the transfer takes place. It was submitted that there are several instances under the Act wherein the year of transfer differs from the year of taxability. Sub-section (1) of section 45 has few exceptions and such exceptions are encompassed in sub-sections (1) to (6) of section 45, wherein the year of chargeability shall not be the year of transfer of capital assets but it is as enunciated in sub-section (1) to (6) of section 45. The exceptions provided are exhaustive and doesn't call for any interference. The ld. AR submitted that in the present case the assessee has transferred his land in the scheme of JDA dated 08-01-2004 and subsequently, as per the sharing agreement, the developer has handed over the possession of commercial space in the FY 2011-2012. The transaction of taking over of possession of super built-up area is neither chargeable to tax as per section 45(1) of the Act nor it can be categorized in any of the exceptions provided in sub-sections (1) to (6) of section 45 of the Act.

17. It was further submitted that it is a trite law that income must be taxed as per the mechanism provided under the statute. The Hon'ble Supreme Court of India in the case of *CIT, Madras vs V. MR. P. Firm, Muar reported in 56 ITR 67(SC)* held as under:-

> "If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income."

18. It was submitted that the transaction of the asse is not taxable under the Income Tax Act, 1961, as the assessee's transaction of taking over the possession of super built-up area cannot be considered as transfer as per provisions of section 2(47) of the Act and hence, it is not exigible to tax under the taxing statute.

19. The ld. AR further submitted that Article 265 of the Constitution of India provides that no tax shall be levied or collected except by the authority of law. The Income Tax Authority does not have an unbridled power to tax the income which is not chargeable to tax. As a corollary, if the

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income is not chargeable to tax, then the retention of tax paid on such income shall be breach of provisions of Article 265 of the Constitution of India. The transaction of the assessee cannot be given the color of income as it is only a subsequent event on transfer of property via JDA. The Hon'ble High Court of Bombay in the case of *Nirmala L. Mehta vs. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1 (Bom)* held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

20. It was submitted that the AO as well as the CIT(Appeals) have erroneously held the transaction of taking over the possession of commercial area under the head capital gains. Reliance was placed on CBDT Circular No. 14(XL-35) of 1955, dated 11.4.1955 in contending that the lower authorities ought to have guided the assessee as to the correct proposition of the law regarding the taxability of capital gains. The contents of the above CBDT Circular, read as under:-

> *"Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should —*
>
> *(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;*

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(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

21. The Authorities below ought to have followed the above circular. The Circulars issued by CBDT are binding on the Authorities and they should have guided the Appellant as to correct proposition of the law regarding the taxability of capital gains.

22. The ld. AR submitted that the dictum laid down by the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. (supra)*, the assessee is not required to file a revised return of income to make the above claim as the assessee is not making any claim before the Assessing Officer but raising issues based on the same set of facts.

23. Also, the Finance Act, 2017 introduced sub-section (5A) to section 45, wherein it is explicitly stated that the year of chargeability in the case of JDA is the year in which certificate of completion for the whole or part of the project is issued by the competent authority. Unlike section 45(5A), which is an exception to section 45(1) of the Act, in the AY 2012-2013 there was no akin provision to tax the income on capital gains vis-a-vis handing over possession of super built-up area of commercial space by the developer or on issuance of completion certificate by the competent authority. Section 45(5A) cannot be read retrospectively as the legislature intends to tax the capital gains from the specified agreement entered into on or after 01.04.2017.

24. The ld. AR submitted that the facts of the case in the latest decision of the Hon'ble Supreme Court in the case of *Seshasayee Steels P Ltd Vs ACIT reported in 421 ITR 46* is distinguishable from the assessee's case as it was held therein that mere giving of licence to the developer could not be said to be "possession" within the meaning of section 53A of the Transfer of Property Act, 1882, and the developer has to get the control over the land and not actual physical occupation of land. The Hon'ble Supreme Court observed that on the date of agreement to sell the owners rights were completely intact and the further held that the assessee's right in the

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immovable property were extinguished on the receipt of last cheque and compromise deed could be stated to be the transaction which had the effect of transferring the immovable property in question.

25. In the case of *Seshasayee Steels P Ltd. (supra)* the facts were that landlord had entered into an agreement to sell coupled with GPA. Subsequently, the parties thereto had entered into a comprise deed to ratify the GPA and the agreement to sell. The compromise deed was executed for the fact that the developer had not adhered to all the terms and condition of agreement to sell and therefore, provisions of section 53A of Transfer of Property Act, 1882 were not complied with and contract for sale fell into question. As per section 53A of Transfer of Property Act, 1882 contract can be ascertained when in part performance of contract, a person has taken over the possession and has done in furtherance of the contract performed or is willing to perform his part of the contract. In the case of Seshasayee Steels though the possession was taken over, there was no willingness to perform his part of contract as the transferee had not adhered to the terms and conditions of the agreement to sell and therefore, the compromise deed was executed to ratify the agreement to sell and GPA. The compromise deed could be stated to be the document to effect the transfer and as such the Hon'ble Supreme Court held that on the receipt of the last cheque mentioned in the compromise deed, the assessee's rights in the property stood extinguished.

26. The learned AR submitted that in the present case, the assessee permitted the developer to enter upon the schedule property and perform all such acts as are necessary to develop the schedule property. The JDA states that the landlord shall not revoke the rights so granted till completion of development and sale of built-up area. The act of assessee and developer, can beyond any doubt of uncertainty, be concluded as a contract within the meaning of section 53A of the Transfer of Property Act, 1882. The assessee has given the possession and the willingness to perform the contract was established since the structure of the building/s got completed and there were no encumbrances to disrupt the terms and condition of JDA so as to draw a compromise deed to ratify the terms of

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JDA. For the aforementioned reasons, the judgment of Sehasayee Steels (supra) is distinguishable from the facts of the present case.

27. Under the above facts and circumstances of the case, it was prayed that the consideration declared by the assessee and subsequently enhanced by the AO and confirmed by the CIT(Appeals) amounting to 40,09,49,500/- be deleted in the interest of justice.

