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

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

ITA No.892/Bang/2019
Assessment Year: 2014-15

Mr. Rahil Mahesh Kumar Nizamuddin CA K.Y. Ningoji Rao Rao & Venkatesulu, Chartered Accountants, No.200, 3rd D Cross, II Block III Stage, Basaveshwaranagar Bengaluru 560 079 **PAN NO : 560 079.**	**Vs.**	Deputy Commissioner of Income-tax International Taxation Circle 1(2) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	:	Shri K.Y. Ningoji Rao, A.R.
Respondent by	:	Shri V.S. Chakrapani, D.R.

Date of Hearing	:	02.06.2022
Date of Pronouncement	:	18.07.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against the order of CIT(A) dated 30.3;2019. The assessee has raised following grounds of appeal:-

1	*The impugned order of the Commissioner of Income Tax (Appeals)-12, Bengaluru is liable to set aside in so far as the same is improper, illegal, unlawful and opposed to law and facts of the case.*	*7,48,46,006/-*
2	*The Learned CIT(A) erred in upholding the adoption of the Sale Consideration of Rs.18,87,60,552/- for Computing the Long-Term Capital Gains from the Sale of 7 Acres 16.68 Guntas of Lands at Poojanahalli, Devanahalli Taluk, Bengaluru District, disregarding the fact that the proportionate sale value received by the Appellant is only Rs.18,54,25,000/-.*	*7,55,836/-*
3	*The Learned Appellate Commissioner ought to have upheld the Sale Consideration of Rs.13,38,43,718/- being the Sale Consideration relatable to 6 Acres 35.10 Guntas out of the total sale consideration of Rs.20,16,17,000/- paid to the Appellant for the total area of 10 Acres 14.40 Guntas sold by the Appellant during the previous year relevant to AY 2014-15 (6 acres 35.10 Guntas) and 2015-16 (3 acres 19.30 guntas) of lands at Poojanahalli.*	*1,24,44,155/-*
4	*The Learned Appellate Commissioner erred in failing to take cognizance of the fact that the Appellant received in all a sum of Rs.20,16,17,0000/- for the total lands at Poojanahalli sold by the Appellant during the Previous year relevant to A.Y. 2014-15 and 2015-16.*	*1,24,44,155/-*
5-	*The Learned CIT(A) erred in confirming the disallowance of deduction of the sum of Rs.18,15,000/- paid by the Appellant to the BIA Development Authority towards the Development Charges for the Poojanahalli Lands u/s 48 (i) of the Act by misconstruing the decision of the Hon. Supreme Court in the Case of Goetz (India) Ltd and of the Hon. High Court of Karnataka in Unique Shelters (P) Ltd.*	*4,11,279/-*

6	*The Learned CIT(A) erred in confirming the disallowance of deduction of the sum of Rs.11,54,250/- paid by the Appellant towards the Brokerage for sale of Poojanahalli Lands u/s 48 (i) of the Act by misconstruing the decisions in Goetz Case and in Unique Shelters case.*	*2,61,553/-*
7	*The Learned CIT(A) erred in upholding the act of the Assessing Officer in refusing to give deduction under section 54F of the Income Tax Act in respect of the investment of US$ 14,10,000 equal to Rs.8,74,20,000/- made by the Appellant in purchase of a Residential Building in Newton, MA, USA, with complete disregard to the law and various decisions on the issue.*	***1,97,96,567/-***
8	*The Learned CIT(A) erred in confirming the adoption of Rs.40,000/- by the Assessing Officer as the FMV of the Poojanahalli Lands as on 1.4.1981 and in" rejecting the Appellant's claim of Rs.25/-per Sq. Ft. as reported by the Registered Valuer without resorting to the Valuation Machinery provided under section 55A of the IT Act.*	***1,65,47,457/-***
9	*The Learned CIT(A) erred in rejecting the Appellant's claim for adoption of FMV of Rs.1,70,00,00/- per acre as on the date on which the Lands at Poojanahalli was permitted to be put to non-agricultural Residential purposes for deduction u/s 48(ii) of the Act in assessing the Long-Term Capital Gains as per principles laid down by the Supreme Court in the case of CIT v. BAI SHIRIN K. KOOKA reported in 46 ITR 86.*	*2,64,93,506/-*
10	*The Learned CIT(A) erred in upholding the assessment of the Long-Term Capital Gains arising out of the Joint Development Agreement dated 31.1.2014 for the A.Y.2014-15 even though the possession of the property bearing No.123, Infantry Road, Bengaluru was delivered on 16.6.2014 and with complete disregard to fact that the Appellant has offered the same for tax for A.Y.2015-16, been assessed too and to the provisions of 5(2) of the Income Tax Act.*	*1,73,28,311/-*

