

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'B', BANGALORE**

**BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI NARENDRA KUMAR CHOUDHRY, JUDICIAL MEMBER**

**ITA No.35(Bang) 2015
(Assessment year : 2010-11)**

The Asst. Commissioner of Income Tax,
Circle-2(1),
Mangalore

Appellant

Vs

M/s Shankar Vittal Motor Co.Ltd.
17-17-1306, SVMCO Building,
N.G.Road, Attvara,
Mangalore-575 001
PAN No.AAACT5176F

Respondent

**Revenue by : Smt. Neera Malhotra, CIT
Assessee by : Smt Sheetal Borkar, Advocate**

**Date of hearing : 15-03-2016
Date of pronouncement : 18-03-2016**

O R D E R

PER SHRI NARENDRA KUMAR CHOUDHRY, JM:

- 1.** This appeal by the revenue is directed against the orders dated 04-2.07-2007 of CIT(A), Mysore for the assessment year : 2010-11.
- 2.** The revenue raised the following grounds;
 - “1. Based on the facts and circumstances of the case, ld.CIT(A) has erred in not appreciating the fact that as can be seen on the date of JDA, the portion of the constructed apartments that are to be assigned to the assessee has already been decided and crystallized and considering this scenario, it is only*

logical that the value of these apartments be considered as State Consideration.

2. *Based on the facts and circumstances, ld.CIT(A) ought to have appreciated the fact that the assessee should only treat the cost of construction as the sale consideration and not the market value of the asset because the assessee is not selling the apartments and is only receiving them. Hence, the true value of the asset is the cost of construction which is the actual money spent in bringing the asset to life.*
3. *The assessee craves leave to add, delete, amend or modify any of the grounds of appeal”.*

Brief facts of the Case are as Under:-

3. The assessee a company engaged in the business of transport operators filed return of income declaring a loss of Rs.58,98,255/- for the assessment year 2010-11. Subsequently, the assessee filed revised return on 20-12-2012 declaring total income at Rs.4,24,97,188/- which includes addition income of Rs.4,83,95,449/- on account of capital gains on the transfer of immovable property situated at Attavar Village, Mangalore comprised in R.S.No.762,784,782,780/1B, 781,766,768/2, having a total of 320.03 cents for development by joint development agreement dated 02.02.2009 which was not offered to tax in the original return filed.

There was a survey u/s 133A of the IT Act, conducted in the business premises of assessee on 10-12-2012, by DDIT

(Inv.) thereafter the assessment was re-opened u/s 147 of the IT Act, 1961. In response to notice u/s 148, the assessee has filed one more revised return declaring a long term capital loss of Rs.2,01,04,068/- based on the guidance value of the land and the assessment was completed u/s 143(3) on 23-07-2014 for the assessment year 2010-11.

During the assessment proceedings, the AO observed that the long term capital gains based on the joint development agreement was treated as the cost of construction at Rs.1,250/- per sq.ft as value of the building when building itself was not completed.

4. The Assessee aggrieved by the order of the Ld AO, challenged the Order before Ld CIT(A), who after considering various judgments allowed the appeal.
5. Learned ld.CIT(A) passed order on the mentioned below reasons which are as under;

“5.3 I have considered the rival contentions carefully. In the case law relied on by the AO i.e. CIT vs. Dr. T. K. Dayalu 60 DTP 403 (Kar) the facts of that case are as follows:

- (i) *That assessee entered into JDA which provides that a sum of Rs. 45,00,0001- to be paid to that assessee as a non refundable advance besides total built-up area of 5,500 sq ft to be constructed by the developer which will be made available to that assessee free of cost.*

(ii) Accordingly, the possession of the property has been handed over on 30.05.1996.

(iii) Accordingly, that assessee returned L TCGs of Rs.29, 19,570/- contending that the capital gain arises in the year 2003 when the project was completed.

5.4 On these set of facts, it was observed by Hon'ble High Court that since, the assessee had received non-refundable amount of Rs. 45,00,000/- and handed over the possession of the property in the year 1996 capital gain is to be taxed in the year 1997-98. Hon'ble High Court also cited the decision of Hon'ble Supreme Court in *Chaturbhuj DwarkadasKapacia Vs. CIT 260 ITR 49 5.5*

Under the facts that, the assessee received, non refundable money and handed over the possession, the conclusion in that case was that transfer was effected as per section 2(47)(v) r.w. s. 53A in the year 1997-98 and not 2003.

5.6 The issue in this case is the date of transfer which is held as the date of signing of JDA. There is no finding regarding the working of capital gains. There is no dispute about the issue of application of section 2(47) since the appellant is also admitting that, it is liable for capital gains as on the date of JDA. Hence, the

case law in the case of Dr. T.K. Dayalu decided by Hon'ble Karnataka High Court is followed. The issue that arises now is, what is the value of consideration to be adopted for computation of capital gain. The A.O held that since the appellant is entitled to receive certain area of constructed building in lieu of transfer of portion of land, the estimated value of likely investment into the built-up area is the consideration for the purpose of capital gains.