28. On the other hand, the ld. DR submitted that the assessee has already taken possession of his share of construction area and also entered into sale agreement or sale deed with various parties in respect of commercial as well as residential space, as such there is no difference between the registration and non-registration of the JDA. Further in the FY 2004-05 relevant to AY 2005-06, it cannot be as a transfer as the condition laid down in section 2(47)(v) of the Income-tax Act, 1961 [the Act] is not complied. However, in the FY 2011-12 relevant to AY 2012-13 all the conditions laid down in section 2(47)(v) of the Act have been complied with and the assessee has also taken the constructed area of property as well as entered into sale of the same with various buyers, therefore it should be construed as transfer in the present assessment year under consideration.

29. We have heard both the parties and perused the orders of the Revenue authorities and other materials on record. The short dispute arising for consideration in this case by way of additional ground by the assessee relates to the year of assessability of capital gains arising on the property, which was the subject matter of development agreement, i.e., whether it is assessable in the year in which the development agreement entered into or in the relevant subsequent year in which the area duly developed and constructed coming to the share of the assessee-land owner has been handed over to the assessee. In this case, the JDA by the assessee with M/s.Brigade Metropolis Project is dated 08.01.2004. According to the assessee, the date of transfer u/s 2(47)(v) of the Act to be the financial year 2004-2005 relevant to the assessment year 2005-2006 and not the financial year 2011-2012 relevant to the assessment year 2012-2013, in which year the assessee got his share of constructed area into his possession. Though it was initially held by various Courts that the

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capital gains are to be assessed in the year in which the development agreement has been entered into between the land owner and the developer, considering the fact that in many cases, the development agreement was not acted upon by the developer, different views have been expressed as to be year of assessability, based on the facts and circumstance of each case. It was held by various Courts that "willing to perform" for the purpose of section 53A of the Transfer of Property Act, 1882 is something vital; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Unless the party has performed or is willing to perform its obligation under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of section 53A of the Transfer of Property Act will come into play on the facts of that case. It is only elementary that, unless provisions of section 53A of the Transfer of Property Act are satisfied on the facts of a case, the transaction in question cannot fall within the scope of deemed transfer u/s 2(47)(v) of the I.T.Act. Thus, let us consider whether the transferee, on the facts of the present case, can be said to have `performed or is willing to perform' its obligations under the agreement.

30. We have carefully gone through the JDA dated 08.01.2004 entered into between the assessee and M/s. Brigade Metropolis Project. As per this agreement, it was specifically mentioned in clause No.(1) and (2) as follows:-

> 1) PERMISSION TO DEVELOP :
>
> 1.1 The First Party hereby permits the Second Party to enter upon the Schedule Property for development of the Schedule Property in terms of this Agreement.
>
> 1.2 The Second Party is hereby authorized and empowered by the First Party to develop the Schedule Property and to construct Buildings therein and the First Party shall not revoke the rights so granted till completion of the development and sale except as provided in this agreement. Such permission to enter Schedule Property shall however not be construed as delivery of possession

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under Section 53A of the Transfer of Property Act read with Section 2(47)(v) of the Income Tax Act, 1961. The legal possession of Schedule Property by way of licence to develop the same. The Second Party shall not be entitled to possession and transfer of the proportionate share in the land in Schedule Property in part performance until completion of structure of the respective building/s.

2) PLANS / LICENCES :

2.1 The Second Party shall at their cost prepare necessary plans / drawings/ designs etc., for construction of multi-storeyed residential and commercial buildings as per building Bye-laws. Rules and regulations in force and submit the same to Bangalore Development Authority or the concerned authorities within two months from the date of receipt of (i) Khata of Schedule Property from City Municipal Council in the name of First Party, (2) Orders for change of land use for the required development from the Bangalore Development Authority and other applicable authorities and (3) Shifting / deletion of the Road proposed to be formed in the schedule property as shown in the present Comprehensive Development Plan (4) No Objection Certificates and consents from various departments required to be submitted to secure sanction of licence and plans. The responsibility and expense for securing all the aforesaid except item No.(1) and cost of preparing the plans and obtaining necessary licences and sanctioned plans and all other permissions required to take up, commence and complete the development and construction of the Buildings in the Schedule Property shall be that of the second party. The First Party agrees to secure at his cost Khata of the Schedule Property in his name from City Municipal Council of Mahadevapura and liable to pay municipal property taxes, charges and all other sums payable till Khata is secured in his name. The First Party agrees to secure Khata from City Municipal Council in his name within Sixty days from this day. If any betterment or

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development charges are to be paid for securing Khata, the same shall be paid by First Party.

2.2 The responsibility and expenses for preparing the plans and all other permissions required to develop Schedule Property and to take up, commence and complete the construction of the buildings thereon and development shall be that of the Second Party. The development charges and other charges and levies and all sums demanded by the authorities in relation to sanction, development and construction shall be paid by Second Party. The First Party shall have no liability whatsoever in this behalf.

2.3 The Second Party shall make available to the First Party one set of sanctioned plans and photo copies of other permissions / clearances / orders received and agree to make available photo copies of other permissions / clearances / orders received hereafter from time to time.

2.4 The First Party has executed a Power of Attorney to enable the Second Party to secure plans, licences and other permissions and for purposes connected with the development and sale of the Schedule Property which shall be in force until Joint development and transfer of Second Party's share of land and building are completed in all respects unless otherwise revoke for reasons set out in this Agreement. In addition thereto the First Party shall sign and execute such other documents, papers and other agreements, applications that may be required by the Second Party for securing permission and licence and effectively developing the Schedule Property. However, the cost thereof shall be met and borne by Second Party. The parties shall co-operate with each other for completion and mutual success of the joint development of the Schedule Property.

2.5 The Second Party shall develop the Schedule Property comprising of residential buildings and commercial buildings and such other development as per the zoning regulations and the

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Second Party will be entitled to implement the developmental activity without any interruption or interference from the First Party. Based on the market conditions, the Second Party shall solely decide about the composition / proposition in which residential and commercial buildings are to be built.

2.6 The Second party shall at their cost secure all the required permissions, licences and plans etc., required for commencement of construction of the buildings in the Schedule Property in terms of this agreement within Twelve months from the date of First Party furnishing Khata in his name from City Municipal Council, subject to force measure and for reasons not attributable to the Second Party. Time is essence of this agreement. In the event of the Second Party being unsuccessful in securing the said Licence and Plan within the said period, the parties shall discuss mutually and evolve the nature of development. The Second Party assures the First Party that they would promptly secure all the clearances and permissions required for commencement and construction within the aforesaid time. However in the event of delay in securing sanction of Licence and Plan on account of non-production of documents by the First Party, the time taken for production of such documents shall be added to the time stipulated above.

