

IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER  
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No. 573/Bang/2014
Assessment year : 2009-10

Shri Prashanth Prakash, No.113, Lalbagh Road Cross, Krishnappa Layout, Bangalore – 560 027. <b>PAN: AHMPP 8079P</b>	Vs.	The Additional Commissioner of Income Tax, Range 8, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri H.N. Khincha, C.A.
Respondent by	:	Shri P. Dhivahar, Jt. CIT(DR)

Date of hearing	:	05.03.2015
Date of Pronouncement	:	20.03.2015

**ORDER**

Per N.V. Vasudevan, Judicial Member

This appeal by the assessee is against the order dated 28.3.2014 of the CIT(Appeals), LTU, Bangalore relating to assessment year 2009-10.

2. The only issue that arises for consideration in this appeal is as to, whether the CIT(A) was justified in coming to the conclusion that sale of land and building by the assessee gave rise to short term capital gain as against the claim of the assessee that sale of land and building has to be bifurcated inasmuch as sale of land has to be considered as giving rise to

long term capital gain and sale of building as giving rise to short term capital gain.

3. The facts and circumstances under which the aforesaid issue arises for consideration are as follows.

4. One, M/s. Concorde Housing Corporation (hereinafter referred to as "Concorde Housing"), a developer of residential layout of sites as well as builder, developed housing sites known as Silicon Valley in Sy. Nos. 85, 164, 165 & 166 of Doddathogur Village, Begur Hobli, Bangalore South Taluk. The assessee purchased a house site bearing No.197. Concorde Housing also agreed to convey the land and construct a Villa for the assessee. One of its sister concerns, Concorde Shelters Pvt. Ltd. (hereinafter referred to "Concorde Shelters") agreed to construct a villa on the site sold by Concorde Housing to the assessee. By a registered sale deed dated 21.10.2004, the site was conveyed to the assessee for a sale consideration of Rs.9 lakhs. The cost of construction of Villa was Rs.24,39,526. The assessee had to pay the cost of construction of Villa in instalments as set out in the agreement dated 4.10.2004 between the assessee and Concorde Shelters. Ultimately construction of Villa got completed in the year 2008 only. The assessee agreed to sell the land as well as Villa under an agreement for sale dated 5.5.2008 to one Shakti Mohan for a consideration of Rs.58,96,006. The land as well as Villa was ultimately sold to Shakti Mohan under a registered sale deed dated

10.10.2008. The sale consideration mentioned in this sale deed is a sum of Rs.21 lakhs. The Revenue has not chosen to take cognizance of the sale consideration as reflected in the sale deed, but has proceeded only on the basis of sale consideration as set out in the agreement dated 5.5.2008.

5. It is not in dispute that the agreement for sale dated 5.5.2008 by which the land as well as Villa was agreed to be sold by the assessee to Shakti Mohan was a transfer and capital gain on such transfer was chargeable to tax in the A.Y. 2009-10. The assessee computed capital gain by bifurcating the capital gain on sale of land and capital gain on sale of Villa. According to assessee, the land was purchased under sale deed dated 21.10.2004 and was sold after construction of Villa thereon on 5.5.2008. The land, according to assessee, was held for a period of more than 36 months and therefore transfer of land would give rise to long term capital gain.

6. As far as Villa is concerned, construction of Villa was completed in 2008 and same was sold on 5.5.2008 within a short period and therefore sale of Villa would give rise to short term capital gain. The computation of long term and short term capital gains made by the assessee was as follows:-

**Land**

	<u>Rs.</u>
Sale consideration from Concorde property land	36,81,926
Less: Indexed cost of acquisition	
$\frac{9,90,920}{480 \times 582} =$	Rs.12,01,491
Interest paid on borrowing: <u>Rs. 7,82,394</u>	
	<u>19,83,885</u>
	16,98,042

**Building**

Concorde property building	22,14,080
Less: Cost of construction	22,14,080

7. The Assessing Officer accepted the aforesaid claim of the assessee. The only objection of the AO was with regard to claim of assessee for deduction of a sum of Rs.7,82,394 which was interest paid on borrowing, which was claimed as deduction while computing long term capital gain on sale of land. According to AO, Section 48 provides the mode of computation for charging capital gain to tax. Income chargeable under the head capital gain 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 (i) expenditure incurred wholly and exclusively in connection with such transfer, and (ii) cost of acquisition of asset and the cost of any improvement thereto. In view of the above provision, he was of the view that the sum of Rs.7,82,394 claimed as deduction cannot be allowed as it is neither cost of acquisition or improvement to the land nor is it wholly and

exclusively incurred in connection with the transfer. The AO therefore added the said amount to capital gains and brought to tax.

8. Aggrieved by the order of AO, the assessee preferred appeal before the CIT(Appeals).

9. The CIT(Appeals) had to address the question as to whether the interest paid on loans borrowed for acquiring the property which was not allowed as a deduction while computing capital gain, can be allowed as a deduction? The CIT(A) without going into this question, went into the question of correctness of the assessee having bifurcated the capital gain on sale of land and Villa into long term and short term capital gains. According to CIT(A), the transaction for purchase of land and building was a single integrated transaction and therefore AO ought not to have accepted the bifurcation of capital gain on sale of land and building into long term and short term capital gains. The CIT(A) was of the view that consequent benefit and indexation while computing long term capital gain ought not to have been allowed to the assessee. The CIT(A) in this regard referred to agreement dated 4.10.2004 to construct the Villa on the land proposed to be purchased by the assessee from Concorde Housing and came to the conclusion that sale of land and construction of Villa was a single transaction. When the factum of land having already been registered in the name of assessee consequent to sale deed dated 21.10.2004 and the recital in the sale deed that assessee was given

possession of the property by Concorde Housing was brought to the notice of the CIT(A), he observed that such possession was only a paper transfer. The CIT(A) also referred to the fact that the assessee was making composite payments for the land & Villa and therefore the transaction with Concorde Housing and Concorde Shelters had to be treated by the assessee as one holistic transaction routed through a common ledger.

10. The assessee placed reliance on the decision of Hon'ble Andhra Pradesh High court in *CGT v. Ethirajalu*, 93 ITR 366 and the jurisdictional ITAT decision in *T.S. Krishnamurthy v. DCIT*, ITA No.569/Bang/2012 dated 14.2.14, wherein the concept of "possession" and the expression "held" were held to be words not having the same meaning.

11. The CIT(A), however, rejected the aforesaid contention and held as follows:-

"8.3 For purposes of considering assessability under the head of "Capital Gains", the interpretation of the word "held" is much wider than notions of 'ownership' and the Hon'ble Supreme Court in the case of *CIT vs Podar Cement Pvt Ltd.* (1997) 226 ITR 625 held that the owner is the one who effectively controls the property and not merely the one who holds title to the same (emphasis added). In the appellant's case, in spite of the appearance of the sale deed having been registered in respect of 'land' the effective possession and control of this capital asset remained with the Concorde Group, and its possession along with the constructed villa, was handed over to the appellant in FY 2008-09 shortly before the entire property was sold to Sakthi Mohan. The issue in dispute here is not whether the sale consideration received from Sakthi Mohan could have been bifurcated into consideration for 'land' and 'building' with separate treatment of each. The issue, essentially, is the period of

holding in respect of the component of 'land' comprised in the property sold to Sakthi Mohan. Since the period of holding of both the land and the constructed villa thereon was less than 36 months as discussed above, the proceeds of the transfer are to be considered for computation of Short Terms Capital Gains only.”

12. The CIT(Appeals) ultimately directed the AO to assess the entire gain as short term capital gain by adopting the full value of consideration on transfer at Rs.58,96,006.

13. Aggrieved by the order of CIT(Appeals), the assessee has preferred the present appeal before the Tribunal.

14. We have heard the rival submissions. The Id. counsel for the assessee reiterated submissions as were made before the AO/CIT(A). The Id. DR relied on the order of CIT(Appeals).

15. We have given a very careful consideration to the rival submissions. From a perusal of agreement dated 4.10.2004 between the assessee and Concorde Shelters, it is clear that Concorde Shelters agreed to construct a Villa on the plot sold by Concorde Housing. Clause 5 of the said agreement is very material and it reads as follows:-

“5. The first party hereby irrevocably permits and authorizes the second party to hold the schedule property to develop the same by constructing a residential villa for him by obtaining the sanctioned plan. The first party shall not revoke the permission so granted, till completion of the entire villa with the plan and the specifications agreed to in Annexure-I and II as the agency created herein is one coupled with interest in so far as the second party constructing a residential villa in the schedule property.”

16. The land was sold by Concorde Housing to the assessee by a registered sale deed dated 21.10.2004. In the said sale deed, Concorde Hosing has affirmed that possession of the site sold to the assessee has been delivered and that the assessee will be in legal possession of the property from the date of sale deed. It is thus clear that the assessee acquired title to the land as early as on 21.10.2004. The possession of Concorde Shelters under agreement dated 4.10.2004, was only a license to carry out construction which cannot be equated to possession as understood in legal parlance. The assessee having acquired title to the land as early as on 21.10.2004 and having sold the land together with Villa under an agreement dated 5.5.2008, it is to be held that the transaction of sale has to be bifurcated as one relating to land and the other relating to building. As far as the transaction of sale of land is concerned, the gain on such sale should be construed as long term capital gain because the assessee held the land for a period of more than 36 months. The conclusions of the CIT(Appeals) that the expression "held" as used in the definition of long term capital asset in the Act means physical possession, in our view, is erroneous and is not contemplated by the provisions of section 2(42A) of the Act. The law is well settled that when there is a transfer of capital asset being land together with building and where the land is held for a period of more than 36 months and the building held for less than 36 months, the capital gain on land and building has to be

bifurcated as one relating to land and the other relating to building. If the land is held for more than 36 months, then capital gain on sale of land has to be treated as long term capital gain. The Hon'ble Madras High Court in the case of *CIT Vs. Ramachandra Rao, 236 ITR 51 (Mad)* had an occasion to deal with identical case. The Hon'ble Court held as follows:-

“8. We have carefully considered the rival contentions of both parties. The expression "capital asset" is defined in s. 2(14) of the Act as under :

"Capital asset means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include -

(i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or professions, .....