5.7 *The crux of the argument of the appellant is that it is a pure estimation. JDA: is a kind of contract agreement wherein, the appellant would get his share of constructed property after completion of the project and the uncertainty of developer not completing the project or not honoring his commitment are always there till the project is completed. The possibility of termination of contract itself for any reason cannot be ruled out. That being the case, estimating the value of property even before it is received by the appellant, is not realistic. Hon'ble Karnataka High Court only held that there is a transfer on the date of JDA. If transfer is deemed, then what can be taxed, is the market value of the property on the date of transfer. What the entire appellant received on the date of JDA is only the right to receive particular area of constructed building and not the building perse. The value of this building in*

physical form may vary from time to time. till the date of completion and handing over. The right to receive the area can at the best be equated with the market value of the property handed over to the developer with a clear understanding to complete the project and hand over the appellant's share in future. Under these circumstances, it is argued by the appellant that the capital gains do arise in the hands of the appellant on the date of JDA and the value of consideration is The market value which can be ascertained from guidance value. It is also informed by the appellant that in fact, actual construction is still going on till date. It may be noted that, only their right has been extinguished while entering into joint development agreement. Appellant has duly computed the long term capital gains for the extinguishment of right in the land by adopting the fair market value as per the guidance value.

5.8 I find strength in this argument of the appellant that for the deemed transfer on the date of JDA the logical deemed consideration would be the guidance value of the property. This would take the character of cost of acquisition for the built-up area to be handed over by the developer as and when it is handed Dyer or the value of right to receive that area in between and as and when either this right to receive the

property or the property when received is sold, the appellant would be gaining further income which needs to be taxed in the respective years.

Hence, I find that as on the date of entering of JDA even on deemed status of transfer the capital gains can only be worked out on the deemed market value of the property as per municipal records which has some basis as admitted by the appellant. Hence, even if the appellant's second revised return is ignored by the AO the calculation has to be based on this logic. However, since the appellant itself has given the revised computation/return before the AO at the time of assessment stage itself, in view of the decisions cited by the appellant the revised computation/return can be adopted accordingly.

“ I find that the admission of the appellant is also in line with the decision of Hon'ble Karnataka High Court in as much as the appellant is admitting the capital gains on the date of JDA treating it is a deemed transfer u/s.2(47)(v). The only dispute is regarding the value of consideration and in my considered opinion I find strength in the argument of the appellant that, it would be reasonable to adopt the fair market value as deemed consideration for the purpose of calculation of capital gains. Hence, I direct the AO to compute the capital gains accordingly”.

6. Aggrieved by the order of the CIT(A), the revenue preferred the present appeal.

7. We have heard both parties and have considered the relevant material available on record.

The learned DR argued that the portion of the constructed apartment that are to be assigned to the assessee has already been decided and crystallized and considering the scenario, it is only logical that the value of these apartment be considered as sale consideration. Further it was argued by the learned DR that assessee should only treat the cost of construction as sale consideration and not the market value of the asset because, the assessee is not selling the apartment and is only receiving them hence, the true value of asset is the cost of construction which is actually money spent in bringing the assets to life.

The learned DR further relied on the judgment of the Co-ordinate Bench of the ITAT at Hyderabad in case of Smt Prathima Reddy Vs ITO, Ward-6(4) (2012) 25 Taxmann.com 264(Hyd.) and emphasized that similar issue was decided by the said Bench, as the said Bench determined the cost of construction while transferring the assets.

On the other hand, learned AR relied on the orders of CIT(A)

and submitted that the learned CIT(A) was agreed on the submissions of the assessee that for the deemed transfer of JDA the logical deemed consideration has to be guidance value of property and even otherwise it was observed by the CIT(A). Even on the date of transfer, the capital gains can only be worked out on the deemed market value of the property as per municipal records which has some basis.

We have given our thoughtful consideration and rival submissions and facts and circumstances of the case and also gone through the order of the authorities below.

As the case referred as Smt Prathima Reddy Vs ITO, Ward-6(4) (2012) 25 Taxmann.com 264(Hyd.) by the learned DR actually dissimilar to the facts of the present case because in the said case, the controversy was with regard to the assessment year, but the determination of value was not in dispute. However, in the instant case, the main controversy is not with regard to the assessment year, but it is of the valuation of property whether market value as on the date of JDA has to be considered or Construction cost has to be considered. The judgment passed by the jurisdictional High Court in the case of CIT Vs Dr. T.K.Dayalu 292 Taxman.com531 is relevant for deciding the present controversy.

We are of the view, because at the time of signing JDA the capital gain has to be computed only on the guidance value of the land. Even otherwise, if any capital gains to be accrued in future in favour of assessee after receiving the possession of the property. Certainly that would also be subject to capital gains. Therefore, in our final conclusion valuation of the capital gain should be appropriate to adopt the FMV/asset as deemed consideration, but not cost of the construction.

With the above observation we dismiss the appeal of the revenue.

Order pronounced in the open court on the 18th March, 2016.

Sd/-
(BOMMARAJU RAMAKOTAIAH)
ACCOUNTANT MEMBER

Bangalore:

D a t e d : 18-03-2016

am*

Copy to :

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

Sd/-
(NARENDRA KUMAR CHOUDHURY)
JUDICIAL MEMBER

By order, AR, ITAT, Bangalore