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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.3184/Bang/2018
Assessment Year: 2014-15

Deputy Commissioner of Income-tax Circle-7(2)(1) Bangalore	**Vs.**	M/s. A.M. Builders and Developers No.4/1, Zenith Chambers, AT Street, Off Hosur Road, Wilson Garden, Bangalore 560 027 **PAN NO : AAJFA1799D**
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri K. Sankar Ganesh, D.R.
Respondent by	**:**	Shri S.V. Ravishankar, A.R.

Date of Hearing	**:**	28.02.2023
Date of Pronouncement	**:**	06.04.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by the revenue is directed against order of CIT(A) daed 14.9.2018 for the assessment year 2014-15. The assessee has raised following grounds:-

1. *The order of the learned CIT(A) is opposed to facts of the case.*

2. *The CIT(A) was not justified in not appreciating that the JDA dated 17,10.2007 did not speak anything about the compensation to be paid for termination of the said JDA?*

3. *The CIT(A) erred in not considering that para 4.1 & 4.5 of the JDA mentioned clearly about the conditions/stipulations and time period for cancellation, if the property does not appear to be marketable or if any legal problem arises in progressing the project and the refund of amount to be paid by the developers alongwith specific rate of interest, if the envisaged time limit exceeds".*

4. *The CIT(A) erred in not appreciating the fact that there was no mention of any building in the sale deed executed by the assessee and hence no deduction on account of cost of such building was allowable in the computation of income under the head 'Capital Gain' as the consideration had been received solely for the transfer of land.*

5. *The CIT(A) was not right in not considering that clause 12 of the JDA dated 17.10.2007 clearly mentions that the owners shall get the hostel building premises vacated at their own cost within 180 days from the date of signing the JDA and till then, access to the property shall be through specified pathway only.*

6. *The CIT(A) erred in not appreciating the fact mentioned in para 3.1(a)(ii) of the JDA, wherein it is mentioned that an amount of Rs.2.5 crores will be paid to the owners within 30 days of fulfilling the three conditions, which also includes getting the hostel premises vacated.*

7. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.*

8. *The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.*

2. Ground Nos.1 & 8 are general in nature, which do not require any adjudication.

3. Ground Nos.2 & 3 are with regard to allowability of sales expenses at Rs.9,86,52,619/-.

3.1 Facts of the case are that in the assessment year under consideration, assessee has sold the property measuring 254.43 guntas in survey Nos.4, 5, 6, 8/1, 8/2, 9/2, 9/3, 9/4, 10/1, 10/2, 14/1 & 14/2 at Veerasandra Village, Attibele Hobi, Anekal Taluk,

Bangalore District, Bengaluru for a consideration of Rs.51,43,40,778/-. The assessee has claimed following expenses:-

a) Sales expenses - Rs.9,86,52,619/-
b) Indexed cost of improvement - Rs.26,52,22,757/-
c) Details of sales expenses

Sl. No	Particulars of expenses	Amount (Rs.)
1	Cancellation of MOU (Memorandum of understanding) dated 25.01.2007	10,00,000
2	Cancellation of JDA dated 17.10.2007	3,25,00,000
3	Cancellation of Purchase agreement dated	2,50,00,000
4	Cancellation of Purchase agreement dated	1,25,00,000
5	Shifting of High Tension Line	1,14,80,202
6	Change of Land use-Industrial to Residential	32,67,770
7	Liasion Consultants Fee	74,59,649
8	Legal and Technical Services	54,44,998
	Total	9,86,52,619

Out of the above expenses the AO disallowed the following expenditure:		
1	Cancellation of JDA dated 17.10.2007	3,25,00,000
2	Cancellation of Purchase agreement dated	2,50,00,000
3	Cancellation of Purchase agreement dated	1,25,00,000

3.2 (i) The expenses incurred towards cancellation of JDA dated 17.10.2017:

The assessee firm entered into a Joint Development Agreement (JDA) with M/s Orlanda Realty Pvt. Ltd on 17.10.2007 and received a refundable deposit of Rs.3,50,00,000/- as per the terms of JDA. This JDA was mutually cancelled on 06.09.2013 and the assessee firm refunded the amount of Rs.3,50,00,000/-. In addition to that the assessee firm paid Rs.3,25,00,000/- by way of compensation for termination of the JDA dated 17.10.2007.

(ii) **The expenses incurred towards cancellation of purchase agreement dated 17.10.2017:**

The assessee firm entered into a sale/purchase agreement with M/s Orlanda Realty Pvt. Ltd on 17.10.2007 and received a refundable deposit of Rs.2,75,00,000/- as per the terms of the agreement. However, this agreement was mutually cancelled on 06.09.2013 and the assessee firm refunded the amount of Rs.2,75,00,000/-. In addition to this the assessee firm paid Rs.2,50,00,000/- to the purchaser as compensation as per the settlement deed dated 06.09.2013.

(iii). **The expenses incurred towards cancellation of purchase agreement dated 17.10.2017:**

The assessee firm entered into another sale/purchase agreement with M/s Orlanda Realty Pvt. Ltd on 17.10.2007 and received a refundable deposit of Rs.l,50,00,000/- as per the terms of the agreement. This agreement was also cancelled on 06.09.2013 mutually by the assessee and the purchaser. The assessee firm refunded the amount of Rs.1,50,00,000/- along with the compensation of Rs.1,25,00,000/- to M/s Orlanda Realty Pvt.Ltd as per the cancellation deed dated 06.09.2013. The AO found that the terms of agreement of the JDA and the two sale agreements do not provide for payment of compensation to the builder. Instead, there was the provision of payment of interest @ 15% on the outstanding amount if the agreements are cancelled. The AO found that section 48 provided for allowance of

(i) Expenditure incurred wholly and exclusively in connection with the transfer of the property and

(ii) The cost of acquisition of the property and the cost of any improvement thereto.

Therefore, he disallowed the amount of Rs.7,00,00,000/- (Rs.3,25,00,000/- + Rs.2,50,00,000/- + Rs.1,25,00,000/-)

3.3 Against this assessee went in appeal before ld. CIT(A). The ld. CIT(A) deleted the addition by observing as under:

(i) Compensation of Rs.7 cr. paid for cancellation of JDA and two purchase agreements

The payment of compensation of Rs.7,00,00,000/- has three components:

a) Rs.3,25,00,000/- for the cancellation of JDA dated 17.10.2007

b) Rs.2,50,00,000/- for the cancellation of purchase agreement dated 17.10.2007 -I

c) Rs.1,25,00,000/- for the cancellation of purchase agreement dated 17.10.2007 - II

(ii) The expenses incurred towards cancellation of JDA dated 17.10.2007

The assessee firm entered into a Joint Development Agreement with M/s Orlanda Realty Pvt. Ltd. on 17.10.2007 and received refundable deposit of Rs.3,50,00,000/- as per the JDA. This JDA was cancelled on 06.09.2013 mutually by the assessee (Land owner) and M/s Orlanda Realty Pvt. Ltd. (Builder). As per the deed of cancellation of JDA dated 06.09.2013 both Land owner and Builder mutually agreed to cancel the agreement dated 17.10.2007 and the assessee firm paid back Rs.3,50,00,000/- refundable deposit. In addition to this the assessee firm paid Rs. 3,25,00,000/- to the Builder as per settlement deed dated 06.09.2013. In the said settlement deed it is stated that the owners have agreed to pay the Developers Rs. 3,25,00,000/~ by way of monetary compensation for termination of the said Joint Development Agreement dated

17.10.2007. In the assessment order the AO has referred to section 48 of the Act and has reached the conclusion that compensation paid to the Builder is not an allowable expenditure as per the provision of the said section. The AO has made the following observation:

6(a). The Joint Development Agreement dated 17.10.2007 does not speak of cancellation by mutual agreement and the payment of compensation thereof. The clause 45 of the JDA dated 07.10.2010 says about termination of this agreement as under;

'45. Termination:
In the event either party commits any material breach of this agreement and fails to cure the same within 60 days then the other party shall be entitled to claim damages from the defaulting party but shall not be entitled to terminate this Agreement for any reason except as mentioned in clauses 4. The quantum of damages shall be decided by the Arbitrator as envisaged in this agreement. '
This clause refers to clause 4 of JDA dated 17.10.2007 and the clause 4.5 of JDA dated 17.10.2007 says;

'4.5 should there be any problem in progressing the project because of the Authorities and or non receipt of any approval and or consent for the project or any part thereof as envisaged in the Development Agreement then, at the option of the Developers the entire Rs.6,00,00,000/- (Rupees Six Crores Only) or any amount till then paid under the said clauses 3.1(a) (i) and (it) will be refunded by the Owners to the Developers within 45 days of the Developers notifying the problem to the owners in writing, falling which the owners shall pay interest at the rate of 15% per annum on any of the outstanding amounts. In such event on refund to the developers of the total amount paid under clauses 3.1 (a) (i) and (ii) received till such time by the owners the developers shall quit the said property with the construction made thereon without any claim for cost, and in that event this agreement shall automatically stand cancelled with

no liability on either side. And this cancellation shall be duly registered before the Sub-Registrar concerned.'

