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

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.54/Bang/2020
Assessment year : 2010-11

The Deputy Commissioner of Income Tax, Central Circle 1(3), Bengaluru.	Vs.	M/s. R. Muniraju (HUF), Rama Nilaya, Ittamadu Main Road, Arahalli Village, Bengaluru – 50 061. **PAN: AAAHM 7410C**
APPELLANT		RESPONDENT

CO No.2/Bang/2022 [in ITA No.54/Bang/2020]
Assessment year : 2010-11

M/s. R. Muniraju (HUF), Bengaluru – 50 061. **PAN: AAAHM 7410C**	Vs.	The Deputy Commissioner of Income Tax, Central Circle 1(3), Bengaluru.
CROSS OBJECTOR		RESPONDENT

Revenue by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.
Assessee by	:	Shri Narendra Sharma, Advocate

Date of hearing	:	06.10.2022
Date of Pronouncement	:	13.10.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal of the revenue and cross objection by the assessee is against the order of CIT(Appeals)-11, Bangalore dated 14.10.2019 passed for the assessment year 2010-11.

2. Brief facts of the case are that the assessee is a HUF and filed return of income for the AY 2010-11 on 25.11.2011 declaring an income of Rs.1,36,15,880. The said return of income was processed u/s.143(1) and the intimation dated 24.11.2012 was sent to the assessee. There was a search u/s.132 of the Act in the residence of Shri R. Muniraju on 7.1.2016 under the strength of warrant issued in the case of M/s. Trans Global Power P. Ltd. in which Shri R. Muniraju was one of the directors. During the course of search, a Joint Development Agreement (JDA) dated 11.12.2009 which was executed between the assessee and M/s. Brundavan Constructions (Developer) for a development of properties situated in Arehalli village, Uttarahalli Hobli, Bangalore was seized. The AO of Trans Global Power Ltd. recorded satisfaction in terms of section 153C that the said seized document does not pertain to Trans Global Power Ltd. but to the assessee. The AO of the assessee after examining the JDA and satisfied that the same belongs to the assessee initiated proceedings u/s.153C. The AO on examination of the JDA was of the view capital gains arises at the time of execution of the JDA when possession of the property is handed over to the Developer due to the concept of part performance and proceeded to compute the

capital gains for AY 2010-11. The AO while computing the capital gain considered the cost of construction as per the estimation of the developer as the sale consideration and arrived at an addition of Rs.24,32,88,991 towards capital gains while completing the assessment u/s. 153C r.w.s. 153A r.w.s. 144 r.w.s. 153D of the Act. Aggrieved the assessee preferred an appeal before the CIT (Appeals).

3. The assessee contented the legality of proceedings u/s.153C by stating that the AO ought to have assumed jurisdiction u/s.153A and also that the JDA is not an incriminating material. On merits, the assessee submitted before the CIT (Appeals) that the date of JDA cannot be treated as year of transfer property and that the assessee has offered the capital gains to tax during AY 2013-14 to AY 2017-18 upon actual sale of flats. The assessee also challenged the cost of construction taken as the sale consideration by the AO. The assessee further submitted before the CIT (Appeals) that the assessee has submitted the various details called for from time to time by the AO and the AO erred in completing the assessment u/s.144. Without prejudice, the assessee prayed that the credit for the taxes paid during the subsequent years towards capital gain to be given against the tax liability of the impugned assessment year.

4. The CIT (Appeals) dismissed the legal grounds raised by the assessee and confirmed the order of the AO with regard to the year of transfer of the property. However, the CIT (Appeals) directed the AO to consider the guideline value of the property as the sale consideration to re-compute the capital gain and also to re-compute the capital gain of

AY 2013-14 to 2017-18. The revenue and the assessee are in cross appeals before the Tribunal against the impugned order of the CIT(Appeals).

5. The issues contended by the revenue through various grounds raised is with regard to the CIT(Appeals) considering the Guideline Value @ Rs.520 per sq.ft. as the sale consideration instead of the estimated cost of construction @ Rs.2505 per sq.ft., for the purpose of determining the capital gain. The issues contended by the assessee through cross objections are with regard to :-

i. Initiation of proceedings by the AO u/s. 153C instead of the proceedings u/s. 153A.
ii. The proceedings u/s. 153C is initiated without any incriminating documents being seized during the course of search.
iii. The year of transfer of the property under JDA is the year when the actual sale of flats happened and not the year in which the JDA is entered into.
iv. Without prejudice, the year of transfer should be the year in which the plan is approved and not the year in which the JDA is entered into.

