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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

ITA No.999/Bang/2019
Assessment year: 2007-08

Mr. Prakash Chand Bethala, 815, 80 feet Ring Road, 8th Block, Koramangala, Bangalore – 560 095. **PAN: AABHK 7700G**	Vs.	The Deputy Commissioner of Income Tax, Circle 7[1], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri Kannan Narayanan, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	11.01.2021
Date of Pronouncement	:	28.01.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 29.03.2019 of the CIT(Appeals), Bangalore-9, Bangalore in relation to assessment year 2007-08.

2. The assessee has raised the following grounds of appeal:-

> "1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
>
> 2. The order of re-assessment is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist

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and have not been complied with and consequently, the order of re-assessment requires to be cancelled.

3. The learned CIT[A] is not justified in upholding the assessment of the long term Capital Gains of Rs. 2,68,25,802/- on the alleged transfer of property during the year invoking the provisions of sec. 50C of the Act under the facts and in the circumstances of the appellant's case.

3.1 The learned CIT[A] failed to appreciate that there was no transfer of the property during the year under appeal and hence, the computation of the Capital Gains for the year under appeal is opposed to law and facts of the appellant's case and therefore, the capital gains assessed ought to have b deleted.

4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s 234-A, 234-6 and 234-C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

3. The main issue raised in this appeal is with regard to taxation of long term capital gains arising on transfer of the Site No. 868, 6th Block, Koramangala.

4. The brief facts of the case are that the assessee is an HUF. For the year under consideration, the assessee filed his return of income on 31/03/2008 declaring total income of Rs.2,06,130-/. The assessee had purchased the above property by participating in a BDA auction. The auction site agreement between the BDA and the assessee took place on 24.07.1984 and further the assessee was put in possession of the aforesaid site by the BDA on 29.08.1984. In the month of September, 1989, the assessee sold the aforesaid property to Shri R.K. Sipani through an oral

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agreement. The assessee gave possession of the site to Shri R.K. Sipani on 24/10/1989 for a consideration of Rs.9,80,500. The assessee received amount of Rs.9,79,455/- through various cheques and balance amount of Rs.1,005/- was to be paid by the purchaser at the time of execution of sale deed. On 08.03.1993, a sale agreement (unregistered document) for the aforesaid site was made between the assessee and Shri R.K. Sipani to bring clarity on the nature of the transaction with respect to oral agreement. The assessee further executed a sale deed on 09.03.2007 in which the aforesaid site was sold to M/s. Suraj Properties (a proprietary concern of R.K. Sipani's wife) for a consideration of Rs.9,80,500/- towards sale and Rs.23,27,305/- towards purchase of stamp duty.

5. The guidance value of the above property as per the sale deed was Rs.2,77,06,000/-. The Assessing Officer noticed that sale consideration was less than the guidance value. For the purpose of computation of capital gains, when the sale value is less than the guidance value calculated by stamp valuation authority, provisions of section 50C are attracted. As per section 50C, in such a case , the guidance value shall be deemed to be the full value of the consideration received or accruing as a result of such transfer. Section 50C of the Income Tax Act reads as follows:

> "50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.
>
> (2) Without prejudice to the provisions of sub-section (1), where—
>
> (a) the assessee claims before any Assessing Officer that the value adopted or assessed by the stamp valuation authority

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> under sub-section (1) exceeds the fair market value of the property as on the date of transfer;
>
> (b) the value so adopted or assessed by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,
>
> the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act."

6. Before the Assessing Officer, the assessee argued that the provisions of section 50C are applicable prospectively and not retrospectively. The assessee submitted that possession by transfer having been completed in 1989, the provisions of section 50C will not be applicable. According to the assessee, the provisions of section 50C of the Act comes with reference to the capital gains by the transferor to the transferee on transfer w.e.f. 01.04.2003. It was submitted that the provisions of section 50C came into statute book w.e.f. 04.04.2003 and it is prospective in nature and not retrospective. The assessee submitted that the assessee gave possession of the property before enactment of section 50C of the Act itself and therefore, section 50C has no application. It was submission of the assessee that assuming section 50C is applicable, the document executed is with reference to a contract or transfer within the meaning of Income-tax Act prior to enactment of section 50C of the Act. Therefore, it was submitted that the provisions of section 50C are not applicable. However, the Assessing Officer stated that provisions of section 50C are applicable and held that transaction is taxable for the year 2007-08. The Assessing Officer

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thus treated Rs.2,77,06,000/- as the sale consideration received by the assessee and calculated income from capital gains accordingly.