Here the JDA speaks about refundable amount received by the owner and payment of the same back to the Builder. Also this agreement shall automatically stand cancelled with no liability on either side and this cancellation should be duly registered before the Sub-Registrar concerned. The eligible amount for payment is interest at the rate of 15% per um on any of the outstanding amounts if the agreement is cancelled. The assessee has paid the refundable amounts of Rs. 3,50,00,000/- immediately after cancellation of JDA. Therefore, further payment of compensation is not mentioned in the JDA. In view of this, the expenses claimed Rs. 3,25,00,000/- being the compensation paid on cancellation of JDA is not in connection with sale of schedule property. Therefore, the compensation paid is not allowable within the meaning of Sec. 48 of the IT Act

(iii) The expenses incurred towards cancellation of purchase agreement dated 17.10.2007

The assessee firm entered into a sale/purchase agreement with M /s Orlanda Realty Pvt. Ltd. on 17.10.2007 and received refundable deposit of Rs.2,75,00,0007- as per the terms of agreement. This agreement was cancelled on 06.09.2013 mutually by the assessee (Land owner) and M/s Orlanda Realty Pvt. Ltd. (Purchaser). As per the deed of cancellation of the agreement dated 06.09.2013 both the Land owner and the Purchaser mutually agreed to cancel the agreement dated 17.10.2007 and the assessee firm paid back Rs.2,75,00,000/- refundable deposit. In addition to this the assessee paid Rs.2,50,00,000/- to the Purchaser as per cancellation deed dated 06.09.2013. In the said cancellation deed it is stated that the owners have agreed to pay the Developers Rs. 2,50,00,000/- by way of monetary compensation for termination of the said purchase Agreement dated 17.10.2007.

(iv) The expenses incurred towards cancellation of purchase agreement dated 17.10.2007

The assessee firm entered into another sale/purchase agreement with M/s Orlanda Realty Pvt. Ltd. on 17.10.2007 and received refundable deposit of Rs.1,50,00,000/- as per the terms of the agreement. This agreement was also cancelled on 06.09.2013 mutually by both the assessee (Land owner) and M/s Orlanda Realty Pvt. Ltd, (Purchaser). As per the deed of cancellation of the purchase agreement dated 06.09.2013 both the Land owner and the Purchaser mutually agreed to cancel the agreement dated 17.10.2007 and the assessee firm paid back Rs.1,50,00,000/- refundable deposit. In addition to this, the assessee paid Rs.1,25,00,000/- to the Purchaser as per cancellation deed dated 06.09.2013. In the said cancellation deed it is stated that the owners have agreed to pay the Developers Rs. 1,25,00,000/- by way of monetary compensation for termination of the said purchase Agreement dated 17.10.2007.

3.4 The ld. CIT(A) observed from the order of the AO that he has verified the genuineness of the claim of payment of compensation and there is no doubt that the assessee has indeed made payments to the builder/purchaser.

3.4 According to the ld. CIT(A), the terms of settlement/cancellation deed shows that amount of compensation has been paid by the assessee to the builder/purchaser and it is also a fact that without the cancellation of the deed the assessee would not have been able to sell the property to a third party. The AO has not brought any material on record to show that the payment was

made for something else and not for cancellation of the deeds. The ld. A.R. argued before the ld. CIT(A) that the assessee paid compensation to the builder and terminated the JDA/purchase deeds to obtain clear title on the property to sell the same to M/s. Titan Company Ltd. for better price. The ld. CIT(A) observed that the condition laid down in the agreement between the assessee and the purchaser, M/s. Titan Company Ltd. which speaks of making an advance to the assessee for clearing the property from all encumbrances. The ld. A.R. pointed out before the ld. CIT(A) that the purchaser put a condition that the land should be free from all encumbrances including the cancellation of the deeds entered into with M/s. Orlanda Realty.

3.5 Further, it was observed by the ld. CIT(A) that the assessee would not have been able to sell the property to the purchaser unless the same was free from all encumbrances. The ld. A.R. argued before the ld. CIT(A) that it was necessary to pay compensation to M/s Orlanda Realty in order to have a clear title on the land without which the sale of the property would not have taken place and it is the prerogative of the assessee to run his business or enter into a transaction in the best possible way and the Revenue has no right to interfere with the same. The ld. A.R. has relied on various judgements to support the claim of the assessee before the ld. CIT(A) that the amount paid as compensation is allowable as a deduction for the purpose of calculation of capital gains.

3.6 The ld. CIT(A) further observed that there was a provision of payment of interest on the outstanding amount in the event of cancellation of the JDA and the purchase deeds. It argued that in any case the assessee was required to pay interest @ 15% on the outstanding amount. The ld. AR submitted the following calculation of interest:

INTEREST CALCULATION on Amount received from M/s Orlanda Realty Pvt Ltd. - From 27.11.2006 to 06.09.2013							
Payment Reed Date	Amount Returned Back Date	Days	Principal Amount	Product	Rate of interest	Int Amount	Payment Reed Date
27.11.06	28.08.2013	2466	1,00,00,000.00	24,66,00,00,000.00	15.00%	1,01,34,246.58	27.11.06
29.01.07	06.09,2013	2412	2,00,00,000.00	48,24,00,00,000.00	15.00%	1,98,24,657.53	29.01.07
07.02.07	06.09.2013	2403	50,00,000.00	12,01,50,00,000.00	15.00%	49,37,671.23	07.02.07
01.03.07	06.09.2013	2381	50,00,000.00	11,90,50,00,000.00	15.00%	48,92,465.75	01.03.07
31.08.07	06.09.2013	2198	1,00,00,000.00	21,98,00,00,000.00	15.00%	90,32,876.71	31.08.07
11.01.08	06.09.2013	2065	2,00,00,000.00	41,30,00,00,000.00	15.00%	1,69,72,602.74	11.01.08
08.07.08	06.09,2013	1886	65,00,000.00	12,25,90,00,000.00	15.00%	50,37,945.21	08.07.08
20.03.09	06.09.2013	1631	25,00,000.00	4,07,75,000.00	15.00%	1,69,72,602.74	20.03.09
			7,90,00,000.00			7,25,08,150.68	

3.7 The assessee argued before the ld. CIT(A) that instead of paying interest to the Builder /Purchaser it has paid the amount in the form of compensation, which is less than the amount of interest.

3.8 The ld. CIT(A) after considering the argument of ld. A.R. and the observation of the AO has observed that the AO has not disputed the payment of compensation to the Builder. All payments have been made through banking channels on which TDS has also been made. On the cancellation of the deeds the assessee was required to pay interest on the outstanding amount @ 15%; instead, it has paid compensation to M/s Orlando Realty. The purchaser M/s Titan Company had put a condition to free the property from all encumbrances including cancellation of the deeds entered into with M/s Orlanda Realty. It is

also a fact that without the cancellation of the deed the assessee would not have been able to sell the property to M/s Titan Company Ltd. In view of the facts mentioned above, the ld. CIT(A) was of the considered opinion that the amount of Rs.7,00,00,000/- (3,25,00,000/- + 2,50,00,000/- + 1,25,00,000/-) paid as compensation amounts to 'expenditure incurred wholly and exclusively in connection with the transfer of the property and hence the same is an allowable expenditure. Therefore, the ld. CIT(A) directed the AO to deduct the amount of Rs.7,00,00,000/- from the total sale consideration of Rs.51,43,40,778/- Against this revenue is in appeal before us.