6. There is a delay of 213 days in filing the cross objections (CO) by the assessee before the Tribunal. In this regard, the ld. AR submitted that the assessee had raised legal grounds on validity of assessment before the first appellate authority which was dismissed. The assessee was under the bona fide belief that it could raise the said legal contentions under Rule 27 of the Appellate Tribunal Rules before the Tribunal and therefore did not file the cross objections. Subsequently, the Karta of the assessee Sri R. Muniraju during the time of professional

consultation of the instant departmental appeal with the Senior Counsel was advised to file a CO and the assessee filed the cross objection with a delay of 213 days (excluding the period of delay from 15.03.2020 to 28.02.2022 by relying on the order of the Hon'ble Supreme Court in Miscellaneous Application No.21 of 2022 and No.665 of 2021). The assessee was also advised to file an application for condonation of delay in filling the appeal before the Tribunal. Relying on the judgment of the Supreme Court in the case of *Collector of Land Acquisition v. Mst. Katiji, (1987) 167 ITR 471* and other judgments of the Supreme Court, it was prayed that the delay in filing the CO may be condoned.

7. We have considered the rival submissions and perused the material on record. We are of the view that there was sufficient and reasonable cause in belated filing of the cross objections since the assessee was under the bona fide belief that the issues can be contended before the Tribunal without filing cross objections under Rule 27. Therefore following the judgment of the Supreme Court in the case of *Mst. Katiji (supra)*, and the delay of 213 days is condoned.

CO No.2/Bang/2022

8. The assessee in the CO has raised grounds on both legal issues and on merits. Therefore, we will first adjudicate the CO of the assessee. The AO on perusal of the JDA entered into between the assessee and the developer had concluded that the year under consideration is a year of transfer. In this regard, the AO relied on the decision of jurisdictional High Court in the case of *Dr. T.K. Dayalu,*

(2011) 14 taxmann.com 120 (Kar). The relevant extract from the AO's order is reproduced below:-

> "3.2. As per the Hon'ble High Court of Karnataka's decision in the case of Dr. T.K. Dayalu, 14 Taxmann.com 120 (2011) (Kar), capital gains arises at the time of execution of Joint Development Agreement, when possession of property is handed over to the Developer due to the concept of Part Performance. The judgement of the Hon'ble High Court of Bombay in the case of M/s. Chaturbhuj Dwarkadas Kapadia vs CIT (2003) 260 ITR 491 has been relied upon by the Hon'ble Karnataka High Court in the T.K. Dayalu decision. The Chaturbhuj decision lists out 6 conditions for satisfaction of Part Performance as per Section 2(47)(v) of Income Tax Act, 1961 and Section 53A of Transfer of Property Act, 1882. The conditions specified in the said case law and their satisfaction in the present case are tabulated below:

S. No.	Conditions	Satisfaction of the Conditions
1	There should be a contract for consideration;	Yes. The JDA dated 11.12.2009 is the contract which specifies that the landowner is entitled to 40% of the super-built up area.
2	it should be in writing;	Yes. The contract viz. JDA dated 11.12.2009 is a written and registered contract.
3	it should be signed by the transferor;	Yes. The contract viz. JDA dated 11.12.2009 has been signed by the transferor viz. Shri. R Muniraju HUF.
4	it should pertain to transfer of immovable property;	Yes. The contract viz. JDA dated 11.12.2009 pertains to immovable property located in Arehalli Village, Uttarahalli Hobli, Bangalore

5	the transferee should have taken possession of the property;	Yes. Vide General Power of Attorney dated 11.12.2009 possession has been handed over to the Developer(M/s. Brundavan Constructions). Also as per Para 1(b) of the JDA, the land owners delivered possession and irrevocably permitted and authorized the Developer to enter and develop the property by constructing a multistory apartment building. The translated copy of Plan Sanction dated 05.06.2010 submitted By the assessee mentions that M/s. Brundavan Constructions had applied for Plan Sanction before BBMP Commissioner vide its representation dated 18.03.2010. This clearly suggests that the developer is in possession of land at Arehalli Village, Uttarahalli Hobli, Bangalore.
6	lastly, the transferee should be ready and willing to perform his part of the contract.	Yes. As mentioned above, the developer Had applied for plan sanction on 18.03.2010. The pre-requisites for plan sanction viz. survey, measurement, plan preparation through architects have also been performed by the Developer.

