

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C”BENCH: BANGALORE**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.94/Bang/2013
Assessment Year: 2004-05

M/s. AMCO Batteries Ltd. 3 <sup>rd</sup> Floor, Unity Building N.R. Square Bangalore 560 002.  <b>PAN NO :AABCA1726F</b>	<b>Vs.</b>	Deputy Commissioner of Income-tax Circle-11(1) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri S. Parthasarathi, A.R.
<b>Respondent by</b>	:	Shri Pradeep Kumar, D.R.

<b>Date of Hearing</b>	:	02.12.2021
<b>Date of Pronouncement</b>	:	03.12.2021

**O R D E R**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

The appeal filed by the assessee is directed against the order dated 28.11.2012 passed by Ld. CIT(A)-1, Bangalore and it relates to assessment year 2004-05.

2. This appeal was originally disposed of by the Tribunal on 31.7.2013, wherein the Tribunal had adjudicated the ground relating to validity of reopening of assessment. The Tribunal annulled re-assessment by holding that the re-opening of assessment is not valid. The revenue carried the matter by filing appeal before Hon'ble High Court of Karnataka. The Hon'ble High

Court, vide its order dated 18.11.2020 passed in ITA No.572/2013, quashed the order passed by the Tribunal and the matter was remitted to the file of Tribunal for taking decision afresh in accordance with law. Accordingly, this appeal came to be placed before us.

3. The grounds of appeal urged by the assessee give rise to the following issues:-

- a) Validity of re-opening of assessment
- b) Validity of assessing capital gain in the hands of the assessee.

4. The facts relating to the case are stated in brief. The assessee is engaged in the business of manufacture and sale of batteries. The assessment in the hands of the assessee was originally completed u/s 143(3) of the Income-tax Act, 1961 ['the Act' for short] on 22.11.2006 determining the total income of the assessee at Rs.7.98 crores. After setting off of the loss, the business income was arrived at nil. Subsequently, the assessment was reopened by issuing notice u/s 148 of the Act.

5. The A.O. noticed that the assessee had entered into a development agreement with M/s. Godrej Properties & Investments Ltd. (subsequently name changed to M/s. Godrej Properties Ltd.) for development of 20 acres and 4 guntas of land near Hebbal Flyover belonging to the company. The agreement was entered on 22.1.2004. As per the above said agreement, the assessee would get 28% of the saleable constructed area and the balance 72% shall belong to the developer. The A.O. took the view that the assessee has handed over the possession of the land to the developer on account of entering into the joint venture agreement. Accordingly, he took the view that, to the extent of land transferred to the

developer, i.e., proportionate land attributable to the constructed area of 72%, there is transfer of land and hence the assessee is liable to capital gains tax in the year in which joint venture agreement was entered into i.e. in assessment year 2004-05.

6. The assessee contended that it has given only permission to the developer to enter the scheduled property for the purpose of developing the same and it will not constitute delivery of possession, as contemplated in section 53A of the Transfer of Property Act. It was submitted that the legal possession of the scheduled property continues with the assessee. The A.O. did not accept the contentions of the assessee and accordingly assessed capital gain on transfer of land at Rs.9.72 crores. The Ld. CIT(A) also confirmed the same.

7. The Ld. A.R. submitted that the assessee has not given possession of the scheduled property to the developer and it has granted only permission to enter upon the scheduled property for the purpose of developing it. Hence the provisions of sec.53A of Transfer property Act shall not apply. The Ld. A.R. further submitted that though the developed agreement was entered on 22.1.2004, yet the General power of attorney was given to the developer only on 7.3.2006. He submitted that the developer has got the power to carry on the development activities only upon giving general power of attorney on 7.3.2006. Accordingly, the Ld. A.R. submitted that even it cannot be considered that the possession was handed over prior to 7.3.2006. Accordingly, the Ld. A.R. submitted that there is no scope for assessing the capital gain in the hands of the assessee in assessment year 2004-05.

8. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A).

9. We heard rival contentions and perused the record. We notice that the joint development agreement has been entered on 22.01.2004. We have gone through the recitals made in the above said agreement. In our opinion, following clause mentioned in the agreement is relevant here:-

*“3.2 The permission granted by the Owner to the Developer to enter upon the Schedule property for the purpose of developing the Schedule property and constructing residential/commercial buildings thereon shall not be construed as delivery of possession under sec.53A of the Transfer of Property Act. The legal possession of the Schedule Property shall continue with the owner and the Developer shall enter upon the Schedule Property for the purpose of developing the Schedule Property and constructing residential/commercial buildings thereon as a mere licensee, and subject to the terms and conditions of this Agreement.”*