7. On appeal, the CIT(Appeals) confirmed the action of the AO in reopening the assessment and held that notice u/s. 148 was validly issued. On merits, he observed that the exact date of transfer has to be ascertained. Before the CIT(A), the assessee submitted that since the possession of the property was given long back, Shri R.K. Sipani had constructed the house for his own residential purpose, therefore, no transfer took place during FY 2006-07 and therefore, the question of offering the proceeds of transfer for capital gains tax does not arise in the A.Y. 2007-08. According to the CIT(A), the execution of sale deed by BDA in favour of the assessee took place only on 11.10.1995. Therefore, before the execution of sale deed, the assessee was only an allottee (agreement holder) of the aforesaid site. Thus, it was clear that the assessee himself was in part performance of the contract u/s. 53A of the Transfer of Property Act. Therefore, it was not clear how he transferred the site to Shri R.K. Sipani in 1993,when he himself got the sale deed executed in his favour in 1995 by the BDA. Further, according to the CIT(A), the ownership of property was transferred to Shri R.K. Sipani in 1993, then the sale deed executed by the BDA in 1995 should have been made in favour of Shri R.K. Sipani and not the assessee. According to the Assessing Officer, if the property had been transferred to Shri R.K. Sipani in 1993 itself, then the assessee should not have executed the sale deed in favour of M/s. Suraj Properties in 2007 as the same was not required from his side. As per the agreement dated 08.03.1993, the aforesaid site was transferred to Shri R.K. Sipani but in the sale deed dated 09.03.2007, it was transferred to M/s. Suraj Properties. Further, vide sale deed dated 09.03.2007 transfer of site as well as building took place; but vide sale agreement dated 08.03.1993, only the site was transferred. Hence, the sale agreement dated 08.03.1993 and the sale deed dated 09.03.2007 were not in coherence with

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each other and the transferee in both the cases were legally different entities and therefore both the transfers were held to be different. For convenience sake, relevant paragraph of sale deed dated 09.03.2007 extracted in the impugned order of the CIT(A) is reproduced below:-

> "Whereas the aforesaid site along with the building constructed thereon is the subject matter of this sale deed and the same is morefully described in the Schedule hereunder and herein referred to as the SCHEDULE PROPERTY."

8. Thus, the CIT(A) was of the view that the transactions carried out by the assessee were not clear and transparent in nature. He also noticed that the assessee had not paid the taxes during the respective year when the property was claimed to be transferred by him and after the execution of sale deed when the property was legally transferred. Thus he observed that the assessee was trying to bypass the laws with the help of various agreements which is clearly an instance of tax avoidance. He referred to section 54 of the Transfer of Property Act which, according to him, clearly states that transfer in case of an immovable property of value more than Rs.100 can only be made through a registered document. Section 54 of the Transfer of Property Act states as follows:-

> "Sale" defined, - "Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promise. Sale how made – Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such, person as he directs, in possession of the property.

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> Contract for sale, -A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

9. The CIT(A) with reference to sections 53A and 54 of the Transfer of Property Act, relied on the judgment of the Supreme Court in the case of *Narandas Karsondas vs. SA Kamtam and Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra* wherein it was observed that a transfer of immovable property by way of sale can be effected only by a deed of conveyance. In the absence of a deed of conveyance (which must be duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred. Reliance was also placed on the judgment of the Supreme Court in the case of *CIT vs. Balbir Singh Maini (2017) 86 taxmann.com 94 (SC)* wherein it was held that no rights are transferred in respect of an immovable property, if the document purportedly conveying such a transfer is not registered.

10. The relevant sections that are necessary for us to decide the present matter are as under:-

> "**53A. Part performance**. – Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other

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than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

Income Tax Act

Section 2 – Definitions In this Act, unless the context otherwise requires,–

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

(i) to (iv) xxx xxx

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

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

45. Capital gains –

(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

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

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

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> (ii) the cost of acquisition of the asset and the cost of any improvement thereto:"

11. Section 53A, as is well known, was inserted by the Transfer of Property Amendment Act, 1929 to import into India the equitable doctrine of part performance. This Court has in *Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bhairoba Suryavanshi (D) by LRs. & Ors., (2002) 3 SCC 676 at 682* stated as follows:-

> "16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53- A of the Act. The necessary conditions are:
>
> (1) there must be a contract to transfer for consideration of any immovable property;
>
> (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
>
> (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
>
> (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
>
> (5) the transferee must have done some act in furtherance of the contract; and
>
> (6) the transferee must have performed or be willing to perform his part of the contract."

12. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (2004) 8 SCC 614 at 619, para 10.* An agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section

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53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words *"the contract, though required to be registered, has not been registered, or"* in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:

> "17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A."

> **"49.** ***Effect of non-registration of documents required to be registered***. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall- (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
>
> **Provided** that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

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"**20**. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "*of the nature referred to in Section 53A*" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in *Shrimant Shamrao Suryavanshi (supra)*, that the Section applies, and this is what is meant by the expression "*of the nature referred to in Section 53A*". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "*of the nature referred to in Section 53A*" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of

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Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question."