3.3. The Joint Development Agreement (11.12.2009), the Power of Attorney (11.12.2009), pre-construction activities and the plan sanction representation (18.03.2010), all occurred during F.Y. 2009-10. In light of the facts brought on record above and in light of the decisions of the Hon'ble High Courts of Karnataka & Bombay, I am satisfied that Capital Gains arises in the hands of the assessee R Muniraju HUF in F.Y. 2009-10 i.e. A.Y. 2010-11. However, the assessee has not offered the capital gains arising from the Joint Development Agreement with M/s. Brundavan Constructions in A.Y. 2010-11.

3.4. In light of the above discussion and in the capacity of Assessing of Officer [DCIT, Central Circle-1(3), Bengaluru, in the case of R. Muniraju (HUF), satisfied that the information contained in the said document (Page Nos. 47 to 75 of A/RM/5) pertains to/relates to R.Muniraju (HUF) and has a bearing on the

determination of its total income, for the Financial Year 2009-10 relevant to Assessment Year 2010-11."

9. The AO considered clauses 14, 15 & 19 of the JDA along with clause (m) & (n) of GPA to conclude that the transfer as contemplated u/s. 2(47)(v) of the Act r.w.s. 53A of the TP Act, 1961 is the date of the JDA. Before the AO, the assessee contended that the plan sanction for the development of the property was obtained only on 15.6.2010 and therefore the year under consideration cannot be taken as the year of transfer. The assessee also contended that without the plan sanction, the terms of JDA cannot be implemented and therefore the AO cannot consider the date of JDA as the date of transfer. The AO did not accept the contention of the assessee and stated that the application for plan approval was submitted by the developer in accordance with the terms of the JDA on 18.3.2010 which is falling in the year relevant to AY 2010-11 and therefore on that count also, the capital gain needs to be assessed in the year under consideration. The AO considered the estimated cost per sq.ft. as submitted by the developer as the consideration for the built-up area receivable by the assessee i.e., Rs.2505 per sq.ft. The AO took the assessee's share of the saleable area at Rs.97,730 sq.ft. and computed the capital gain at Rs.24,50,64,150. Aggrieved the assessee preferred appeal before the CIT(Appeals).

10. The assessee submitted before the CIT (Appeals) that the proceedings initiated by the AO by issuing notice u/s. 153C is bad in law as the AO ought to have assumed jurisdiction u/s. 153A and therefore the order of the AO is not valid. The assessee alternatively

submitted that the seized document relied upon by the AO is not incriminating in nature and therefore assumption of jurisdiction u/s. 153C of the Act is bad in law.

11. On merits, the assessee submitted before the CIT (Appeals) that the date of JDA cannot be considered as the date of transfer and that the assessee has offered the capital gains to tax as and when the flats were actually sold from AY 2013-14 to 2017-18. The assessee also submitted before the CIT(Appeals) that the plan sanction itself was received only on 15.6.2010 and therefore no gain would arise to the assessee in the year under consideration when the work itself did not commence.

12. The CIT (Appeals) on the legal issue held that the AO has followed the correct procedure for invoking provisions of section 153C of the Act. He further held that the JDA seized during the course of search is an incriminating material for AY 2010-11 and therefore held that initiation of proceedings u/s. 153C to be valid. While considering the issue on merits, the CIT (Appeals) gave partial relief to the assessee by directing the AO to consider the guideline value of Rs.520 per sq.ft. and also the built-up area of 88,925 sq.ft. for the purpose of re-computing the capital gain. In this regard, the CIT (Appeals) relied on the decision of the coordinate Bench of the Tribunal in the case of Shri K. Ramesh Reddy (HUF) v. DCIT (ITA No.1507/Bang/2016). The CIT (Appeals) further directed the AO to re-compute the capital gains of AY 2013-14 to 2017-18.