31. Further, as seen from the clause (1), it is specifically mentioned that the assessee is only permitted to give licence to the vendee to develop the Schedule Property. Such permission to enter the Schedule Property shall however not be construed as delivery of possession u/s 53A of the Transfer of Property Act r.w.s. 2(47)(v) of the I.T. Act. The legal possession of schedule property shall continue to remain with the possession of the assessee. Further, as per clause 5.2, the assessee received refund of security deposit of Rs.10,00,00,000, which is interest free. Further, the plan and licence to be obtained by the vendee within two months from the date of receipt of Khata schedule property from City Municipal Council. The assessee not shown that whether the vendee acted upon within the stipulated time to secure the building plan.

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32. We have also gone through Clause No.7, which reads as under:-

7. COMMENCEMENT AND COMPLETION OF CONSTRUCTION :

7.1 The Second Party shall commence construction of the buildings in the schedule property within Ninety days from the date of sanction of licence and plan and all other permissions. The second party shall under normal conditions and in the absence of any restrictions, shall complete the construction of OWNER'S CONSTRUCTED AREA within five years from the date of commencement of construction and issue of commencement certificate by Bangalore Development Authority and / or other sanctioning authorities which period does not include the time taken for obtaining of the Occupancy certificate / completion certificate from the Bangalore Development Authority or other authorities and Electrical water and sanitary connections from the respective departments. However the second party shall not incur any liability for any delay in delivery of possession of the OWNER'S CONSTRUCTED AREA" by reason of non-availability of Government Controlled Materials, and / or by reason of Governmental restrictions and / or civil commotio, transporters strike, Act of God or due to any injunction or prohibitory order (not attributable to any action of the Second Party) or conditions force majeure. In any of the aforesaid events, the Second Party shall be entitled to corresponding extension of time for delivery of the said OWNER'S CONSTRUCTED AREA. The time taken for obtaining occupancy certificate, power / water / sanitary connections by the Second Party shall be excluded at the time of computing the period stipulated for construction. In the event of any delay in completing the construction as stated above for reasons other than what is stated above, the Second Party shall be entitled for six months grace period to complete the construction of the portions of OWNER'S CONSTRUCTED AREA. After such extension also the Second Party is unable to deliver the OWQNER'S CONSTRUCTED

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AREA the Second Party will be given further time of six months thereafter to deliver the OWNER'S CONSTRUCTED AREA subject to payment of Rs.2/- (Rupees Two Only) per sq.ft. super built-up area of residential apartments and Rs.3/- (Rupees Three Only) per sq. ft. super built-up area of commercial potion per month of delay by way of damages and the Second Party agrees to pay the same in the form of money every month till delivery of OWNER'S CONSTRUCTED AREA. If part of OWNER'S CONSTRUCTED AREA is delivered, the damages payable shall be for undelivered portion of OWNER'S CONSTRUCTED AREA.

7.2 In the event of delay in securing permanent power / sanitary / water connections, the Second Party shall at their cost arrange to provide temporary electrical, water and sanitary connections until permanent connections are obtained and the same shall constitute compliance with regard to construction of built-up areas. But it shall not be treated as waiver of Second Party's obligations to secure and provide such permanent connections. The First Party is liable to pay consumption charges to the authorities for utilizing the said amenities.

7.3 It is specifically understood that the Second Party shall not be deemed to be in default or incur any liability for any delay in delivery of OWNER'S CONSTRUCTED AREA if the performance of its obligations hereunder is delayed or prevented by conditions constituting force majeure. All periods, hereunder fixed shall be deemed to have been extended by the periods equal to the periods of delay on account of the force majeure conditions. In any of the aforesaid events, the Second Party shall be entitled to corresponding extension of time for delivery of the said OWNER'S CONSTRUCTED AREA. In the event of any such occurrence the Second Party shall give written notice of such occurrence to the First Party within Fifteen days thereof and in the absence of such intimation the same will not affect this Agreement.

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If the delay is more than Twelve months from the date of expiry of the period, the First Party shall be entitled to deal with the incomplete construction of OWNER'S CONSTRUCTED AREA and provide all access and facilities and recover the entire cost incurred from Second Party. The Second Party will be liable and responsible for all the claims and demands arising out of default by second party and also the claims of persons with whom the first party would have contracted for sale of lease or transfer or otherwise pursuant to this Agreement in schedule property and second party agree to settle all such and other claims and demands and protect the first party and the schedule property therefrom and accordingly offer indemnity. In addition thereto the second party is also liable and answerable to the persons who would have dealt with them.

7.4 In the event of first party completing the balance of development under the circumstances stated above, the parties shall assess the cost of development undertaken by the second party and the first party in the first instance. The first party shall be entitled to reimbursement of the cost of development undertaken by him on account of second party and failure to complete the balance development, assess the quantum of damages suffered by the first party herein and appropriate the same from the cost of development undertaken by second party and after such settlement, the second party would be entitled to the remaining developed / constructed area. Any short fall or deficit shall be made good by the second party and any dispute with regard to the valuation shall be settled through arbitration as provided in this Agreement.

33. As per this clause No.7, the time limit to complete the project is five years. In the assessment year 2005-2006 nothing moved towards the construction of the schedule property. Thus, in the financial year 2004-2005 relevant to assessment year 2005-2006, the transferee had neither performed nor was it willing to perform its obligation under the JDA. Being so, the argument of the learned AR that the capital gains are to be taxed in the present case in the assessment year 2005-2006 is not tenable. This is