13. The CIT(A) concluded that the sale agreement dated 08.03.1993 is an unregistered document and no legal transfer has happened through that. The CIT(A) observed that the transfer can only be effected by the execution of a sale deed which happened only on 09.03.2007. All other evidences/documents whether it is in the nature of shares of the company after formation of the company, possession of the property etc. are not relevant or not valid for transfer of immovable property after amendment in 2001. Therefore, the CIT(A) held that the sale agreement does not create any title in favour of the assessee and the sale agreement was not a valid document for transfer of property. Considering that the transfer had taken place on 09.03.2007, the CIT(A) held that provisions of section 50C of the Act are applicable in the present case, the transfer agreement dated 09.03.2007 was through a registered document and the guidance value of the property as on that date has to be considered as the sale consideration received by the assessee and taxed accordingly. Thus, the CIT(A) upheld the order of AO.

14. Against this, the assessee is in appeal before us.

15. With regard to the reopening of the assessment, the ld. counsel for the assessee firstly submitted that the reasons recorded furnished by the AO in the letter dated 30/11/2011 contains only the purported extract of the reasons recorded. However, it is submitted that the reasons to be recorded u/s. 148[2] of the Act are required to be done in the order sheet of the assessee's file with the date of recording the reasons and the signature of the AO recording the reasons. It is submitted that the AO has not furnished the copy of the order sheet notings containing the reasons recorded and in the circumstances, the assessee is unable to state if the mandatory requirements for initiating the proceedings have been properly complied with

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inasmuch as the date of recording the reasons is not known to the assessee. Further, the name and signature of the officer recording the reasons etc., is also unavailable and therefore, on this count also, the assessee is unable to state if the mandatory requirements of recording the reasons have been complied with. Hence, it is prayed that the AO may kindly be directed to furnish the same for effective representation of the case and upon the receipt of the same, permit the assessee to make submissions on this aspect of the matter.

16. Secondly, it was submitted that in the extract of the reasons as furnished by the learned A.O., there is a reference made to a survey was conducted by the Department in the case of M/s. Suraj Properties, Proprietrix, Smt. Suraj Sipani on 23/08/2011. It is stated that in course of the aforesaid survey proceedings, certain documents viz., sale deeds/agreements to sell were found and impounded. Perusal of these documents revealed that the assessee had sold the land acquired from BDA to M/s. Suraj Properties under the sale deed dated 09.03.2007 registered as document No. BHM 04162-2009-2010 in Book I, stored in CD No., BMHD 385 in the office of Sub-registrar, Bommanahalli, Bangalore for a consideration of Rs. 9,80,500/- towards sale and Rs. 23,27,305/- towards purchase of stamp duty. The guidance value of the property as seen from the sale deed is Rs. 2.7 crores. As the sale consideration is much less than the guidance value, the provisions of Sec. 50C of the Act is attracted in the hands of M/s. Prakash Chand Bethala and Sons [HUF]. Thus, the assessee is liable to pay capital gains tax. On the above basis, the AO was of the view after verification of the seized materials that it was found that the assessee has evaded the capital gains tax on the above sale of property for the aforesaid assessment year 20078-08. Hence, the learned A.O. has derived a reason to believe that income has escaped assessment.

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17. As mentioned earlier, the assessee did not file any formal objections. However, it has stated that there was no escapement of capital gains tax as the possession of the property sold under the sale deed dated 09.03.2007 was given long back. It was submitted that in fact, this aspect of the matter is clear from the materials found in course of survey itself and hence, according to the assessee, there could not be a bonafide belief that income has escaped assessment for the year under appeal. The reopening of the assessment has to be bonafide. It cannot be a mere pretense and when facts that are relevant for arriving at a proper conclusion are ignored and not considered the reopening of the assessment is not bonafide. Hence, it is submitted that the reopening of the assessment is unjustified and the consequent assessment order passed requires to be cancelled.

18. On the other hand, the ld. DR submitted that time for completion of the Sale Deed is only 1 year 6 months from the date of 08.03.1993 and Absolute Sale Deed was not executed within that period, therefore agreement to sell is not valid. He further submitted that even capital gain was not offered to tax consequent to this sale agreement also in the AY 1993-94. Accordingly he submitted that reopening of assessment is to be held as valid.

19. We have heard both the parties and perused the material on record. As seen from the facts of the case, during the course of survey in the case of M/s. Suraj Properties on 23.8.2011 certain documents were found and impounded, which showed there was a Sale Deed dated 9.3.2007 wherein the present assessee, PCBS(HUF) has sold the property to Smt. Suraj Sipani for a consideration of Rs.9,80,500 and stamp duty was paid at Rs.23,77,305. The guidance value of the said property was Rs.2.7 crores as per the provisions of section 50C of the Act. We are of the opinion that the assessee has to declare capital gain for the AY 2007-08 to the tune of Rs.2.77 crores which is said to have escaped assessment for the AY 2007-

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08. Accordingly the AO issued notice u/s. 148 to the assessee on 15.10.2012 after prior approval of the Addl. CIT, Range 7, Bangalore.