13. With regard to the legal issue that the AO ought to have assumed jurisdiction u/s.153A and not u/s.153C, the ld AR submitted that the AO in his order has admitted that there was a search in the residence of the assessee i.e., M/s.R.Muniraju (HUF) and that when the assessee is searched the assessment should have been done u/s.153A and not u/s.153C.

14. We heard the DR and perused the materials on record. We notice that the CIT (Appeals) has considered this contention of the assessee and held that though the place of the assessee was also searched, the warrant is in the name of M/s.Trans Global Power Pvt Ltd., and therefore the assessee cannot be considered as the person searched. We see merit in the observations of the CIT (Appeals) and see no reason to interfere with the decision of the CIT(Appeals).

15. The next legal issue contented is whether the JDA found during the course of search is an incriminating material. Before us, the ld. AR submitted that the JDA seized during the course of search is not an incriminating material warranting invocation of provision of section 153C of the Act. The ld. AR drew our attention to the fact that the assessee has disclosed the amount of advance received as per the JDA in the balance sheet drawn for the year ended 31.3.2010 and therefore the same cannot be termed as undisclosed. The ld. AR further drew our attention to the fact that the assessee has declared capital gains on sale of flats from AY 2013-14 to 2017-18 and this fact has been brought to the notice of AO during the proceedings u/s. 153C. The ld. AR also

submitted that the assessment of AY 2010-11 is unabated since the time limit for issue of notice u/s. 143(2) has already expired and that without any incriminating material found, the AO cannot invoke the provisions of section 153C. The ld. AR in this regard relied on the decision of the Hon'ble Karnataka High Court in the case of *CIT v. IBC Knowledge Park Pvt. Ltd., 385 ITR 346 (Kar).*

16. The ld. DR submitted that the JDA is an incriminating material found during the course of search for the year under consideration because, but for the JDA, the impugned addition would not have been made in the year under consideration. The ld. DR further submitted that disclosing the amount of advance received as per JDA in the balance sheet is not relevant since the income is what is not disclosed and therefore the AO's action of invoking section 153C is correct. The ld. DR also submitted that without the search operation, the JDA would not have come to the notice of the revenue and the income would not have been taxed in the correct assessment year i.e., AY 2010-11.

17. We have heard the rival submissions and perused the material on record. We notice that the coordinate bench of the Tribunal in the case of DCIT vs M/s. Chaitanya Properties Pvt. Ltd (ITA Nos.617 & 618/Bang/2017) has considered a similar issue and held that

> *"16. We have heard the rival submissions and perused the record. There was a search in the case of Srinivasa Trust on 6.8.2012. In the course of search documents belonging to the assessee were found. The documents seized and marked as Annexure 14/ST/132 comprised Joint Development Agreement dated 5.2.2005 between the assessee and PEPL and related documents. The related document marked as 18/ST/132 consisted of loan*

sanction details of the assessee. After duly recording the reasons, notice u/s. 153C of the Act dated 30.8.2013 was issued and served on the assessee requiring the assessee to file return of income in the prescribed form by 10.9.2013. In this case, search took place on 6.8.2012. Now the dispute is with regard to the framing of assessment u/s 153C of the Act. There was seized material marked as 14-ST/132 & 18-ST/132. The contention of the Ld. A.R. is that these seized materials are already on record relevant to proceedings u/s 148 of the Act on 6.3.2012 for the assessment year 2005-06. According to the A.R., they are not incriminating material. In our opinion, this argument of the Ld. A.R. holds no merit since the provisions of section 153C of the Act do not discuss that seized material should be incriminating in nature or undisclosed in nature for pending assessment. It says only about any material, articles, things, books of accounts, documents seized or requisitioned that belongs to or pertains to person other than the searched person. In our opinion, there were seized material procured during the course of search action in the case of Srinivasa Trust on 6.8.2012. Therefore, framing assessment thereafter u/s 153C of the Act is valid and the question of abatement or non-abatement do not arise since there are seized material. Accordingly, the argument of the assessee's counsel that the assessment for the ITA Nos.617 & 618/Bang/2017 assessment year 2010-11 & 2011-12 do not abate on 30.8.2013 is incorrect and the ratio laid down by the Hon'ble Karnataka High Court in the case of Delhi International Airport Ltd. cited (supra) do not come into assistance of assessee since there is seized material.