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so because the transferee not adhered to complete any act as mentioned in JDA. The transferee only made payment of refundable deposit of Rs.10 crore by 08.01.2004 and other necessary permission so as to commence the construction not at all commenced and there was no progress in the development of property in the assessment year 2005-2006. The Municipal sanction for development was obtained subsequently, which is utmost important for the implementation of the JDA. Without sanctioning of the building plan, the very genesis of the agreement fails. To enable the execution of the JDA, firstly, plan is to be approved by the competent authority. Since no building plan in the assessment year 2005-2006 was approved or produced before us, we cannot hold that the transfer took place in the assessment year 2005-2006. Nothing is brought on record by the assessee to show that there was a development activity in the impugned project during the assessment year 2005-2006 and any cost of construction was incurred by the builder. It is to be inferred that no amount of investment by the developer in the construction activity during the assessment year 2005-2006. Hence, we are of the opinion that transferee was not willing to perform his part of obligations as stipulated in the JDA, in the assessment year 2005-2006 within the meaning as expressed in section 53A of the Transfer of Property Act. As such, the contractual obligation of the developer was not met with in the assessment year 2005-2006. Being so, the conditions laid down in section 2(47)(v) of the I.T. Act cannot be invoked so as to bring the capital gains into tax in the assessment year 2005-2006 and thus the very foundation of the assessee's case is devoid of merits and not tenable and more so there is a specific clause in the JDA as enumerated earlier that the assessee is only permitted to give licence to the vendee to develop the Schedule Property and the legal ownership remains with the assessee and there cannot be any transfer in the assessment year 2005-2006 and it has rightly brought into taxation by the A.O. in the assessment year 2012-2013 as in the assessment year 2012-2013, the assessee received duly developed and constructed area into his possession coming into his share. Accordingly, we are not in agreement with the argument of the learned AR that the transfer took place in the assessment year 2005-2006 and has been rightly

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brought to tax by the AO in the year 2012-2013, since the assessment in the year 2012-2013 the assessee received duly developed and constructed area into his possession out of his share of constructed area. Thus, the additional ground raised by the assessee is dismissed.

34. Coming to the merits of the case, the first issue is with regard to disallowance of non-consideration of commission paid of Rs.1 crore to Bentley Investment while computing cost of acquisition of the property.

35. The assessee purchased about 36 Acres of land (measuring 15,59,123 Sq.ft) in the FY 2003-2004 for a consideration of Rs. 14,19,99,602/-. During the FY 2005-2006 he transferred 326635.3 Sq.ft. to Bangalore Development Authority and retained 1232771 Sq.ft of land. The assessee entered into a JDA with M/s Brigade Enterprises Private Limited on 08-01-2004 and retained land measuring 1232771 Sq.ft which was put to development as per the covenants of JDA. The cost of acquisition includes a sum of Rs. 1 crore paid to M/s Bentely Investment as commission. The Commission paid was with respect to the purchase of aforesaid land. The assessee though had an obligation to pay the commission amount immediately after the purchase of land, had to defer the payment due to negotiation differences. The assessee has paid the commission amount of Rs. 1 crore in the FY 2007-2008 and details of the same are under:-

(a) Rs.83,30,000/-paid from Vijaya Bank Ch.No 674658 dtd 10.01.2008

(b) Rs.16,70,000/- paid from Axis Bank Ch.No 462924 dtd 17.03.2008.

36. The AO disallowed the commission amount from cost of acquisition on the grounds that:-

a) the Payment of commission did not add value to the property;

b) the transfer was in the nature of adventure of trade;

c) cost was not incurred within the time limit as prescribed U/s 48(1) and 55(1)(b) of the Act;

d) such expenditure was not indicated in the return of income;

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e) such transaction should have reflected as receivable in the books of M/s Bentley; and

f) the transaction did not suffer TDS and payment was not supported by any agreement.

37. The CIT(Appeals) has not adjudicated the issue even when there was a specific ground (Ground No. 4). The assessee had filed a confirmation letter from M/s Bentley Investment for having acknowledged the commission amount. However, the CIT(A) rejected the contentions of assessee.

38. The ld. AR relying on the decision of Tribunal in the case of Pradeep Kar, Bangalore vs ACIT, Bangalore in ITA No.596/Bang/2014 dated 11.05.2016 submitted that the provisions of section 48 or 55(1)(b) do not stipulate time frame within which the payment has to be made. The assessee has paid the commission amount exclusively for the purchase of property and cost of acquisition includes all the expenses incurred by way of commission or brokerage towards purchase of a capital asset. The finding of the AO that tax must be deducted at source on payment of commission amount is absurd as the profits are chargeable under the head income from capital gains. The provisions contained under the head capital gains doesn't stipulate the assessee to deduct tax at source to claim commission amount as part of cost of acquisition.

39. It was submitted that the AO has irrationally held that the commission paid to M/s Bentley Investment is only afterthought and devise to reduce the taxable capital gains. It was submitted that the AO has misguided himself and has travelled beyond the scope to ascertain the facts. The assessee before the Learned CIT(Appeals) has produced the evidence in form of confirmation letter for having paid the commission amount and as such it overriders the irrational, preponderance findings of the AO to refute the genuineness of transaction. Therefore, the disallowance of the commission amount of Rs.1 crore paid to M/s Bentely Investment is arbitrary, unreasonable, and opposed to factual position.

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The ld. DR submitted that this ground was not pressed by the assessee at the time of hearing before the CIT(Appeals), as such the same was not adjudicated by the CIT(Appeals).

40. We have gone through the order of CIT(Appeals) wherein the assessee raised ground No.4 before the CIT(Appeals) as follows:-

> "4. The learned Assessing Officer has erred by disallowing Rs.1,00,000/- being the Commission paid to M/s. Bently who are the agents negotiated the property on behalf of purchaser when the payment is genuine and not fictitious."

41. The assessee also filed written submissions dated 26.3.2019 before the CIT(Appeals) on this issue as follows:-

> "c) The learned Assessing Officer has erred by disallowing Rs.1,00,000/- being the Commission paid to M/s. Bently who are the agents negotiated the property on behalf of purchaser when the payment is genuine and not fictitious. At the time of assessment appellant could not produce the confirmation letter from M/s. Bently and the office suspected the genuinity of the recipient. The payments were made through Cheques."

42. However, there is no discussion on this issue by the CIT(Appeals). The assessee explained before us that this payment has been made by the assessee vide Cheques as follows:-

(a) Rs.83,30,000/-paid from Vijaya Bank Ch.No 674658 dtd 10.01.2008

(b) Rs.16,70,000/- paid from Axis Bank Ch.No 462924 dtd 17.03.2008.

43. This was not doubted by the AO. However, the AO disallowed the payment of commission while computing the cost of acquisition of the property on the following reasons:-

(a) The assessee's contention that the purported commission has to be treated as cost of improvement is factually incorrect and legally untenable, as it is, as claimed the assessee himself, commission claimed to have been paid for the services rendered in acquiring the property by the assessee, but not for anything done to improve the value of the property after its acquisition by the assessee.