20. The assessee is a HUF, who filed return of income on 31.3.2008 declaring a total income of Rs. 2,06,130. There were no further proceedings taken in this case AO for the year under appeal. A notice u/s. 148 of the Income-tax Act, 1961 [the Act] was issued to the assessee on 15/12/2012 calling upon to file his return of income. In response to the notice, the ld. counsel for the assessee submitted on 22/01/2013 requesting that the return of income filed originally on 31/03/2008 be treated as return filed in response to the notice issued u/s 148 of the Act. In the said reply, the reasons recorded for issuing the notice u/s. 148 of the Act was also sought.

21. In our opinion, at the time of issue of notice u/s. 148 of the Act, the AO should have reason to believe that income has escaped assessment and it is not imperative that the AO should actually disclose the escapement of particular item of income. In other words, at the time of issue of notice u/s. 148, there need not be conclusive proof that there was escapement of income. The AO shall *prima facie* certify that there is escapement of income. In the present case, at the time of issue of notice u/s.148, there is a reason to believe that income has escaped assessment in the AY 2007-08. Even further discovery of the fact cannot invalidate the notice u/s. 148 of the Act, which when issued, was a valid notice. Accordingly, we uphold the reopening of assessment in this case.

22. Coming to the merits, the Ld. AR submitted that the assessee had originally participated in a BDA auction for purchase of property. The assessee was in possession of the site on 29/08/1984 pursuant to the auction site agreement dated 24/07/1984 entered into between the assessee and the BDA. It was submitted that Shri R.K. Sipani purchased the aforesaid site to construct his residential house through M/s. K. Prakashchand Bethala Properties Pvt. Ltd (M/s. KPCBPPL for short) floated

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earlier by him along with the assessee. After the incorporation of M/s. KPCBPPL, the assessee and Shri R.K. Sipani entered into an oral agreement in the month of September, 1989 whereby the assessee sold the aforesaid site to Shri R.K. Sipani for a consideration of Rs.9,80,500/- and a sum of Rs.9,79,455/- was received by the assessee by way of various cheques. It was submitted that the assessee gave possession to Shri R.K. Sipani of the aforesaid site on 24/10/1989 itself. Thereafter, the assessee entered into an unregistered agreement dated 08/03/1993 to sell the aforesaid site.

23. As already submitted by Ld. AR, Shri R.K. Sipani purchased the aforesaid site to construct his residential house through M/s. KPCBPPL. Thus, it was submitted that the land came to be owned by Shri R.K. Sipani and the super structure put up on the aforesaid site came to be owned by M/s. KPCBPPL, since it had put up the structure out of its funds. It was further submitted that the Khata of the aforesaid property stood in the name of M/s. KPCBPPL and also that the property taxes were paid by the said company from time to time. The Ld. AR drew our attention to the copy of the Khatha certificate and tax paid receipt which was already made available before the CIT(Appeals) as additional evidence (placed on record at PB pages 70 to 71). Further, the ld. AR submitted that as far as assessee was concerned, the transaction was virtually completed in the year 1989 and thereafter the assessee totally forgot about the transaction. In the year 1995 or thereabout, Shri R.K. Sipani realized that he did not have the title as he had not yet obtained the auction Sale Deed from the BDA. Subsequently, Shri R.K. Sipani got the Sale Deed dated 11.10.1995 executed by the BDA in favour of assessee and the copy of Sale Deed was placed on record

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which was not considered by the Assessing Officer. The Ld. AR submitted that on 09/03/2007, Shri R.K. Sipani got the assessee to execute a sale deed in respect of the aforesaid site in favour of his nominee viz., M/s. Suraj Properties, which is a proprietary concern of Shri R.K. Sipani's wife. Thus, it was submitted that the title of the property stood in favour of assessee in the records of Sub-Registrar since no registered sale agreement/document was executed between the parties. Therefore, Shri R.K. Sipani requested the assessee to execute the sale deed as vendor which was readily accepted by the assessee since he had received the entire sale consideration of Rs.9,80,500/- and M/s. KPCBPPL was made a confirming party as the super structure belonged to it.

24. The Ld. AR submitted that the difference between the guideline value of the sale deed being 09/03/2007 and the actual consideration agreed between the two parties became the subject matter of and the AO concluded the assessment proceedings, determining the total income of the assessee at Rs.2,70,31,932/- by making a solitary addition of Rs.2,68,25,802/- on the transfer of property by invoking the provisions of sec. 50C of the Act which was confirmed by the CIT(A).

25. On the other hand, the ld. DR submitted that the Sale Agreement dated 8.3.1993 is an unregistered document and it cannot be considered as a valid conveyance deed so as to transfer the impugned property and the actual sale took place vide Sale Deed dated 9.3.2007. According to the ld. DR, the sale took place only on 9.3.2007, as such the provisions of section 50C of the Act as it stood on that date should be applied. He supported the order of the lower authorities.

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

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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 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

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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 Act, according to which, if there is a gap between the date of execution of Sale Agreement and the Sale Deed

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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.

30. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 28th day of January, 2021.

Sd/-	Sd/-
(GEORGE GEORGE K.) JUDICIAL MEMBER	(CHANDRA POOJARI) ACCOUNTANT MEMBER

Bangalore,
Dated, the 28th January, 2021.