17. Accordingly, the issue of framing of assessment u/s. 153C of the Act is upheld and order of the CIT(Appeals) is reversed on this issue."

18. The provisions of section 153C(1) reads as follows –

"153C. (1)Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

> a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A :"

19. The above section provides that the if the AO is satisfied that if the documents seized have a bearing on the determination of the total income of such other person for the six assessment years preceding the year of search. The section does not use the word incriminating document, it is the various judicial decisions which have brought in the expression incriminating documents based on the facts specific to the case. However while determining whether a document seized is discriminating or not, the words used in the section need to considered i.e. if the documents seized have a bearing on the determination of the total income of such other person. In our considered view, if the document has a bearing on the determination of the total income of the assessee, then the same can be considered as incriminating.

20. In assessee's case, the JDA is a document seized and is the basis on which the taxability of capital gain in the year under consideration is decided by the assessee. The claim of the ld AR that the amount of advance is already reflected in the books of accounts and that the

amount is offered to tax in the subsequent years will not have a bearing since the question is whether for particular AY 2010-11, the JDA is an incriminating material with regard to the undisclosed income i.e. the capital gain on transfer of land. We see merit in the contention of the ld DR that if the said JDA has not been seized the capital gain would not have been taxed on the correct assessment year i.e. in AY 2010-11 and to that extent it is an incriminating material. In view of the above discussion and considering the decision of the coordinate bench in the case of *M/s. Chaitanya Properties (supra),* we are of the view that the JDA is an incriminating material.

21. We will now adjudicate the issue contended based on merits. On merits, the ld. AR argued that the date of JDA cannot be considered as the date of transfer for the purpose of capital gains since it is the possession given by the assessee to the developer for the purpose of obtaining necessary approval for construction. The actual construction and the sale happened during subsequent years and assessee has offered to tax the income in the year in which the flats were actually sold. The plan sanction was obtained on 5.6.2010 and therefore during the year under consideration, nothing with respect to the construction happened. The ld. AR drew our attention to the capital gain working that were offered to tax (pg.145 of the PB) and also the balance sheet of the assessee where the amount received from the developer is reflected on the liabilities side to demonstrate that there is no undisclosed income with respect to the sale of flats. The ld AR further submitted that the new subsection 5A inserted in section 45 by the Finance Act 2017

nullified the decision of Hon'ble Karnataka High Court relied on by the AO and therefore the impugned addition cannot be done in the year under consideration.

22. The ld. DR, on the other hand, submitted that the AO has correctly placed reliance on the decision of *Shri T.K. Dayalu (supra)* and it is clearly demonstrated by the AO in his order that the various conditions to attract taxability in the year under consideration have been satisfied and therefore the AO is correct in assessing the capital gains in AY 2010-11. The ld. DR drew our attention to clause (1) of the JDA where the assessee has given irrevocable permission to the developer to enter the property and the developer has also complied with the terms of the JDA by applying for plan sanction which would substantiate that the year of taxability is the year in which the JDA is entered into.

23. Before proceeding further we will look at the relevant provisions

Section 2(47) of the Act

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

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

(ii) the extinguishment of any rights therein ; or

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

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ;] [or]

(iva) the maturity or redemption of a zero coupon bond; or]

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a

contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

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

[Explanation 1].—********

[Explanation 2.—********

Section 53A of the Transfer of Property Act - Part performance

53A. Where any person contracts to transfer for consideration any immovable 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 therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

(emphasis supplied)

24. The issue for our consideration is 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. Though it was initially held by various Courts that the 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. Therefore the analysis of the various terms of the JDA is critical for arriving at the decision on the year of assessability of the capital gains. In this context we will now look at certain relevant clauses of the JDA and the power attorney executed by the assessee in favour the developer –

JOINT DEVELOPMENT AGREEMENT

"**1. PERMISSION TO CONSTRUCT**

a. The OWNERS hereby irrevocably permitted and authorized the DEVELOPER to enter upon the Schedule Property for the purpose of survey, measurements and other preliminaries necessary prior to the commencement of construction.

b. The OWNERS have hereby delivered possession and irrevocably permitted and authorized the DEVELOPER to enter upon the Schedule Property and develop the Schedule Property by constructing a multi-storied apartment building thereon.