(iii) agricultural land in India, etc. The key words of the definitions of capital asset found in s. 2(14) are the property of any kind and the term comprehends and includes within itself any interest in the property. It may be movable or immovable property or any interest thereon. The term 'short-term capital asset' is defined in s. 2(42A) of the Act as under :

"Short-term capital asset" means a capital asset held by an assessee for not more than sixty months immediately preceding the date of transfer".

During the relevant period, s. 2(42A) of the Act prescribed the period of thirty six months. The emphasis that is given in s. 2(42A) is that the capital assets should be held by an assessee for a period not more than 36 months immediately preceding the date for the asset to be termed as a short-term capital assets. Here also, the emphasis is given on the expression held by an assessee. The mode of computation of the capital gain is provided under s. 48 of the Act which reads as under :

"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 capital asset and the cost of any improvement thereto".

Sec. 80T of the Act grants deduction in respect of the long-term capital gains in the case of an assessee other than companies where the gross total income of an assessee not being a company includes any income chargeable under the head "Capital gains" relating to capital assets other than short-term capital assets. In the case of buildings or land, separate deduction is provided under s. 80J(b) of the Act. It is relevant to note when s. 80T grants deduction, it uses the expression both the buildings or land or any rights in building or lands. The question that arises for consideration is whether it is possible to bifurcate the capital gains that arises on the sale of the land and building, when it is sold as one unit. The decision of this Court in *Park View Enterprises* (cited supra) makes it clear that the Indian law recognises dual ownership of the land and building. The Privy Council in *Narayan Das vs. Jatindranath* AIR 1923 PC 135 has also taken the view that having regard to the law in India it is possible to have separation of ownership of the building from the ownership of the land. This view of the Privy Council was approved by the Supreme Court in ***Bishan Das vs. State of Punjab*** . In so far as the definition of capital asset is concerned, as already seen, the definition of capital asset includes property of any kind and the land held by the assessee is a capital asset and the building held by the assessee is also a capital asset and it is possible to bifurcate the capital gain arising with reference to the sale of the land and building even if they are sold as one unit, if the lands are held by the assessee for a period more than that prescribed under s. 2(42A) of the Act. It is not possible to say that by construction of the building, that the land which was a long-term capital asset, has ceased to be a long-term capital asset. The land is an independent and an identifiable capital asset, and it continues to remain as an identifiable capital asset even after construction of building and at the time of the sale of the house. Since the land was held by the assessee for a period exceeding 36 months, the land cannot be regarded as a short-term capital asset

only by virtue of the construction of building thereon. Hence we are unable to accept the contentions of learned counsel for the Revenue that it is not possible to bifurcate the capital asset into two. We are of the opinion that the Tribunal has come to a correct conclusion that it is possible to work out capital gain with reference to sale of building and land separately. The decision of the Supreme Court in **State of Kerala vs. P. P. Hassan Koya** (supra) relied on by the learned counsel for the Revenue has no application to the facts of this case as it deals with the case where compensation was payable in respect of land and building and in that situation, the Supreme Court has held that both the land and building should be valued as one unit and hence, the decision rendered by the Supreme Court with reference to determination of compensation under the Land Acquisition Act has no application, particularly in the light of s. 80T of the Act. It is impermissible for the learned counsel to rely on a decision for a point which was not decided in that case. In **CIT vs. Vimal Chand Golecha** (supra), the Rajasthan High Court held that even if the land and building are sold as one unit for a consolidated price, the assessee is entitled to bifurcate the same and the capital gain arising from the sale of the land had to be treated as long-term capital gains. We are in agreement with the view expressed by the Rajasthan High Court in the above case. We are of the view that the land can be regarded as capital asset as per s. 2(14) of the Act and in accordance with the scheme of the Act, land would be considered as a separate capital asset, even if a building is constructed thereon. We are also of the opinion that where the land having been held for more than a prescribed period, the gains arising from the sale of the land could be considered as a long-term capital gains, though the building thereon was a new construction held for a period less than 36 months. Since the Tribunal has come to the correct conclusion by applying the well settled principles of law, we are of the opinion that no referable question of law arises out of the order of the Tribunal. Therefore, we reject the tax case petition. No costs.”

17. We are therefore of the view that bifurcation of capital gain as made by the assessee should be accepted. We, however, desist from making

any observations with regard to claim of assessee for deduction of interest paid on borrowings while computing long term capital gain on sale of land, as the same is not subject matter of appeal before us. With these observations, the appeal of the assessee is allowed.

18. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 20<sup>th</sup> day of March, 2015.

Sd/-

( JASON P. BOAZ )  
Accountant Member

Sd/-

( N.V. VASUDEVAN )  
Judicial Member

Bangalore,  
Dated, the 20<sup>th</sup> March, 2015.

/D S/

Copy to:

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

By order

Assistant Registrar /  
Senior Private Secretary  
ITAT, Bangalore.