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(b) On one hand, the assessee claims that he is not engaged in any business activity in real-estate but has only transferred his property to the Developer for the purpose development and hence receipts arising out the transaction can not be treated as business receipts, but only as capital receipts; and on the other hand claims to have agreed to make certain payment as commission not at the time of he acquiring the property, but only after he starts receiving the fruits of his subsequent transfer to the Developer. Obviously, the latter claim indicates that the intention of the assessee purchasing the said property was to transfer it to a Developer for the purpose of development and earning higher returns. In such case, the transaction of the assessee amounts adventure in the nature of trade, necessitating accounting such returns as business receipts. Thus, the claims of the assessee are contradictory.

(c) The assessee's contention that no time limit is prescribed by the provisions of section 48(1) and 55(1)(b) of the Income Tax Act, 1961 is far-fetched for the simple reason that cost of acquisition is consideration paid for and till the time of legally recognised transfer (acquisition), while cost of improvement is cost incurred for value addition to the property from the time of legally recognised acquisition to the time of subsequent legally recognised transfer.

(d) Without prejudice to the claim of the assessee following cash system of accounting and the said expenditure was not provided for in earlier years as it has not crystalised then, it needs to be noted that if such expenditure were to be incurred in future as agreed upon, the assessee ought to have indicated the same in his Return of Income when purchase of the property was mentioned. In the absence of such details, the claim carries no credibility.

(e) Even if the assessee follows cash system of accounting, if the assessee were to pay the said commission to M/s Bently, as claimed, the same should have been accounted as receivable in the books of M/s Bently, which is stated to be a partnership firm. However, no claim far documentary substantiation of such accounting was made available for independent verification.

(f) Further, except making the claim of the commission as paid to simply `M/s Bently', no further details of the said payee were furnished by the assessee for making any verification possible. It needs to be noted that the said payment of commission was not subjected to any Tax Deduction at Source.

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(g) The assessee had not entered into any agreement with M/s Bently for payment of the alleged commission much later, nearly four years, after the finalisation of the acquisition of the property by the assessee. Contrastingly, the assessee had such an agreement with one Mr. Abubakar for payment of Rs.14 crores as commission, for the services rendered by him in negotiating with the Developer for higher returns to the assessee for the transfer of the property to the Developer, as and when the assessee received such returns. Further, such payments of commission, on the basis of an agreed arrangement, to Mr. Abubakar were subjected to TDS.

(h) In conspectus, taking into account the assessee's claim of not engaging in any real-estate business and the significant quantum of capital gain arising out of the transaction which is liable to tax, it emerges that the claim of payment of the commission to M/s Bently, after the transfer of the property by the assessee to the Developer, for the purported services rendered before the acquisition of the property by the assessee, is only an afterthought and device to reduce the taxable capital gains, with indexed cost of improvement. Thus, it appears that after the agreement with Mr. Abubakar related to transfer of property to the Developer, the assessee attempted to reduce the taxable capital gains with similar claim that can be related to the acquisition of the property also. in this context, it needs to be noted that the assessee did not have much time left from the date of acquisition of the property to the date of transfer of the same to the Developer to car out/claim any improvement to the property, during the period of its possession by him. Hence, the only option left for reducing tax liability is to claim expenditure in relation to the acquisition itself but not to later period/events."

44. In our opinion, the above reasons given by the AO for not considering the payment of commission as cost of acquisition is not justified. The party who has received the commission payment confirmed that they have received the commission and payment has been made by cheque. The AO cannot doubt the genuineness of these payments. These payments are inextricably linked to the acquisition of the impugned property and it should be considered as cost of acquisition while determining the capital gain on entering into JDA. Accordingly, we direct the AO to consider the payment of Rs.1 crore as part of cost of acquisition and thereafter compute the capital gain. This ground of appeal by the assessee is allowed.

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45 The next ground for consideration is with regard to determination of sale consideration by adopting guidance value of commercial space in respect of cost of construction of this commercial space to the builder.

46. The ld. AR firstly at the cost of repetition submitted that the assessee in lieu of JDA dated 08-01-2004 was entitled to receive super built-up area of commercial space and residential flats representing his 21.94% share in the Brigade Metropolis Project. The assessee admitted/offered capital gains as and when he received his share of built-up area. As per the scheme of JDA, Sharing Agreement dated 20.02.2006 and Supplement Agreement dated 27.05.2010, the assessee during the FY 2011-2012 has taken over the possession of super built-up area of commercial space i.e., Summit A, Summit B and Shopping Arcade measuring 235063.5 Sq.ft in Brigade Metropolis Project.

47. The assessee admitted capital gains by determining sale consideration on taking over the possession of super built-up area at Rs. 1,500 per Sq. ft. being the cost of construction incurred by the developer. The Copy of Confirmation Letter dated 23.06.2014 from Brigade Enterprises Ltd is submitted along with Paper Book at page No.99. The AO refuting the methodology adopted by the assessee held that the while determining the full value of consideration, the Guideline value of the super built-up area of commercial area has to be adopted as against the cost of construction given the developer and hence, determined the consideration at Rs.2,200 per Sq.ft being the Guideline value. The Learned CIT(Appeals) confirmed the additions made by the Learned Assessing officer held that the Appellant has retained the commercial space for his own and therefore, he was duty bound to take the value fixed Government of Karnataka.

48. It was submitted that the CIT(A) without assigning any valid reasons for rejection of assessee’s grounds has gone by the observations made by the AO. The CIT(A) held that provisions of section 50C of the Act is applicable and hence confirmed the additions made. The ld. AR submitted that the provisions of section 50C applies where the consideration received or accruing as a result of "transfer" of capital assets, being land or building or both is less than the value adopted for the purpose of payment of stamp

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duty. Therefore, applying the provisions of section 50C is irrational as the assessee has received the constructed area in lieu of JDA and the same cannot be considered as "transfer" for the purpose of invoking provisions of section 50C of the Act.

49. It was further submitted that the authorities below have grossly erred in adopting the guideline value for the purpose of determining consideration with regard to the taking over of possession of commercial space. In the scheme of JDA the assessee is receiving the super built-up area of the commercial space and the full value of consideration as per section 48 of the Act is the cost incurred by the developer and not the guideline value as per section 50C of the Act. Section 50D which was introduced in statute book in the Finance Act, 2012 enumerates that when consideration received or accruing is not ascertainable, then the fair market value of the said asset on the date of transfer shall deemed to be the full value of consideration. Therefore, it can be unequivocally argued that the full value of consideration need not necessarily be the fair market value of the asset. Even the said provision cannot be applied as it is effective from AY 2013-2014 and in the present case consideration can be determined as cost of construction to the developer.