10. Now the question that arises is whether the provisions of sec.53A of the Transfer of property Act shall apply to the impugned JDA entered by the assessee with M/s Godrej Properties Ltd, when one considers the clause of the JDA referred above. We notice that an identical issue was examined by the co-ordinate bench in the case of Anugraha Shelters (P) Ltd (ITA No.2314/Bang/2016 dated 22.11.2021) and it was decided as under:-

*10. We notice that the assessee has entered into a joint development agreement on 29.12.2005 and on the very same day a supplementary joint development agreement was also entered. Both the agreements have been registered with the registration authorities. The last paragraph in page 4 of the supplementary joint development agreement is relevant here and the same reads as under:-*

*“The I Party or Owners hereby undertake to convey or transfer at the cost of the II Party or Developers 65% share of undivided interest in the Schedule property to the II party or Developers at their request to their nominees or buyers located by them at rates which may be decided by the II Party or Developers and hereby grant them exclusive rights to construct the residential*

*apartments as per the sanctioned plan to obtained from the sanctioning authorities based on the approved plan. For this purpose, the I Party or Owner hereby grant them irrevocable permission and license including authority to the II Party or Developers to enter upon the Schedule Property for the purpose of construction residential apartments as per the sanctioned plan to be obtained. The II Party or Developers shall enter upon the Schedule Property for commencing the preliminary work and continue to exercise the said right throughout the construction period until the completion the entire project. This license however shall not be construed as possession delivered in part performance under Section 53 of Transfer of Property Act nor any property right shall be deemed to vest in favour of the II Party or Developers, save as expressly provided in this agreement. The I Party or Owners shall not enter into any agreement with any party to sell 65% of undivided share in schedule property or any part thereof which is allotted to the II Party or Developers except to the nominees of the II Party or Developers or the buyers located by them.”*

*We notice that the AO has also extracted the above cited clause in the assessment order, but conveniently omitted the a portion of the paragraph highlighted above.*

10. *A careful perusal of the above said paragraph of the agreement would show that the developer is granted irrevocable permission and license to enter the scheduled property for the purpose of construction of residential apartments as per the plan to be obtained. It is specifically been mentioned that the license so granted shall not be considered as possession delivered in part performance of the contract u/s 53(sic. 53A) of Transfer of property Act nor any property right shall be deemed in favour of developer.*

11. *We notice that the AO has invoked the provisions of sec.2(47)(v) of the Act, which reads as under:-*

*“2(47) “transfer” in relation to a capital asset includes*

*.....*

*(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882).”*

*The provisions of section 53A of the Transfer of property Act reads as under:-*

*“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[\*\*\*] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”*

12. A careful perusal of the above said provision would show that the transferee should have taken possession in part performance of the contract and has done same act in furtherance of the contract. In the instant case, development agreement clearly specified on the possession of the property was not given and what was given is only license to enter the property. The question whether granting of such kind of license would amount to “Possession” within the meaning of sec.53A of Transfer of Property Act r.w.s sec. 2(47)(v) of Income tax Act was examined by the Bangalore SMC bench of Tribunal in the case of Smt. Lakshmi Swarupa vs ITO (ITA No.2278/Bang/2018 dated 12.10.2018). The relevant observations made and decision taken by the Tribunal in the above said case are extracted below:-

*“4. Clause 1 of the JDA provides as follows:*

*“1) PERMISSION FOR DEVELOPMENT:*

*1.1) The Owner is in possession and enjoyment of the Schedule Property. The Owner hereby authorize the Promoter for the purpose of development, to enter upon the Schedule Property and develop the same, however the authority so granted does not in any manner be construed as delivery of possession by the Owner in part performance of this agreement under [Section 53-A](#) of the Transfer of Property Act or under [Section 2\(47\)\(iv\)](#) of the Income Tax Act, 1961.*

1.2) *The Owner hereby agrees not to interfere or interrupt in the course of construction and development of the Schedule Property and/or commit any act or omission having the effect of delaying or stopping the work that has to be done under this Agreement. However, the Owner shall always be entitled to inspect the progress of the work and type of work which is being done on the Schedule Property."*

.....

9. *I have carefully considered the rival submissions. Sec.45 of the Act lays down that profits and gains arising out of transfer of capital asset effected in the previous year shall be chargeable to income tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. It is thus clear that there should be transfer during the previous year to attract charge to tax on capital gain. Sec.2(47) of the Act defines "Transfer" for the purpose of the Act. It reads thus:*

*"Sec.2 (47) "transfer", in relation to a capital asset, includes,--*

*(i) the sale, exchange or relinquishment of the asset; or*

*(ii) the extinguishment of any rights therein ; or*

*(iii) the compulsory acquisition thereof under any law ; or*

*(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in trade of a business carried on by him, such conversion or treatment ; or (iva) the maturity or redemption of a zero coupon bond; or*