4. The ld. D.R. submitted that with regard to ground No.3 of the revenue's appeal, the brief facts of the case are that the Assessing Officer disallowed payment of Rs.7 Crores, which is allegedly claimed by the assessee to have been paid for cancellation of one JDA and two purchase agreements. They are as follows:

<u>4.1 Rs.7 Crs paid on cancellation of JDA and two purchase Agreements</u>

The payment of Rs.7,00,00,000/- has three components

a) Rs.1,25,00,000/- for the cancellation of purchase agreement dated 25/01/2007 (related to MOU dated 25/01/2007)
b) Rs.3,25,00,000/- for the cancellation of JDA dated 17/10/2007
c) Rs.2,50,00,000/- for the cancellation of purchase agreement dated 25/01/2007 (related to JDA dated 17/10/2007)

4.2 The ld. D.R. submitted that the AO found that the terms of agreement of the JDA and the two sale agreements do not provide for payment of compensation to the builder. The AO found that Sec.48 provides for allowance only for the following;

i) Expenditure incurred wholly and exclusively in connection with transfer of property and

ii) The cost of acquisition of the property and the cost of any improvements thereto

And stated that the amount of Rs. 7 Crores claimed by the assessee was not incurred wholly and exclusively in connection with the transfer of property and he disallowed the amount.

4.3 Before heading further the ld. D.R. submitted that it is necessary to make one thing clear that the allegations of the assessee that the Assessing Officer has stated that this payment was related to different business dealings (refer page no.11 para 2.6 of the CIT(A) order) is not true. In the entire assessment order, nowhere the Assessing Officer has observed as such. This false allegation of the assessee was relied by the learned CIT(A) while giving relief to the assessee (refer page no.20 para 5.2.9 of the CIT(A) order). This observation and consequential action of the learned CIT(A) is perverse. Hence, the allegation of the assessee, observation and consequential relief given by the ld. CIT(A) is to be reversed.

4.4 The ld. D.R. further submitted that going by the merits of the case, vide ground No. 14 of the assessee before the ld.CIT-(A), reference is made about encumbrance of property (refer CIT(A) order in Page No.20 para 5.2.9) play a vital role in the context of the observation of the Assessing Officer that the payment of Rs.7 Crs is not incurred wholly and exclusively in connection with the transfer of the property.

The ld. D.R. drew our attention to Ground No. 14 made by the assessee before the CIT(A) which is as follows:

"The Assessing Officer is not justified in disallowing the compensation which is in the nature of interest on cancellation of Joint Development Agreement/ purchase agreement, as the said compensation was paid after TDS U/S.194A to the Developer and also the said Developer has offered the said income in the return of

income filed by him for the A. Y.2014-15. Thus, taxing the same income by disallowing the compensation paid amounts to economic double taxation, which against the taxing policy".

4.5 So the assessee without any doubt had stated that the payment was in the nature of interest. In such context it is necessary to look into the relevant clauses which provide for payment of interest.

4.6 The ld. D.R. submitted that as per clause 4.5 of JDA and clause 4.6 of MOU, the assessee was liable to pay interest only under a particular context. The relevant clause is reproduced below:

> *"4.5. should there be any problem in progressing the project because of the Authorities and or non receipt of any approval and or consent for the project or any part thereof as envisaged in the Development Agreement then, at the option of the Developers the entire Rs.6,00,00,0007- (Rupees six crores only) or any amount till then paid under the said clauses 3.1(a)(i) and (ii) will be refunded by the Owners to the Developers within 45 days of the Developers notifying the problem to the owners in writing, falling which the owners hall pay interest at the rate of 15% per annum on any of the outstanding amounts. In such event of refund to the developers of the total amount paid under clauses 3.1(a)(i) and (ii) received till such time by the owners the developers shall quit the said property with the construction made thereon, without any claim for cost and in that event this agreement shall automatically stand cancelled with no liability on either side. And this cancellation shall be duly registered before the Sub-Registrar concerned".*

4.7 The ld. D.R. further submitted that though the JDA provide for payment of interest the assessee has not brought anything to prove that the interest was paid only under the circumstances mentioned above. The assessee did not prove that there was any problem in progressing the project because of concerned Authorities are on account of non-receipt of any approval and or consent for the project or any part thereof despite sincere effort by the Developer. In such circumstances, it can be ascertained that the payment of interest is related to the money enjoyed by the assessee which was received under the guise of JDA and sale agreement. This assertion is reinforced

by the facts narrated by the ld. CIT(A) in para 5.2.9 of his order, where he stated that the assessee created an encumbrance of the property with M/s. Orlanda Realty. The same is reproduced for the sake of convenience,

> *The A/R brought to my notice the condition laid down in the agreement between the appellant and the purchaser, M/s. Titan Company Ltd which speaks of making an advance to the appellant for clearing the property from all encumbrances. He pointed out that the purchaser put a condition that the land should be free from all encumbrances including the cancellation of the deeds entered into with M/s. Orlanda Realty. Relevant portion of the agreement is reproduced below:*
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> *Agreement for sale (copy of the same enclosed as Annexure 15):* ***Page No,8;*** *AND WHEREAS the certificate Encumbrance issued by the jurisdictional Sub Registrar in respect of the aforesaid Schedule 'C' properties bearing Survey No. 4,5 and 8/2 reveals two transaction (I) A* ***Development Agreement executed between L Orlanda Realty Private Limited (Developer), 2. K S M Shabbir (Vendor) and 3. Sher Banu Shabbir registered as document No. BAL-1-03234-20Q7-08 dated 02.11.2007*** *and (2) mortgage of the property bearing survey No. 5 and 8/2 by the VENDOR in favour of the* ***corporation bank(*)*** *and registered as document No. ABL-J-OJ443-2009-10 dated 16/10/2009, other than this no other encumbrance affecting the said property have been found;*
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> ***Page No. 12:*** *The purchaser has paid this advance amount to the second vendor to discharge the liability, existing on the schedule property* ***including cancellation of development agreement executed with*** *M/s* ***Orlanda Realty Pvt Ltd. Etc,*** *And produce to the purchaser nil encumbrance certificate on the property obtained from the jurisdictional sub registrar's office for its examination and also to redeem mortgaged property and seek release of documents from the corporation bank and obtain NOC from the bank and nil encumbrance certificate from the jurisdiction sub registrar's office.*
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> *(*) Note:* ***Same*** *property was mortgaged* ***with two parties.***
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> ***Page No.13:*** *4.b) The VENDORS have not entered in to any other arrangement or agreement to sell or otherwise with any third party or parties in respect of the said schedule property* ***excepting the development*** *agreement executed with M/s. Orlanda Realty Pvt Ltd., and mortgage of the properties belonging to the second vendor with the Corporation Bank.*

4.8 The ld. D.R. submitted that it is very well laid by the various judicial pronouncements that the expenditure incurred in

connection with encumbrance/mortgage is not an allowable expenditure u/s.48(l)(i) of the Act. In this regard ld. D.R. placed reliance on the following case laws:

1. Hon'ble High Court of Bombay decision in the case of CIT Vs. Roshanbabu Mohammed Hussein Merchan - (2005) 144 Taxmann.com 720 (Bombay), ,
2. Decisions of High Court of Madras in the case of
   i) Tmt D. Zeenath Vs. ITO, W-l(l), Nagapattinam - (2019) 105 taxmann.com 298 (Madras),
   ii) Sri Kanniah Photo Studio Vs. ITO, Ward-1 (1) 31, Kumbakonam (2015) 62 taxmann.com 357 (Madras)

4.9 Hence, The ld. D.R. argued that the payment of Rs.7 Crores needs to be disallowed. This argument is further reiterated by the working given in page no.21 para 5.2.11 and observation made by the ld. CIT(A) in page no.22 para 5.2.12. In para 5.2.11 the interest worked out comes to Rs.7.25 Crores and the assessee paid a rounded figure of Rs.7 Crs. But the vital point to be noted is that the interest is not paid for the conditions/situations as envisaged in clause 4.5 of the JDA. This interest at the most can be stated to be paid against the mortgage. The interest paid for mortgage is not eligible expenditure u/s.48(l)(i) of the Act.

