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

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.2045/Bang/2016
Assessment year : 2006-07

Shri K.G. Shivarudraiah, "Shivakrupa Nilaya", Kagadasapur, C.V. Raman Nagar Post, Bangalore – 560 093. **PAN: ADGPS 5896F**	Vs.	The Income Tax Officer, Ward 7(2)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Narendra Sharma, Advocate
Respondent by	:	Shri M.K. Biju, Jt. CIT(DR)(ITAT)-3, Bengaluru

Date of hearing	:	15.05.2017
Date of Pronouncement	:	26.05.2017

O R D E R

This appeal is preferred by the assessee against the order of CIT(Appeals) *inter alia* on the following grounds:-

"1. The order of the learned Assessing Officer under section 143(3) r.w.s 147 of the Act is opposed to law, facts and circumstances of the case, and therefore liable to be cancelled.

NOTICE U/S.148.

2. The Learned AO ought to have appreciated that the Joint Development Agreement(JDA) dated:23/05/2006 with M/s. Keerthi Estates did not prima facie indicate any escapement of income and therefore, no notice u/s.148 could be issued on that basis.

3. The Learned AO failed to appreciate that Capital Gain income accruing as per the JOA was already admitted in the return of income filed for the relevant assessment year and therefore, it was not a case of escapement of income at all warranting issue of notice u/s.148.

4. The Learned AO failed to appreciate that there was no tangible material on the basis of which satisfaction could be reached regarding escapement of income to issue the notice u/s.148.

5. The reasons recorded by the Learned AD, if any, in the absence of any tangible material indicating escapement of income, could have no nexus with the purported income escaping assessment and therefore, the notice u/s.148 is liable to be set-aside as bad in law.

JOINT DEVELOPMENT AGREEMENT (JDA)

6. The Learned A.O as well as the Learned Appellate Commissioner failed to appreciate that there was no handing over of possession to M/s. Keerthi Associates on execution of the JOA and there was no consideration received in contradistinction to the case before the Hon'ble Jurisdictional High Court in T.K.Dayalu, and consequently there was no liability to tax the capital gain in the present assessment year.

DEDUCTION U/S. 54F.

7. The Learned A.O as well as the Learned Appellate Commissioner failed to appreciate that the decision of the Jurisdictional High Court in the case of CIT Vs. K.G.Rukminiamma is applicable to the facts of the case and the statutory amendment to sections 54 and 54F by the Finance Act, 2014 further clarifies the legal position and accordingly, the deduction u/s.54F could not be denied.

8. The Learned A.O. as well as the Learned Appellate Commissioner failed to "appreciate that the decision of the Hon'ble Supreme Court in Goetze (India) Ltd., is not applicable to the facts of the case since income under the head capital gain itself is not recognized in the return filed and the appellant could not have claimed the deduction on the capital gains income not

admitted, and once it is found that the appellant was eligible for the deduction u/s.54F, it should not have been denied.

9. The Learned Appellate Commissioner ought to have appreciated that the decision of the Hon'ble Supreme Court in Goetze (India) Ltd., restrict the power of the Assessing Officer to allow the deduction which is not claimed in the return / revised return, and such restriction cannot be extended to the Appellate Authority as clarified by the Hon'ble Supreme Court itself in this very decision.

The Appellant seeks leave to add, alter, amend or delete any of the grounds urged at the time of hearing.

For these and other grounds that may be urged at the time of actual hearing, the Hon'ble ITAT may be pleased to cancel the impugned assessment order and allow the appeal in the interest of equity and justice."

2. During the course of hearing, the ld. counsel for the assessee has moved an application for admission of following additional grounds:-

"1. Without prejudice to the contention that there is no transfer by virtue of the joint development agreement dated *23/0312006,* the authorities below are not justified in adopting the proportionate cost of construction incurred by the developer for the built up area falling to the share of the appellant by virtue of Joint Development of the appellant's property as the full value of the consideration accruing as a result of transfer under the facts and in the circumstances of the appellant's case.

2. The authorities below ought to have appreciated and determined the full value of consideration accruing as a result of transfer under the joint development agreement on the basis of the guideline value of the undivided interest in the land agreed to be transferred by the appellant as the extent of built up area and the cost of construction thereof was not capable of being ascertained on the date of execution of the joint development agreement and consequently, the sale consideration adopted is highly excessive and liable to be reduced substantially.

> 3. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered."

3. The ld. counsel for the assessee submitted that the additional grounds should be admitted for the advancement of substantial cause of justice. He invited our attention that the impugned issue is squarely covered by the order of Tribunal in the case of *Shri K.G. Adaveeshaiah in ITA No.2043/Bang/2016* in which the Tribunal has restored the matter to the Assessing Officer with a direction to readjudicate the issue afresh in the light of guidelines laid down in that order. It was further contended that *Shri* K.G. Adaveeshaiah is one of the co-owner of the impugned property for which the agreement was executed with the builder for construction of the property. Since the Tribunal has taken a particular view in a similar set of facts, the order of CIT(Appeals) may be set aside and the matter be restored back to the file of AO to readjudicate the issue in the terms indicated in the order of Tribunal in the case of *Shri K.G. Adaveeshaiah in ITA No.2043/Bang/2016*, copy of which is placed on record.