50. The AO has relied on the decision of the Hon'ble High Court of Karnataka in the case of *CIT Vs Ved Prakash Rakhra reported in 256 CTR 285* and held that the fair market value/guideline value has to be adopted as consideration for the purpose of computing capital gains on sale of property. The AO has relied on the decision without emphasizing the dictum laid down by the Hon'ble High Court that it is not essential to adopt the construction cost of the builder and if the consideration is specified in the agreement then the same represent the market value for determining the consideration.

51. Reliance was placed on the following decisions in support of the contentions put forth on behalf of the assessee and it was prayed that the guideline value at Rs.2200 per sq.ft adopted by the revenue authorities is liable to be deleted and the assessee’s valuation at Rs.1500 per Sq. ft being the cost of construction to the builder be confirmed.

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i) ITO Vs. N. S. Nagaraj reported in 152 ITD 262

ii) CIT and Anr. V. Khivraj Motors reported in 380 ITR 215

52. The ld. DR submitted that the assessee adopted the cost of construction of commercial space @ Rs.1500 per sq.ft. as against the guidance value of that property fixed by Govt. of Karnataka @ Rs.2000 per sq.ft. According to him, the provisions of section 50C are applicable where the value of property is less than the value fixed by any authority of a State Govt. for the purpose of payment of stamp duty, the AO has to adopt such value fixed by State Govt. for the purpose of computation of capital gain. According to the ld. DR, the assessee has retained commercial space for his own use and therefore the AO was duty bound to take the value fixed by the State Govt. for the purpose of stamp duty. He thus supported the orders of lower authorities.

53. The contention of the learned AR is that as per section 48, the consideration received by the assessee is nothing but the cost of construction incurred by the builder on the assessee's share of constructed area because the assessee would receive constructed area in lieu of transfer of land belonged to developers share. Whatever is the expenditure incurred by the developer for constructing the area earmarked for assessee / land owners share, as the consideration received by the assessee. The Assessing Officer estimated this consideration at Rs.2,200 per sq.ft. being the guideline value adopted for registration by State Registration Authority. The assessee adopted at Rs.1,500 per sq.ft. being the cost of construction incurred by the developer. First of all, section 50C of the I.T.Act have no application of this point. Section 50C of the Act is applicable only when there is actual registration of property on transfer. In this case, the assessee's share of constructed area is not the subject matter of any registration in the name of the assessee in the assessment year under consideration. The assessee is getting his share of constructed area in the developed property vide JDA dated 08.01.2004. The Assessing Officer cannot apply the guideline value by invoking the provisions of section 50C of the Act when the subject matter of developed property is not the subjected to registration in the assessment year under consideration. The

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Assessing Officer has to consider the cost of construction incurred by the developer on the construction of assessee's share of developed property. The Assessing Officer not rejected the claim of assessee that the cost of construction claimed by the assessee at Rs.1,500 per sq.ft. being the cost of construction incurred by the developer. The Assessing Officer only claimed that provisions of section 50C of the Act is applicable at Rs.2,200 per sq.ft. being the guideline value. Since the Assessing Officer not disputed the cost of construction at Rs.1,500 per sq.ft. incurred by the developer on constructing the assessee's share of constructed area, we are of the opinion that the Assessing Officer has to consider the cost of construction at Rs.1,500 per sq.ft. being the cost of construction incurred by the developer towards the constructed area of assessee's share and to determine the capital gains in the assessment year 2012-2013. This view is fortified by the judgment of the Co-ordinate Bench of the ITAT Bangalore in the case of ITO v. N.S.Nagaraj reported in 152 ITD 262 and the Hon'ble Karnataka High Court in the case of CIT v. Khivraj Motors reported in 380 ITR 215, wherein held that when the cost of construction is been agreed upon by the parties and such cost of construction being the full value of consideration is not refuted by the Assessing Officer without assigning any valid reasons, then the cost of construction to the developer ought to be accepted as full value of consideration.

54. Thus, this ground of the assessee is allowed.

55. The next issue is with regard to applicability of section 50C of the Act for sale of residential flats. The ld. AR submitted that assessee during the FY 2011-2012 sold certain residential flats and offered the same to tax as Long-Term Capital Gains. The agreement to sell/booking advances in respect sales reflected in the FY 2011-2012 were entered into in the FYs 2006-2007 and 2007-2008. The consideration apropos agreement to sell/booing advances was received by proper banking channel, The AO applying the provisions of section 50C held that the guideline value as on the date of execution of sale deed needs to be considered and not the guideline value prevailing at the time of execution of agreement to sell/booking date. The AO in page 12 and 13 of the assessment order has

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tabulated the details of flat sold where the consideration is less than the guideline value and has worked out the difference between guideline value and the sale consideration at Rs.2,22,52,725/-. The assessee's share in the sale consideration is 21.94% and accordingly, a sum of Rs. 48,82,428 (Rs.2,22,52,725 x 21.94%) was added to the agreed consideration.

56. The CIT(Appeals) confirming the additions of the AO held that booking of flats cannot be construed as transfer of flats because in many cases the buyers are susceptible to cancel the booking and more so the flats are not in existence and are not in saleable condition.

57. The ld. AR submitted that all the booking advances are received by developer M/s Brigade Enterprises through banking channel. The confirmation of booking on receiving amount through cheques, itself, is an agreement of purchase of the flat. The booking of flat coupled with the payment made by buyers in pursuant to the booking of the flat constitute an agreement. Reliance was placed upon the decision of the ITAT, Jaipur in the case of *Radha Kishan Kungwani vs ITO in ITA No.1106/JP/2018 dated 19/08/2020*, held as under:-

> *"Thus, even if there is no separate agreement between the parties in writing but the agreement which is registered itself shows that the terms and conditions as contained in the said agreement were agreed between the parties at the time of booking of the flat. Hence, in our considered opinion that there was an agreement between the parties regarding purchase and sale of flat in question at the time of booking of the said flat and part payment made by the assessee on 10/10/2010 through cheque and there is subsequent payment on 14/10/2010 through cheque. Thus, the booking of the flat and part payment by the assessee constitute agreement between the parties as the terms and conditions which are reduced in writing in the agreement registered on 16/09/2014 relates to the performance of both the parties right from the beginning i.e. date of booking of the flat."*

58. Further, as per the second proviso to section 50C, the value adopted or assessed by the stamp valuation authority on the date of agreement may be taken as the full value of consideration provided the consideration has been received through electronic mode on or before the date of agreement.