5. On the other hand, the ld. A.R. submitted that the assessee has filed detailed written submissions before the learned CIT(A) and filed documents in support of its contentions that the registered cancellation agreement was in pursuance to the settlement arrived mutually between the parties and further buttressed by the payments after deduction of TDS, to demonstrate that the claim of expenditure of Rs. 7 Crores was incurred to enable the assessee to

perfect the title and remove any impediment by the developer, without which the property could not have been sold.

5.1 In support of his submissions the A/R has relied on judgments of various courts before the ld. CIT(A). The gist of some of the judgements relied on by the A/R is mentioned below:

(i) In the case of **Sasson** J. David **85 Co. P.Ltd. v. CIT (1979) 1 18 ITR 261,** the Hon'ble Supreme Court observed as follows:

"It has to be observed here that the expression "wholly and exclusively" used in section 10(2)(xv) of the Act does not mean "necessarily". Ordinarily, it is for the assesses to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assesses can claim deduction under section 10(2)(xv) of the Act even though there was no compelling necessity to incur such expenditure.

(ii) In the case of **S.A. Builders Ltd. vs. CIT, [2007] 288 ITR** 1, the Hon'ble Supreme Court held as follows:

The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency.

(iii) In the case at **CIT vs. Walchand and Co. (P.) Ltd.. [1967] 65 ITR 381** the Hon'ble Supreme Court held as follows:

When a claim for allowance under section 10(2)(xv) of the Income-tax Act is made, the income-tax authorities have to decide whether the expenditure claimed as an allowance was incurred voluntarily and on grounds of commercial expediency. In applying the test of commercial expediency, for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue.

(iv) In the case of **CIT vs. Panipat** Woollen **&. General** Mills **Co. Ltd., [1976] 103 ITR 66** the Hon'ble Supreme Court held as follows:

Before coming to the facts it may be necessary to mention that there can be no dispute with respect to the two important propositions:

That in order to full within section 10(2)(xv} of the Act the deduction claimed must amount to an expenditure which was laid out or expended wholly and exclusively for the purpose of the business, profession or vocation. This will naturally depend upon the facts of each case. That in order to determine the question of reasonableness of the expenditure, the test of commercial expediency would have to be adjudged from the point of view of the businessman and not of the income-tax department.

(v) In the case of **CIT vs. Dalmia** Cement **P. Ltd., (2002) 254 ITR 377** the Hon'ble Delhi High Court held as follows:

The jurisdiction of the revenue is confined to deciding reality of the expenditure, namely, whether the amount claimed as deduction was factually expended or laid down and whether it was wholly and exclusively for the purpose of the business. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount spent. Once it is established that there was a nexus between the expenditure and the purpose of business, the revenue cannot justifiably claim to put itself in the armchair of a businessman or in the position of the board of directors and assume the said role to decide how much is a reasonable expenditure having regard to the circumstances of the case.

(vi) In the case of **CIT vs. Smt.** Shakuntala **Kantilal, [1991] 190 ITR 56** the Hon'ble Bombay High Court held as follows:

The section broadly contemplates three amounts for the purpose of computing income chargeable under the head 'Capital gains'.

The first is the full value of consideration for which the capital asset has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and the third and the last is the cost of acquisition of the capital asset including the cost of any improvement thereto. We have already referred to the facts of the case in detail earlier. It cannot be disputed that unless the assessee has settled the dispute with Radio 85 Sons (P.) Ltd., the sale transaction with Cosmos Co-operative Housing Society Ltd. under agreement dated 30-3-1967 would not, rather could not have, materialised. If this transaction had not materialised, there would have perhaps been no question of capital gains. ... The Legislature while using the expression full value of consideration; in our view, has

contemplated both additions to as well as deductions from the apparent value. What it means is the real and effective consideration. That apart so far as (i) of section 48 is concerned, we find that the expression used by the Legislature in its wisdom is wider than the expression for the transfer'. The expression used is 'the expenditure incurred wholly and exclusively in connection with such transfer'. The expression 'in connection with such transfer' is, in our view" certainty wider than the expression for the transfer'. Here again, we are of the view that any amount the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if without removing any encumbrance including the encumbrance of the type involved in this case, sale or transfer could not be effected, the amount paid for removing that encumbrance will fall under clause (i). Accordingly, we agree with the Tribunal that the sale consideration requires to be reduced by the amount of compensation.

(vii) In the case of **Honda Motor Co** Limited **A.A.R. No 1200 of 2011,** dated 07.02.2018, the authority observed as follows:

We have considered the nature of expenses incurred. A perusal of the cases cited and the vision contained in section 48 shows that the words "wholly and exclusively" do not connote necessarily". If the expenses have been incurred in connection with the transfer, they are to be allowed. The words "in connection with" are of wide import and if such expenses have an intimate connection with the transfer, they have to be allowed u/s 48.

5.2 On perusal of aforesaid judgement, the ld. CIT(A) observed that these judgements are directly applicable to the facts of the assessee's case. From the order of the AO, he observed that he has verified the genuineness of the claim of payment of compensation and there is no doubt that the assessee has indeed made payments to the Builder/purchaser and accordingly, the learned CIT(A) upon appreciation of the detailed written submissions, documents filed, judgements relied on by the assessee, etc. deleted the disallowance of Rs. 7 Crores as being spent to perfect the title and held that it was an allowable deduction in computing the capital gains. In a nutshell the ld. CIT(A) has granted relief for the following reasons;

i) The AO has not disputed the payment of compensation to the builder.

ii) All payments have been made through banking channels on

which TDS also has been made.

iii) On the cancellation of the deeds the assessee was required to pay interest on the outstanding amount @ 15%, instead it has paid compensation to M/s. Orlando Realty.

iv) The purchaser M/s. Titan Company Ltd. had put a condition to free the property from all encumbrances including cancellation of the deeds entered into with M/s. Orlanda Realty.

v) Without cancellation of the deed, the assessee would not have been able to sell the property to M/s. Titan Company Ltd.

5.3 The ld. A.R. drew our attention to the relevant para of ld. CIT(A) order at Para 5.2.12 for the sake of ready reference -

> *"5.2.12 I have carefully considered the argument of the A/R and the observation of the AO and the above cited judgement along with the facts of the case. The AO has not disputed the payment of compensation to the Builder, All payments have been made through banking channels on which TDS also has been made. On the cancellation of the deeds the appellant was ^ required to pay interest on the outstanding amount @ 15%; instead, it has paid to compensation to M/s. Orlando Realty. The purchaser M/s. Titan Company Ltd. had put a condition to free the property from all encumbrances including cancellation of the deeds entered into with M/s. Orlanda Realty. It is also fact that without the cancellation of the deed the appellant would not have been able to sell the property to M/s. Titan Company Ltd. In view of the facts mentioned above, I am of the considered opinion that the amount of Rs. 7,oo,oo,ooo/- (3,25,00,000/- + 2,50,00,000/- +1,25,00,000/-) paid as compensation amounts to expenditure incurred wholly and exclusively in connection with the transfer of the property and hence the same is an allowable expenditure. There, I direct the AO deduct the amount of Rs.7,00,00,000/- from the total sale consideration of Rs.51,43,40,778/-*

5.4 The ld. A.R. relied on following decisions:-

i. Sassoon J. David & Co. Pvt Ltd. v. CIT (1979) 118 ITR 261 (SC)
ii. S.A. Builders Ltd. v. CIT (2007) 288 ITR i (SC)
iii. CIT v. Walchand and Co (P.) Ltd. (1967) 65 ITR 381 (SC)
iv. CIT v. Panipat Woollen & General Mills Co, Ltd. (1976) 103 ITR 66 (SC)
v. CIT v. Dalmia Cement (P.) Ltd. (2002) 254 ITR 377 (Del.)

vi. CIT v. Shakuntala Kantilal (1991) 190 ITR 56 (Bom.)
vii. Trimm Exports (P.) Ltd. v. DCIT (2021) 130 taxmann.com 169 (Kar.)
viii. Kaushalya Devi v. CIT (2018) 404 ITR 136 (Del.)
ix. Miss Dhun Dadabhoy Kapadia v. CIT (1967) 63 ITR 651 (SC)
x. CIT v. Bradford Trading Co. (P.) Ltd. (2003) 261 ITR 222 (Mad.)