4. The ld. DR placed reliance upon the order of CIT(Appeals).

5. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that undisputedly the property was owned by K.G. Basavaraj, K.G. Adaveeshaiah, Mr. K.G. Nagaraj and the assessee and all the owners of the property through their legal heirs have entered into a joint development agreement with the builder, M/s. Keerthi Estates

and these facts are evident from the joint development agreement placed on record at pages 1 to 15 of the compilation. In the case of *Shri K.G. Adaveeshaiah in ITA No.2043/Bang/2016*, the Tribunal has examined the aspect as to in which assessment year the capital gain accrued following the judgment of Hon'ble jurisdictional High Court in the case of *T.K. Dayalu (331 ITR 211)*. The Tribunal has held that fair market value of the share of the assessee in the constructed area has to be considered as on the date of joint development agreement and for doing that exercise, the Tribunal has restored the matter to the AO. The Tribunal has also held that capital gain has to be accrued in the year in which the property was transferred. It has also directed the AO to examine the claim of deduction u/s. 54/54F of the I.T. Act. The findings of the Tribunal in paras 5 to 8 are extracted hereunder for the sake of reference:-

> "5. Regarding Ground No. 6 and additional grounds, it was submitted by the learned AR of the assessee that in the case of Shri C. Jagannath - HUF vs. ITO in ITA 1231, 1233 and 1234/bang/2016 dated 20.01.2017, the facts were similar and the tribunal duly considered the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Dr. T. K. Dayalu (Supra) and held that the fair market value of the share of the assessee in the constructed area has to be considered as on the date of the IDA and for doing that exercise, the matter was restored to A.O. He submitted a copy of this tribunal order and drawn our attention to Para 9 thereof. Learned OR of the revenue supported the orders of the lower authorities. A specific query was raised by the bench that whether there is difference in facts in the present case and in the case cited by the learned AR of the assessee. In reply, learned DR of the revenue could not point out any difference in facts.
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> 6. We have considered the rival submissions. We find force in the submissions of the learned AR of the assessee that in view

of the judgment cited by him, in the present case also, the matter should be restored to the A.O. for determining the amount of capital gain by considering the fair market value of the share of the assessee in the constructed area as on the date of the IDA as the consideration received by the assessee. Accordingly, by respectfully following this tribunal order rendered in the case of Shri C. Jagannath - HUF vs. ITO (Supra), we set aside the order of CIT(A) on this issue and restore the matter back to the A. O. in both the cases to work out the capital gain afresh by considering the fair market value of the share of the assessee in the constructed area as on the-date of the IDA as the consideration received by the assessee. Needless to say, the A.O. should provide adequate opportunity of being heard to the assessee. Ground No. 6 and additional grounds are allowed for statistical purposes.

7. Regarding the remaining grounds i.e. grounds 7 to 9, in respect of denial of deduction u/s 54 & 54F, it was submitted by the learned AR of the assessee that by following the Judgment of Hon'ble apex court rendered in the case of Goetz (India) Ltd., 157 taxman 1, this issue was decided by CIT (A) against the assessee as per Para 6.2 of his order by saying that since it was not claimed in the return of income or by filing a revised return, this claim is not allowable. He submitted that this judgment of Hon'ble apex court does not impinge the powers of CIT(A) and therefore, he should have decided this issue on merit. Learned DR of the revenue supported the order of CIT(A).

8. We have considered the rival submissions. We find force in the submissions of the learned AR of the assessee on this issue also because the Judgment of Hon'ble apex court rendered in the case of Goetz (India) Ltd. (Supra) does not impinge the powers of CIT (A) and therefore, he should have decided this issue on merit. Therefore, on this issue also, we restore the matter back to the A.O. for a decision on the merit of the claim of the assessee. Generally, under these facts, we restore the matter to CIT(A) but since, in the present case, the main issue about quantum of capital gain is restored to A.O., we feel it proper to restore this matter also to the file of the A.O. The A.O. should provide adequate opportunity of being heard to the assessee and then pass necessary order as per law on this issue also. "

6. Since the Tribunal has already taken a particular view in one of the co-owner's case, we find no justification to take a contrary view in this appeal. Therefore, following the same, we restore the matter to the file of the Assessing Officer with a direction to recompute the capital gain in the terms indicated in the order of Tribunal in the case of *Shri K.G. Adaveeshaiah in ITA No.2043/Bang/2016*. Accordingly, the order of CIT(Appeals) is set aside and the matter is restored back to the file of AO to re-examine the issue afresh, after affording opportunity of being heard to the assessee.

7. In the result, the appeal of assessee is allowed for statistical purposes.

Pronounced in the open court on this 26th day of May, 2017.

Sd/-	Sd/-
(JASON P. BOAZ)	(SUNIL KUMAR YADAV)
Accountant Member	Judicial Member

Bangalore,
Dated, the 26th May, 2017.
/ Desai Smurthy /

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore. 6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.