

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " C "**

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER AND
SHRI VIJAYPAL RAO, JUDICIAL MEMBER**

I.T.A. No.268/Bang/2014 (Assessment Year : 2005-06)		
M/s. Essae Teraoka Ltd., No.410, 100 Feet Road, 4 th Block, Koramangala, Bangalore-560 034 PAN AAACE 3061A	Vs.	Dy. Commissioner of Income Tax, Circle 11(3), Bangalore.
Appellant		Respondent.

Appellant By : Shri H.N. Khincha, C.A.

Respondent By : Shri Sunil Kumar Agarwala, JCIT.

Date of Hearing : 10.11.2015.

Date of Pronouncement : 18.11.2015.

O R D E R

Per Shri Vijaypal Rao, J.M. :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)- Dt.30.12.2013 for Assessment Year 2005-06. The assessee has raised the following grounds :-

1. The Assessment Order passed by the Assessing Officer was without jurisdiction and bad in law and was liable to be quashed. The learned Commissioner of Income-tax (Appeals), has instead of quashing the order, erred in confirming the same.
2. The conditions precedent for issue of notice u/s. 148 of IT. Act, 1961 being not present, the notice as issued was bad in law and consequently all proceedings being bad in law are to be quashed.
3. In any case, and without prejudice the notice u/s. 148 having been issued without following the prescribed procedure in law is bad in law and is liable to be quashed.

4.1 Without prejudice to above, the Assessing Officer erred in holding that the transfer took place in the previous year relevant to year under appeal and in accordingly *taxing* as capital gain for the year under appeal and the learned Commissioner of Income-tax (Appeals) has erred in confirming the same. The incident of transfer having not taken place during the previous year relevant to Assessment Year 2005-2006, the taxing of capital gain in the year under appeal is not correct on the fact and circumstances of the case and law applicable, therefore the taxing of capital gain in the year under appeal being wrong is to be deleted.

5. In any case and without further prejudice, the calculation of capital gain is wrong.

6. The Assessing Officer has erred in levying interest. The appellant denies the liability to pay interest. The interest having been levied erroneously is to be deleted.

7. In view of the above and on the grounds to be adduced at the time of hearing it is requested that the impugned order be quashed or at least to addition made to income be deleted and interest levied be deleted.

2. Ground Nos.1 to 3 regarding validity of reopening of assessment. The assessee is a company engaged in the manufacture and sale of specialized electronic goods. The assessee filed its return of income for the Assessment Year 2005-06 on 30.10.2005 declaring a total income of Rs.7,97,74,810. Originally the assessment was completed under Section 143(3) vide order dt.26.11.2007 by accepting the returned income of the assessee. Subsequently, the Assessing Officer received communication from the Joint Director of Income Tax (Investigation) (OSD), Bangalore disclosing the fact that capital gains amounting to Rs.49,98,089 arising from transaction relating to transfer of immovable property had escaped assessment. This fact came to the knowledge of the revenue authorities due to the search carried out in the case of M/s. V Infrastructure Pvt. Ltd. Accordingly, the Assessing Officer reopened the assessment under Section 147 by issuing a notice under Section 148 of the Act. The reassessment was completed under Section 143(3) rws 147 vide order dt.29.11.2012 whereby the Assessing Officer has brought to tax the capital gains of Rs.49,98,089. Aggrieved by the order of the Assessing Officer, the assessee filed the appeal before the CIT (Appeals), inter alia, raising the ground for

validity of action under Section 147 of the Act. The CIT (Appeals) did not accept the contention of the assessee on the point of the validity of reopening as well as reassessment and upheld the action of the Assessing Officer.

3. Before us, the learned Authorised Representative of the assessee submitted that reopening is not valid because the notice issued under Section 148 dt.16.3.2012 is beyond four years from the end of the assessment year and therefore reopening without the requisite approval of the authority is not permissible.