5.5 The ld. A.R. submitted that if the compensation was not paid, then the assessee could not have sold the property to M/s. Titan Company Ltd. The compensation paid paved an easy path for the assessee to enable the transfer of the property to its desired purchaser. It was an obligation cast on the assessee to ensure that the property transferred is free of encumbrance and transfer a good title to the purchaser. Therefore, the amounts paid towards the cancellation of the agreements were essential for the transfer is wholly and exclusively incurred in connection with the transfer of property and consequently, the same is required to be allowed as cost as per the provisions of section 48 of the Act. In so far as the submission of the learned Department representative is concerned, the ld. A.R. submitted that the authorities filed are in respect of encumbrance created by way of mortgage, which is not the case of the respondent assessee and thus is not applicable.

<u>Findings:-</u>

6. We have heard the rival submissions and perused the materials available on record. In this case assessee sold the property vide sale deed measuring 254.43 gunas in survey nos.4,5,6,8/1, 8/2, 9/2, 9/3, 9/4, 10/1, 10/2, 14/1 & 14/2 at Veerasandra Village, Attibele Hobli, Anekal Taluk Bangalore District, Bengaluru for a consideration of Rs.51,43,40,778/-. Against this assessee claimed deduction towards sales expenses at Rs.7 crores, which are as follows:-

1. Cancellation of JDA dated 17.10.2007 -Rs.3.25Cr.
2. Cancellation of purchase agreement dt.17.10.2007 -Rs.2.5cr.
3. Cancellation of purchase agreement dt.17.10.2007 -Rs.1.25Cr.

Total: Rs.7 Cr.

This has been disallowed by the AO on the reason that these are not relating to the cost of transfer. The contention of ld. A.R. is that if these compensations had not paid to the concerned parties, the assessee was not in a position to transfer the property to M/s. Titan Company Ltd. Therefore, payment of compensation on cancellation of earlier agreement with Orlanda Reality Pvt Ltd. is necessary expenditure incurred in relation to the transfer of the property. At this point, it is pertinent to refer the provisions of section 48 of the Act:

"Section 48 of the Act:

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,
(ii) The cost of acquisition of the asset and the cost of any improvement thereto;"

6.1 The section contemplates 3 amounts for the purpose of computing the income chargeable under the head "Capital gains". The first is full value of consideration for which the capital asset has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and third and last is the cost of acquisition of capital asset including the cost of any improvement there to. As seen from the facts of the case, the assessee already entered with M/s. Orlanda Reality Pvt. Ltd. with following agreements before the sale of property to M/s. Titan Company Ltd:

1. MOU for development property dated 25.1.2007

2. Copy of purchase agreement dated 25.1.2007 for purchase of 1% developed property.
3. The Joint Development Agreement dated 17.10.2007 for development of property.

6.2 Thereafter, the assessee has also entered into cancellation agreement as follows:-

1. Cancellation of MOU dated 6.9.2013 in respect of Memorandum of Understanding dated 25.1.2007
2. Deed of cancellation of purchase agreement dated 6.9.2013 in respect of purchase agreement dated 25.1.2007.
3. Cancellation of Joint development agreement dated 6.9.2013 in respect of JDA dated 17.10.2007.
4. Deed of settlement dated 6.9.2013 for payment of damages as per the joint development agreement.

6.3 Thus, the assessee has finally entered finally into registered sale deed on 23.1.2014 with M/s. Titan Company Ltd. In our opinion, unless assessee had settled the dispute with M/s. Orlanda Reality Pvt. Ltd. in respect of impugned property by paying compensation to them, the sale transaction with Titan company limited would not, have materialized. In our opinion, full value of consideration has contemplated both additions as well as deduction from the apparent value. What it means is the real and effective consideration, that apart, was far as clause – (i) of section 48 is concerned, we find that the expression “for the transfer”. The expression used is “the expenditure incurred wholly and exclusively in connection with the transfer”. The expression “in connection with such transfer” is, in our view, certainly wider than the expression “for the transfer”. Here again, we are of the view that any amount of payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if any other removing any

encumbrances including encumbrances of the type involved in this case, sale or transfer could not be effected, the amount paid to M/s. Orlanda Reality Pvt. Ltd. for removing the encumbrance will fall under clause (i) of section 48 of the Act and the sale consideration required to be reduced by the amount of compensation paid to M/s. Orlanda Reality Pvt. Ltd. to the expenditure of related to the transfer of property measuring 254.43 guntas in survey Nos. 4,5,6,8/1, 8/2, 9/2, 9/3, 9/4, 10/1, 10/2, 14/1 & 14/2 at Veerasandra Village, Attibele Hobli, Anekal Taluk Bangalore District, Bengaluru. In other words, if the assessee paid any other amount not relating to these properties cannot be allowed as a deduction. These facts are to be verified by the AO by examining the expenses incurred on cancellation of agreement entered with M/s. Orlanda Reality Pvt. Ltd. along with Memorandum of Understanding, purchase agreement and registered JDA cited (supra). The ld. CIT(A) in wholesome manner allowed the claim of assessee in toto without examining the facts whether the entire compensation of Rs.7 Crores paid to M/s. Orlanda Reality Pvt. Ltd. is relating to the transfer of impugned property to M/s. Titan Company Ltd. At the same time, AO also outrightly rejected the claim of assessee without examining the facts whether it is relating to the transfer of property to M/s. Titan Company Ltd. We noticed that cancellation of Memorandum of Understanding dated 6.9.2013 in respect of Memorandum of Understanding dated 25.1.2007 and cancellation of JDA dated 17.10.2017 vide Cancellation deed dated 6.10.2013 which includes certain properties which are not subject matter of sale deed dated 23.1.2014 with M/s. Titan Company Ltd. Being so, the compensation paid in respect of properties on cancellation of MOU/JDA other than the property sold to M/s. Titan Company Ltd. cannot be granted as a deduction while computing the capital gain arising out of the transfer of the property to M/s. Titan Company Ltd. Hence, the AO should examine these cancellation agreement and compare with sale deed entered with M/s. Titan

Company Ltd. and grant the proportionate deduction out of compensation paid in relation to transfer and allow only it is related to the properties sold to M/s. Titan Company Ltd. and not the entire amount of Rs.7 crores, which cannot be granted as deduction towards cost of transfer from the sale consideration relating to the property transferred to M/s. Titan Company Ltd. For clarity, we extract the property covered in MOU cancellation dated 6.9.2013, cancellation JDA dated 6.9.2013 and cancellation purchase agreement dated 6.9.2013 along with the sale deed dated 23.1.2014 as below:-

(A) (B)

Details of Land as per registered MoU dt:17.10.2007 (Pg 147-192 of Paper Book)		Details of land sold as per sale deed dt:23.01.2014 (Pg 319 Onwards)	
Survey No	Area in Acres	Survey No	Area in Acres
Schedule A 4	0.29	Schedule C – 4	0.18.4
5	0.20	5	0.20
6	0.21	6	0.20
7	1.35		
8/1	0.28	8/1	0.05.85
9/1	0.14		
9/2	0.15	9/2	0.05.77
9/3	0.15	9/3	0.15
9/4	0.10	9/4	0.10
10/1	1.02	10/1	0.16.91
10/2	0.13	10/2	0.12
13	0.15		
14/1	0.26	14/1	0.22.1
14/2	1.01	14/2	1.01
Sch B - 8/2	0.29	8/2	0.29

Accordingly, the AO has to go through the records and to grant the cost of transfer only in respect of corresponding properties covered in sale deed dated 23.1.2014 and not the entire amount of Rs.7 crores, which cannot be allowed. Accordingly, this ground of revenue is partly allowed.