/*Desai S Murthy* /

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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.

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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

ITA No.999/Bang/2019
Assessment year: 2007-08

Mr. Prakash Chand Bethala, 815, 80 feet Ring Road, 8th Block, Koramangala, Bangalore – 560 095. **PAN: AABHK 7700G**	Vs.	The Deputy Commissioner of Income Tax, Circle 7[1], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri Kannan Narayanan, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	11.01.2021
Date of Pronouncement	:	28.01.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 29.03.2019 of the CIT(Appeals), Bangalore-9, Bangalore in relation to assessment year 2007-08.

2. The assessee has raised the following grounds of appeal:-

> "1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
>
> 2. The order of re-assessment is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist

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and have not been complied with and consequently, the order of re-assessment requires to be cancelled.

3. The learned CIT[A] is not justified in upholding the assessment of the long term Capital Gains of Rs. 2,68,25,802/- on the alleged transfer of property during the year invoking the provisions of sec. 50C of the Act under the facts and in the circumstances of the appellant's case.

3.1 The learned CIT[A] failed to appreciate that there was no transfer of the property during the year under appeal and hence, the computation of the Capital Gains for the year under appeal is opposed to law and facts of the appellant's case and therefore, the capital gains assessed ought to have b deleted.

4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s 234-A, 234-6 and 234-C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

3. The main issue raised in this appeal is with regard to taxation of long term capital gains arising on transfer of the Site No. 868, 6th Block, Koramangala.

4. The brief facts of the case are that the assessee is an HUF. For the year under consideration, the assessee filed his return of income on 31/03/2008 declaring total income of Rs.2,06,130-/. The assessee had purchased the above property by participating in a BDA auction. The auction site agreement between the BDA and the assessee took place on 24.07.1984 and further the assessee was put in possession of the aforesaid site by the BDA on 29.08.1984. In the month of September, 1989, the assessee sold the aforesaid property to Shri R.K. Sipani through an oral

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agreement. The assessee gave possession of the site to Shri R.K. Sipani on 24/10/1989 for a consideration of Rs.9,80,500. The assessee received amount of Rs.9,79,455/- through various cheques and balance amount of Rs.1,005/- was to be paid by the purchaser at the time of execution of sale deed. On 08.03.1993, a sale agreement (unregistered document) for the aforesaid site was made between the assessee and Shri R.K. Sipani to bring clarity on the nature of the transaction with respect to oral agreement. The assessee further executed a sale deed on 09.03.2007 in which the aforesaid site was sold to M/s. Suraj Properties (a proprietary concern of R.K. Sipani's wife) for a consideration of Rs.9,80,500/- towards sale and Rs.23,27,305/- towards purchase of stamp duty.

5. The guidance value of the above property as per the sale deed was Rs.2,77,06,000/-. The Assessing Officer noticed that sale consideration was less than the guidance value. For the purpose of computation of capital gains, when the sale value is less than the guidance value calculated by stamp valuation authority, provisions of section 50C are attracted. As per section 50C, in such a case , the guidance value shall be deemed to be the full value of the consideration received or accruing as a result of such transfer. Section 50C of the Income Tax Act reads as follows:

> "50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.
>
> (2) Without prejudice to the provisions of sub-section (1), where—
>
> (a) the assessee claims before any Assessing Officer that the value adopted or assessed by the stamp valuation authority

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> under sub-section (1) exceeds the fair market value of the property as on the date of transfer;
>
> (b) the value so adopted or assessed by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,
>
> the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act."

6. Before the Assessing Officer, the assessee argued that the provisions of section 50C are applicable prospectively and not retrospectively. The assessee submitted that possession by transfer having been completed in 1989, the provisions of section 50C will not be applicable. According to the assessee, the provisions of section 50C of the Act comes with reference to the capital gains by the transferor to the transferee on transfer w.e.f. 01.04.2003. It was submitted that the provisions of section 50C came into statute book w.e.f. 04.04.2003 and it is prospective in nature and not retrospective. The assessee submitted that the assessee gave possession of the property before enactment of section 50C of the Act itself and therefore, section 50C has no application. It was submission of the assessee that assuming section 50C is applicable, the document executed is with reference to a contract or transfer within the meaning of Income-tax Act prior to enactment of section 50C of the Act. Therefore, it was submitted that the provisions of section 50C are not applicable. However, the Assessing Officer stated that provisions of section 50C are applicable and held that transaction is taxable for the year 2007-08. The Assessing Officer

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thus treated Rs.2,77,06,000/- as the sale consideration received by the assessee and calculated income from capital gains accordingly.