4. The learned Departmental Representative has contended that as per the reasons recorded by the Assessing Officer which does not indicate that prior to the issue of notice under Section 148, the Assessing Officer took the approval/sanction of the competent authority. In response to the objections, the learned Departmental Representative has produced the assessment record before us indicating the requisite sanction was duly granted by the CIT. On perusal of the record, we find that the notice under Section 148 dt.16.3.2012 issued by the Assessing Officer after the sanction was duly granted / approved by the competent authority. Therefore, in view of the fact that the Assessing Officer obtained the necessary approval / sanction of the competent authority, the objections raised by the learned Authorised Representative against the validity of the notice under Section 148 does not survive. Accordingly, we reject this ground of the assessee in respect of the validity of the reopening.

5. The next contention of the learned Authorised Representative against the reopening the assessment is that the Assessing Officer was not having any material to indicate that

the alleged capital gains has escaped assessment during the year under consideration. He has further contended that this issue also goes to the merits of the case that during the year under consideration there was no transfer of the alleged land by the assessee but it was transferred only vide sale deed dt.15.2.2006 which falls in the assessment year 2006-07 and not in the assessment year 2005-06. Therefore when the incidence of capital gains does not occur during the year under consideration then the question of escapement of the income chargeable to tax does not arise. The learned Authorised Representative of the assessee has referred to the Joint Development Agreement ('JDA') and submitted that no transfer took place regarding the land in question. He has pointed out that as per the terms and conditions of the JDA, the assessee has allowed the developer to construct the property and after the construction of the property, the assessee would receive 53% of the built up area and remaining 47% was to be received by the developer. The learned Authorised Representative has submitted that subsequent to the JDA, the assessee has transferred 47% share of the land in favour of the developer vide sale deed dt.15.2.2006. Therefore the transfer of the land in question took place during the period relevant to the Assessment Year 2006-07 and not during the period relevant to the Assessment Year under consideration. The learned Authorised Representative of the assessee has further pointed out that even otherwise there is no capital gain arises or accrued to the assessee on transfer of land in question because the cost of the land in the hands of the assessee as well as sale consideration is same and the assessee has not charged anything more than the cost of the land. He has pointed that the Assessing Officer has worked out the

capital gains by computing the value of the built up area to be received by the assessee on the basis of the total cost of construction as per the record of the developer. The learned Authorised Representative has submitted that the cost of the share of 53% of the constructed portion was already determined between the parties as recorded in the sale deed and therefore when the parties have agreed to consideration which is recorded in the sale deed, then the computation of the capital gains and valuation of the constructed share of the assessee in the project is without any basis. The cost recorded by the developer in its books of accounts is inclusive of all other expenditure including the advertisement and marketing. Therefore the same may not be the true cost of the construction of the project as some of the expenditure at the end of the developer may be in the nature of general business expenditure. This cannot be imbibed to the cost of the construction for the purpose of capital gains on sale of the asset. The learned Authorised Representative has further pointed out that the valuation of the land in question as per the circular rate/guidance value is much less than the sale consideration agreed between the parties as per the sale deed. In support of his contention, he has filed the rate prescribed by the Govt. of Karnataka in respect of the area wherein the property is situated. Thus the learned Authorised Representative has submitted that the addition made by the Assessing Officer is highly presumptive and without any basis when the assessee has already disclosed the consideration in the sale deed. On the other hand, the learned Departmental Representative has submitted that the assessee did not disclose the capital gains in return of income arising out of transfer of property in question,

therefore, there was no occasion for considering this aspect of the assessment of income while framing the original assessment dt.26.11.2007. Only because of the search conducted in case of the developer group, the Assessing Officer came to know about the transfer of the land in question and the assessee has not disclosed the capital gains in the return of income. Thus the learned Departmental Representative has submitted that the Assessing Officer was having sufficient tangible material to form the opinion that the income assessable to tax in respect of the capital gains arising from sale of the land has escaped assessment. As regards the computation of capital gains and the incidence of the capital gains during the year under consideration, the learned Departmental Representative has submitted that when the land in question was transferred in favour of the developer vide JDA dt.28.1.2005 and the developer was allowed to take possession of the land for the purpose of construction of the area then the condition as prescribed under Section 2(47)(v) rws 53A transfer of the Properties Act are satisfied on the completion of the transaction of handing over of the land in question to the developer vide JDA. He has relied upon the orders of the authorities below. As regards the valuation of the constructed area and computation of the capital gains, the learned Departmental Representative has pointed out that the Assessing Officer has considered the cost of construction as recorded by the developer in its books of accounts and therefore the Assessing Officer has rightly determined the capital gains of Rs.49,98,089 by considering the valuation of the constructed area allotted to the assessee at Rs.6,72,70,089.