Disallowance of Indexed Cost of Improvement Rs.26,52,22,757/-

7. Next ground for our consideration in ground Nos.4 to 7 which are with regard to allowability of Rs.26,52,22,757/-, which represent indexed cost of improvement of building.

7.1 Facts of the case are the assessee owned a property at Veerasandra village, Attibele Hobli, Anekal Taluk, Bangalore District, Bangalore which was sold to M/s Titan Company Ltd. for a consideration of Rs.51,43,40,778/-. The AO found that there was a construction on the plot of land but the sale deed does not mention the construction on the land and therefore he arrived at the conclusion that the price has been paid by the purchaser for the piece of land and not for the construction thereon. In this regard, the observation of the AO is reproduced below:

> i) *The sale deed dated 23.01.2014 is executed and as per this sale deed the assessee sold and extinguished the rights over the land lady only to the extent of 254.43 guntas. Therefore, the assessee has transferred only land to M/s. Titan Company Ltd. The sale consideration received Rs.51,43,40,778/- is for the assessee's relinquishment of right over the land only as per Schedule of Property at page nos. from 28 to 35 of sale deed dated 23.01.2014. There is no mention of sale consideration received on the building in this sale deed. Therefore the question of allowing Improvement Cost does not arise in the assessee case because the assessee has not-transferred building to the purchaser in the sale deed.*
>
> ii) *The assessee has entered into agreement of sale on 26.08.2013 with M/s Titan Company Ltd and it is noticed that here also the assessee and the purchaser have entered into agreement for sale of lands only and the consideration to be paid/received for the land only as-per Schedule of Property at page nos. from 27 to 34 of sale agreement dated 26.08.2013. Therefore, the assessee cannot claim Improvement Cost i.e. for construction of building on the sale consideration received in respect of land only.*

iii) The assessee firm entered into Joint Development agreement with the developer M/s. Orlanda Realty Pvt. Ltd on 17.10.2007 to develop the property mentioned above as per Schedule of property at page no.s 35 to 40 of the said JDA, to be developed is also land only. On verification it is found that there is no mention of building in this Joint Development Agreement also. The assessee firm entered into serious of agreements mentioned above for the land portion only and there is no mention of building in all of these agreements.

7(d). The Hon'ble High Court of Madras in the case of CIT v/s Union Co Motors Pvt Ltd (283 ITR 445 (Madras) 2006) has held 'it is therefore, a settled law that even though the transaction involved land and building, once the land of the assets of the undertaking, the transfer is of the entire undertaking as a whole and it is not possible to bifurcate same, as suggested by the Assessing Officer in the instant case. All the more, in the instant case, the fact remains that the purchaser had applied for the demolition of the building and also demolished the building, which was taken into consideration by the commission and the tribunal, while arriving at a conclusion that section 50 of the Act, is not attracted, as Under the facts and circumstances of the case, it is that the sale consideration made by the purchase is only for the land, since the building had no value and therefore got demolished. Finding no error in the order of the authorities below, the appeal stands discussed.'

In the assessee case also, the assessee has not considered any value for the building at the time of entering into JDA with M/s Orlanda Realty Pvt. Ltd to develop the said land. Similarly, the assessee firm itself has not considered and thought of value for the existing building at the time agreement for sale and execution of sale deed with M/s Titan Company Ltd,. This is because no value is attached to the building at the time of JDA and also at the time of sale. Hence, it is evident that the sale consideration received solely for sale of land only and not to the Building. Again, in view of the decision "of the Hon'ble High Court of Madras cited above the building has no value in the assessee case at the time of JDA itself. The assessee has sold the schedule property after 6 years from JDA and therefore, there is no value for the building in view of the above decision of Hon'ble High Court of Madras.

7(e). In view of the above discussion the Improvement Cost and its indexed Cost of Improvement claimed on the building cannot be allowable. The disallowable indexed Cost of Improvement is worked out as under:

FY	Cost of Improvement	Indexed Cost of Improvement
2002-03	*/ 31903486	6,70,18,732
2004-05	*/ 409684	8,01,444
2005-06	*/ 20051270	3,78,83,587
2006-07	*/ 78000890	14,11,22,998
	Total	**24,68,26,761**

Therefore, assessee claim of Rs.24,68,26,761/- towards indexed Cost of Improvement cannot be acceptable and accordingly disallowed and added to the income.

7.2 On the other hand, the assessee submitted that there was a hostel on the land in question from which it received house property income which was duly disclosed to the income-tax Department and taxes were paid on the same. The ld. AR argued that the existence of the building has not been disputed by the AO. In fact, the AO has also found that the building existed at the time of transfer of the property.

7.3 The ld A.R. submitted that the building was in existence is not disputed by the AO. The only grievance of the AO is that the assessee has not transferred the building to the purchaser in the sale deed. Further, the AO has noted that the purchaser has demolished the building and used the land for construction of new residential property, which would amply reiterate that the building was very much transferred along with the land. The assessee submitted that the mere non mentioning of the building in the sale deed cannot lead a conclusion that there was no transfer of the building, which is attached to the land. If possession of land and building was not given, then the purchaser could not demolish the building to construct afresh, as noted by the AO himself. Alternatively, the

assessee submitted that it has relinquished its right in the building or giving possession of the same to the purchaser has resulted in extinguishment of its right in the building. Both are methods of transfer as per the provisions of section 2(47) of the Act. Therefore, once the building has been transferred as per the provisions of the Act, then automatically the provisions of section 48 of the Act are attracted and the assessee is eligible to claim indexed cost of improvement i.e., the indexed cost of the construction of the building.

7.4 The ld. A.R. submitted that the decisions which are relevant for the adjudication of this issue are as under:

(i) Charu Agarwal v DCIT [2022] 194 ITD 478 (Delhi)

(ii) Prabhandam Prakash v. ITO (2008) 22 SOT 58 (Hyd.)

iii) D Ranga Rao v ITO, in ITA No. 1234 & 1235/Hyd/20l2, dated 7/06/2013

7.5 The ld. CIT(A) observed that the assessee has entered into a sale agreement with M/s. Titan Company Ltd. and in the sale deed there is no mention of any construction on the land. Thus, the AO is of the opinion that the assessee has received sale consideration for the piece of land only and not for the construction thereon. However, from the sale deed it does not appear that the assessee has not transferred the building to the purchaser. If the land is sold to someone, it cannot be said that any construction on it has not been sold unless there is specific provision in the deed. The AO has relied on the judgement in the case of CIT v/s Union Co Motors Pvt Ltd (283 ITR 445 (Madras) 2006). However, the said judgement is related to the provision of section 50 of the Act which is in relation to 'Special provision for computation of capital gains in case of depreciable assets'. In this regard, the ld. A/R referred

to the decision in the case of Dr. Maya Shenoy vs. ACIT, [2009] 124 TTJ 692 wherein the Hon'ble Hyderabad Tribunal held as follows:

> *19. Another issue relates to the allowability of the cost of the old superstructure demolished by the assesses before handing over the possession of the land to the developer. This issue is undoubtedly covered in favour of the assessee by the order of the Hyderabad Bench of the Tribunal in the case of Prabhandam Prakash v. CIT in ITA No. 147/Hyd/2007, dt. 25th Jan., 2008. Even otherwise also, as per the TP Act, immovable property would include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth. Thus, the building being attached to the earth will pass on to the transferee along with the land. It is immaterial that the said building was demolished by the assessee. It was merely taking upon oneself a responsibility. Further, it also makes no difference if the sale proceeds of the scrap are taken by the owner, i.e., the transferor. This fact does not necessarily lead us to the inference that the building is not transferred along with the land. Thus, unless there is a specific agreement to the contrary, when land is transferred, things attached to it or fastened to anything attached to the earth will also get automatically transferred. At the most, if the owner receives the sale proceeds of the scrap, then while computing capital gains on transfer of land, the proceeds so received may be added to the overall consideration received by the assessee.*