7. On appeal, the CIT(Appeals) confirmed the action of the AO in reopening the assessment and held that notice u/s. 148 was validly issued. On merits, he observed that the exact date of transfer has to be ascertained. Before the CIT(A), the assessee submitted that since the possession of the property was given long back, Shri R.K. Sipani had constructed the house for his own residential purpose, therefore, no transfer took place during FY 2006-07 and therefore, the question of offering the proceeds of transfer for capital gains tax does not arise in the A.Y. 2007-08. According to the CIT(A), the execution of sale deed by BDA in favour of the assessee took place only on 11.10.1995. Therefore, before the execution of sale deed, the assessee was only an allottee (agreement holder) of the aforesaid site. Thus, it was clear that the assessee himself was in part performance of the contract u/s. 53A of the Transfer of Property Act. Therefore, it was not clear how he transferred the site to Shri R.K. Sipani in 1993,when he himself got the sale deed executed in his favour in 1995 by the BDA. Further, according to the CIT(A), the ownership of property was transferred to Shri R.K. Sipani in 1993, then the sale deed executed by the BDA in 1995 should have been made in favour of Shri R.K. Sipani and not the assessee. According to the Assessing Officer, if the property had been transferred to Shri R.K. Sipani in 1993 itself, then the assessee should not have executed the sale deed in favour of M/s. Suraj Properties in 2007 as the same was not required from his side. As per the agreement dated 08.03.1993, the aforesaid site was transferred to Shri R.K. Sipani but in the sale deed dated 09.03.2007, it was transferred to M/s. Suraj Properties. Further, vide sale deed dated 09.03.2007 transfer of site as well as building took place; but vide sale agreement dated 08.03.1993, only the site was transferred. Hence, the sale agreement dated 08.03.1993 and the sale deed dated 09.03.2007 were not in coherence with

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each other and the transferee in both the cases were legally different entities and therefore both the transfers were held to be different. For convenience sake, relevant paragraph of sale deed dated 09.03.2007 extracted in the impugned order of the CIT(A) is reproduced below:-

> "Whereas the aforesaid site along with the building constructed thereon is the subject matter of this sale deed and the same is morefully described in the Schedule hereunder and herein referred to as the SCHEDULE PROPERTY."

8. Thus, the CIT(A) was of the view that the transactions carried out by the assessee were not clear and transparent in nature. He also noticed that the assessee had not paid the taxes during the respective year when the property was claimed to be transferred by him and after the execution of sale deed when the property was legally transferred. Thus he observed that the assessee was trying to bypass the laws with the help of various agreements which is clearly an instance of tax avoidance. He referred to section 54 of the Transfer of Property Act which, according to him, clearly states that transfer in case of an immovable property of value more than Rs.100 can only be made through a registered document. Section 54 of the Transfer of Property Act states as follows:-

> "Sale" defined, - "Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promise. Sale how made – Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such, person as he directs, in possession of the property.

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> Contract for sale, -A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

9. The CIT(A) with reference to sections 53A and 54 of the Transfer of Property Act, relied on the judgment of the Supreme Court in the case of *Narandas Karsondas vs. SA Kamtam and Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra* wherein it was observed that a transfer of immovable property by way of sale can be effected only by a deed of conveyance. In the absence of a deed of conveyance (which must be duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred. Reliance was also placed on the judgment of the Supreme Court in the case of *CIT vs. Balbir Singh Maini (2017) 86 taxmann.com 94 (SC)* wherein it was held that no rights are transferred in respect of an immovable property, if the document purportedly conveying such a transfer is not registered.

10. The relevant sections that are necessary for us to decide the present matter are as under:-

> "**53A. Part performance**. – Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other

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than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

Income Tax Act

Section 2 – Definitions In this Act, unless the context otherwise requires,–

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

(i) to (iv) xxx xxx

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

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

45. Capital gains –

(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

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

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

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

11. Section 53A, as is well known, was inserted by the Transfer of Property Amendment Act, 1929 to import into India the equitable doctrine of part performance. This Court has in *Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bhairoba Suryavanshi (D) by LRs. & Ors., (2002) 3 SCC 676 at 682* stated as follows:-

> "16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53- A of the Act. The necessary conditions are:
>
> (1) there must be a contract to transfer for consideration of any immovable property;
>
> (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
>
> (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
>
> (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
>
> (5) the transferee must have done some act in furtherance of the contract; and
>
> (6) the transferee must have performed or be willing to perform his part of the contract."

12. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (2004) 8 SCC 614 at 619, para 10.* An agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section

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53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words *"the contract, though required to be registered, has not been registered, or"* in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:

> "17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A."

> **"49.** ***Effect of non-registration of documents required to be registered***. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall- (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
>
> **Provided** that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

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"**20**. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "*of the nature referred to in Section 53A*" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in *Shrimant Shamrao Suryavanshi (supra)*, that the Section applies, and this is what is meant by the expression "*of the nature referred to in Section 53A*". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "*of the nature referred to in Section 53A*" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of

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> Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question."