6. We have considered the rival submissions as well as the material on record. As regards the validity of reopening of assessment, we find that admittedly the assessee did not disclose the capital gains arising from transfer of the land in question in the return of income. The assessee was owner of the property bearing No.6B situated at Koramangala Indl. Layout in Ward No.68, Koramangala, Bangalore-560034. The assessee entered into a JDA with **M/s. Vaishnavi Promoters and Developers**, a partnership firm for development of the property in question by constructing a commercial building. The parties have agreed that a total area of 8733.23 sq. m. was to be constructed under JDA. Out of the total built up area, the assessee was to get 53% (approx. 4628.96 sq. m.) of super built up area. The developer was to get the remaining 47% of the built up area. Thus by virtue of the JDA, the assessee has to transfer 47% of the undivided share, the title and interest in the land in question in favour of the developer. There was a search in the group concern of the developer under Section 132 during which the transaction of transfer of land under JDA was detected by the Investigation Wing of Income Tax Department. Therefore, on receipt of the information from the Investigation Wing that the assessee has transferred the land in question in favour of the developer, the Assessing Officer proposed to reopen the assessment by recording the reasons as under :-

" M/s. Essae Teraoka Limited filed its return of income for the Assessment Year 2005-06 on 31.10.2005 declaring income of Rs.7,97,74,810. The return was selected for scrutiny and assessment completed under Section 143(3) on 26.11.2007 determining a taxable income of Rs.7,97,74,810.

In this case information has been received from the JDIT (Inv.)(OSD), Bangalore stating that a search under Section 132 was carried out in the case of M/s. Vaishnavi Infrastructure Pvt. Ltd. on 5.7.2001 and during the course of search

investigation, it came to light that M/s. Vaishnavi Promoters & Developers, a sister concern of Vaishnavi Group has entered into a Joint Development Agreement dt.28.1.2005 with M/s. Essae Teraoka for construction of commercial complex on the land situated at No.6-B, VII Main, 80 feet road, Koramangala, Bangalore with a total built up area of 1,00,644 sq. ft. and the share of built up area given to the assessee company is 53,341 sq. ft. The total cost of construction of 1,00,644 sq. ft. is Rs.12,69,24,695.

As per the sale deed dt.15.2.2006, M/s. Essae Terroka has given an undivided share of land amounting to Rs.19,722.26 sq. ft. to M/s. Vaishnavi Promoters & Developers. The total cost of undivided share of land given to M/s. Vaishnavi Group is Rs.6,22,72,000. The total cost of construction of the entire built up area of 1,00,644 sq. ft. is Rs.12,69,24,695. Hence, the cost of construction of super built up area allotted to Essae Teroka is Rs.6,72,70,089. Thus there is a capital gain to the extent of Rs.49,98,089 in the hands of the assessee company for the A.Y. 2005-06. As the joint development agreement was entered in the F.Y. 2004-05, the capital gain has to be taxed for the Assessment Year 2005-06 as per the judgement of Hon'ble High Court of Karnataka in the order in ITA Nos.3209 of 2005 - CIT Vs. Dr. T.K. Dayalu.

On verification of the records of this office, it is observed that assessee has not shown any capital gain arising on sale of undivided share of land. Thus there is escapement of income chargeable to tax to an extent of Rs.49,98,089.

From the above, it is clear that the assessee has not disclosed truly and fully all the material facts necessary for assessment. In view of this, I have reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the IT Act, 1961."

