

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

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.880/Bang/2018
Assessment Year: 2008-09

Venugopal Naidu Pushparaj No.41, 3 <sup>rd</sup> Cross, Police Road Ranasinghpet Bengaluru 560 053.  <b>PAN NO : AFJPPI1140C</b>	<b>Vs.</b>	ITO Ward-1(3) Bengaluru
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri H. Guruswamy, A.R.
<b>Respondent by</b>	:	Smt. R. Premi, D.R.

<b>Date of Hearing</b>	:	07.04.2021
<b>Date of Pronouncement</b>	:	16.04.2021

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by the assessee is directed against order of the CIT(A) dated 30.6.2017. The assessee has raised the following grounds of appeal:

1. *The impugned Appellate order dated 30-06-2017 passed by the Learned CIT(A), is opposed to law, facts and circumstances of the case.*
2. *The Ld. CIT(A) has erred in holding that the Appellant is not entitled for cost of construction of the 7 flats sold on the ground that the Appellant has not incurred any expenditure for construction of the flats without appreciating the fact that the Built-up area received was in lieu of the land transferred in favour of the Developer.*
3. *The Ld. CIT(A) has erred in holding that the land transferred in the Scheme of JDA to M/s. Sai Gokul Builders was liable for capital gains at the rate of Rs. 800/- per sq.ft as against Rs. 500/- per sq.ft as per the Guidance Value notified by Government of Karnataka.*

4. *The Appellant craves leave to add, alter, amend and delete any of the grounds at the time of hearing.*

2. The facts of the case are that the Assessee had filed the original return of income for the Asst Year 2008-09 on 30-10-2008. declaring income of Rs. 55,81,323/- without claiming the cost of Construction of the 7 Flats sold. The return of income so filed was processed u/s. 143(1) of the act. dated 18-02-2010. Subsequently, the AO initiated re-assessment proceedings by issue of a notice u/s. 148 of the Act. dated 11-02-2013 and called for the return of income. The Re-Assessment Proceedings were initiated on the ground that the Capital Gains chargeable to tax was escaped Assessment in respect of the Land transferred in favour of M/s. Sai Gokul Builders in the scheme of JDA dtd: 28-01-2008. In response to the said notice the Assessee has filed a return of income on 26-12-2013 declaring income of Rs. 15.49.445/- as under:-

a) Short Term Capital Gains on sale of 7 flats as reduced by the cost of land, cost of construction and incidental expenses	Rs. 13,27.915/-
b) Short Term Capital Gains on JDA. dtd 28-01-2008 entered into with M/s. Sai Gokul Builders.	Rs. 1,73.450/-
c) Short Term Capital Gains on sale of two sites as reduced by the cost and incidental expenses	Rs. 48,080/-
	<hr/> <b>Rs. 15,49,445/-</b> <hr/>

3. The Ld. AO has completed the Scrutiny Re-Assessment u/s. 143(3) r.w.s 147 of the Act, dated 31-03-2014 determining the Total income at Rs. 68,85,955/- as against the declared income of Rs. 15,49,445/- in the return of income filed on 26-12-2013 in response to notice u/s. 148 of the Act. The break-up of the assessed income is as under :-

a) Income from two sites (as asmitted)	Rs.48,080/-
b) Capital Gains on sale of 7 Flats obtained fromM/s. S.V Developers as per JDA	Rs. 58,29,375/-
c) Short Term Capital Gains, out of JDA, dtd ----- 28-01-2008 entered into with M/s. Sai Gokul Builders	Rs. 10,08,500/-
<b>TOTAL</b>	<b>Rs. 68,85,955/-</b>

4. **Capital Gains on sale of 7 Flats obtained from M/s. S.V Developers - Rs. 58,29,375/-**

The Assessee and his Co-owner Sri. N. Prakash had owned a land bearing Survey No. 115/2, B Narayanapura Village, K.R Puram, Hobli, Bangalore East Taluk measuring 10890 sq.ft. The Assessee and his co-owner have entered into a JDA dtd: 02-06-2006 with M/s. S.V. Developers and as per the terms of JDA the Developers were entitled to 55% of undivided share of land measuring 5990 sq.ft in lieu of 45% of the Built-up area consisting of the following 12 flats.

SI.No.	Flat No.	Floor	Super Built Area
1	A-01	Ground Floor	1153 sq.ft
2	A-02	Ground Floor	1190 sq.ft
3	A-03	Ground Floor	1190 sq.ft
4	A-04	Ground Floor	1203 sq.ft
5	A-05	Ground Floor	1162 sq.ft
6	A-06	Ground Floor	1332 sq.ft
7	A-07	Ground Floor	1380 sq.ft
8	B-02	First Floor	1190 sq.ft
9	B-07	First Floor	1280 sq.ft
10	C-01	Second Floor	1153 sq.ft
11	C-06	Second Floor	1332 sq.ft
12	D-05	Third Floor	1162 sq.ft

The Assessee and his co-owner out of the 12 flats, have sold the following 7 flats for a consideration of Rs. 1,20,67,000/-.

SI.No.	Flat No.	Floor	Super Built Area	Sale Consideration
1	A-01	Ground Floor	1153 sq.ft	Rs. 16,22,000/-
2	A-02	Ground Floor	1190 sq.ft	Rs. 16,71,000/-
3	A-03	Ground Floor	1190 sq.ft	Rs. 16 71 000/-
4	A-04	Ground Floor	1203 sq.ft	Rs. 16,88,000/-
5	A-05	Ground Floor	1162 sq.ft	Rs. 16,34,000/-
6	A-06	Ground Floor	1332 sq.ft	Rs. 18,59,000/-
7	A-07	Ground Floor	1380 sq.ft	Rs. 19,22,000/-
		TOTAL	<b>8610 sq.ft</b>	<b>Rs. 1,20,67,000/-</b>

5. The Assessee has declared the Capital Gains in the original return of income amounting to Rs. 55,33,159/- without claiming the cost of construction of the flats so sold. But in the return of income filed in response to notice u/s. 148 of the Act, the Capital Gains arising out of the sale of the said 7 flats were declared as under :-

Sale Consideration for 7 Flats		Rs. 1,20,67,000/-
Less : 1. Proportionate cost of Land 45% of land	Rs. 3,90,250	
2. Cost of construction of Super Built area at 1000 per sq.ft (Rs. 1000X8610sft)	Rs.86,10,000	
		<u>Rs. 90,00,250/-</u>
Balance		Rs. 30,66,750/-
Less: <b><u>Incidental Expenses</u></b>		

1. Commissioner paid	Rs.1,46,919
2. Customers Flat visit Expenses	Rs. 1,20,000
3. Legal and documentation Charges	Rs. 18,000
4. Security charges of the Flats	Rs.1,26,000

	<u>Rs. 4,10,919/-</u>
Net Sale Consideration from Sale of 7 Flats	<u>Rs. 26,55,831/-</u>
Assessee's 50% Share of the Sale Proceeds	<u>Rs. 13,27,915/-</u>

6. The Ld. Assessing Officer has held that the Assessee has made a new claim on account of cost of construction of the 7 flats amounting to Rs. 86,10,000/- out of the total consideration of Rs. 1,20,67,000/- and the same was disallowed by AO on the ground that the cost of construction as claimed was not incurred by the Assessee. but it was incurred by the Builder. The Assessee submits that the finding of the AO as to the disallowance of the cost of construction attributable to the 7 flats sold is not justifiable in view of the fact that the Assessee and his Co-owner have jointly acquired said 7 flats in the Scheme of the Joint Development Agreement dtd: 02-06-2006 entered into with M/s. S.V Developers.
7. The Builders in lieu of the undivided portion of land deemed to have been transferred in their favour. have delivered the flats to the Assessee and his Co-owner as a consideration for such deemed transfer of land. The Builders have constructed the flats falling into the share of the Assessee and his Co-owner by investing the funds attributable to the deemed transfer of undivided portion of land in the Scheme of Joint Development. The Assessee submits that the Builders cost represents the consideration for the transfer of undivided portion of land and therefore. it cannot be construed that the Assessee has never invested any amount in the construction of flats. In the Scheme of Joint Development the Owners of the land are entitled to receive a specified percentage of built-up area as a consideration for the deemed transfer of undivided portion of land in favour of the Developers.

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Therefore. the AO was not justified to hold that the Assessee has not made any investment in construction of flats.

The Flats so acquired in the Scheme of Joint Development were in lieu of the land transferred in favour of the Developers and therefore the built-up area received in the form of flats represents the consideration for such deemed transfer and consequently, the said consideration received amounts to cost of flats sold subsequently. The consideration in the form of built-up area for transfer of land represents the cost of flats in the first stage and the sale of flats was a subsequent event in the second stage. The Assessee submits that at the time of sale of flats in the second stage, the Capital Gains are to be quantified as reduced by the cost and other incidental expenses as per Section 48 of the Act. However, the Ld. Assessing Officer has not allowed the cost of construction claimed by the Assessee and therefore, the Capital Gains amounting to Rs. 58,29,375/ determined by the AO without providing deduction towards the cost of acquisition as required u/s. 48 of the Act are not in accordance with law and are not justifiable and consequently, the addition so made without providing the cost of construction is liable to be deleted and the capital gains offered by the Assessee amounting to Rs. 13,27,915/-after claiming the cost of flats, proportionate land cost and incidental expenses requires to be restored.

8. The Assessee having been aggrieved with the Assessment order regarding the disallowance of cost of construction of the flats has filed an Appeal before the Ld. CIT(A) who in turn in para 5 of the Appellate order has held as under:

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"6. The Cost of construction of 7 flats sold: The assessee had claimed the cost of construction of 7 flats sold at Rs. 86,10,000 at the rate of Rs. 1000 per sq.ft on the build-up area of 8610 sq.ft, the Ld. AO has disallowed the cost of construction on the ground that the cost of construction was incurred by the builder and not by the assessee. In this context, the assessee submits that he is entitled for the deduction of the cost of construction of the flats sold while determining the capital gains as per section 48 of the Act. The assessee was entitled for the built-up area of 7 flats in lieu of transfer of 55% of the undivided portion of the land in the scheme of joint development."

9. However the Ld. CIT(A) has not appreciated the claim of the Assessee for deduction towards the cost of flats sold and the claim was rejected.
10. Capital Gains of Rs. 10,08,500/- determined in view of JDA dated 28-01-2008 with M/s. Sai Gokul Builders :-

The Assessee submits that a Joint Development Agreement dated 28-01-2008 was entered into with M/s. Sai Gokul Builders in respect of the property situated at Hoodi Village, K.R Puram. Bangalore East Taluk, Bangalore. According to a JDA, 62% undivided portion of the land was deemed to have been transferred in favour of the Developer against which the Assessee has not offered any Capital Gains for the Asst Year 2008-09. Therefore. the Ld. AO has issued a notice u/s. 148 of the Act to levy tax on the Capital Gains arising out of the

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JDA dated 28-01-2008 relating to the transfer of 62% of the undivided portion of the land.

The Ld. AO in the re-assessment Order has held that the Capital Gains arising out of a JDA dated 28-01-2008 are chargeable to tax for the Asst Year 2008-09 as per Section 2(47)(v) of the Act r.w.s 53A of the Act and accordingly, the consideration was determined on the basis of the provisions of Section 50C of the Act by obtaining the guidance value at Rs. 800/- per sq.ft., from the Sub-registrar, Mahadevapura, Bangalore. Accordingly, the Ld AO has quantified the Assessee's 50% share of Capital Gains at Rs. 10,08,500/- arising out of the JDA dated 28-01-2008 with the Developers M/s. Sai Gokul Builders. The Ld. AO vide letter dated 24-03-2014 called upon the Assessee to file objections if any as to why the Capital Gains arising out of the JDA dated 28-01-2008 should not be chargeable to tax for the Asst Year 2008-09 adopting the guidance value of Rs. 800/- per sq.ft., as certified by the Sub-registered, Mahadevapura, Bangalore as against Rs. 500/- per sq.ft. adopted by the Assessee. The Assessee has filed a detailed objection vide letter dated 27-03-2014. However, the Ld. AO has not appreciated the objections filed by the Assessee and quantified the Capital Gains chargeable to tax arising out of the JDA dated 28-01-2008 at Rs. 10,08,500/- adopting the guidance value at Rs. 800/- per sq.ft., provided by the Sub-registrar, Mahadevapura, Bangalore. The Assessee submits that the rate of Rs. 800/- adopted by the AO is not justifiable, since the rate applicable was of Rs. 500/- sq.ft., as per the guidance value prescribed by the Government of Karnataka. The Assessee submits that the capital gains so determined at Rs. 10,08,500/- are arbitrary, unreasonable and opposed to the law and facts of the case and therefore an Appeal *against the adoption of value at Rs. 800/- per sq.ft as against Rs. 500/- per sq.ft* was filed before the Ld. CIT(A) and provided a copy of the Guidance Value Notification. However the Ld.

CIT(A) has not appreciated the contention of the Assessee and held as under:

..... also the claim of Rs. 500/- per sq.ft cannot be accepted. The value at Rs. 800/- per sqft is in order and upheld."

11. The Assessee submits that the AO has relied upon the value of Rs. 800/- per sq.ft on the basis of the information obtained from the Sub-Registrar. Mahadevpura, Bangalore. As against the assessee has provided a notification wherein the value of the relevant land was notified at Rs. 500/- per sq.ft. The value of Rs. 800/- per sq.ft reported by the Sub-registrar was related to the Land situated in a different area and not related to the area in which the assessee's property was situated. In spite of the evidence produced by the Assessee in the form of Guidance Value notified by Government of Karnataka applicable to the land, the Ld. CIT(A) has rejected the contention of the Assessee as regards rate to be adopted at Rs. 500/- per sq.ft and held that the Guidance Value of Rs. 800/- per sq.ft adopted by the AO was in order. The Assessee is aggrieved with the order of the Ld. CIT(A) in upholding the value of Rs. 800/- per sq.ft adopted by the AO and hence this Appeal.

12. Regarding the first ground, Ld. A.R. submitted that while computing the capital gain on transfer of 7 flats, the A.O. has not considered the cost of construction of these flats. According to him, the assessee got 12 flats as per the terms of JDA with M/s. S.V. Developers. Out of 12 flats got from the developer vide JDA dated 2.6.2006, assessee sold 7 flats to various persons and deducted cost of construction out of the sale consideration of these 7 flats. The lower authorities has not considered the cost of construction of these 7 flts as incurred by the developer.

12.1 The Appellant and his Co-owner N. Prakash had entered into a Joint Development Agreement dtd: 02-06-2006 with M/s. S.V Developers in respect of the land measuring 10890 sq.ft situated in Sy. No. 115/2, B. Narayanapura Village, K.R. Puram Hobli, Bangalore East Taluk. The Appellant had agreed to transfer 55% of the land measuring 5990 sq.ft in favour of the Developer in lieu of 45% of the Built-up area consisting of 12 flats out of which 7 flats were sold for a consideration of Rs. 1,20,67,000/- and the Capital Gains arising there from were offered as under

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Sale Consideration for 7 Flats		Rs. 1,20,67,000/-
Less : 1.Proportionate cost of Land 45% of land	Rs. 3,90,250	
2.Cost of construction of Super Built area at 1000 per sq.ft (Rs.1000X8610sft)	Rs.86,10,000	
		<u>Rs. 90,00,250/-</u>
Balance		Rs. 30,66,750/-
<b>Less: Incidental expenses</b>		
1. Commission paid	Rs.1,46,919	
2. Customers flat visit expenses	Rs.1,20,000	
3. Legal and documentation charges	Rs. 18,000	
4. Security charges of the flats	Rs.1,26,000	
		<u>Rs.4,10,919/-</u>
Net Sale consideration from Sale of 7 flats		<u>Rs.26,55,831/-</u>
Assessee's 50% share of the sale proceeds		<u>Rs.13,27,915/-</u>

However the Ld. AO has computed the Capital Gains at Rs. 58,29,375/-as against admitted capital gains of Rs. 13,27,915/-. The Ld. AO has held that the cost of construction of Rs. 86,10,000/- relating to 7 flats was not allowable since the cost of construction was not actually incurred by the Appellant and the same was incurred by the Builder.

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12.2 The Appellant submits that the AO has disallowed the cost of construction of the 7 flats sold mainly on the ground that the Developer had incurred the expenditure and not the Appellant. In this regard the Appellant submits that the flats were received in lieu of transfer of 55% of the undivided portion of land in favour of the developer and therefore the Developer had incurred the expenditure. The Ld. CIT(A) has held that the claim of the Appellant in respect of cost of construction of the 7 flats was not allowable and accordingly the addition made by the AO was upheld.

12.3 The Appellant submits that the Co-ordinate Bench of the Hon'ble ITAT Bangalore in its order dtd: 07-09-2012 in the case of Jeeva Vadivelu in ITA No. 255/Bang/2011 (at para 31) has held that the Cost of Construction was allowable. Further the Hon'ble ITAT in its order dtd: 04-09-2015 in the case of Sri. K. Rajanna in ITA No. 928/Bang/2014 for the A.Y 2008-09 has held at para 10.4.2 (internal page 12) that the Appellant was entitled for the cost of construction. The Appellant further relies upon the decision of the Hon'ble CIT(A) Bangalore - 2, in the Appellate Order dtd: 28-02-2019 in the Appellant's own case for the A.Y 2010-11 wherein the cost of construction was allowed. The relevant findings as found on page 5 of the Appellate Order is reproduced as under

*"The Cost of construction of two flats sold was claimed to an extent of Rs. 18,92,000/-. In support of his contention, the Appellant relied on the Hon'ble Jurisdiction ITAT order in the case of Smt. Jeeva Vadivelu wherein it was held that the Assessee should be allowed the benefit of cost of construction of the flats sold for the purpose of working out of the cost of acquisition while computing the CG. Further relied on Sri. Rajanna wherein the Hon'ble Jurisdictional*

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*ITAT followed the ruling given in the case of Smt. Jeeva Vadivelu. Respectfully following the above stated jurisdictional ITAT Orders I hereby allow the grounds taken by the Appellant.*

*In the result the Appeal is allowed"*

12.4 The Appellant submits that in view of the above judicial decisions, the Appellant is entitled for the deduction towards the cost of construction of 7 flats sold amounting to Rs. 86,10,000/- out of the Sale Consideration of Rs. 1,20,67,000/- and prays that this Hon'ble ITAT be pleased to pass orders and to allow the claim of the Appellant in respect of the cost of construction.

12.5 The Ld. D.R. submitted that this was a new claim on account of cost of construction for a total amount of Rs.86,10,000/-. This is not the cost incurred by the assessee. At any point of time the cost of construction is incurred by the builder to equalize the land holding of the land lord. It is a claim of expenditure to be made by builder to determine his profitability and the cost which is never incurred by the assessee cannot be claimed as an exemption except the proportionate cost of land. Since this is an expenditure not actually incurred by the assessee, the exemption claimed on the cost of construction cannot be allowed. Further, assessee could not produce any documentary proof in the nature of vouchers or bills for various expenditure incurred by the assessee. Hence, the A.O. allowed proportionate cost of land at 45% worked out at Rs.3,90,250/- and legal & documentation charges Rs.18,000/- total cost of acquisition Rs.4,08,250/- was deducted from total sale consideration of 7 flats at Rs.1,20,67,000/- and computed the total capital gain at Rs.1,16,58,750/- and assessee's shares at 50% i.e. Rs.58,29,375/- was brought to tax and the same to be confirmed.

13. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. In this case, the A.O. denied the cost of construction incurred on 7 flats while computing the capital gain on the reason that assessee has not incurred this expenditure but it was incurred by developer. However, it has to be noted that the assessee has considered cost of these 7 flats as a consideration while computing the capital gain on entering into JDA. Once the assessee includes the cost of these 7 flats as sale consideration while determining capital gain on entering into JDA, the corresponding benefit shall be given on sale of these 7 flats. Now the issue is only with regard to the sale consideration adopted by assessee towards these 7 flats while offering the capital gain. The A.O. cannot overlook the computation of capital gain offered by assessee on entering into the JDA. Once the assessee adopted the cost of these 7 flats for the purpose of offering the capital gain, same to be considered as cost of construction on sale of these 7 flats. This has been supported by the order of the Tribunal in the case of Jiva Vadivelu in ITA No.255/Bang/2011 as follows:

*30. As far as computation of income on sale of 5 flats is concerned, we are of the view that the revenue authorities have proceeded to compute the income of the assessee incorrectly. In our view, in the A.Y. 2004-05, there would be income arising out of joint development agreement dated 20.10.03. Such income would have to be arrived at by reducing from the value of 8664 sq.ft. of built up area which the assessee was to receive from the developer the market value of 70% of the land as on the date of the joint development agreement. This conclusion is on the basis that a sale by the assessee to the developer had happened during the previous year relevant to A.Y. 2004-05. It appears that the revenue has not taken any steps to tax the income for the A.Y. 2004-05. We are not, however, concerned at this stage on the above aspect. We are now concerned with the question as to whether the assessee should get the benefit of cost of construction of the 5 flats sold during the previous year. In our view, the assessee should be allowed the aforesaid benefit. Admittedly, the assessee had to pay a cost for acquiring these 5 flats. The Assessing Officer in the order of assessment has not given any cost to these flats. In our view, therefore the cost of 5 flats has to be worked out and for this purpose of working out the cost of acquisition of 5 flats, the*

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*matter is remanded to the Assessing Officer. The AO will verify the cost from the developer, who developed the properties and arrive at the cost of 8664 sq.ft. This cost should be debited to the trading account. The assessee has retained 3 flats out of 8 flats and we direct the cost of these 3 flats lying in the stock with the assessee has to be added as part of the closing stock in the trading account. Similarly, 30% of the value of the land (retained by the Assessee) should also be shown as cost in the debit side of the profit and loss account. The value for this purpose will be 30% of the value for which the Assessee purchased the entire property which was given for joint development. Out of the 30% undivided share of land retained by the Assessee, the value attributable to the extent of undivided share of land sold by the assessee (along with the 5 flats) should be shown as receipt on the credit side of the profit and loss account. The AO is directed to work out the trading account by following the aforesaid procedure and in accordance with law and the directions given earlier. Thus, issue (C) is decided accordingly.*

14. Further, in the case of K. Ranjan in ITA No.928/Bang/2014, the Tribunal vide order dated 4.9.2015 held that

*10.4.1 We have heard both parties and perused and carefully considered the material on record. As regards the allowability of the cost of acquisition of property to the assessee, we find that the co-ordinate bench of the Tribunal in the case of Smt. Jeeva Vadivelu (supra) at para 31 thereof has held as under:*

*31.....We are now concerned with the question as to whether the assessee should get the benefit of cost of construction of the 5 flats sold during the previous year. In our view, the assessee should be allowed the aforesaid benefit. Admittedly, the assessee had to pay a cost for acquiring these 5 flats. The Assessing Officer in the order of assessment has not given any cost to these flats. In our view, therefore the cost of 5 flats has to be worked out and for this purpose of working out the cost of acquisition of 5 flats, the matter is remanded to the Assessing Officer. The A.O. will verify the cost from the developer, who developed the properties and arrive at the cost of 8664 sq.ft.....*

15. Further, it was noted that in assessee's own case, in assessment year 2010-11, the CIT(A) himself allowed the claim of assessee while discussing in para 5 of his order dated 28.2.2019 as follows:

*"5. I have considered the above grounds of appeal, statement of facts and written submissions filed by the appellant and also perused the assessment order. The AO while computing the CG on the sale of two flats out of the ten flats received from the developer in lieu of the transfer of 62% of land measuring 5567 SFT in favor of the developer as per the joint development*

*agreement has considered only the market value of the land attributable to two flats sold out of 38% of undivided portion of land as cost. Aggrieved by this computation the appellant filed this appeal submitting that the cost of construction of two flats sold is also required to be allowed. Further submitted that he and his co-owner were entitled to 10(Ten) flats in lieu of deemed transfer of 62% of land measuring 5567 sq.ft. in favour of the Developer. In lieu of the said deemed transfer of land measuring 5567 sq.ft., the Developer has incurred the entire cost of construction of the flats constructed and delivered to the Appellant and his Co-owner. The deemed consideration arising out of the transfer of 62% of the land in favour of the Developer was utilized towards the cost of construction of the 10(ten) flats and therefore, the Appellant and his Co-owner were lawfully entitled towards the cost of construction of the two flats (G2 and G5) sold during the previous year ending 31-03-2010 relevant to the Asst Year 2010-11. The cost of construction of the two flats sold was claimed to an extent of Rs. 18,92,000/-. In support of his contention the appellant relied on the Hon'ble jurisdictional ITAT order in the case of Smt Jeeva Vadivelu wherein it was held that the assessee should be allowed the benefit of cost of construction for the flat sold for the purpose of working out the cost of acquisition while computing the CG. Further relied on Sri K Rajanna wherein the Hon'ble jurisdictional ITAT followed the ruling given in the case of Smt. Jeeva Vadivelu. Respectfully following the above stated jurisdictional ITAT orders, I hereby allow the grounds taken by the appellant.”*

16. Further, in our opinion as held by Hon'ble Supreme Court in the case of CIT Vs.V.MR.P.Firm, Muar 56 ITR 67 it was held as under:

*“The doctrine of "approbate and reprobate" is only a species of estoppel; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income.”*

17. Further, it is appropriate to place reliance on the CBDT circular No.14(XL-35) of 1995 dated 11.4.1995 as per which the lower authorities should have got the assessee s to the correct proposition of the law regarding the taxability of the capital gain. For clarity, we reproduce the contents of the said circular.

“Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer

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in every reasonable way, particularly in the matter of claiming and securing relief and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting the square deal from the department. Although, therefore, the responsibility for claiming refunds and relief rests with the assessee on whom it is imposed by law, officers should.....

- (a) Draw their attention to any refunds or reliefs to which the assessee appear to be clearly entitled but which they have omitted the claim for some reason or other;
- (b) Freely advise them when approached by them as to the rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.”

18. Being so, we direct the A.O. to consider the cost of construction of 7 flats while computing the capital gain from the sale of these 7 flats. This ground of assessee is allowed.

19. Next ground is with regard to determining the value of land transferred to Sai Gokul Builders under JDA at Rs.800/- p. sq.ft. instead of Rs.500/- p.sq.ft. as guidance value notified by the Government of Karnataka.

20. The Ld. A.R. submitted that the a Joint Development Agreement dated 28-01-2008 was entered into with M/s. Sai Gokul Builders in respect of the property situated at Hoodi Village, K.R Puram. Bangalore East Taluk, Bangalore. According to a JDA, 62% undivided portion of the land was deemed to have been transferred in favour of the Developer against which the Assessee has not offered any Capital Gains for the Asst Year 2008-09. Therefore. the Ld. AO has issued a notice u/s. 148 of the Act to levy tax on the Capital Gains arising out of the JDA dated 28-01-2008 relating to the transfer of 62% of the undivided portion of the land. The Ld. AO in the re-assessment Order has held that the Capital Gains arising

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out of a JDA dated 28-01-2008 are chargeable to tax for the Asst Year 2008-09 as per Section 2(47)(v) of the Act r.w.s 53A of the Act and accordingly, the consideration was determined on the basis of the provisions of Section 50C of the Act by obtaining the guidance value at Rs. 800/- per sq.ft., from the Sub-registrar, Mahadevapura, Bangalore. Accordingly, the Ld AO has quantified the Assessee's 50% share of Capital Gains at Rs. 10,08,500/- arising out of the JDA dated 28-01-2008 with the Developers M/s. Sai Gokul Builders. The Ld. AO vide letter dated 24-03-2014 called upon the Assessee to file objections if any as to why the Capital Gains arising out of the JDA dated 28-01-2008 should not be chargeable to tax for the Asst Year 2008-09 adopting the guidance value of Rs. 800/- per sq.ft., as certified by the Sub-registered, Mahadevapura, Bangalore as against Rs. 500/- per sq.ft. adopted by the Assessee. The Assessee has filed a detailed objection vide letter dated 27-03-2014. However, the Ld. AO has not appreciated the objections filed by the Assessee and quantified the Capital Gains chargeable to tax arising out of the JDA dated 28-01-2008 at Rs. 10,08,500/- adopting the guidance value at Rs. 800/- per sq.ft., provided by the Sub-registrar, Mahadevapura, Bangalore. The Assessee submits that the rate of Rs. 800/- adopted by the AO is not justifiable, since the rate applicable was of Rs. 500/- sq.ft., as per the guidance value prescribed by the Government of Karnataka. The Assessee submits that the capital gains so determined at Rs. 10,08,500/- are arbitrary, unreasonable and opposed to the law and facts of the case and therefore an Appeal *against the adoption of value at Rs. 800/- per sq.ft as against Rs. 500/- per sq.ft* was filed before the Ld. CIT(A) and provided a copy of the Guidance Value Notification. However the Ld. CIT(A) has not appreciated the contention of the Assessee and held as under:

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..... also the claim of Rs. 500/- per sq.ft cannot be accepted. The value at Rs. 800/- per sqft is in order and upheld."