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Though this amendment to section 50C was introduced in Finance Act, 2017, the law is well settled that the amendment must be given retrospective effect from the point when the provision was introduced. Reliance was placed upon the following decisions:-

(a) CIT v. Shri Vummudi Amarendran in T.C.A. No.329/2020 dated 28.09.2020 (Madras High Court), wherein it was held as under:-

"The Honble Supreme Court in Kolkata Export Company took note of the earlier decisions on the same issue in the case of Allied Motors Private Limited Vs. CIT [1997 (224) ITR 677 (SC)], Whirlpool of India Limited Vs. CIT, New Delhi [2000 (245) ITR 3], CIT Vs. Amrid Banaspati Company Limited [2002 (255) ITR 114] and CITvs. Alom Enterprises [2009 (319) ITR 306] and held that the new proviso should be given retrospective effect from the insertion on the ground that the proviso was added to remedy unintended consequences and supply an obvious omission. The proviso ensured reasonable interpretation and retrospective effect would serve the object behind the enactment. Thus by taking note of the above decisions, we have no hesitation to hold that the proviso to Section 50C(1) of the Act should be taken to be retrospective from the date when the proviso exists"

(b) Smt Kausalya Madanagopal and Ors. Vs ITO in ITA No.322/Bang/2019 dtd: 29-02-2020, wherein it was held as under:-

"We have considered the rival submission. We find that there is no dispute on these facts that Agreement of sale was entered on 12.08.1995 because this fact is noted by CIT (A) also in Para 5.3 of his order dated 05.01.2016 in the case of Shri V. M Harikrishna. In the same para of his order, this is also noted by CIT (A) that against the agreed sale consideration of Rs. 15 lacs for 1/3rd share, total value Rs. 45 lacs, an amount of Rs. 7.03. Lacs was received as advance and the details of this amount of Rs. 7.03 lacs is available in the said Agreement of sale as noted above. In the light of these facts, when we examine the applicability of these two tribunal orders cited by the learned AR of the assessee having been rendered in the case of Bharathi Dev Anandani vs. ACIT (Supra) and in the case of M/s Universal Power Transformer Pvt. Ltd. Vs. DCIT (Supra), we find that these are squarely applicable and since the evidence about receipt of part sales consideration by way of Account Payee Cheques before the date of sale deed is also available in the present case as discussed above, we do not feel any necessity to remand the matter to AD. Respectfully following these tribunal orders, we hold that the Stamp Duty Value as on the date of sale agreement on 07.08.1995 should be adopted to work out capital gain u/s 50C in both these cases as against the stamp duty value as on date of the sale deed as adopted by the AO. This issue is decided in favour of the assessee.

59. Therefore, it was submitted that the additions confirmed by the CIT(Appeals) amounting to Rs.48,82,248 is liable to be deleted.

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The ld. DR submitted that the dates which the assessee is showing as the date of agreement is nothing but the date of booking of flats. As such, booking is made with initial down payment and can be cancelled at any time after forfeiture of a nominal amount as cancellation charges. By no definition the booking of the flats can be treated as a transfer of the flats because in many of the cases the flats itself are not in existence or not in a saleable condition. The booking of flats simply represent an intention to sell on the part of purchaser. Therefore, it cannot be treated as the date of agreement for the sale of flats. Therefore it cannot be treated as the date of agreement for the sale of the flats. Thus, he supported the orders of lower authorities.

60. In this case, there is no dispute that the agreement to sale the impugned residential flats were entered into financial years 2006-2007 and 2007-2008. There is no dispute for this fact. Now the contention of the assessee is that for determining guideline value by invoking the provisions of section 50C of the Act, it should be considered the year in which the assessee entered into the agreement and not the year in which the sales were effected in view of the proviso to section 50C(1) of the Act, which was inserted by the Finance Act, 2016 with effect from 01.04.2017, which reads as under:-

> *"Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer."*

61. The contention of the learned DR is that this provision is only prospective and not retrospective and cannot be applied to the assessment year 2012-2013. As discussed earlier, the sale agreement actually entered in the financial years 2006-2007 and 2007-2008. In such circumstances, the guideline value prevailing in the financial year 2011-2012 could not be applied to the agreement entered into earlier assessment years. In all fairness, the guideline value prevailed in the relevant assessment year to be considered as a consideration so as to bring the capital gains into taxation. Since there is no dispute regarding the fact that the agreement for

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sale of flats were entered into the financial years 2006-2007 and 2007-2008, right over such flat has been transferred from the assessee to the respective purchasers. The only pending was the actual registration of sale deed. In other words, by way of sale agreement, the right in persona is created in favour of the purchaser. When such a right is created in favour of the purchaser and the assessee is refrained from selling such flats to someone else because the purchaser of the flat in whose favour right in persona is created, has legitimate right to enforce such specific performance on the agreement if the assessee-vendor have some reason or other reason has not executed the sale deed. Thus, by virtue of agreement to sale, the same right is given to the respective buyers by the assessee, being the vendor. There is encumbrance created over the flats in favour of the respective flat purchasers. Since there is a gap between the date of execution of sale agreement and sale deed and if the guideline value changes, the guideline value as on the date of agreement has to be considered as the full value of the consideration of the capital gains. In the present case, since enforceable agreement was entered in the financial years 2006-2007 and 2007-2008 and for the purpose of computation of capital gains in the hands of the assessee, the A.O. has to be adopted the guideline value as on the date of sale of the agreement and not on the date of sale deed. Our this view is fortified by the order of the Co-ordinate Bench of ITAT Bangalore in the case of Prakash Chand Bethala v. DCIT in ITA No.999/Bang/2019 dated 28.01.2021, wherein it was held as under:-

> *"26. We have considered the rival submissions. Section 48 of the Act provides the mode of computation of capital gain. It contemplates the income arising under the head 'capital gain' so as to compute by deducting from the full value of consideration received or accruing as a result of transfer of capital asset the following amounts viz., (a) expenditure incurred wholly and exclusively in connection with such transfer; (b) cost of acquisition of asset and cost of any improvement made thereto.*
>
> *27. Section 50C provides that where the consideration received or accruing as a result of transfer by an assessee of a capital asset being rent or building or both is less than the value adopted or assessed by any authority for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of section 48, be deemed to be the full value of the consideration. In other words, the full value of consideration*

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mentioned in section 48 is to be replaced by the consideration on which the value of the property was adopted for the purpose of payment of stamp duty.

