IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 210/Bang/2016
Assessment Year : 2006-07

The Income Tax Officer, Ward – 5 (2) (4), Bangalore.	Vs.	Late Sri M. Nagaraju, L/R Sri N. Abhilash, No. 27/8, Maruthi Nilaya, 3rd Main, Hanumanthnagar, Bangalore – 560 019. **PAN: ABQPN2924H**
APPELLANT		RESPONDENT

&

C.O. No. 51/Bang/2016
(in ITA No. 210/Bang/2016)
Assessment Year : 2006-07
(By Assessee)

Assessee by	:	Shri V. Chandrasekhar, Advocate & Prashanth .G.S, CA
Revenue by	:	Shri Pradeep Kumar, CIT (DR)

Date of hearing	:	12.09.2019
Date of Pronouncement	:	25.10.2019

O R D E R

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the revenue and the C.O. is filed by the assessee and these are directed against the order of ld. CIT(A)-5, Bangalore dated 30.11.2015 for Assessment Year 2006-07. In course of hearing, it was submitted by ld. AR of assessee that the C.O. filed by the assessee is not pressed and hence, the C.O. filed by the assessee is dismissed as not pressed.

2. In the appeal filed by the revenue, following grounds are filed by the revenue.

> "*1. The order of the Commissioner of Income Tax (Appeals)-5, Bangalore, is opposed to the law and not on the facts and circumstances of the case.*
>
> *2. On the facts and circumstances of the case, the CIT(A) erred in law*

in allowing the appeal of the assessee even after agreeing to the fact that there was no transfer of land. It is practically impossible for the builder to enter land, get all the approvals and start construction unless and until the possession is handed over to it.

3. On the facts and circumstances of the case, the CIT(A) erred in law in ignoring to consider the ratio of judgements in CIT Vs High Court of Karnataka and Chiturbhuj Dwarkadas Kapadia Vs CIT of Bombay High Court and erred in holding that these cases are not applicable to the facts to this case.

4. For these and other grounds that may be urged upon, the order of the CIT(A) may be reversed and that assessment order be restored.

5. The appellant craves leave to add, alter, ament of delete any other grounds on or before hearing of the appeal."

3. The revenue has also filed additional grounds which are as under.

"*a. The order of the Ld CIT(A)-5, BANGALORE-5, Bangalore in so far as it is prejudicial to the interest of revenue, is opposed to the law and the facts and circumstances of the case.*

b. Whether in the facts and circumstances of the case the learned CIT(A) was right in not considering the fact that nothing prevented the assessee to get the property registered in the firm' s name after conversion if it was the asset of the firm?

c. Whether in the facts and circumstance of the case the learned CIT(A) was right in not considering the fact that the Joint development agreement dated 04-04-2005, categorically states that the owner of the land at question is the assessee and not the firm? Here again the other persons included in the JDA are only the confirming parties and there are no reason mentioned in the document as to why they are the confirming parties.

d. Whether in the facts and circumstance of the case the learned CIT(A) was right in not considering the para no.5 of the sale deed dated 19-01-2006, wherein the assessee confirms that he is the vendor and assures the purchaser that he is the absolute owner of the schedule site and that except him there are no others, who have got any kind of right, title, share or interest, whatsoever over the schedule site?"

4. The relevant brief facts are that it is noted by the AO in the assessment order that Investigation Wing, Bangalore forwarded information that the present assessee had executed a Joint Development Agreement with a builder / developer M/s. Ajmera Housing Corporation, Bangalore jointly with his wife Smt. N. Lakshmi and Son Sri N. Abhilash as ‘owners’ and 9 others as

'confirming parties' in respect of land measuring 7 Acres 05 guntas. It is noted by the AO on page no. 2 of the assessment order that this JDA was registered on 04.04.2005 and as per the agreement, the assessee received refundable deposit of Rs. 795 Lakhs. He has further noted that as per the terms of agreement, in consideration of the assessee agreeing to transfer undivided share of 69.5% in the said land, the builder agreed to construct and deliver 30.50% of super-builtup area in the form of apartments along with similar percentage of car parking and other benefits in the constructed area. The AO computed the capital in the hands of the present assessee in Assessment Year 2006-07. The AO further noted that in the return of income filed by the assessee for this year on 26.03.2007, no capital gain was offered by the assessee in the said return and therefore, the AO issued the notice u/s. 148 and it was replied that the return earlier filed may be treated as the return filed in response to notice u/s. 148. It is noted by the AO in para 13 of the assessment order that in course of assessment proceedings, it was claimed before him that the land which is covered in JDA is relating to the firm M/s Neeladri Developers in which all the persons covered in the JDA are partners. He has further noted that in this connection, the assessee has filed written submissions which is reproduced by the AO. Thereafter in para 14 of the assessment order, it is noted by the AO that the land in question was originally purchased in the individual name of Sri M Nagaraju. He has further noted that the said land was introduced as a business asset in the books of the firm M/s Neeladri Developers. But it is further noted by the AO that there is no mention about the fact that the land belongs to the firm at the time of entering into JDA. The AO has also observed that if the flats are received consequent to JDA by firm, the firm ought to have declared such income in the return of income. M/s Neeladri Developers has not filed any return of income from Assessment Year 2007-08 onwards. The AO has further noted that in Financial Year 2011-12, the assessee has admitted capital gain for few of the flats received consequent on JDA and based on this discussion, the AO computed the capital gain of Rs. 20,11,94,074/- and taxed the same in the hands of the present assessee in the present year. Being aggrieved the assessee carried the matter in appeal before ld. CIT(A). The ld. CIT(A) held

in para 11.5 of his order that by respectfully following the judgment of the Hon'ble Karnataka High Court rendered in the case of Jansons Vs. CIT as reported in 154 ITR 432 wherein it is held that just because the land was registered in the name of the appellant for the reason that as per the Karnataka Land Reforms Act, firms could not buy / acquire agricultural lands, does not take away the right of the firm over the property which was acquired using its funds which is evident from the balance sheet of the firm which also has not been disputed by the AO and thus, the firm remains the owner of the land. He has also held that merely because entering into JDA by the appellant in his individual capacity with the developer M/s Ajmera Housing Corporation does not result in the appellant being the owner of the land. On this basis, the ld. CIT(A) has decided the issue in favour of the assessee and now the revenue is in appeal before us.

5. The ld. DR of revenue filed the written submissions which are reproduced hereinbelow.

> "*In the present case filed by the department, the Grounds of Appeal as raised by the revenue has been broadly categorised into the following headings and D.R. Submissions thereon.*
>
> *(1) On the facts and circumstances of the case, the Ld.CIT(A) erred in law in allowing the appeal of the assessee after agreeing to the facts that there was no transfer of land. It is practically impossible for the builder to enter land, get all the approvals and start construction unless and until the possession is handed over to it.*
>
> *Submission: The Ld.CIT(A) considered the written submissions filed by the appellant and perused the assessment order and the comments in the remand report of the Ld.AO. As per the terms and conditions of the agreement dated 04.04.2005, the builder agreed to construct and deliver 27.96% in the form of flats along with other benefits in the constructed area for which the appellant agreed to transfer his undivided share in the aforesaid property. However, the Ld.AO found that the appellant did not declare any capital gains for the assessment year 2006-07 as on the date of entering into the original JDA. It was submitted that the appellant is not the owner of the land and the land belong to the partnership firm M/s Neeladri developers. The Ld.AO relying on the case law of the Hon'ble Karnataka High Court in the case of CIT vs Dr.T.K.Dayalu 202 Taxman 531, has held that the contents of the agreement dated 26/01/1996 and subsequent agreements based upon the material on record and cannot be said to be perverse or illegal.*

The Hon'ble Bombay High Court in Chaturbhuj Dwarkadas Kapadia of Bombay vs.CIT 260 ITR 491, wherein it was held that substantial payment, substantial permissions coupled with the parting of the possession of the property are the determining factors so as to treat the transfer u/s 2(47)(v) of the act. From the perusal of the above clauses it is evident that the appellant is entitled as consideration, a refundable advance of Rs.5 lakhs , super built area of 27.96% in the proposed construction. The Ld.CIT(A) further stated that the agreement further stipulate the permission to enter the schedule property is for a limited purpose of obtaining the plan sanction, licences etc., The appellant has filed the sample sale deed where in the appellant is shown as the owner of the land and the developers are signatories. Thus, it indicates that the developer was never in possession of the property as an absolute owner of the land. The Ld.CIT(A) held that from the facts of the case the appellant has not received any consideration nor parted with the possession of the property so as to fall within the meaning of the 'transfer under section 2(47) of the Act. The Ld.CIT(A) keeping in mind the principles of judicial discipline as laid down by the SC in the case of Asst.Collector of Central Excise vs Dunlop India Ltd & others reported in 154 ITR 172, allowed the assessee's alternate grounds of appeal on this issue of transfer of the impugned property as on the date of entering into JDA. I do not agree with the decision of the Ld.CIT(A) and it is
liable to be dismissed. I agree with the assessment order of the Ld.AO on the issue and the same may be restored.

2.Additional Grounds of Appeal.
Whether in the facts and circumstance of the case the Ld.CIT(A) was right in not considering the fact that the JDA dated 04-0402005, categorically states that the owner of the land at question is the assessee and not the firm? Here again the other persons included in the JDA are only the confirming parties and there are no reason mentioned in the document as to why they are the confirming parties.

Submission: : The agreement was registered as document in the office of the Sub-Registrar, Bangalore South Taluk. As per the agreement, the assessee received refundable deposit of Rs.7,95,00,000/-. As per the terms of this agreement, in consideration of the assessee agreeing to transfer undivided share of 69.5% in the above said land, the builder agreed to construct and deliver 30.50% of super-built up area in the form of apartments along with similar percentage of car Parking and other benefits in the constructed area. Since this transaction which is in the nature of transfer of land, capital gains accrued in the hands of the assessee in the F.Y: 2005-06 relevant to A.Y: 200607. On verification of assessment records, it was found that the assessee did not declare any capital gains to tax. However, the agreement further stipulates that the permission to enter the schedule property is for a limited purpose of obtaining the sanction of licences etc. Meanwhile

both the parties have entered into a rectification deed dated 20/02/2009 to rectify the terms of the erstwhile JDA and the appellant has agreed for the lower consideration i.e. 27.6% of super built up area instead of 30.50%.. As per the agreement it is evident that the appellant is the owner of the property and other partners of the firm are confirming parties. In the JDA the assessee , Sri M.Nagaraju, mentioned his wife Smt.N.Lakshmi and his son Sri N.Abhilash also as owners and other 9 persons as confirming parties. No person other than a person cultivating land personally shall be entitled to hold. Therefore, the partnership firm acquired the agricultural land through the assessee. This is evident from the sale deeds dated 16.03.1995 entered into by the assessee with the respective sellers. In view of the above, the assessee is the owner of the land and other partners are only the confirming partners.

C.O.No:51/Bang/2016 by the assessee.

1. The order of the assessment is bad in law as the mandatory conditions required for assumption of jurisdiction in terms of section 148 of the Income-tax Act, 1961 have not been assumed in accordance with law.

Submission: The agreement was registered as document in the office of the Sub-Registrar, Bangalore South Taluk. As per the agreement, the assessee received refundable deposit of Rs.7,95,00,000/-. As per the terms of this agreement, in consideration of the assessee agreeing to transfer undivided share of 69.5% in the above said land, the builder agreed to construct and deliver 30.50% of super-built up area in the form of apartments along with similar percentage of car Parking and other benefits in the constructed area. Since this transaction which is in the nature of transfer of land, capital gains accrued in the hands of the assessee in the F.Y: 2005-06 relevant to A.Y: 2006-07. On verification of assessment records, it was found that the assessee did not declare any capital gains to tax. Therefore, the assessment was re-opened by issue of notice u/s 148 on 27-03-2013, after recording the. reasons and obtaining necessary approvals from the competent authority. Hence the notice issued u/s 148 is valid and the assessment proceedings are not bad in law. The cross objection of the assessee may be dismissed.

Conclusion

In view of the submissions made above, examination of submissions made by the department, the order of the Ld.CIT(A), Bangalore is erroneous and bad in law. The assessee's appeal may be dismissed.

Prayer

In the wake of the above submissions, it is humbly prayed to dismiss the appeal of the assessee/appellant and any other order as may please your honours."

6. The ld. AR of assessee supported the order of ld. CIT(A). He has also submitted that on page nos. 337 to 377 of the paper book is the copy of JDA entered into by the assessee with builder M/s Ajmera Housing Corporation

on 04.04.2005. He also submitted that on page no. 430 of the paper book is the deed of rectification of JDA as per which the share of the land owners was reduced to 27.96% as against 30.5% as per original JDA. He also submitted that on page nos. 312 to 324 of the paper book is the copy of partnership deed. It is also submitted that on page no. 267 of the paper book is the balance sheet of the partnership firm M/s Neeladri Developers as on 31.03.2005 as per which the advances received from Ajmera Housing on account of JDA are reflected as a liability of the firm and the land in question has been shown as asset having value of Rs. 5,89,33,908.55. He also submitted that on page no. 275 of the paper book is the balance sheet of M/s. Neeladri Developers as on 31.03.2006 as per which the JDA advance from Ajmera Housing is shown at liability side of Rs. 311.59 Lakhs and as per page no. 350 of the paper book being part of JDA, the developer was required to pay Rs. 795 Lakhs as interest free refundable security deposit to the owners and the liability appearing in the balance sheet of M/s. Neeladri Developers is such interest free refundable security deposit given by the developer M/s. Ajmera Housing. He also submitted that on para no. 11.4 on page no. 62 of its order, it is noted by ld. CIT(A) that the Assessing Officer has issued notice u/s. 148 for Assessment Year 2008-09 on M/s. Neeladri Developers, the partnership firm during which year the JDA-2007 was entered into and stated the fact that the action of AO in issuing the notice for the Assessment Year 2008-09 to the firm proves that the impugned lands both of JDA 2005 and JDA 2007 belonged to partnership firm and not to the partner's individually.

7. We have considered the rival submissions. First of all, we reproduce para nos. 11.4 and 11.5 from the order of ld. CIT(A) from pages 62 and 63. These paras are as under.

> "*11.4 The appellant through his representative has submitted vide his letter dated 22/04/2015 enclosing the copy of the JDA, that Assessing Officer has issued notice u/s.148 for the assessment year 2008-09 on M/s. Neeladri Developers, the partnership firm during which year the JDA-2007 was entered into and stated the fact that the action of Assessing Officer in issuing the notice for the assessment year 2008-C9 to the firm proves that the impugned lands both of JDA 2005 and JDA 2007 belonged to partnership firm and not to the partner's individually.*

It is the fact that the impugned property was purchased in the name of appellant as the partnership firm cannot acquire agricultural lands as per Karnataka Land Reforms Act and the payments of the sale consideration are also made by the partnership firm. And further the refundable security deposit received from the developer was shown in the books of the partnership firm only. Thus, it is very clear that the owner of the impugned lands is only the partnership firm and not the appellant. The AR further urged that the firm's property was held by the partner in only a fiduciary capacity which can amply be demonstrated by the undisputable fact that the entire funds to acquire the impugned lands were flown through the books of The Thin Neeladri Developers and thus the firm is the owner of the land and not the partner/s in their individual capacities. For this proposition, the AR referred to the Jurisdictional High Court decision in the case of Jansons vs CIT reported in 154 ITR 432 wherein it was held that

> *"The partners, by making mere book entries by agreement amongst themselves, could not claim the assets of the firm as their separate property during the continuance of the firm. Book entries do not change title to property unless the properties are given by partners as their contribution to the capital of die, firm. Any other conveyance known to law must be by an instrument properly executed and registered, if the value thereof exceeds Rs. 100. Mere entries in the account books will not convert partnership property into individual property of partners or of third parties. Nor would the agreement entered into: by the partners have any such effect, unless that agreement was followed by c deed of conveyance. The partners could not claim the firm's property as their individual property so long as the firm continued. Therefore, the. Tribunal was justified" [emphasis supplied]*

11.5 Respectfully following the above decision, I hereby hold that just because the land was registered in the name of the appellant for the reason that as per the. Karnataka Land Reforms Act, firms could not buy / acquire agriculture lands, does not take away the right of the firm over the property which was acquired using its funds which is evident from the balance sheet of the firm and which also has not been disputed by the assessing officer and thus the firm remains the owner of the land. Further, mere entering into JDA by the appellant in his individual capacity with the developer M/s Ajmera Housing Corporation does not result in the appellant being the owner of the land. Therefore, the grounds of appeal relating to the ownership of the land is allowed."

8. From the above paras, it is seen that in the present case, the AO has issued notice u/s. 148 to the partnership firm M/s. Neeladri Developers also in Assessment Year 2008-09 in respect of the same land for which another JDA 2007 was entered into. Reliance was placed on the judgment of the Hon'ble Karnataka High Court rendered in the case of Jansons Vs. CIT (supra). As per the facts noted in this case, the properties bearing Nos. 21-22, Dispensary

Road, was purchased from out of the funds of the firm and subsequently, the partners of the firm entered into an agreement inter alia as per which it was stated that the partners owned the property at Nos. 21-22, Bangalore for the purpose of said firm out of the funds of the firm treating the same property and as per this subsequent agreement dated 30.06.1970, ,it was decided among the partners that such property were held as separate properties of the partners. Para 7 of this judgment is relevant and therefore, the same is reproduced hereinbelow: -

"7. ***It will be seen from the above narration that the partners admitted that the properties were initially held as the assets of the firm for all practical purposes. The depreciation in respect of the properties was claimed by the firm and allowed by the ITO. It was only after the demolition and reconstruction of the buildings, the partners claimed that the properties were held as separate properties of the partners. The support for this contention was drawn from the written agreement dated June 30, 1970, and the entries in the books of the firm. The question is whether this material is sufficient to vest the properties in the individual partners as their separate properties. Sec. 14 of the Indian Partnership Act provides as to how a firm could become the owner of a property. Property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm in the course of the business of the firm. It includes also the goodwill of the business."***

9. This claim was not accepted by the Hon'ble Karnataka High Court and it was held that mere entries in the account books of the partnership firm will not convert partnership property into individual property of the partners or of third parties and therefore, the agreement dated 30.06.1970 entered into by the partners treating the firm's property as individual property will not have any such effect unless that agreement is followed by a deed of conveyance known to law and without that, the partners cannot claim the firm's property as their separate and individual property so long as the firm continues. In the present case also, this is the claim that the property in question although registered in the name of the individual partners were purchased out of the funds of the

partnership firm and although this fact was not made clear in the JDA but interest free refundable security deposit received as per JDA was received by the partnership firm and was shown in the partnership firm as liability. Hence, without any valid conveyance, such property of the firm cannot be considered and adopted as individual property of the partners and hence, the order of ld. CIT(A) is in line with this judgment of the Hon'ble Karnataka High Court. Therefore, we find no reason to interfere in the order of ld. CIT(A) on this issue.

10. Regarding this aspect as to who made payment for the property in question when it was purchased, we find that even in the written submission filed by learned DR of the revenue as reproduced above, there is no material brought on record to show by bringing cogent evidence that the land in question was purchased out of the funds of the present individual assessee and not out of the funds of the firm and hence, we find that the written submissions by ld. DR of revenue is not helping the case of the revenue. Regarding the additional grounds of appeal raised by the revenue, this is the submission of ld. DR of revenue that in the JDA, the assessee Sri M. Nagaraju mentioned his wife Smt. N. Lakshmi and his son Sri N. Abhilash as ‘owners’ and 9 others as ‘confirming parties’. This is also the submission that no person other than the person cultivating the land shall be entitled to hold that it/he acquired the agricultural land through the assessee. It is also submitted that this is clear from the sale deed dated 16.03.1995 entered into by the present assessee with the respective sellers that it is purchased by the present assessee. In our considered opinion, as per this submission also, this is not the case of the revenue that the land in question was not acquired out of the funds of the firm and the assessee was having sufficient fund to acquire the land in question. As per the ld. DR of revenue, the land in question was purchased as per purchase deed dated 16.03.1995 and on page no. 186 of the paper book is the balance sheet of the said firm M/s. Neeladri Developers as on 31.03.1995 in which land purchase of Rs. 7,24,900/- is shown and as per the balance sheet as on 31.03.1996 available on page no. 190 of the paper book, the amount of land purchases of the said firm M/s. Neeladri Developers has increased to Rs. 1,17,99,542/-. The said deed is dated 16.03.1995 and it is

available on pages 445 to 457 and 458 to 477 of the paper book. The area of land as per page no. 456 of the paper book is 3 acres and 4 guntas and the area of land as per second land deed on page no. 477 of the paper book is four acres. The total area of land as per assessment order is 7 acres and 5 guntas and out of these two deeds also, the total area is 7 acres and 4 guntas at survey no. 156 in Doddathoguru Village. On page no. 449 of the paper book it is noted that the purchaser has already paid a sum of Rs. 2.50 Lakhs and further paid an amount of Rs. 2.15 Lakhs through cheque bearing no. 650585 dated 16.03.1995 drawn on the Federal Bank Ltd., Bangalore. On page no. 478 of the paper book is the bank statement of the firm M/s. Neeladri Developers with Federal Bank Ltd., Bangalore and there is entry of Rs. 2.15 Lakhs on 28.03.1995 as withdrawal by way of cheque no. 650505. Hence, it is seen that the purchase consideration was in fact paid by the firm M/s. Neeladri Developers for which evidence regarding payment of at least part consideration is available on record. Hence, we hold that no inference is called for in the order of ld. CIT(A).

11. In the result, the appeal filed by the revenue and the C.O. of the assessee are dismissed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 25th October, 2019.
/MS/

Copy to:

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.