13. The CIT(A) concluded that the sale agreement dated 08.03.1993 is an unregistered document and no legal transfer has happened through that. The CIT(A) observed that the transfer can only be effected by the execution of a sale deed which happened only on 09.03.2007. All other evidences/documents whether it is in the nature of shares of the company after formation of the company, possession of the property etc. are not relevant or not valid for transfer of immovable property after amendment in 2001. Therefore, the CIT(A) held that the sale agreement does not create any title in favour of the assessee and the sale agreement was not a valid document for transfer of property. Considering that the transfer had taken place on 09.03.2007, the CIT(A) held that provisions of section 50C of the Act are applicable in the present case, the transfer agreement dated 09.03.2007 was through a registered document and the guidance value of the property as on that date has to be considered as the sale consideration received by the assessee and taxed accordingly. Thus, the CIT(A) upheld the order of AO.

14. Against this, the assessee is in appeal before us.

15. With regard to the <u>reopening of the assessment</u>, the ld. counsel for the assessee firstly submitted that the reasons recorded furnished by the AO in the letter dated 30/11/2011 contains only the purported extract of the reasons recorded. However, it is submitted that the reasons to be recorded u/s. 148[2] of the Act are required to be done in the order sheet of the assessee's file with the date of recording the reasons and the signature of the AO recording the reasons. It is submitted that the AO has not furnished the copy of the order sheet notings containing the reasons recorded and in the circumstances, the assessee is unable to state if the mandatory requirements for initiating the proceedings have been properly complied with

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inasmuch as the date of recording the reasons is not known to the assessee. Further, the name and signature of the officer recording the reasons etc., is also unavailable and therefore, on this count also, the assessee is unable to state if the mandatory requirements of recording the reasons have been complied with. Hence, it is prayed that the AO may kindly be directed to furnish the same for effective representation of the case and upon the receipt of the same, permit the assessee to make submissions on this aspect of the matter.

16. Secondly, it was submitted that in the extract of the reasons as furnished by the learned A.O., there is a reference made to a survey was conducted by the Department in the case of M/s. Suraj Properties, Proprietrix, Smt. Suraj Sipani on 23/08/2011. It is stated that in course of the aforesaid survey proceedings, certain documents viz., sale deeds/agreements to sell were found and impounded. Perusal of these documents revealed that the assessee had sold the land acquired from BDA to M/s. Suraj Properties under the sale deed dated 09.03.2007 registered as document No. BHM 04162-2009-2010 in Book I, stored in CD No., BMHD 385 in the office of Sub-registrar, Bommanahalli, Bangalore for a consideration of Rs. 9,80,500/- towards sale and Rs. 23,27,305/- towards purchase of stamp duty. The guidance value of the property as seen from the sale deed is Rs. 2.7 crores. As the sale consideration is much less than the guidance value, the provisions of Sec. 50C of the Act is attracted in the hands of M/s. Prakash Chand Bethala and Sons [HUF]. Thus, the assessee is liable to pay capital gains tax. On the above basis, the AO was of the view after verification of the seized materials that it was found that the assessee has evaded the capital gains tax on the above sale of property for the aforesaid assessment year 20078-08. Hence, the learned A.O. has derived a reason to believe that income has escaped assessment.

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17. As mentioned earlier, the assessee did not file any formal objections. However, it has stated that there was no escapement of capital gains tax as the possession of the property sold under the sale deed dated 09.03.2007 was given long back. It was submitted that in fact, this aspect of the matter is clear from the materials found in course of survey itself and hence, according to the assessee, there could not be a bonafide belief that income has escaped assessment for the year under appeal. The reopening of the assessment has to be bonafide. It cannot be a mere pretense and when facts that are relevant for arriving at a proper conclusion are ignored and not considered the reopening of the assessment is not bonafide. Hence, it is submitted that the reopening of the assessment is unjustified and the consequent assessment order passed requires to be cancelled.

18. On the other hand, the ld. DR submitted that time for completion of the Sale Deed is only 1 year 6 months from the date of 08.03.1993 and Absolute Sale Deed was not executed within that period, therefore agreement to sell is not valid. He further submitted that even capital gain was not offered to tax consequent to this sale agreement also in the AY 1993-94. Accordingly he submitted that reopening of assessment is to be held as valid.

19. We have heard both the parties and perused the material on record. As seen from the facts of the case, during the course of survey in the case of M/s. Suraj Properties on 23.8.2011 certain documents were found and impounded, which showed there was a Sale Deed dated 9.3.2007 wherein the present assessee, PCBS(HUF) has sold the property to Smt. Suraj Sipani for a consideration of Rs.9,80,500 and stamp duty was paid at Rs.23,77,305. The guidance value of the said property was Rs.2.7 crores as per the provisions of section 50C of the Act. We are of the opinion that the assessee has to declare capital gain for the AY 2007-08 to the tune of Rs.2.77 crores which is said to have escaped assessment for the AY 2007-

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08. Accordingly the AO issued notice u/s. 148 to the assessee on 15.10.2012 after prior approval of the Addl. CIT, Range 7, Bangalore.

20. The assessee is a HUF, who filed return of income on 31.3.2008 declaring a total income of Rs. 2,06,130. There were no further proceedings taken in this case AO for the year under appeal. A notice u/s. 148 of the Income-tax Act, 1961 [the Act] was issued to the assessee on 15/12/2012 calling upon to file his return of income. In response to the notice, the ld. counsel for the assessee submitted on 22/01/2013 requesting that the return of income filed originally on 31/03/2008 be treated as return filed in response to the notice issued u/s 148 of the Act. In the said reply, the reasons recorded for issuing the notice u/s. 148 of the Act was also sought.