7.6 On perusal of above submissions of the ld. A.R., the ld. CIT(A) while adjudicating the appeal of the assessee has referred to the judgement in the case of Prabhandam Prakash [2008] 22 SOT 58 (ITAT, Hyderabad), wherein it has been held that even if the superstructure is to be demolished by the promoter the seller is entitled to deduction of the cost of construction of the house. Relevant portion of the judgement is reproduced below:

> *"Cost of superstructure*
>
> *9. The stand of the revenue is that since the superstructure was to be demolished by the promoter, it cannot be said that the existing house was also transferred and since only land was transferred, the cost of the house cannot be allowed as deduction. On the other hand, ^{f} the stand of the assessee is that as per the agreement, both were to be transferred and in any case, the building of the house on the land amounts to improvement of land and hence the cost thereof should be allowed as deduction. In order to*

appreciate the rival contentions, it would be necessary to refer to the agreement entered into by the assessee with the promoter.

10. the assessee owns a piece of land admeasuring 500 sq. yds. at Sri Krishna nagar, Hyderabad. The assessee is the absolute owner and possessor of the impugned land. It further mentions that the assessee is desirous of developing the said property and for the purpose has approached the promoter. In the preamble itself it is declared that the promoter shall demolish the existing structure and construct thereon a new complex. This will be at the cost of the promoter only. This clearly indicates that unless the superstructure is also transferred, the promoter cannot take possession and demolish the same. The view of the CIT(A) that it is not an asset but a liability for the promoter has no basis. In fact, it is more a rhetoric than an argument. He may demolish the same but the fact remains that the transferor, i.e., the assessee is parting away with his house along with the land. The question of not allowing the cost of the house would arise only if it is retained by the assessee himself. This is not the case in the present transaction. What the transferee does to that asset is not the concern of the transferor. It is also not the case of the revenue that the income generated, if any, from the sale of scrap is appropriated by the assessee. Even accepting for the sake of argument that the superstructure has no value for the promoter, it cannot be denied that the land below that structure is certainly of value and use to the promoter. This is because, if he has to build a new complex, he will have to make use of that land. ***Therefore, in order to use the land which is beneath the structure, he Has to acquire the structure also and then he may demolish it. Therefore, there is no gainsaying that the superstructure is not transferred to the promoter. Considering the issue from the view of the transferor, since he is parting with an asset, for which he has incurred cost, t has to be allowed as deduction*** *while* ***computing capital gains.*** *In the light of the g discussion, we hold that the superstructure is also transferred by the assessee to the promoter and the cost of construction thereof may be allowed to the assessee.*

7.7 The ld. CIT(A) observed that the case of the assessee is similar to the one mentioned above and the same is squarely applicable to the facts of the case of the assessee. In the case of the assessee the agreement does not mention that the superstructure is not transferred to the purchaser and is retained by it. As per section 2(47) of the Act 'transfer" includes:

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

(ii) The extinguishment of any right thereon;

In the instant case the assessee has relinquished its right on the building with the transfer of the piece & of land to M/s Titan Company Ltd. The purchaser is free to use or demolish the building as per its wish; the assessee has no say in the same. Therefore, ld. CIT(A) did not find merit in the observation of the AO that the assessee has not transferred the building and the price it has received is only for the piece of the land. Accordingly, the ld. CIT(A) directed the AO to delete the disallowance of Rs.24,68,26,761/- from the total sale consideration of Rs.51,43,40,778/-. Against this revenue is in appeal before us.

7.8 In a nutshell the CIT(A) has granted relief for the following reasons

i) The agreement does not mention that the superstructure is not transferred to the purchaser and it was retained by the assessee.

(ii) The assessee has relinquished its right on the building with the transfer of the piece of land to M/s. Titan Company Ltd. The purchaser is free to demolish the building as per its wish and the assessee has no say in the same.

7.9 The assessee submitted that the learned Department representative has not made any observations on the above grounds and the submissions are restricted to ground No. 2 and No.3, alone. The assessee requested to hold that:

i. The compensation paid by way of interest was necessary to perfect the title, without which the property- could not be sold.

ii. The interest has arisen on account of a special event, being the cancellation of the JDA and that the entire

interest was allowable as an expenditure in the year it was paid.

iii. The building was fixed to the land and there could be no transfer of only land.

iv. The building since appurtenant to land, was by necessary implication sold and transferred to the purchaser, though there was no recitals in respect of the building.

8. The ld. D.R. submitted that the assessee firm has claimed indexed Cost of Improvement at Rs. 26,52,22,757/- and Indexed Cost of Acquisition at Rs. 9,71,748/- while calculating Long Term Capital Gains earned on sale of schedule property. The assessee Representative has furnished the details of Cost of Acquisition and Improvement details at the time of hearing. The details are tabulated as under;

Acquisition Cost

FY	Cost of Land/ Acquisition Cost
1995-96	Rs. 290800

Improvement cost

FY	Cost of Land	Other Costs	Cost of Improvement
	(A) Rs.	(B) Rs.	(A) + (B) Rs.
1999-00	1267750		1267750
2000-01	557027	837711	1394738
2001-02	922220	305095	1227315
2002-03	874540	*I 31903486	32778026
2004-05	3868440	*I 409684	4278124
2005-06		*I 20051270	20051270
2006-07		*I 78000890	78000890
		Total	138998113

8.1 Joint Development Agreement dated 17.10.2007, agreement for sale dated 26.08.2013 read along with sale deed dated 23.01.2014 and observed from the sale deed dated 23.01.2014 shows that the property sold was only land measuring total 254.43 guntas for total Rs.51,43,40,778/-.

8.2 Further, the ld. D.R. submitted that:

i) The sale deed dated 23.01.2014 is executed and as per this sale deed the assessee sold and extinguished the rights over the land only to the extent of 254.43 guntas. Therefore, the assessee has transferred only land to M/s. Titan Company Ltd. The sale consideration received Rs.51,43,40,778/-is for the assessee's relinquishment of right over the land only as per Schedule of Property at page nos. from 28 to 35 of sale deed dated 23.01,2014. There is no mention of sale consideration received on the building in this sale deed. Therefore, the question of allowing Improvement Cost does not arise in the assessee case because the assessee has not transferred building to the purchaser in the sale deed.

ii) The assessee has entered into agreement of sale on 26.08.2013 with M/s. Titan Company Ltd and it is noticed that here also the assessee and the purchaser have entered into agreement for sale of lands only and the consideration to be paid/received for the land only as per Schedule of Property at page nos. from 27 to 34 of sale agreement dated 26.08.2013.Therefore the assessee cannot claim Improvement Cost i.e for construction of building on the sale consideration received in respect of land only.

iii) The assessee firm entered into Joint Development agreement with the developer M/s. Orlanda Realty Pvt. Ltd on 17.10.2007 to

develop the property mentioned above as per Schedule of property at page no.s 35 to 40 of the said JDA, to be developed is also land only. On verification it is found that there is no mention of building in this Joint Development Agreement also. The assessee firm entered into serious of agreements mentioned above for the land portion only and there is no mention of building in all of these agreements.