Thus it is clear from the reasons recorded that prior to the information received from the Investigation Wing and prior to the search under Section 132, there was no occasion for the Assessing Officer to take note of this fact that the assessee has entered into a JDA with the developer and thereby the assessee has transferred 47% share in the land in favour of the developer. Thus keeping in view of the facts and circumstances of the case, we find that there was a tangible material came to the notice of the Assessing Officer on the basis of which the Assessing Officer has formed the opinion that capital gains arising on sale of undivided share of land has escaped assessment. Though at the time of

forming the opinion it is not necessary that the belief of the Assessing Officer would be proved on merits but what is required is sufficiency of material on the basis of which the Assessing Officer has formed a reasonable opinion. The reopening of assessment cannot be questioned merely on the ground that the reasons recorded by the Assessing Officer could not withstand the test of scrutiny on merits. Hence we do not find any error or illegality in the order of the CIT (Appeals) in confirming the validity of the reassessment by the Assessing Officer.

7. As regards the incidence of arising of capital gains during the year under consideration, we note that the assessee has permitted the developer to enter upon the property and construct a commercial building. Apart from allowing the developer to take over the property for the purpose of construction, the assessee has also executed a Power of Attorney in favour of the developer to facilitate the developer to sell the property along with the undivided land to the extent of 47%. The relevant part of the recitals as well as terms and conditions of the Joint Development Agreement (JDA) are reproduced as under :-

"AND WHEREAS the Owner is desirous of developing the Schedule Property by constructing a Commercial Building thereon and the owner was on the lookout for a Developer who will be able to formulate a scheme for development of the Schedule Property. The Developer who is in the field of property development and having come to know of the intention of the owner has offered to develop the Schedule Property by constructing a multistoried Commercial Building for which the owner has agreed since the same would accrue to its benefit also.

AND WHEREAS the owner.....

AND WHEREAS the Developer acting on the above representations has agreed to develop at its cost and expenses the Schedule Property in accordance with the scheme formulated by it on the condition that the Developer will construct a Commercial Building by name

"ESSAE VAISHNAVI" of 8733.23 sq. m. of super built up area (approx.) on the Schedule Property (hereafter referred to as the "COMMERCIAL BUILDING") and delivering to the owner or its nominees, 53% (approx. 4628.96 sq. m. of super built area) of the total saleable super built area with 41 Nos. of covered and 23 Nos. of uncovered car parking spaces, together with exclusive rights for usage of 53% of the open terrace area as detailed in the sketch attached in consideration of the owner transferring or conveying 47% of undivided share of right, title and interest in the Schedule Property in favour of the Developer or its nominees as agreed upon and as set out hereunder.

AND WHEREAS the owner.....

1. DEVELOPMENT : That in pursuance of the foregoing, the Owner hereby authorizes and empowers the developer to develop the Schedule Property into a multistoried Commercial Building at the cost of the Developer as set out here below and the Owner shall not revoke the rights so granted till the completion of the project development and sale as contemplated hereunder :
2. RELATIVE INTEREST OF THE PARTIES : The owner hereby permits the Developer to enter upon the Schedule Property and construct a Commercial Building having approx. 8733.23 sq. m. of super built up area thereon. The Developer shall construct the Commercial Building in the Schedule Property at its own cost and expense, utilizing (subject to necessary approvals by the authorities) the floor area ratio and allot and deliver 53% (approx. 4628.96 sq. m. of super built area) of the total saleable constructed super built area along with 41 (Fortyone) Nos. covered and 23 Nos. uncovered car parking space to the owner or its nominees. The Commercial Building shall be constructed in accordance with the specifications appended to this Agreement. It is further agreed by the parties that the owner shall convey and deliver 47% share of the undivided interest in the Schedule Property in favour of the Developer or its nominee/s in accordance with clause 2.1 infra.

2.1

3.....

4.....

5.....

6.....

7. LICENSE TO ENTER : The owner has granted license to enter the Schedule Property to the Developer for the purpose of constructing the Commercial Building immediately on signing this Agreement. It is specifically understood between the parties that the license to enter Schedule Property being given to the Developer is not being given or intended to be given by the Owner in part performance of this Agreement under Section 53A of the Transfer of Property Act and this is not a Sale Agreement in any form or manner. Both the parties confirm that the owner shall retain legal possession over the Schedule Property, subject to other terms and conditions of this agreement. The Development

contemplated by this Agreement is not in the nature of a Partnership as contemplated either by the Indian Partnership Act, 1932, or by the Income Tax Act, 1961."