28. In the present case, the AO applied the provisions of section 50C of the Act on the basis of Sale Deed executed by the assessee on 9.3.2007. At this stage, it is appropriate to observe that there was an Agreement of Sale executed by assessee on 8.3.1993 and total payment of Rs.9,79,455 was made to the Vendor by the Purchaser out of total consideration of Rs.9,80,500 and pending balance was only Rs.1,005 and the entire payment was made by cheque and the same was mentioned in the Sale Deed dated 9.3.2007. Further, the possession of property was also handed over to the Purchaser mentioning Sale Agreement as on 8.3.1993. It is also brought on record that this property has been mentioned as address of R.K. Sipani as evident from Form 32 filed by Sipani Automobiles Ltd. before ROC on 17.12.1996. Further Katha of said property has been transferred on 9.2.2000 in the name of M/s. KPCBPPL. Thus, the major payment of Rs.9,79,455 was received by the assessee vide Sale Agreement dated 8.3.1993 which was much before the Sale Deed executed on 9.3.2007. As observed earlier, section 50C provides that where the consideration received or accruing as a result of transfer by an assessee of a capital asset, being land or building or both, if less than value adopted or assed by any authority for the purpose of stamp duty in respect of such transfer, the value adopted or assessed shall for the purpose of section 48 be deemed to be the full value of consideration. The question before us is, what could be the full value of such consideration i.e., whether value on which stamp duty was paid at the time of Sale Deed or the value declared in the Sale Agreement?

29. In the present case, the assessee has entered into sale agreement on 8.3.1993 and major portion of the consideration has been received by the assessee mentioned in the Sale Agreement through account payee cheque and possession of property was also handed over to Sri R.K. Sipani on 24.10.1989, which was mentioned in clause 5 of sale agreement. There is no dispute regarding these facts. The Purchaser has not paid anything more than the value mentioned in the Sale Agreement. Further by way of Agreement dated 8.3.1993 right over the property has been transferred from the Vendor to Purchaser. The only pending was actual registration of the Sale Deed. In other words, at time of Agreement of Sale in respect of this immovable property on 8.3.1993, a right in persona is created in favour of the Purchaser. When such a right is created in favour of the Purchaser and the Vendor is restrained from selling such property to someone else because the Purchaser, in whose favour right in persona is created, has legitimate right to enforce such specific performance of the agreement if the Vendor for some reason or other has not executed the Sale Deed. Thus by virtue of Agreement of Sale, some right is given to the Vendee by the Vendor. It is encumbrance on the property. At this stage, it is appropriate to mention that the provisions of section 50C(1) of the

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Act, according to which, if there is a gap between the date of execution of Sale Agreement and the Sale Deed and if the guidance value changes, the guidance value as on the date of Agreement has to be considered as the full consideration of the capital asset. In the present case, the enforceable agreement was entered into on 8.3.1993 by payment of major portion of the Sale Consideration and only formal Sale Deed was executed on 9.3.2007. The assessee has produced all the relevant documents for demonstrating the authenticity of the Sale Agreement with corroborative evidence in the form of Katha Certificate in the name of M/s. KPCBPPL dated 1.7.1997, the address of R.K. Sipani, Sipani Automobiles Ltd. in Form 32 before the Registrar of Companies on 17.12.1996 and the payment details through Cheques. The payment mentioned in the Sale Deed towards sale consideration clearly demonstrated that these payments have been passed between the parties vide Sale Agreement dated 8.3.1993 and possession of property has already been handed over on 24.10.1989. Therefore, transfer has taken place vide Sale Agreement dated 8.3.1993 and full value of consideration for the purpose of computing long term capital gain in the hands of the assessee has to be adopted on the basis of guidance value of this property as on the date of Sale Agreement only, not on the date of Sale Deed dated 9.3.2007. Accordingly we allow the grounds taken by the assessee as there was no applicability of section 50C in the year 2007-08."

62. Accordingly, we direct the A.O. to consider the guideline value of the impugned residential flats as in the financial years 2006-2007 and 2007-2008 as the sale agreement are entered in the earlier assessment years and not in the assessment year 2012-2013. Taking the consistent view, we allow the ground of appeal of the assessee.

63. The last ground is that the CIT(Appeals) erred in confirming the action of the AO with regard to treatment of interest on fixed deposits which was prematurely closed and interest paid was reversed on premature closure of fixed deposits.

64. The ld. AR submitted that assessee during the FY 2011-12 had prematurely closed one fixed deposit with Vijaya Bank, Hassan Branch and the interest accrued on such FD was reversed subsequently. The assessee had declared Rs.4,50,840/- as interest from premature closure of FD. However, the CIT(Appeals) confirmed the additions of Rs.12,56,890/- made by the AO. It was submitted that the CIT(A) failed to appreciate the FD

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ledger account from Vijaya Bank, Hassan Branch which the assessee relied on to prove the transaction. Hence, the additions confirmed by the CIT(Appeal)s amounting to Rs.8,06,050/- is liable to be deleted.

65. The ld. DR submitted that the assessee has not disclosed interest of RS.6,11,866 received from Vijaya Bank. According to the ld. DR, the statement of Vijaya Bank shows that AO has correctly calculated the interest received and rightly brought it to tax.

66. After hearing both the parties, we are of the opinion that the Assessing Officer has to bring on tax the correct income earned from fixed deposits while going through the bank statements / certificate issued by Vijaya Bank, Hassan Branch in respect of fixed deposit prematurely closed by the assessee. The assessee shall produce bank statements / interest certificate in support of the income earned from the fixed deposit from Vijay Bank. With these observations, we remit the issue to the file of the A.O. for fresh consideration.

67. In the result, the appeal filed by the assessee is partly allowed.

Pronounced in the open court on this 15th day of February, 2021.

Sd/-	Sd/-
(SMT.BEENA PILLAI) **JUDICIAL MEMBER**	**(CHANDRA POOJARI)** **ACCOUNTANT MEMBER**

Bangalore,
Dated, the 15th day of February, 2021.

/*Desai S Murthy /Devadas*

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Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.