2. PLANS/ LICENSES

a. The DEVELOPER hereby agrees to prepare the necessary plan/drawing/designs for the construction of multi-storied building and submit the same to the Bangalore Mahanagara Palike/BDA or other concerned authorities for sanction of license and plan. The working plan shall be shown to the OWNERS.

b. The DEVELOPER shall prepare the plans approval and shall obtain the unction and license with its cost and the OWNERS shall sign necessary documents, affidavits and applications necessary for obtaining plan sanction as and when required.

6. SHARING OF BUILDT AREA:

b. In consideration of the OWNERS agreeing to transfer to the DEVELOPER and or to its nominees, 60% of saleable super built-up area in the said building, including proportionate area in common areas and car park to be constructed by the DEVELOPER on the Schedule Property corresponding undivided share in Schedule Property to the DEVELOPER and or its nominees, the DEVELOPER agrees to construct and deliver to the OWNERS' share of saleable super built-up area are including proportionate areas in common areas and car park in the multi-storied building apartment building to be constructed on the Schedule Property for the absolute use and/or benefit and Ownership of the OWNERS 40% of undivided share in land shall be apportioned to the total super built-up area to be given to OWNERS.

c. The OWNERS hereby also executed a registered irrecoverable Power of Attorney to the DEVELOPER to transfer/convey to the DEVELOPER and/or its nominees an undivided 60% share in land in the schedule property, either in one lot or in several shares in addition to this agreement on this day. Inspite of executing the Power of Attorney, the OWNERS shall as and when requested convey /transfer to the DEVELOPER or its nominees or assignees to the extent of Developer's share.

d. The DEVELOPER shall be entitled to receive in their own name against agreements to sell and retain with them all amount received from the persons to whom the said premises are allotted or sold as the case may

be including the amounts for the sale of undivided share in land and in the building to be constructed by the DEVELOPER on the Schedule Property and to appropriate the same to themselves, subject to a maximum of 60% of undivided share in land and building constructed on the Schedule Property.

g. The DEVELOPER shall be entitled to the remaining flats and the accompanying common areas and car parking area (hereinafter referred to as the Developer's constructed area) with undivided 60% share in the land comprised in the Schedule Property. The DEVELOPER shall be entitled to hold or to sell, lease or otherwise dispose of their share of the constructed area with undivided 60% share in the land comprised in the Schedule Property in any manner they deems fit and they shall be entitled to all income, gains capital appreciation and benefits of all kinds of description accruing or arising there from. Once the sanction plan is procured from Bruhath Bangalore Mahanagara Palike/ BDA earmarking of apartments towards the shares of OWNERS & DEVELOPER shall be incorporated in the form of supplemental agreement. The DEVELOPER is liable to pay sales tax, service tax and income tax to their 60% share of Super built up area as applicable under the Acts.

8. TRANSFER OF DEVELOPER'S SHARE

c) The constructed area with proportionate undivided share of land, common amenities, together with car parking space-covered or uncovered, falling to the share of the DEVELOPER shall be the absolute property of the DEVELOPER and he shall be entitled to hold, sell, mortgage, gift, lease or otherwise dispose of the same and it shall be entitled to all income, gains, capital appreciation and benefits of all kinds and description accruing, arising and/or flowing there from subject to the terms of this agreement.

14. DOCUMENTS OF TITLE

a. The original title deeds of the schedule property are handed over to the DEVELOPER. After completion of the development and sale of undivided share in the schedule property and formation of apartment OWNERS

Association/condominium, DEVELOPER shall deliver original documents to such OWNERS Association/ condominium.

19. LOANS AND ADVANCES:

The DEVELOPER is entitled to raise the loan from financial institutions, banks, financiers, financial companies by mortgaging the Schedule Property to the extent of 60% undivided share in the land and super built-up area for the purpose of construction and development of the Schedule Property. The OWNERS shall extend all necessary co-operation for the same."