Thus it is clear that the intention of the party as reflected from the JDA clearly manifest that the assessee handed over 100% of the land to the developer for purpose of construction and further by executing the Power of Attorney authorize the developer to transfer 47% of the share in the land to the prospective buyers of the developed property. The transfer of right and interest in the land under JDA & Power of Attorney are irrevocable. Therefore, 47% of the land was transferred by the assessee in favour of the developer at the time of executing the JDA dt.28./1.2005 against the consideration in the form of constructed area equivalent to the 53% of the total super built up area amounting to 4628.96 sq. m. Thus the consideration for transferring the land in favour of the developer was the value of the cost of construction of built up area equivalent to 4628.96 sq. m. Though subsequently, the assessee has executed a sale deed whereby the legal title / ownership of 47% of the undivided share which goes to the developer as per the JDA was formally transferred. Thus it is clear that subsequent sale deed dt.15.2.2006 is only for transfer of legal title over the land and as a measure of precaution to avoid any dispute or litigation in future with regard to the legal tile over the land. It is clear from the terms and conditions of the JDA that the developer was entitled to enjoy the property and even to sell the same after construction of the same. Therefore, it is nothing but transfer under the JDA to the extent of the share received by the developer from the constructed property as well as undivided share in the land. Thus the JDA

constitute transfer of property as per the provisions of section 269UA as well as rws 2(47)(v) of the Act. Accordingly, we are of the view that the condition of transfer of the capital asset as prescribed under Section 2(47)(v) rws 269UA are satisfied and consequently the incidence of transfer of land in question and capital gain, if any, arises during the period relevant to the assessment year under consideration. We fortify our view by the recent judgment dt.4.11.2015 of Hon'ble Supreme Court in the case of Unitech & Anr. Vs. Union of India & Anr. Hence, we do not find any error or any illegality in the orders of the authorities below in holding that the transfer of the undivided share of land to the extent of 47% in favour of the developer took place during the year under consideration.

8. The next question for our consideration is the computation of capital gains. The learned Authorised Representative has vehemently contended that the Assessing Officer has computed the capital gains by taking the cost of construction as recorded by the developer in the books of accounts without making any enquiry. We find that the Assessing Officer has not conducted any enquiry to but just adopted the figure as given in the report of the Investigation Wing sent to the Assessing Officer for reopening of the assessment. There is no dispute that at the time of execution of the sale deed dt.15.2.2006, the parties have determined the value of the constructed share of the assessee to the extent of 53% at Rs.6,22,72,000. There is also no dispute that the cost of land in question was Rs.6,22,72,000 which has been admitted by the Assessing Officer in the assessment order. Therefore as per the claim of the assessee there was no capital

gains on transfer of land in question in favour of the developer because cost as well as the sale consideration is same. The learned Authorised Representative has also relied upon the guideline value as notified by the Govt. of Karnataka in respect of the area in question and thus contended that the guideline value prescribed by the Govt. is much less than the sale consideration agreed between the parties. We find force in the contention of the learned Authorised Representative that the cost recorded by the developer in the books of accounts may also include some of the expenditure which have not directly related to the construction activity but may have been incurred in relation to the general administration and other business expenditure. Since income in the hands of the developer is assessed to tax as business income, therefore, the said expenditure which are in the nature of business expenditure are allowable from the sale consideration of the constructed area belongs to the developer. Accordingly, in the absence of any enquiry or any other material or evidence to show that the actual cost of construction or the value of the constructed area belonging to the assessee is more than the value shown by the assessee at Rs.6,22,72,000 we do not approve the action of the Assessing Officer to compute the capital gains by adopting the figure of expenditure recorded in the books of the developer. There is a substantial difference between the cost of construction for the purpose of computing the capital gains on sale of capital asset and expenditure booked by the developer in the course of construction activity being the business activity of the developer. Therefore, the expenditure recorded by the developer being business expenditure having no direct nexus with construction cannot be adopted as cost of

construction for the purpose of capital gains in the hands of the assessee. Accordingly, we delete the addition made by the Assessing Officer on account of capital gains.

9. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 18th Nov., 2015.

Sd/-
(ABRAHAM P GEORGE)
Accountant Member

Sd/-
(VIJAYPAL RAO)
Judicial Member

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Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore