

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'C' BENCH, BENGALURU**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER  
and  
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.1057/Bang/2016  
(Assessment year: 2008-09)

Shri M.C.Sathyanarayana Gowda,  
By L/R Smt.Bindu Latha,  
No.59, Sunkenahalli Main Road,  
Bull Temple Road,  
Bengaluru-560019. ... Appellant  
*PAN:AGIPG 5272 G*

Vs.

Income-tax Officer,  
Ward 5(4),  
Bengaluru. ... Respondent

Appellant by : Shri B.E.Balasubramanyam, CA.  
Respondent by : Dr. Pradeep Kumar, Addl.CIT

Date of hearing : 27/11/2017  
Date of pronouncement : 26/02/2018

**ORDER**

**Per INTURI RAMA RAO, AM :**

This is an appeal filed by the assessed directed against the order of  
CIT (A) dated 04/03/2016 for the assessment year 2008-09.

2. The assessee raised the following grounds appeal:

Page 2 of 6

The Appellant objects to the impugned order on the following grounds:

1. That the impugned order is opposed to the facts of law in so far as it is pre-judicial to the interest of the appellant.
2. That the Ld. CIT (A) erred in treating the transfer of asset as resulting in short-term capital gains and in doing so,
  - a) The Ld.CIT (A) failed to appreciate the fact that the Appellant had acquired a vested interest in the property transferred by way of a registered agreement dated 14-06-2004 itself.
  - b) The Ld.CIT (A) failed to appreciate that the sale deed dated 05-12-2005 was only executed in order to give a better title of the property in respect of which the Appellant had already got ownership and possession.
  - c) The Ld.CIT (A) also failed to consider the various decisions of the Honorable Supreme Court and the jurisdictional High Court.
- 3) That the Ld.CIT (A) erred in not allowing deduction under section 54F in respect of the apartments obtained by the Appellant as consideration in terms of the JDA.
- 4) Without prejudice to ground No.2 and 3 the Appellant objects to the order of the Ld.CIT(A) in directing the AO to consider Rs.1061.27/- per sq. ft as the consideration received for the following grounds:
  - a) That the amount fixed is erroneous and untenable inasmuch as it is based on a certificate given by the developer which does not have any details or break-up of the cost of construction.
  - b) The Ld.CIT (A) failed to appreciate that the term 'cost of the project' is different from the term 'cost of construction' inasmuch as the former includes administrative financial and marketing expenditure incurred by the developer from which no benefit accrues to the land owner/Appellant.

**Page 3 of 6**

- c) Without prejudice, the Ld.CIT (A) failed to appreciate that the cost of the project to the developer would also include the non-refundable amount given to the owner/Appellant which amount has already been brought to tax and including the same again would result in taxing the same amount twice.

**For these and such other grounds that may be adduced in time to time, it is requested that the Hon'ble ITAT may be pleased to examine the case in the light of justice and grant the relief sought for.**

3. Briefly, facts of the case are that the assessee is an individual. The return of income for the assessment year 2008-09 was filed on 02/09/2008 declaring income of Rs.5,06,440/-. After processing the said return of income u/ 143(1) of the Income-tax Act 1961 (hereinafter referred to as 'the Act'), the assessment was re-opened by issuance of notice u/s 148 on 30/12/2011. After receipt of said notice u/s 148 the assessee submitted that the original return of income filed may be treated as return filed in response to notice u/s 148. Subsequently the assessment was completed by the Income tax Officer, Ward 5(4), Bangalore, vide order dated 25/03/2013 passed u/s 143(3) read with section 147 of the Income Tax Act 1961 (hereinafter referred to as 'the Act' for short) at total income of Rs.4,78,74,340/-. While doing so, the Assessing Officer (AO) made addition on account of capital gains arising out of entering into Joint Development Agreement with M/s.Adarsh Developers dated 14/06/2007 also GPA on 14 6 2007. The AO was of the view that in terms of the provisions of section 2(47) there was transfer of immovable property on entering into JDA as per the ratio of the decision of the jurisdictional High Court in the case of *CIT vs. Dr. T K Dayalu* in ITA No.3209 of 205 c/w ITA No.3165 of 2005. Therefore, the AO held that there is 'transfer' within the meaning of section 2(47) and assessed to Capital gains by adopting cost of construction of the share of built up area as a consideration and computed short term capital gains and brought to tax.

## Page 4 of 6

4. Being aggrieved, an appeal was preferred before the Id.CIT(A) who, vide impugned order, after calling for remand report from the Assessing Officer and after giving notice of enhancement to the assessee, enhanced the consideration by adopting cost of construction at Rd.1061 per sq.ft. as against Rs.955/- adopted by the appellant and also confirmed the addition and denied the benefit u/s 54F of the Act.

5. Being aggrieved, the assessee is in appeal before us. The learned authorized representative of the assessee submitted that the lower authorities were not justified in concluding that the assessee derived short term capital gains on entering into joint development agreement on 14/06/2016 with M/s.Adarsh developers. It was further contended that the lower authorities were not justified in not reckoning/ignoring the agreement dated 28/06/2000 entered with Mr.Gopal to purchase the said property in consideration of services rendered by him in connection with proposed acquisition of the property by the Bangalore Development Authorities. He submitted that the assessee had entered into another supplementary agreement dated 01/06/2004 by virtue of which the assessee acquired interest in the property which was subject matter of joint development agreement. It was further submitted that the sale deed was executed on 05/02/2005 by virtue of which the assessee became absolute owner of the property. According to the learned authorized representative, the date on which the assessee entered into agreement of sale is to be reckoned for the purpose of computing the period to determine whether gains derived out of said transaction are short term or long term. He placed heavy reliance on the decision of the Hon'ble Supreme Court in the case of *Sanjeev Lal vs. CIT* (365 ITR 389) in support of the proposition that once entered into agreement to sell property, some right in the asset is extinguished in favour of the seller and this *right in personam* created in favour of the intended purchaser. He also placed reliance on the decision of the Hon'ble Karnataka High Court in the case of *Shakuntala* (ITA No.1707 of 2006). He also placed reliance on the decision of the Hon'ble High Court of Andhra Pradesh in the case of *M.Syamal Rao vs. CIT* (234 ITR140), Hon'ble Punjab & Haryana High Court decision in the case of *CIT vs Ved Prakash & Sons* (207 ITR 148) in support of the contention that the subsequent event of

**Page 5 of 6**

registration of sale deed is not relevant. It is only the date of agreement which is material for the purpose of reckoning the holding period of the assessee to determine whether the asset is short or long term. The Id. AR further submitted that once the gains arising out of entering into joint development agreement is assessable as long term capital gains, the same is exempt u/s 54. Reliance in this regard was placed on the decision of the Hon'ble High Court of Karnataka in the case of *CIT vs. K.G.Rukminiamma* (331 ITR 211), *CIT vs Khoobchand M Makhija* in ITA 1315/2015 and *ITO vs. Avinash Prabhakar Hegde* (TS-6733-ITAT-2016) (Bang).

On the other hand, the learned departmental Representative relied on the orders of the lower authorities.

6. We heard rival submissions of the parties and considered material on record. The issue in the present appeal is whether the gains arising on entering into joint development agreement is taxable under short term capital gains or long term capital gains. It must be stated here that the assessee is not challenging the eligibility to capital gains tax on entering into JDA. The bone of contention between assessee and revenue is only with regard to the holding period of property which is subject matter of JDA between assessee and M/s.Adarsh Developers. It is contended before us that the assessee had acquired the subject property on 28/06/2000 on entering into agreement of sale with Mr. Gopal. The sale deed was executed on 5/12/2005. According to the assessee, it is the date of agreement which has to be reckoned with for the purpose of calculating holding period of the asset and not the date of registration of sale deed. No doubt it is trite law that on entering into agreement of sale, the seller relinquishes certain rights in favor of the buyer. But the crucial factor to be taken into consideration is whether the buyer has taken possession of the property and paid consideration agreed etc. In the present case, the assessee never produced this agreement of sale before the Assessing Officer. Therefore genuineness of the agreement is not beyond doubt. Furthermore mere perusal of the agreement of sale placed at page 30 of the paper book, it is clear full consideration has not been paid. Out of total amount of consideration of Rs.12 lakhs only a sum of Rs.1 lakh was stated to have been paid. There is no covenant in the agreement of sale

**Page 6 of 6**

that possession of the property was transferred in favour of the assessee. Therefore it can be safely concluded that even in terms of agreement of sale entered into, the assessee has not acquired any interest in the said property from the date of agreement of sale that is 28/06/2000. Therefore the agreement of sale cannot be considered for the purpose of reckoning the holding period. The only date which can be considered is the date of registration of sale deed that is 5/12/2005. The decisions in the case of *Sanjeev Lal* (supra) and *M.Syamal Rao* (supra) relied upon by the Id.AR of the assessee, do not come to the aid of the assessee as the facts of those decisions are materially different. In the said decisions, full consideration was paid by the buyer and possession of the property was handed over to the buyer by the seller. In such circumstances, courts have held that even on entering into agreement of sale property, rights in said asset is extinguished and the buyer should be deemed to be the owner of the asset from the date of agreement of sale. Therefore, gains arising out of entering into joint development agreement are assessable as 'short term capital gain'. Hence, short term capital gains are not eligible for exemption u/s 54D of the Act. Therefore we uphold the order the lower authorities

7. In the result, the appeal filed by the assessee is dismissed.

*Order pronounced in the open court on 26<sup>th</sup> February, 2018*

sd/-

**(SUNIL KUMAR YADAV)**  
**JUDICIAL MEMBER**

Place : Bengaluru.

D a t e d : 26/02/2018

*srinivasulu, sps*

**Copy to :**

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

sd/-

**(INTURI RAMA RAO)**  
**ACCOUNTANT MEMBER**

By order

Senior Private Secretary  
Income-tax Appellate Tribunal  
Bangalore