*(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in [section 53A](#) of the Transfer of Property Act, 1882 (4 of 1882) ; or*

*(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.*

*Explanation [1]: For the purposes of sub-clauses (v) and(vi), "immovable property" shall have the same meaning as in clause (d) of [section 269UA](#);"*

10. The clause that was invoked by the revenue authorities in the case of the Assessee is Sec.2(47)(v) of the Act. Under the general law, transfer of immovable property of the value of rupees one hundred and upwards can take place only by a registered deed. If no registered deed is executed in respect of such property, legal title or ownership is not effectively conveyed to the transferee although transferee might have paid entire consideration and/or obtained possession from the transferor in pursuance of contract of sale. "Transfer" in [section 2\(47\)](#) also envisaged execution of registered deed in such circumstances. Capital gains become liable to be charged to tax only if they arise as a result of "transfer" of capital asset and the date on which they arise is date of "transfer". If as a result of mutual arrangement by parties or otherwise, no registered deed is executed even after transaction is completed by delivery of possession and receipt of consideration, capital gains tax would escape assessment altogether or if such execution of registered sale-deed is postponed, the capital gains tax would also be postponed. In several cases it suited the parties to complete such transactions without execution of registered deed and thereby evade payment of tax on capital gains. It is in order to plug this loophole that cl. (v) was inserted in [section 2\(47\)](#) to lay down that transfer would include any transaction involving allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in [section 53A](#) of Transfer of Property Act. Thus, the Provisions of Sec.53A of the Transfer of Property Act, 1882 stand incorporated into the provisions of the [Income Tax Act](#), 1961. If that be so then the Tax authorities for coming to a conclusion that provisions of Sec.53A of the Transfer of Property Act, 1882 are attracted to a particular transaction have to come to a conclusion the transaction/agreement in question is such that the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee, has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract.

11. In the present case, the clause in the JDA regarding possession clearly states that what is given is not possession contemplated [u/s.53A of the Transfer of Property Act](#) and that it is merely a license to enter the property for the purpose of carrying out development. Further, the subsequent MOU dated 16.8.2006 and delivery of legal possession on 22.4.2006 clearly shows that there was no transfer within the meaning of Sec.2(47)(v) of the Act during the previous year relevant to AY 2006-07. Therefore, invocation of the provisions of Sec.2(47)(v) in the facts and circumstances of the present case on the basis of clause-1 of the JDA, in my view was not proper. **The possession in the present is traced to the joint**

*development agreement which is in the nature of permissive possession and not possession in part performance of agreement for sale. In the present case, there is no document by which the revenue can come to the conclusion that there was delivery of possession. The mere fact that development of the property cannot be done without possession cannot be the basis to come to a conclusion that possession was delivered in part performance of the agreement for sale in the manner laid down in Sec.53A of the Transfer of Property Act. Such possession as I have already held is on behalf of the Assessee and not in the independent capacity of purchaser of the property.*

*12. For the reasons given above, I hold that there was no transfer during the previous year relevant to AY 2006-07. Therefore, capital gain on transfer of the property cannot be assessed in AY 2006-07. The assessment of capital gain in AY 2006-07 is therefore held to be bad and deleted.”*

*13. In the instant case also, we have noticed that the assessee has given permissive possession and not “legal possession” as contemplated within the meaning of sec.53A of the Transfer of Property Act. Hence we hold that the provisions of sec.53A of the Transfer of Property Act are not applicable to the impugned Joint Development Agreement. In this view of the matter, the provisions of sec.2(47)(v) of the Act are also not applicable. Hence the tax authorities are not justified in invoking the above said provision and consequently, the capital gains assessed in the hands of the assessee is liable to be deleted.*

11. We have earlier noticed that the assessee, in the instant case, has given only permissive possession, i.e., permission to enter the scheduled property and not “legal possession” as contemplated within the meaning of sec.53A of the Transfer of Property Act. Accordingly, following the co-ordinate bench decision referred supra, we hold that the provisions of sec.53A of the Transfer of Property Act are not applicable to the impugned Joint Development Agreement.

12. In this view of the matter, the provisions of sec.2(47)(v) of the Act are also not applicable. Hence the tax authorities are not justified in invoking the above said provision and assessing capital gains in the hands of the assessee during the year under consideration. Accordingly, we set aside the order passed by Ld

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CIT(A) and direct the to delete the capital gains assessed in the hands of the assessee during the year under consideration.

13. Since we have decided the issue urged on merits in favour of the assessee, there is no need to adjudicate the legal issue relating to validity of reopening of assessment, as the same would be academic in nature.

14. In the result, the appeal of the assessee is treated as allowed.  
Order pronounced in the open court on 3<sup>rd</sup> Dec, 2021

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

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 3<sup>rd</sup> Dec, 2021.  
VG/SPS

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.**