11.	The Learned CIT(A) erred in upholding the assessment of the Long-Term Capital Gains arising out of the Joint Development Agreement dated 31.1.2014 in respect of the property bearing No.123, Infantry Road, Bengaluru for the A.Y.2014-15 even when the transfer thereof took place on 16.6.2014 when possession whereof is delivered which is opposed to law contained u/s 5(2) of the Ac t and to the facts of the case.	1,73,28,311/-
12.	The Learned CIT(A) erred in rejecting the Appellant's claim for estimate of the Consideration due under the Joint Development Agreement other than the Non-Refundable Deposit by adopting the Construction Rate of Rs.2,000/- per Sq. Ft. for built-up area received under the JDA which is more than the rata prescribed in the Notification dated 3.7.2013 bearing No.CVC 24 of 2013-14 issued by the Central Valuation Committee constituted u/s 45B of the Karnataka Stamp Act, 1957, which came in to effect from 12.8.2013.	76,71,614/-
13.	The Learned CIT(A) erred in sustaining the estimate of the Consideration due under the Joint Development Agreement other than the Non-Refundable Deposit by adopting the Consolidated Rate of Rs.8,550/- per Sq. Ft. of built-up area with complete disregard to the facts of the case and to the Notification dated 3.7.2013 bearing No.CVC 24 of 2013-14 issued by the Central Valuation Committee constituted u/s 45B of the Karnataka Stamp Act, 1957, which came in to effect from 12.8.2013 and with complete disregard to the fact that the rate of Rs.8,550/- adopted is for the sale of each Square Feet of the Built-up area of the Flat including the value of proportionate undivided share of land.	76,71,614/-

14.	*The Learned CIT(A) erred in denying the Appellant the deduction available to him u/s 54 of the Income Tax Act, in toto, to the extent of the Consideration other than the Non-Refundable Deposit received or deemed to have been received by the Appellant from the Developer under the Joint Development Agreement dated 31.1.2014 which is invested in construction of the Residential Building.*	*1,00,14,091/-*
15.	*The Learned CIT(A) erred in disregarding the fact that what was received by the Appellant in return is only the Non-Refundable Deposit and the construction of the Land Owners area apartment and thus even if the consolidated rate of Rs.8,550/- per square feet of his share apartment area is adopted, the value of the proportionate land of 2549.75 Sq. Ft. valued @ Rs.12,600/- per Sq. ft. will have to be deducted there from.*	*72,79,944/-*
16.	*The Learned CIT(A) erred in upholding the refusal of AO to give deduction u/s 54 of the Income Tax Act to the extent of the Consideration under the Joint Development Agreement dated 31.1.2014 which is invested in construction of the Residential Building with complete disregard to the decisions of the Jurisdictional High Court and also to the provisions of Section 54 of the Act*	*1,00,14,091/-*
17,	*The Learned CIT(A) erred in failing to direct the Assessing Officer to give credit for the sum of Rs.77,14,409/- out of the sum of Rs.79,73,867/- being the Prepaid Taxes for A.Y.2015-16 when the AO has brought to tax the Long-Term Capital Gains Tax in the A.Y.2014-15 which is declared by the Appellant in his total income for the A.Y.2015-16 and assessed to tax in that year.*	*77,14,409/-*
18.	*The Learned Appellate Commissioner erred in upholding the levy of interest u/s 234B as consequential, even though the Appellant is not liable to pay the same.*	*1,13,80,816/-*

19.	*The Learned Appellate Commissioner erred in upholding the levy of interest u/s 234D as consequential, even though the Appellant is not liable to pay the same.*	*18,53,900/-*
20.	*The Learned Appellate Commissioner erred in upholding the withdrawal of interest allowed u/s 244A as consequential.*	*16,11,123/-*
	Total tax effect	*7,48,46,006/-*

2. The assessee filed the following additional evidence along with application dated 5.9.2019 before us.

"Sharing agreement dated 26.10.2016 between the assessee and developer regarding property No.123, Infantry Road, Bengaluru"

3. However, at the time of hearing, the assessee not pressed admission of additional evidence. Accordingly, additional evidence are dismissed as not pressed.

4. Ground No.1 is general in nature. Ground Nos.3 & 4 not pressed and accordingly, dismissed as not pressed.

5. Ground No.2 is with regard to the upholding the sale consideration of Rs.18,87,60,552/- for computing the long term capital gain from the sale of 6 acres and 25.10 guntas of land at Pujanahalli, Devanahalli village, Bengaluru District disregarding the fact that proportionate sale value received there for is only Rs.18,54,25,000/-.

5.1 Facts of the case are that the assessee has taken the sale consideration of 7 acres 16.68 guntas for consideration of Rs.18,54,25,000/- vide sale agreement dated 3.2.2014. However, by way of another agreement dated 2.4.2014, the earlier agreement dated 3.2.2014 has been cancelled and therefore, agreement is

effected for the transfer of whole 11 acres and 25 guntas for a total sale consideration of Rs.20,16,17,000/-. Thus, a portion of the whole land (7 acres 16.88 guntas) was agreed to sale on 3.2.2014 and consideration of Rs.18,54,25,000/- was received during the previous year 2013-14. Though this agreement was subsequently cancelled, the consideration amount is received and the possession is handed over during the previous year 2013-14 itself, the assessee declared this amount to taxation in assessment years 2014-15 itself. The balance amount of (Rs.20,16,17,000/- minus Rs.18,54,25,000/-) equal to Rs.1,61,92,000/- is taken to the previous year relevant to assessment year 2015-16 on the strength of the fresh agreement to sell dated 2.4.2014 and relatable capital gain is declared for the assessment year 2015-16. The assessee computed total capital gain on sale value of Rs.18,54,25,000/-, which is sale consideration received in the previous year 2013-14 and arrived at the capital gain for the assessment year 2014-15. According to the A.O., the sale consideration for 7 acres and 12.10 guntas land was Rs.30,94,87,500/-. To come to this conclusion, he relied on the absolute sale deed document bearing No.3570/2014-15 & 3569/2014-15 dated 20.8.2014. The document No.3570/2014-15 is referring to the agreement to sale dated 3.2.2014 and as per the document No.3570/2014-15, the vendor is the assessee and confirming party is M/s. OMR Investments LLP and purchaser are M/s. Amin Properties LLP. Against this, assessee went in appeal before Ld. CIT(A). Ld. CIT(A) observed that sale consideration received in assessment year 2014-15 was at Rs.18,87,60,552/- in place of Rs.18,54,25,000/- added by AO. Against this assessee is in appeal before us.

5.2 Ld. A.R. submitted that the assessee agreed to sell 7 acres 16.68 guntas of converted land out of Sy.No.19 & 20/1 of

Poojanahalli unto OMR Investments LLP (PAN AACFO8864E) for a total sale consideration of Rs.18,54,25,000/- in terms of the registered agreement to sell dated 3.2.014. On receipt of the entire sale consideration of Rs.18,54,25,000/-the assessee delivered the possession of the land so agreed to be sold as evidenced by the Sworn declaratory affidavit dated 3.2.2014.

5.2.1 The Ld. A.R. submitted that AO, by mistake added a sum of Rs.33,35,552/- being TDS made by OMR Investments to be the sale consideration at Rs.1,61,92,000/- paid to assessee for another business of land agreed to sold under agreement to sell dated 2.4.2014. Thus, he submitted that the AO has considered the land transferred in the assessment year 2014-15 at Rs.18,54,25,000/- as per amount reflected in form 26AS relating to assessment year 2014-15 and he drew our attention to pages Nos.134 & 135 of paper book-I.

5.3 Ld. D.R. relied on the order of the Ld. CIT(A).

5.4 We have heard the rival submissions and perused the materials available on record. The assessee in the grounds of appeal has raised that sales consideration should be at Rs.13,38,43,715/- instead of at Rs.18,87,60,552/-. However, the assessee made it clear in the written submission that the sale consideration to be considered at Rs.18,54,25,000/- as per amount reflected in form No.26AS relating to assessment year 2014-15. In our opinion, the argument of assessee's counsel is to be verified with reference to the form No.26AS filed before us. Accordingly, we direct the AO to consider sales consideration as reflected in form No.26AS relating to assessment year 2014-15 for the purpose of computation of capital gain on transfer of property at Pujanahalli, Devanahalli

village, Bengaluru district. This ground of the appeal of the assessee is allowed.

6. Ground Nos.5 & 6 are with regard to disallowance of Rs.18,15,000/- paid to Bengaluru Development Authority towards the development charges and Rs.11,54,250/- paid towards brokerage charges paid while computing the capital gain in the hands of the assessee. The AO disallowed this claim of the assessee on the reason that this has not been claimed in the original return of income filed by the assessee. The Ld. CIT(A) confirmed the disallowance.

6.1 We have heard the rival submissions and perused the materials available on record. There is no allegation by the AO or Ld. CIT(A) that the assessee has not incurred this expenditure. The only plea of the Ld. D.R. is that there was no claim by the assessee in the original return of income filed by the assessee. In our opinion, as held by Hon'ble Supreme Court in the case of Goetz (India) Ltd. Vs. CIT 284 ITR 323 (SC), wherein the assessee filed the return of income for the relevant assessment year without claiming a particular deduction, later on, it sought to claim the deduction by way of a letter addressed to the AO the deduction disallowed by the AO on the ground that there was no provision under the Act to make amendment in the return of income by making an application at the assessment stage without revising the return of income. However, the same is allowed by the Hon'ble Supreme Court. Being so, the Tribunal being the second appellate authority in this case and there is no restriction on the power of Tribunal to entertain such claim. Accordingly, we direct the AO to allow this claim as claimed by assessee. This ground of appeal of assessee is allowed.

7. Ground No.7 is with regard to non-granting of deduction u/s 54F of the Act in respect of investment of Rs.8,74,20,000/- in purchase of a residential building in Newton MA, USA. The assessee claimed the above deduction before the AO. The AO rejected the same on the reason that it was mentioned only as "a residential house" and not as "a residential house in India". The assessee was free to make the investment anywhere in the World. According to the AO, the benefit of section 54F of the Act should be given only in respect of investment in residential house in India. On appeal, Ld. CIT(A) observed that the assessee not claimed exemption for investment in house property located in USA in the return of income. Therefore, same was rejected by placing reliance on the judgement of Hon'ble Supreme Court in the case of Goetz (India) Ltd. Cited (supra). Against this assessee is in appeal before us.

7.1 We have heard the rival submissions and perused the materials available on record. Similar issue came for consideration before this Tribunal in the case of Dr. Sunita Aggrawal in ITA No.840/Bang/2012. The Tribunal vide order dated 18.1.2013 held as under:-

> *"4.5.4 On a plain reading of the provisions of section 54F of the Act, we do not find anything therein to suggest that the new residential house acquired should be situated in India. The jurisdictional High Court in the case of Director of Income Tax (International Taxation) Vs. Jennifer [Aide in ITA No.169/2001 has held that introducing a word which is not there into a section amounts to legislating when Parliament has not used these words in the said section. In view of this decision, we are precluded from reading the words "In India" into section 54F of the Act, when Parliament in its legislative wisdom has deliberately not used the word 'in India' in section 54F of the Act. Therefore, in view of the discussion above, we follow the latter decisions of the Mumbai Benches of the ITAT in the cases of Mrs. Prema P Shah & Sanjiv P Shah (supra) and Or. 6irish M Shah (supra). The provisions of section 54 of the Act which was considered by the Mumbai Benches*

of the ITAT in the cases of Mrs. Prema P. Shah & Sanjiv P Shah (supra) and Dr. 6irish M Shah (supra) are in pari material with section 54F of the Act and therefore these two decisions of the Mumbai Benches of the Tribunal are equally applicable while considering the exemption under section 54F of the IT Act and hence would be applicable to the present case of the assessee. In this view of the matter, we-allow the assessee 's claim for exemption under section 54F of the Act since all conditions laid down in this section are satisfied for availing the said exemption.

5 In the result, the assessee's appeal is allowed"

7.2 Further, in the case of Vinay Mishra Vs. ACIT in (2012) 20 ITR (Trib) 129, ITAT Bangalore wherein held as under:

"18. On a plain reading of the provisions of section 54F of the Act, we do not find anything therein to suggest that the new residential house acquired should be situated in India. The jurisdictional High Court in the case of Director of Income-tax (International Taxation) v. Mrs. Jennifer Bhide [2012] 349 ITR 80 (Karn) in I. T. A. No. 169 of 2011 has held that introducing a word which is not there into a section amounts to legislating when Parliament has not used these words in the said section. In view of this decision, we are precluded from reading the words "in India" into section 54F of the Act, when Parliament in its legislative wisdom has deliberately not used the word "in India" in section 54F of the Act. Therefore, in view of the discussion above, we follow the latter decisions of the Mumbai Benches of the Income-tax Appellate Tribunal in the cases of Mrs. Prema P. Shah and Sanjiv P. Shah [2006] 282 ITR (AT) 211 (Mumbai) and Dr.Girish M Shah. The provisions of section 54 of the Act which was considered by the Mumbai Benches of the Income-tax Appellate Tribunal in the cases of Mrs. Prema P. Shah and Sanjiv P. Shah and Dr. Girish M. Shah are in pari material with section 54F of the Act and therefore these two decisions of the Mumbai Benches of the Tribunal are equally applicable while considering the exemption under section 54F of the Income-tax Act and hence would be applicable to the present case of the assessee. In this view of the matter, we allow the assessee's claim for exemption under section 54F of the Act since all conditions laid down in this section are satisfied for availing of the said exemption."

7.3 Further, in the case of Harvinder Singh Vs. ACIT in ITA No.728/Del/2017 dated 4.2.2019, wherein held as under:

9. *"We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that by selling the property situated in India, the assessee has purchased a residential property in Auckland, New Zealand. It is equally true that the amendment has been brought in section 54 vide Finance Act, 2014 w.e.f 01.04.2015. We are of the considered opinion that the Legislature, in its wisdom, has given effect to the amended provision from 01.04.2015 and, therefore, there is no ambiguity as the said provisions are effective from A.Y 2015-16.*

10. *Similar view was taken by the Authority for Advance Rulings, New Delhi in the case of Dipankar Mohan Ghosh [supra]. Moreover, we find that the decision heavily relied upon by the first appellate authority has been reversed by the Hon'ble High Court of Gujarat in 392 ITR 18. We find that the Hon'ble High Court has held "We are of the opinion that benefit of section 54F before its amendment can be extended to a residential house purchased outside India*

11. *Considering the facts of the case in totality, in light of the judicial decisions discussed hereinabove, we direct the Assessing Officer to allow the claim of deduction."*

7.4 Regarding non-claiming of deduction in the return of income filed by the assessee, in our opinion, judgement of Hon'ble Supreme Court in the case of Goetz (India) Ltd. Cited (supra) applied as the Tribunal is not precluded in entertaining the claim of the assessee before the appellate proceedings. Accordingly, we allow the claim of assessee u/s 54F of the Act in respect of investment made in property situated in Newton MA, USA. This ground of appeal of the assessee is allowed.

8. In ground No.8 and 9 the assessee alternatively wants that difference between the indexation cost as at 17.11.2011 and FMV of the land of 17.11.2011 will have to be treated as gains arising from the transfer of agricultural land relying on the decision of Hon'ble Gujarat High Court in the case of CIT Vs. B.B. Vyas (261 ITR 73) in respect of sale of property measuring 7 acres and 16.68 guntas of

converted land at Pujanahalli. In our opinion, this ground of the assessee is infructuous, in view of our findings in ground No.2. Accordingly, these grounds are dismissed.

9. Ground Nos.10 & 11 are with regard to the upholding assessment of the long-term capital gain arising out of the JDA dated 31.1.2014 for the assessment year 2014-15. Even though the possession of property bearing No.123, Infantry Road, Bengaluru said to be a joint development was delivered on 16.6.2014 (AY 2015-16).

10. Facts of the case are that in this case JDA has been entered on 31.1.2014 in respect of property No.123, Infantry Road, Bengaluru. However, gain on this transaction was not declared during the previous year relevant to assessment year 2014-15 in respect of this transaction. The assessee stated that the possession of said property was agreed to give on 16.6.2014, hence, the long-term capital gain to be taxed in the assessment year 2015-16. However, the lower authorities of the opinion that in view of the judgement of Hon'ble Karnataka High Court in the case of T.K. Dayalu ITA No.3209 of 2005 & C/W ITA No.3165 of 2005 Dated 20.6.2011, the capital gain to be taxed in this assessment year 2014-15 only. Against this assessee went in appeal before Ld. CIT(A) who has confirmed the order of AO. Against this assessee is in appeal before us.

10.1 The Ld. A.R. submitted that the assessee and his father Late Mr. Abdul Rahim Nizamuddin (who died on 13.7.2015), the joint owners of the Residential Property No.123, Infantry Road, Bengaluru 560 001 offered the said Residential House Property for Joint Venture with m/s Rajarajeshwari Buildcon Pvt. Ltd., to develop the same into a Residential Apartment Complex in terms

of the Registered Joint Development Agreement (JDA) dated 31.1.2014.

10.2 As per clause 2.1 of the JDA the owners had agreed to give the possession of the old property unto the Developer for Development on or before 31.3.2014. As per para 2.2 such possession shall not be construed as delivery of possession as contemplated u/s 53A of the Transfer of Property Act read with section 2(47)(v) of the Income Tax Act, 1961.

10.3 However, for certain obvious reasons the Appellant and his father delivered the vacant possession of the old Property on the 16.6.2014 as evidenced by the Declaration of Transfer of Possession dated 7.6.2014.

10.4 Since the Appellant, and his deceased father (died on 13.7.2015) had given the possession of the said property for development on 16.6.2014, the Appellant and his father reckoned the date of transfer as 16.6.2014 and offered and declared the Long-Term Capital arising out of the JDA for the A.Y.2015-16.

10.5 Disregarding all the aforesaid facts and the explanations offered by the Appellant the AO held that the date of transfer of old asset under the JDA is the date of JDA and assessed the Long-Term Capital Gains arising from the JDA for the A.Y.2014-15 disregarding the law related and the decisions of the Jurisdictional Hon'ble High Court of Karnataka.

10.6 The said decision of the AO was upheld by the Appellant Commissioner vide para (31) of his Appellate Order stating "Therefore, in this case transfer is to be taken on the date of JDA i.e., 31.01.2014. Hence, the taxability for the same arises in FY

2013-14 pertaining to AY 201415." for the reasons stated in para (26) viz., "For this, the appellant has submitted a transfer of possession document. Here it is to be noted that this document is an unregistered document whereas JDA is a registered document. Thus, in the eyes of law the validity of a registered document supersedes the validity of a registered document" and for those stated in para (27) to (30) of the Appellate Order.

10.7 The aforesaid decisions of the AO as well as that of the First Appellate Authority are opposed to facts and law.

1. In support of this the Appellant relies on the following:

(a) The provisions of Section 2(47)(v) which comes in to operation in the case of the Appellant on delivery physical possession on 16.6.2014 and hence the gains are assessable in the A.Y.2015-16 and not in A.Y.2014-15 as held by the AO and the First Appellate Authority;

(b) The Hon'ble Jurisdictional High Court of Karnataka in its decision in the case of CIT & Another v. Dr. T.K. DAYALU in ITA No.3209 of 2005 & C/W ITA No.3165 of 2005 held that "The Hon'ble if the contract, read as a whole, indicates passing of or transferring complete control over the property in favour of the developer, then the date of contract would be relevant to decide the year of chargeability."

(c) The Hon'ble Jurisdictional High Court of Karnataka in its decision in the case of CIT & Another v. N. VEMANNA REDDY in ITA No.591/2008 has held that "Therefore, on mere entering in to a joint development agreement there is no transfer. The "transfer" in the Income Tax Act takes places on the date the

possession of the property is delivered though not a registered document is executed conveying the title."

(d) Thus the possession of the old asset having been delivered only on 16.6.2014 the transfer as contemplated in section 2(47) takes place only on 16.6.2014 and thus the transfer occurred in the previous year relevant to the A.Y.2015-16 and not in A.Y.2014-15; and

(e) This apart the new provision contained in Section 45(5A) which has come in to effect from 1.4.2018 stipulates the date of transfer as the date on which the Certificate of Completion of the new asset is obtained.

10.8 Therefore the Appellant urges that the date of transfer as contemplated u/s 2(47)(v) be taken as 16.6.2014 and the resultant capital gains under the JDA be brought to charge in the A.Y.2015-16 as declared and returned by the Appellant and accordingly the impugned order be set aside.

10.9 On the other hand, Ld. D.R. relied on the order of lower authorities.

11. We have heard the rival submissions and perused the materials available on record. The issue before us relate to the year of assessability of capital gain arising on the transfer of property vide JDA dated 31.1.2014 i.e. whether it is assessable in the year in which the development agreement entered into or in the relevant subsequent year in which the area duly developed and constructed giving the share of the assessee and land ownership has been handed

over to the assessee. In this case, JDA has been entered on 31.1.2014 in respect of property No.123, Infantry Road, Bengaluru. However, gain on this transaction was not declared during the previous year relevant to assessment year in respect this transaction. According to the assessee, the possession of property was agreed to give to the developer on 16.6.2014, hence, the long term capital gain to be taxed in the assessment year 2015-16. However, the contention of Ld. D.R. is that in view of judgement in the case of T.K. Dayalu cited (supra), the capital gain to be taxed in this assessment year 2014-15 only. We have carefully gone through the JDA dated 31.1.2014. Clause Nos.2.1 & 2.2 of the JDA reads as follows:-

> "*2.1 the members of First Party hereby agree and bind themselves to permit the Second party within two (2) months from this day to enter upon the Schedule Property to commence and complete development of the Schedule Property by constructing 'Residential Apartments' as aforesaid on sanction of license and plans, subject to terms of this Agreement. That on such entry into the Schedule Property, the First Party shall be entitled to demolish the existing building and remove the same at its cost and commence construction of the proposed building by second party.*
>
> *2.2 It is hereby clarified that such permission to enter the Schedule Property shall however not be construed as delivery of possession under Section 53A of Transfer of Property Act read with Section 2(47)(v) of the Income Tax Act, 1961. "*

11.1 However, the property has been actually delivered to the developer on 7.6.2014 by separate confirming document dated 7.6.2014 which is as follows:-

GOVT. OF KARNATAKA 71009 ಕರ್ನಾಟಕ
ಭಾರತ 129679 JUN 06 2014
15:57
DEPT. OF STAMP & REGISTRATION INDIA Rs.0000100 PB6948
STAMP DUTY KARNATAKA

L2

Sub-Registrar
Nagar, Bangalore

TRANSFER OF POSSESSION

The Joint Development Agreement entered into between **Mr. A.R. NIZAMUDDIN** and **Mr. RAHIL M NIZAMUDDIN** the "First Party land owners" and **M/S. RAJARAJESHWARI BUILDCON PVT. LTD.,** represented by its Director **Mr. RAMANLAL M SHA** the "Second Party Developer", for the construction and development of Residential Apartments on the Schedule Property.

Pursuant to the above said registered Joint Development Agreement dated 31-01-2014, document no. SHV-1-03081-2013-14, stored in C.D. No. SHVD172, in the office of Sub-Registrar, Shivajinagar, Bangalore, which had set out the basic norms of this project between the parties and further the land owners, executed a General Power of Attorney dated 31-01-2014, which is registered as document No. SHV-4-00359-2013-14, stored in C.D. No.SHVD172, in the office of Sub-Registrar, Shivajinagar, Bangalore, to facilitate the developer to obtain licenses and permissions, to represent before the Government authorities and also to sell the share of the developers in the residential apartment as per the terms of the Joint Development Agreement.

Both the documents confer that; the developer should take possession of the scheduled property for the commencement of construction work as per the scheduled project. It is therefore the Land owners hereby transfers or declares to handover possession to the Developer M/S. Rajarajeswari Buildcon Pvt.Ltd., and in turn the Developer will take Physical Possession of the **"Schedule Property"** bearing no.123, Infantry Road, Vasanthanagar, Bangalore, as on 16th June 2014 the possession of the schedule property vests with the developer till the completion of the project and the Developer will take steps to ensure the smooth functioning of construction work and have rights to sue or be sued to protect the property from any kind of trespass/ unlawful interference by strangers in any manner.

The parties herein have affixed their respective seal and signatures to this certificate at Bangalore on the 7th day, June 2014, in the presence of the witnesses:

WITNESSES:-

1) G Prasad
(G. PRASAD RAO)
67, Sriranga complex
Nr. Kallappa Circle
Banavanguli, Bangalore-560004.

(A.R. NIZAMUDDIN)

TRUE COPY
K.V. NINGOJI RAO
Chartered Accountant

11.2 On the above basis, assessee has actually offered the capital gain arouse out of the impugned JDA which is placed at paper book page Nos.373 & 374 in A.Y. 2015-16 by filing return of income for the assessment year 2015-16 which is placed at page Nos.375 to 382. As seen from the above facts, the legal possession of the impugned property was continued with the assessee in the AY 2014-15. The assessee has not received constructed portion of his share of building and the construction also not started in the assessment year under consideration. There is no evidence to suggest that the developer has started any activity relating to the construction in the impugned property. The developer also not taken any steps to secure the building plan in the assessment year under consideration. The A.O. has also not brought anything on record to show that there is a development activity in the impugned property during the assessment year 2014-15 and any cost of construction was incurred by the developer. It has to be inferred that no investment by the developer in the construction activity during the assessment year 2014-15. Hence, we are of the opinion that transferee was not willing to perform its part of obligation as stipulated in the JDA in the assessment year 2014-15 out of the meaning as expressed in section 53A of the TP Act. As such, the contractual obligation of the developer was not made within the assessment year 2014-15. Being so, the condition laid down in section 2(47)(v) of the Act cannot be invoked so as to bring the capital gain into tax in the assessment year 2014-15. Thus, the very foundation of the case of the revenue devoid of merits and more so, there is specific clause in the JDA as enumerated earlier that the assessee has not fully parted with the possession of the impugned property in assessment year 2014-15. Even assessee given the permission to the developer to enter into the property, so as to facilitate the construction activity it cannot lead to conclusion that there is a transfer in the AY 2014-15. It cannot be

said that the assessee has parted with the legal possession of the property. When assessee has actually given the possession of property by separate document on 7.6.2014, it cannot be presumed by AO that assessee has given the possession of property on 31.1.2014. Further, we also place reliance on the judgement of Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini in 398 ITR 531, wherein it was held as follows:-

- *"The JDA was between the housing society, who was referred to as the owner, and two developers. Strewn throughout the agreement is the fact that the owner, being absolutely seized and possessed of the property, was desirous of assigning its development rights for developing the same. [Para 13]*
- *A reading of the JDA shows that, it is essentially an agreement to facilitate development of 21.2 acres so that the developers build at their own cost, after obtaining necessary approvals, flats of a given size, some of which were then t9.be handed over to the members of the society. Payments were also to be made by the developer to each member in addition to giving each member a certain number of flats depending upon the size of the member's plot that was handed over. What is important to bear in mind is that payments under the third instalment were only to be made after the grant of approvals and not otherwise, and that it is an admitted position that this was never done because no approvals could be obtained as the High Court ultimately interdicted the project. Also, the termination clause is of great significance because it shows that in the event of the JDA being terminated, whatever parcels of land have already been conveyed, will stand conveyed, but that no other conveyances of the remaining land would take place. [Para 16]*
- *It is also well-settled that the protection provided under section 53A is only a shield, and can only be resorted to as a right of defence. An agreement of sale which fulfilled the ingredients of section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in section 53A of the Transfer of Property Act and sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words 'the contract, though required to be registered, has not been registered, or' in section 53A of the 1882 Act have been omitted. Simultaneously, sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as*

evidence of any collateral transaction not required to be effected by a registered instrument. [Para 19]

- *The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of section 53A. In short, there is no agreement in the eyes of law which can be enforced under section 53A of the Transfer of Property Act. This being the case, that the High Court was right in stating that in order to qualify as a 'transfer' of a capital asset under section 2(47)(v), there must be a 'contract' which can be enforced in law under section 53A of the Transfer of Property Act. A reading of section 17(1A) and section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in section 53A.*

- *The ITAT was not correct in referring to the expression 'of the nature referred to in section 53A' in section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 with effect from 1-4-1988. All that is meant by this expression is to refer to the ingredients of applicability of section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi [2002] 3 SCC 676, that the section applies, and this is what is meant by the expression 'of the nature referred to in section 53A'.*

- *This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression 'of the nature referred to in section 53A' would somehow refer only to the nature of contract mentioned in section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no 'transfer' can be said to have taken place under the aforesaid document.*

- *Since sub-clause (v) of section 2(47) is not attracted on the facts of this case, there is no need to go into any other factual question. [Para 20]*

- *However, the High Court has held that section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. One cannot agree with the High Court on this score. Under section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression 'or in any other manner whatsoever' in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. It is, therefore, necessary to see whether the impugned transaction can fall within this provision. [Para 21]*

- *The object of sectio.2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression 'enabling the enjoyment of takes colour from the earlier expression 'transferring', so that it s clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact. [Para 22]*

- *A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, and that too for a specific purpose - the purpose being to develop the property, as envisaged by all the parties. Therefore, of this clause will also not rope in the present transaction. [Para 23]*

- *The matter can also be viewed from a slightly different angle. The assessee is right in referring to sections 45 and 48 and has then argued that some real income must 'arise' on the assumption that there is transfer of a capital asset. This income must have been received or have 'accrued' under section 48 as a result of the transfer of the capital asset. [Para 24]*

- *In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, where for want of statutory permissions, the entire transaction of development of land envisaged in the JDA fell through. At all that, there will be no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under section 45 read with section 48. [Para 27]*

- *In the present case, the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assessee by the developers and therefore, the assessee have not acquired any right to receive income under the JDA. This being so, no profits or gains 'arose' from the transfer of a capital asset so as to attract sections 45 and 48. [Para 28]*

- *Therefore, the High Court was correct in its conclusion, but for the reasons stated hereinabove. The appeals is dismissed. [Para 29]"*

11.3 In the present case, there is no transfer of land per say vide JDA dated 31.1.2014 and developer only got right to construct and the ownership of property as such does not get transferred to him to the developer on execution of JDA. The assessee has to receive Rs.7.5 crores as refundable deposit, out of this assessee has received

in this assessment year an amount of Rs.3.75 crores and balance Rs.3.25 crores to be received by assessee within 4 months from the date of execution of JDA dated 31.1.2014 and another balance Rs.50 lakhs shall be to the first party at the time of handing over the super-built up area of 10,337 sq.ft. to the owners. Being so, the capital gains as a result of this JDA can arise only at point of receipt of consideration by the assessee and not on the date of JDA. More so, in the absence of any act in furtherance of contract by the developer, it cannot be held that transfer did took place u/s 2(47)(v) of the Act in the assessment year under consideration. Being so, we are of the opinion that capital gain arising out of the impugned JDA dated 31.1.2014 to be taxed in the assessment year 2015-16 only and not in assessment year 2014-15. More so, it is already subject to tax in the assessment year 2015-16 and cannot be brought to tax in the assessment year 2014-15, which amounts to double taxation. Accordingly, this ground of appeal of assessee is allowed.

12. Ground Nos.12, 13 & 15 are not required for adjudication at this stage as we have held in the earlier paras as the gain arising out of JDA dated 31.1.2014 not to be taxed in the assessment year 2014-15. Hence, these 3 grounds are dismissed as infructuous.

13. Ground Nos.14 & 16 are with regard to granting of deduction u/s 54 of the Act and quantification of the same. The contention of Ld. A.R. is that th assessee had claimed deduction u/s 54 of the Act at Rs.1,03,37,500/- for assessment year 2015-16 in respect of assessee's share of residential apartment under JDA dated 31.1.2014. Since this ground is not related to assessment year 2014-15, we are declined to entertain these grounds in the assessment year 2014-15. However, the assessee is at liberty to take appropriate

remedy in the right assessment year, if so advised. These grounds are disposed of accordingly.

14. Ground No.17 is remitted to AO to give correct tax credit after verifying the records. Directed accordingly.

15. Ground Nos.18, 19 & 20 are consequential in nature and to be computed accordingly.

16. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 18th Jul, 2022

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 18th Jul, 2022.
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.