

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES : "B", BANGALORE

BEFORE SHRI N.V.VASUDEVAN, VICE PRESIDENT  
AND

SHRI B.R.BASKARAN, ACCOUNTANT MEMBER

ITA No.1984(Bang)/2017  
(Assessment Year : 2012-13)

Shri Chandrashekar Naganagouda Patil,  
No.GR2, Lavina Courts 67,  
7<sup>th</sup> Cross, RMV Extension,  
Sadhashivanagar,  
Bangalore-560 080  
PAN No.ACFPP7579J

Appellant

Vs

The Deputy Commissioner of Income Tax,  
Circle-6(2)(1),  
Bangalore

Respondent

Appellant by : Shri Mallaha Rao, Advocate  
Revenue by : Shri Priyadarshi Misra, JCIT

Date of hearing : 25-06-2020  
Date of pronouncement : 29-06-2020

**ORDER**

**PER N.V.VASUDEVAN, VICE PRESIDENT**

This is an appeal by the Assessee against the order dated 31-07-2017 of the Id.CIT(A), Bangalore relating to assessment year: 2012-13.

2. The only issue that arises for consideration in this appeal is whether the revenue authorities were justified in considering the sum of Rs.45,55,000/- received by the Assessee as income under the head "*income from other source*" as against the claim of the Assessee that the said sum received is in the nature of capital gains and should be assessed under the head "capital gains (as long term capital gain (LTCG)).

3. The material facts giving rise to the appeal are that the Assessee is an individual. He entered into an agreement dated 09-02-2005 to purchase vacant site bearing BDA No.161, survey no.5, Srinivgilu Amanikere Village, Begur Hobli, Bangalore South Taluk, measuring 6900 sq.ft (herein after referred to as 'the property'). The consideration agreed between the Assessee and Shri Channakesava, owner of the property was a sum of Rs.27,60,000/-. The Assessee paid an advance of Rs.2,75,000/- and agreed to pay the remaining sum at the time of registration of sale deed. The vendor of the property was required to make out a marketable title to the property. The Assessee under clause-8 of the agreement had a right to enforce the terms by way of specific performance.

4. On 08-12-2011 Shri Channakeshava, as vendor and the Assessee as confirming party sold the property to a third party for a consideration of Rs.82,80,000/-. As per the preamble to the sale deed it has been mentioned that the Assessee has been added as a confirming party as he was agreement holder who had a right to obtain conveyance of the property from the owner. The preamble further recites that the conforming party nominated the purchaser to purchase the property and that out of the sale consideration of Rs.1200/- agreed between the parties as sale consideration, a sum of Rs.500/- per sq.ft was to be paid as sale consideration to the vendor i.e Shri Channakeshava and Rs.700/- was to be paid to the Assessee who was a confirming party to the sale deed. The relevant recital in the preamble in the sale deed is as follows;

*“ And whereas, the confirming party being entitled to have the sale deed executed in respect of schedule property by the vendor in his favour or in favour of any of his nominee/s, has called upon the vendor to execute and register the sale deed in respect of the schedule property in favour of the purchaser herein for a total sale consideration calculated at Rs.1200/- sq.ft from out of which the vendor would be entitled to receive a sum of Rs.500/- sq.ft as sale consideration and the confirming party is required to be paid a sum of Rs.700/- sq.ft by the purchaser as instructed by the vendor himself to defray the expenses so far incurred by the confirming party in respect of the payment of advance sale consideration and*

*other expenses incurred so as to protect the schedule property and the rights, title and interest of the vendor therein and to get the infrastructural works done to some extent”.*

4. The manner of payment of sale consideration has also been set out in clause-1 of the sale deed which reads as follows:

*“..1. In consideration of a sum of Rs.82,80,000/- (Rs.Eighty two lakhs eighty thousand only) paid by the purchaser to the vendor and/or the confirming party as per the directions of the vendor in the following manner.*

*a) A sum of Rs.13,80,000/- (Rs.Thirteen lakhs and eight thousand only) by way of DD bearing No.078386 dated 21.11.2011 payable at UCO Bank, Koramangala, Bangalore-560 034 in favour of the vendor before the witnesses.*

*b) A sum of Rs.20,70,000/-(Rs.Twenty lakhs and seventy thousand only) by way of cheque bearing No.572515 dated 08.12.2011 drawn on UCO Bank, Koramangala, Bangalore-560 034 in favour of the vendor before the witnesses.*

*c) a sum of Rs.48,30,000/-(Rs.Forty eight lakhs and thirty thousand only) by way of cheque bearing no.572516 dated 08.12.2011 drawn on UCO Bank, Koramnagala, Bangalore-560 034 in favour of the confirming party before he witnesses as instructed by the vendor before the attesting witnesses herein towards full and final satisfaction of the entire sale consideration amount and the vendor hereby acknowledges the receipt of the total sale consideration of Rs.82,80,000/- (Rs.Eight two lakhs and eighty thousand only) from the purchaser before the attested witnesses herein the aforesaid manner and discharges the purchaser any further liability towards sale consideration and also in consideration of the covenants herein contained, the vendor do as sole, true and beneficial owner of the schedule property sells, assigns, conveys and sets over possession of the schedule property to the purchaser from all encumbrances. Henceforth, the purchaser shall be the absolute owner of the schedule property”.*

5. For assessment year 2012-13 the Assessee filed return of income declaring the sum received under the sale deed as giving rise to the capital gain and claimed deduction u/s 54F of the Income Tax Act, 1961 (Act). The AO was of the view that under the agreement for sale the Assessee did not have any right over the property except a right to get refund of advance paid under the agreement dated 09-05-2005. According to the AO the Assessee did not possess any right over the property and there is no question of relinquishing or

surrendering of such right and receipt of Rs.48,300/- under the sale deed had to be taken under the head “*income from other sources*”. Consequently deduction U/s.54F of the Act was also denied to the Assessee.

6. Aggrieved by the order of AO, the Assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A) Assessee had relied on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs H Anil Kumar (2011) 242 CTR 537 (Kar.). In the aforesaid decision, the Assessee received compensation for giving up his right to specific performance of an agreement to sell. The question before the Court was whether the sum received was assessable under the head “long term capital gains”. *On appeal by the Assessee, the Hon'ble Karnataka High Court held that the word 'capital asset' means property of any kind held by the assessee which does not necessarily be confined to an immovable property. Similarly, when the word 'transfer' in relation to a capital asset though includes sale, exchange or relinquishment of the asset, the said asset need not necessarily be an immovable property. The right to obtain a conveyance of immovable property falls within the expression 'property of any kind' used in s. 2(14) and consequently it is a capital asset. It is because the expression 'property of any kind' is of wide import. When this expression is read along with the expression defined in s. 2(47)(ii) i.e., 'extinguishment of any rights therein', the giving up of a right of specific performance by the assessee to get conveyance of immovable property in lieu of receiving consideration, results in the extinguishment of the right in property, thereby attracting the rigor of s. 2(14) r/w s. 2(47). Giving up of a right to claim specific performance by conveyance in respect to an immovable property, amounts to relinquishment of the capital asset. Therefore, there was a transfer of capital asset within the meaning of the Act. The payment of consideration under the agreement of sale, for transfer of a capital asset, is the cost of acquisition of the capital asset. Therefore, in lieu of giving up the said right, any amount received, constitutes capital gain and it is exigible to tax. However, as is clear from s. 48, before the income chargeable under the head capital gains is computed, the deductions*

set out in s. 48 has to be given to the assessee. It is only the amount thus arrived at, after such deductions under s. 48, would be the income chargeable under the heading capital gains. The Hon'ble Karnataka High Court in the aforesaid decision placed reliance on similar decisions rendered by several Hon'ble High Courts in the case of [CIT vs. Tata Services Ltd.](#) (1980) 122 ITR 594 (Bom), [CIT vs. Vijay Flexible Containers](#) (1990) 186 ITR 693 (Bom), [CIT vs. Abbasbhoy A. Dehgamwalla & Ors.](#) (1992) 195 ITR 28 (Bom), [Rustom Spinners Ltd. vs. CIT](#) (1992) 198 ITR 351 (Guj), [CIT vs. Smt. Laxmidevi Ratani & Ors.](#) (2008) 296 ITR 363 (MP) and [CIT vs. J. Dalmia](#) (1984) 149 ITR 215 (Del).

7. The Id. CIT(A) however, confirmed the order of the AO by observing that in the case before the Hon'ble Karnataka High Court the Assessee had given up right for specific performance whereas in the case of the Assessee in this appeal, the Assessee did not file any suit for specific performance and did not have any right over the capital asset.

8. Aggrieved by the order of the Id. CIT(A) the Assessee is in appeal before the Tribunal. The Id counsel for the Assessee apart from relying on the decision of the Hon'ble Karnataka High Court in the case of H Anil Kumar (supra) also placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT Vs Vijay Flexible Containers 186 ITR 693(Bom.) and the decision of the Bombay High Court in the case of CIT Vs Tata Services Ltd., 122 ITR 594. The Id. counsel also placed reliance on the decision of the Hon'ble Kolkata Bench of the ITAT in the case of Gautam Jhunhunwala Vs ITO in ITA No.1356/Kol/2017 for assessment year 2012-13 vide order dated 07-09-2018, reliance was also placed on the decision of the Hon'ble ITAT Ahmedabad Bench 'B' Bench in the case of Smt. Sapnaben Dipakbhai Patel Vs ITO in ITA No.2414/Ahd/2013 for assessment year 2010-11 by an order dated 13-01-2016. In all these decisions the proposition laid down is similar to the decision of Hon'ble Karnataka High Court in the case of H.Anil Kumar (supra).

9. The Id. AR submitted that the agreement between the Assessee and Shri Chandrakeshava dated 09-02-2005 was an unregistered agreement. It was submitted by him that u/s 17(1)(b) of the Registration Act, 1908 agreement for sale requires compulsory registration for its validity and any document which requires compulsory registration, if it is not registered cannot be admitted as evidence of any transactions and does not affect any immovable properties comprised therein as laid down u/s 49 of Registration Act, 1908. He also placed reliance on the decision of the Hon'ble ITAT, Amritsar Bench in the case of Shagan Lal Vs ITO(2018) 89 Taxmann.com 177) (Amritsar-Trib.) wherein it was held that agreement to sell which is not registered could not be relied upon for any purposes.

10. *We have given a very careful consideration to the rival submissions. We are of the view that* right acquired under the Agreement by the Assessee has to be regarded as "Capital Asset". The decision of the Hon'ble Karnataka High Court in the case of H.AnilKumar (supra) supports the plea of the Assessee. The Hon'ble High Court in the said decision held that the right to obtain a conveyance of immovable property falls within the expression 'property of any kind' used in s. 2(14) and consequently it is a capital asset. It is because the expression 'property of any kind' is of wide import. The Hon'ble Court held that when this expression is read along with the expression defined in s. 2(47)(ii) i.e., 'extinguishment of any rights therein', the giving up of a right of specific performance by the assessee to get conveyance of immovable property in lieu of receiving consideration, results in the extinguishment of the right in property, thereby attracting the rigor of s. 2(14) r/w s. 2(47). Giving up of a right to claim specific performance by conveyance in respect to an immovable property, amounts to relinquishment of the capital asset. Therefore, there was a transfer of capital asset within the meaning of the Act. The payment of consideration under the agreement of sale, for transfer of a capital asset, is the cost of acquisition of the capital asset. Therefore, in lieu of giving up the said right, any amount received, constitutes capital gain and it is exigible to tax. However, as is clear from s. 48, before the income chargeable

under the head capital gains is computed, the deductions set out in s. 48 has to be given to the assessee. It is only the amount thus arrived at, after such deductions under s. 48, would be the income chargeable under the heading capital gains. It is not necessary that in all such cases there should have been a lis between the parties and in such is the right to specific performance has to be given up. The CIT(A), in our view, fell into an error in holding that the Assessee did not file a suit for specific performance and therefore cannot claim the benefit of the ratio laid down by the Hon'ble Karnataka High Court in the case of H.Anil Kumar (supra).

11. With regard to the submission of the Id.DR relying on the provisions of sec.17(1A) of the Registration Act, 1908, the relevant provisions which read as under;

*"...17. Documents of which registration is compulsory. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No.XVI of 1864 or the Indian Registration Act, 1866, the Indian Registration Act, 1871 or the Indian Registration Act, 1877, or this act or came or comes into force namely:-*

*a) instruments of gift of immovable property;*

*b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or immovable property;*

*c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest: and*

*d) Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly; and*

*e) Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order of a ward purports or operates to create, declare, assign, limit or*

*extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property*⊙ *Provided that the (State Government ) may, by order published in the (official Gazette) exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.*

**(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property act, 1882(4 of 1882) shall be registered if they have been executed on or after the commencement of the registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.**

12. A perusal of the aforesaid provisions would show that these provisions are applicable only in the case of a claim made for application of the doctrine of part performance enshrined in Section 53A of the Transfer of Property Act, 1882. In the present case, there was no delivery of possession in part performance of the agreement for sale dated 09-02-2005 and therefore, there is no question of the agreement dated 09-02-2-005 being regarded as a document requiring compulsory registration. Therefore, the decision of the Hon'ble Supreme Court in the case of CIT Vs Balbir Singh Maini 398 ITR 531(SC) is not applicable to the facts of the present case. For the reasons given above, we are of the view that the sum in question is chargeable to tax under the head '*capital gains*'.

13. *Taking into consideration the facts and circumstances of the present case, we are of the view that income from relinquishing rights under an agreement should be assessed under the head income from capital gains. We hold accordingly. We however find that the AO/CIT(A) have not examined the claim of the Assessee under the head "Capital Gain" in accordance with the provisions of Sec.48 of the Act and also claim for deduction u/s.54F of the Act. We therefore remand the question of computation of Capital Gain to the AO*

after due opportunity of being heard afforded to the Assessee. The Appeal of the Assessee is accordingly treated as allowed for statistical purpose.

14. In the result, the appeal of the Assessee is treated as allowed for statistical purposes.

Order pronounced on

Sd/-  
(B.R.BASKARAN)  
ACCOUNTANT MEMBER  
Dated: 29-06-2020  
\*am

Sd/-  
(N.V.VASUDEVAN)  
VICE PRESIDENT

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
- 6.Guard File

By Order  
**Asst. Registrar**