POWER OF ATTORNEY

"m. To enter into agreements for sale of 60% undivided share in the Schedule Property or any portions/shares thereof or enter into any kind of agreement/s on such terms as our Attorney deems fit and to get the Agreement's registered as well to cancel the said registration;

n. To transfer and convey by way of sale, the Schedule Property upto an extent of 60% or any portions/shares either divided or undivided thereof together the built up area and to hand over possession and execute necessary agreements of sale, Sale Deed, any other of Conveyance in favour of the Intending purchasers/transferee and to do everything necessary for completing the sale/conveyance/transfer of the same including execution of sale deed/s, presentation of the sale deed/s and admitting execution thereof as well as to sign and execute all forms, affidavits, applications / statements / declarations / forms / returns;

o. To receive (in our Attorney's name) the consideration for sale/transfer/conveyance, as also advances, earnest money/deposits, part payments and balance payments in regard to the sale/conveyance/transfer of 60% undivided share in the Schedule Property or portions/shares therein together with built up area and issue receipts and acknowledgements therefore;"

25. The combined reading of the above clauses of the JDA and POA makes it clear that it is not the permissible possession but the absolute possession that is being given to the Developer by the assessee. Clause 8 extracted above states that the Developer is the absolute owner of the proportionate share of the undivided land and he shall be entitled to hold, sell, mortgage, gift, lease or otherwise dispose of the same. In all the cases relied on by the Ld AR, the developer was given only the license to develop the property and the legal ownership was retained with the owners. It is also noticed that the agreement in the cases relied on by the assessee contain the specific clause that the permission to enter cannot be construed as delivery of possession u/.53A of the Transfer of Property Act read with section 2(47)(v) of the Income Tax Act. However in assessee's case there is no mention in the JDA to this effect and as per Clause 1 extracted here the possession is given irrevocably by the assessee to the developer and the developer is given the irrevocable power of attorney to transfer or sell the developer's share in the undivided share of land which would mean that the developer is given the absolute possession of the land which in our considered view amounts to transfer within the meaning of section 2(47)(v) of the Act. One of the contentions of the Ld AR is that the plan approval for development of the property came only in the subsequent assessment year. According to section 53A whereby the transferee has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract. During the year under consideration the developer has made an application for plan approval

which is an act in furtherance of the contract and that he is willing to perform his part of the contract. In view of the above discussion and based on the facts of the present case we are of the considered view that the CIT(Appeals) is correct in upholding the order of the AO whereby the capital gain is to be taxed in AY 2010-11 i.e. the year in which the JDA is entered into.

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26. We will now take up the revenue appeal for adjudication. With regard to the issue of the CIT (Appeals) considering the guideline value for the purpose of computing capital gains, the ld. DR submitted that it is the cost incurred by the developer that needs to be considered since it is the amount paid in exchange of the assessee transferring 60% of the share in the property. The ld. DR also submitted that the guideline value of Rs.520 per sq.ft. does not represent the correct value of sale consideration and therefore cannot be considered for computation of capital gains.

27. The ld. AR submitted that the CIT (Appeals) has rightly considered the guideline value for the purpose of capital gains and in this regard relied on the decision of the jurisdictional High Court in the case of *PCIT v. CPC Logistics Ltd., ITA 653/2016* wherein it was held as under:-

> "14. Learned counsel for the Revenue argued that section 50C is applicable where the consideration is less than the guidance value and as such the same is not applicable to the facts of the present case. Similarly, section 50D is also not applicable which has come into

force with effect from 1-4-2013; thus, cost of construction would be the appropriate mode. However, we are not inclined to accept the arguments of the Revenue in entirety for the reason that the entire issue is revenue neutral. The Tribunal has categorically observed that "even otherwise, if any capital gains to be accrued in favour of assessee after receiving the possession of the property, certainly that would also be subject to capital gains." It is thus clear that in the event the assessee were to dispose of the built-up area, on any part thereof, after receipt of the same from the developer, it would have to necessarily pay tax on the capital gains in the year of such sale and the cost of such built-up area to be reckoned for the purpose of indexation which would be proportionate to the fair market value of land. At this juncture, it would be beneficial to refer to the judgment of the Hon'ble Apex Court in the case of CIT v. Excel Industries Ltd. [2013] 38 taxmann.com 100/219 Taxman 379/358 ITR 295 wherein the Hon'ble Apex Court has observed thus:

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

Similarly, in the case of CIT v. Bilahari Investment (P.) Ltd. [2008] 168 Taxman 95/299 ITR 1 (SC), the Hon'ble Apex Court has observed thus:

> "20. As stated above, we are concerned with assessment years 1991-1992 to 1997-1998. In the past, the Department had accepted the completed contract method and because of such acceptance, the assessees, in these cases, have followed the same method of accounting, particularly in the context of chit discount. Every assessee is entitled to arrange its affairs and follow the method of

> accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method. Further, in the present cases, we find from the various statements produced before us, that the entire exercise, arising out of change of method from completed contract method to deferred revenue expenditure, is revenue neutral. Therefore, we do not wish to interfere with the impugned judgment of the High Court."

15. In the present case (ITA.No.11/2017), Assessing Officer has adopted the rate of Rs. 1250/- per square feet merely based on the letter given by the developer which is not supported with any particulars. It cannot be ruled out the possibility of the developer giving an inflated figure to suit his requirements in order to gain minimum tax on his profits by inflating his costs. As such, the basis for determination of full value of consideration by the Assessing Officer based on the letter of the developer cannot be appropriate. No doubt at the relevant period, no provision was available in cases where the consideration received or accruing as a result of transfer of a capital asset by an assessee is not ascertainable. Section 50D inserted by Finance Act, 2012 with effect from 1-4-2013 would throw some light on the said issue. As per the memorandum to Finance Bill, 2012, the reasoning for inserting section 50D of the Act is as under:

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

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

16. In Seshasayee Steels (P.) Ltd. v. Asstt. CIT [2020] 115 taxmann.com 5/275 Taxman 187/421 ITR 46 (SC) while considering the provision of section 53 of the TP Act in the context of capital gains under the Income-tax Act, it has been held thus:

> "11. In order that the provisions of section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of section 53A can be said to be attracted on the facts of a given case.
>
> 12. On a reading of the agreement to sell dated 15-5-1998, what is clear is that both the parties are entitled to specific performance. (See clause 14)
>
> 13. Clause 16 is crucial, and the expression used in clause 16 is that the party of the first part hereby gives 'permission' to the party of the second part to start construction on the land.
>
> 14. Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone."

17. It was argued by the learned counsel for the assessee that when the scheme of the Act does not contemplate the method of computation, no capital gains could be computed, placing reliance on B.C. Srinivasa Setty (supra). It appears to overcome this aspect, a machinery provision has been introduced by way of section 50D of the Act. Though the said provision has come into effect from 1-4-2013, it certainly throws some light on the mode of computation under section 48 of the Act. In the circumstances, we are of the considered opinion that the guidance value of the land or the guidance value of the building would be appropriate mode to determine the full value of consideration in the case of a transfer where consideration for the

transfer of a capital asset is not attributable or determinable. Hence, guidance value adopted by the Tribunal cannot be faulted with.

28. We heard the rival submissions and perused the material on record In assessee's case the amount of Rs.2505/- per Sq.ft. is an estimated cost construction given by the developer and in our view the same cannot considered for the purpose of computation of capital gains. Further there is no loss to the revenue since the assessee would be paying the capital gain at the time of sale of flats at which time the gain already taxed i.e. the guideline value would be considered as the cost of acquisition. In the light of these discussions and considering the decision in the case *CPC Logistics Ltd* (supra) we uphold the decision of CIT(Appeals) in directing the AO to recompute the capital gain by adopting the guideline value @ Rs.520 per Sq.ft. We also see no reason to interfere with the order of the CIT(Appeals) in directing the AO to consider the built up area for the purpose of computing capital gains and to re-compute the capital gain for AY 2013-14 to 2017-18. The revenue appeal is therefore dismissed.

29. In the result, the appeal by the revenue and the CO by the assessee are dismissed

Pronounced in the open court on this 13th day of October, 2022.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 13th October, 2022.
/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.