21. In our opinion, at the time of issue of notice u/s. 148 of the Act, the AO should have reason to believe that income has escaped assessment and it is not imperative that the AO should actually disclose the escapement of particular item of income. In other words, at the time of issue of notice u/s. 148, there need not be conclusive proof that there was escapement of income. The AO shall *prima facie* certify that there is escapement of income. In the present case, at the time of issue of notice u/s.148, there is a reason to believe that income has escaped assessment in the AY 2007-08. Even further discovery of the fact cannot invalidate the notice u/s. 148 of the Act, which when issued, was a valid notice. Accordingly, we uphold the reopening of assessment in this case.

22. Coming to the merits, the Ld. AR submitted that the assessee had originally participated in a BDA auction for purchase of property. The assessee was in possession of the site on 29/08/1984 pursuant to the auction site agreement dated 24/07/1984 entered into between the assessee and the BDA. It was submitted that Shri R.K. Sipani purchased the aforesaid site to construct his residential house through M/s. K. Prakashchand Bethala Properties Pvt. Ltd (M/s. KPCBPPL for short) floated

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earlier by him along with the assessee. After the incorporation of M/s. KPCBPPL, the assessee and Shri R.K. Sipani entered into an oral agreement in the month of September, 1989 whereby the assessee sold the aforesaid site to Shri R.K. Sipani for a consideration of Rs.9,80,500/- and a sum of Rs.9,79,455/- was received by the assessee by way of various cheques. It was submitted that the assessee gave possession to Shri R.K. Sipani of the aforesaid site on 24/10/1989 itself. Thereafter, the assessee entered into an unregistered agreement dated 08/03/1993 to sell the aforesaid site.

23. As already submitted by Ld. AR, Shri R.K. Sipani purchased the aforesaid site to construct his residential house through M/s. KPCBPPL. Thus, it was submitted that the land came to be owned by Shri R.K. Sipani and the super structure put up on the aforesaid site came to be owned by M/s. KPCBPPL, since it had put up the structure out of its funds. It was further submitted that the Khata of the aforesaid property stood in the name of M/s. KPCBPPL and also that the property taxes were paid by the said company from time to time. The Ld. AR drew our attention to the copy of the Khatha certificate and tax paid receipt which was already made available before the CIT(Appeals) as additional evidence (placed on record at PB pages 70 to 71). Further, the ld. AR submitted that as far as assessee was concerned, the transaction was virtually completed in the year 1989 and thereafter the assessee totally forgot about the transaction. In the year 1995 or thereabout, Shri R.K. Sipani realized that he did not have the title as he had not yet obtained the auction Sale Deed from the BDA. Subsequently, Shri R.K. Sipani got the Sale Deed dated 11.10.1995 executed by the BDA in favour of assessee and the copy of Sale Deed was placed on record

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which was not considered by the Assessing Officer. The Ld. AR submitted that on 09/03/2007, Shri R.K. Sipani got the assessee to execute a sale deed in respect of the aforesaid site in favour of his nominee viz., M/s. Suraj Properties, which is a proprietary concern of Shri R.K. Sipani's wife. Thus, it was submitted that the title of the property stood in favour of assessee in the records of Sub-Registrar since no registered sale agreement/document was executed between the parties. Therefore, Shri R.K. Sipani requested the assessee to execute the sale deed as vendor which was readily accepted by the assessee since he had received the entire sale consideration of Rs.9,80,500/- and M/s. KPCBPPL was made a confirming party as the super structure belonged to it.

24. The Ld. AR submitted that the difference between the guideline value of the sale deed being 09/03/2007 and the actual consideration agreed between the two parties became the subject matter of and the AO concluded the assessment proceedings, determining the total income of the assessee at Rs.2,70,31,932/- by making a solitary addition of Rs.2,68,25,802/- on the transfer of property by invoking the provisions of sec. 50C of the Act which was confirmed by the CIT(A).

25. On the other hand, the ld. DR submitted that the Sale Agreement dated 8.3.1993 is an unregistered document and it cannot be considered as a valid conveyance deed so as to transfer the impugned property and the actual sale took place vide Sale Deed dated 9.3.2007. According to the ld. DR, the sale took place only on 9.3.2007, as such the provisions of section 50C of the Act as it stood on that date should be applied. He supported the order of the lower authorities.

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

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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 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

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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 Act, according to which, if there is a gap between the date of execution of Sale Agreement and the Sale Deed

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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.

30. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 28th day of January, 2021.

Sd/-	Sd/-
(GEORGE GEORGE K.) JUDICIAL MEMBER	(CHANDRA POOJARI) ACCOUNTANT MEMBER

Bangalore,
Dated, the 28th January, 2021.

/*Desai S Murthy* /

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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.