8.3. The ld. D.R. placed reliance n he judgement of Hon'ble High Court of Madras in the case of CIT v/s Union Co Motors Pvt Ltd (283 ITR 445 (Madras) 2006) wherein held that *'it is therefore, a settled law that even though the transaction involved land and building, once the land of the assets of the undertaking, the transfer is of the entire undertaking as a whole and it is not possible to bifurcate same, as suggested by the Assessing Officer in the instant case. All the more, in the instant case, the fact remains that the purchaser had applied for the demolition of the building and also demolished the building, which was taken into consideration, by the commission and the tribunal, while arriving at a conclusion that section 50 of the Act, is not attracted, as Under the facts and circumstances of the case, it is that the sale consideration made by the purchase is only for the land, since the building had no value and therefore got demolished. Finding no error in the order of the authorities below, the appeal stands discussed.'*

8.4 He further submitted that in the assessee case also, the assessee has not considered any value for the building at the time of entering into JDA with M/s Orlanda Realty Pvt. Ltd. to develop the said land. Similarly, the assessee firm itself has not considered and thought of value for the existing building at the time of agreement for sale and execution of sale deed with M/s Titan Company Ltd,. This is because no value is attached to the building at the time of JDA and also at the time of sale. Hence, it is evident that the sale consideration received solely for sale of land only and not to the Building. Again, in view of the

decision of the Hon'ble High Court of Madras cited above the building has no value in the assessee case at the time of JDA itself. The assessee has sold the schedule property after 6 years from JDA and therefore, there is no value for the building in view of the above decision of Hon'ble High Court of Madras.

8.5 In view of the above discussion the ld. D.R. submitted that the Improvement Cost and its indexed Cost of Improvement claimed on the building is not allowed by the AO. The disallowable indexed Cost of Improvement is worked out as under;

FY	Cost of Improvement	Indexed cost of improvement
2002-03	*I 31903486	6,70,18,732
2004-05	*I 409684	8,01,444
2005-06	*I 20051270	3,78,83,587
2006-07	*I 78000890	14,11,22,998
	Total	**24,68,26,761**

Therefore, assessee's claim of Rs.24,68,26,761/- towards Indexed Cost of Improvement was not accepted by the AO and accordingly disallowed and added to the income and same to be confirmed and order of CIT(A) on this issue to be revised.

Findings:

9. We have heard the rival submissions and perused the materials available on record. In this case, assessee has sold a property vide sale deed measuring 254.43 gunas in survey nos.4,5,6,8/1, 8/2, 9/2, 9/3, 9/4, 10/1, 10/2, 14/1 & 14/2 at Veerasandra Village, Attibele Hobli, Anekal Taluk Bangalore District, Bengaluru. The assessee is claiming the indexed cost of building as a deduction out of sale consideration. The sale consideration received by

assessee is only with regard to sale of land. It is not relating to the sale of any building thereon. The building cost of acquisition claimed by assessee has not at all transferred by assessee vide sale deed dated 23.1.2014. The assessee all along claiming the cost of building, which is not at all transferred by assessee as such the cost of such building cannot be allowed out of the sale consideration of the land as a deduction. The claim of assessee that the building is already existing in the said land and it has been let out to M/s. Edutech NTTF Pvt. Ltd and the rental income of said building has been offered for taxation from year to year. On this basis assessee is claiming cost of building as a deduction out of the sale consideration received from M/s. Titan Company Ltd. The assessee ought to have claimed this deduction only if the sale consideration received by the assessee includes the sale value of the said building in the total sale consideration received by the assessee. In the absence of such and there was no transfer of building to M/s. Titan Company Ltd., said deduction could not be allowed. U/s 17 of the Registration Act, 1908, all transactions that involve the sale of an immovable property for a value exceeding Rs.100 should be registered. Admittedly, in the case there was no instrument of any registration of the said building. Thus, there was no transfer of the building vide sale deed dated 23.1.2014 in favour of M/s Titan Company Ltd. According to ld. A.R., the building is situated on the land is also deemed as transferred to M/s. Titan Company Ltd. and he placed reliance on the judgement pf Padmanabha Prakash 22 SOT 58. In that judgement, there was a mentioning of super structure and super structure was handed over to the developers, but it was no asset in his hands, rather a liability in the hands of developer as he had to incur some expenditure to remove the same and there was no dispute regarding the existence of super structure thereon the land. In the case of Dr. Maya Shanoy 124 TTJ 692 also there was no dispute regarding existence of super structure and it should be demolished by the assessee before handing over the

possession of the land to the developer. Hence, the Tribunal was of the opinion that building being attached to the earth will pass on to the transferee along with land and the cost of such building to be deducted from the value of the sale consideration while determining the capital gain. But in the present case on hand, there was no iota of evidence shown by the assessee with regard to the transfer of the building in the sale deed entered by the assessee with M/s. Titan Company Ltd. and also the balance sheet of the assessee as on 31.3.2013 have no reference of building and it shows only the land-electronic city Rs.14,13,42,439/- .For better understanding, we extract the balance sheet for the immediate previous years:

A M BUILDER AND DEVELOPERS

No. 4/1 Zenith Chambers Anjaneya Temple Street off Hosur Road Wilson Garden Bangalore-560027

DETAILS OF FIXED ASSETS AND DEPRECIATION 2012-2013

Sl. No.	Particulars	Rate of Depreciation	WDV as on 01.04.2012	Additions > 180days	Additions < 180 days	Deductions during the year	Balance on which depreciation is claimed	Depreciation for 2012-13	As on 31.03.2013
1	Land - Electronic City	0%	71,116,439.00	0.00	70,226,000.00	0.00	141,342,439.00	0.00	141,342,439.00
2	Capital WIP-A M Millenium	0%	227,532,489.16	0.00	0.00	37,310,220.49	190,222,268.67	0.00	190,222,268.67
3	Office Equipments	15%	8,313.62	0.00	0.00	0.00	8,313.62	1,247.00	7,066.62
4	Vehical	15%	174,394.00	0.00	0.00	0.00	174,394.00	26,159.00	148,235.00
5	Computer	60%	1,108.00	0.00	0.00	0.00	1,108.00	665.00	443.00
	Total		298,832,743.78	0.00	70,226,000.00	37,310,220.49	331,748,523.29	28,071.00	331,720,452.29

For A.M. BUILDERS & DEVELOPERS

Partner

(K S M Shabbir)
Managing Partner
Date : March 31, 2014
Place : Bengalore

(Sherbanu Shabbir)
Partner

For A.M. BUILDERS & DEVELOPERS

Partner

9.1 After sale of the property, the assessee reduced the same value from the land- electronic city and presented fixed asset schedule as below:-

A M BUILDER AND DEVELOPERS

No. 4/1 Zenith Chambers Anjaneya Temple Street off Hosur Road Wilson Garden Bangalore-560027

DETAILS OF FIXED ASSETS AND DEPRECIATION 2011-2012

Sl. No.	Particulars	Rate of Depreciation	WDV as on 01.04.2013	Additions > 180days	Additions < 180 days	Deductions during the year	Balance on which depreciation is claimed	Depreciation for 2013-14	As on 31.03.2014
1	Land - Electronic City	0%	1413,42,439.00			1413,42,439.00	0.00	0.00	0.00
3	Capital WIP-A M Millenium	0%	1902,22,268.67			1902,22,268.67	0.00	0.00	0.00
4	Office Equipments	15%	7,066.62				7,066.62	1,060.00	6,006.62
5	Vehical	15%	1,48,235.00				1,48,235.00	22,235.00	1,26,000.00
6	Furniture & Fixtures	15%	0.00	0.00	1,00,000.00	0.00	1,00,000.00	7,500.00	92,500.00
7	Computer	60%	443.00				443.00	266.00	177.00
	Total		3317,20,452.29	0.00	1,00,000.00	3315,64,707.67	2,55,744.62	31,061.00	2,24,683.62

(K S M Shabbir)
Managing Partner
Date : September 25, 2014

(Sherbanu Shabbir)
Partner

For A.M. BUILDERS & DEVELOPERS

Partner

9.2 As seen from the above, there was no mentioning of any value of the building in the schedule of the fixed assets and now assessee again says that sale of land also includes the sale of building so as to claim deduction towards cost of building from the sale value of the land, actually it was not so. Accordingly, this ground of appeal of revenue is allowed.

10. In the result, the appeal of the revenue is partly allowed.

Order pronounced in the open court on 6th Apr, 2023.

Sd/- **(N.V. Vasudevan)** **Vice President**	**Sd/-** **(Chandra Poojari)** **Accountant Member**

Bangalore,
Dated 6th Apr, 2023.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.