21. The Assessee submits that the AO has relied upon the value of Rs. 800/- per sq.ft on the basis of the information obtained from the Sub-Registrar. Mahadevpura, Bangalore. As against the assessee has provided a notification wherein the value of the relevant land was notified at Rs. 500/- per sq.ft. The value of Rs. 800/- per sq.ft reported by the Sub-registrar was related to the Land situated in a different area and not related to the area in which the assessee's property was situated. In spite of the evidence produced by the Assessee in the form of Guidance Value notified by Government of Karnataka applicable to the land, the Ld. CIT(A) has rejected the contention of the Assessee as regards rate to be adopted at Rs. 500/- per sq.ft and held that the Guidance Value of Rs. 800/- per sq.ft adopted by the AO was in order. The Assessee is aggrieved with the order of the Ld. CIT(A) in upholding the value of Rs. 800/- per sq.ft adopted by the AO and hence this Appeal.

22. The Ld. D.R. submitted that as per Government notification value of the impugned land is at Rs.800/- and the same was adopted by the A.O.

23. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. We have carefully gone through the market guidance value published by the Government of Karnataka w.e.f. 19.4.2017 as per which, the impugned property bearing No.40B/3 & 40B Sai Gokula Builders situated at Hoodi's village, Bengaluru, East Taluk (erstwhile South Taluk), Mahadevapura, CMC Limits, Ward No.12, K.R. Puram Main Road, Hubli, Bengaluru and it is also noted that the property was converted for non-agricultural residential purposes vide sanction order ALN-SR-1175/1981-82 issued by

the Tahsildar, South Taluk, situated at Hoodi's village, Bengaluru, East Taluk (erstwhile South Taluk), Mahadevapura, CMC Limits, Ward No.12, K.R. Puram Main Road, Hubli, Bengaluru. As such notified value was Rs.550/- per sq.ft. which can be seen from entry No.19 as follows:

Sl. No.	VILLAGE	Outer Ring Road Opp. Lands		National Highway Opp. Lands		Towards Peripler Road (Devanahalli International Air Port) Villages Opp. Lands		State Highway Opp. Lands		Revised Market Value (Rs. Per Sq.Ft.)					
		Survey No.	Revised Agri.Lands (Rs. in Lacspcr Each Acre)	Survey No.	Revised Agri.Lands (Rs. in Lacspcr Each Acre)	Survey No.	Revised Agri.Lands (Rs. in Lacspcr Each Acre)	Survey No.	Revised Agri.Lands (Rs. in Lacspcr Each Acre)	B.D.A. Sites	H.B.C.S. Sites	Converted/ B.M.P. Sites	CMC Sites	Gramathana Sites	
		3	4	5	6	7	8	9	10	11	12	13	14	15	16
1												840			
l	Ashraya Houses														
m	I.T.I. Housing											1300	1000	900	
16	Ward No.10, B.Narayanapura - Mahadevapura CMC											1000	800	700	
a	Whitefield Main Right Side														
b	B. Narayanapura Main Road														
17	Ward No. 11, Gramathana B. Narayanapura - Mahadevapura CMC											1300	1000	900	
a	Whitefield Main Road														
b	Venkataramana Temple Behind Road									125		1000	800	700	
18	Hoodi & Industrial Area											700	550	500	
19	Ward No. 12 Hoodi Mahadevapura CMC											700	550	500	
a	Hoodi to K.R. Puram Main Road											840	600	510	
b	Iyappanagar 1st Block											700	550	500	
c	Whitefield Main Road to Hoodi														
d	Narayana Reddy House to Whitefield Main Road											700	550	500	
20	Ward No.13, Hoodi Kaverinagar Mahadevapura CMC											2000	1500	1200	
a	Kaveri Nagar Main Road														
c	Whitefield Main Road I.T.P.L											1300	1000	900	

24. As such in our opinion, the value to be adopted at Rs.550/- per sq.ft. instead of Rs.800/- p.sq.ft valued by the A.O. This ground of assessee is allowed.

25. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 16<sup>th</sup> Apr, 2021

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 16<sup>th</sup> Apr, 2021.  
VG/SPS

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Copy to:

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

By order

**Asst. Registrar,  
ITAT, Bangalore.**