

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER  
AND  
SHRI. LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

<b>ITA No. 383/Bang/2019</b>
<b>Assessment Year : 2015-16</b>

Smt. Vani Shree, No. 49, 3 <sup>rd</sup> Cross, Marappa Thota, J.C. Nagar, Bangalore – 560 006. PAN: GAYPS9756K	<b>Vs.</b>	The Income-tax Officer, Ward 6 (2)(4), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri S.V. Ravi shankar, Advocate
Revenue by	:	Shri Ramesh B.R., Addl. CIT (DR)

Date of Hearing	:	09-06-2022
Date of Pronouncement	:	28-07-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by the assessee against order dated 05.12.2018 passed by the Ld.CIT(A)-6, Bangalore for A.Y. 2015-16 on following grounds of appeal:

*“1. The order of the learned Commissioner of Income-tax (Appeals), Bengaluru, passed under section 250 of the Act in so far as it is against the Appellant is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.*

*2. The appellant denies herself to be liable to be assessed to total income of Rs.2,16,39,499/- on the facts and circumstances of the case.*

3. *The learned Commissioner of Income Tax (Appeals) is not justified in law in confirming the disallowance of exemption a sum of Rs. 1,99,07,549/- claimed by the appellant u/s 54F of the Act on the facts and circumstances of the case.*

4. *The learned Commissioner of Income-tax (Appeals) is not justified in law in confirming the addition of Rs. 1,99,07,549/- long term capital gains on the facts and circumstances of the case.*

5. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that the appellant is eligible for exemption under section 54F of the Act for the entire capital gains that arise on the JDA on the facts and circumstances of the case.*

6. *The learned Commissioner of Income-tax (Appeals) erred in law in holding that the capital gain is chargeable in the assessment year 2015-16 as against assessment year 2012-13 on the facts and circumstances of the case.*

7. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that the capital gain is liable to be taxed for AY 2012-13 on the facts and circumstances of the case.*

8. *The learned Commissioner of Income-tax (Appeals) failed to appreciate that the transfer of the property takes place upon execution of JDA and handing over of the property and hence the capital gains is to be charged in assessment year 2012 - 13 on the facts and circumstances of the case.*

9. *The learned Commissioner of Income-tax (Appeals) is not justified in law in not admitting additional evidence under Rule 46A of Income Tax Rules, 1962 on the facts and circumstances of the case.*

10. *The learned Commissioner of Income-tax (Appeals) failed to appreciate that the appellant was prevented by sufficient cause in not furnishing the additional evidences before the Assessing Officer on the facts and circumstances of the case.*

11. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that consent cannot confer jurisdiction on the facts and circumstances of the case.*

12. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that the appellant is entitled to point out the mistake in the assessment proceedings and claim that the long term capital gains is required to be charged to tax in AY 2012-13 as against declared by the appellant in AY 2015-16 on the facts and circumstances of the case.*

13. *The appellant denies itself liable to be charged interest under section 234A and 234B of the Act on the facts and circumstances of the case.*

14. *Without prejudice, the learned Commissioner of Income Tax (Appeals) failed to appreciate that the capital gain is required to be charged to tax for AY 2012-13 and correspondingly, the appellant is entitled to exemption u/s 54F of the Act for 2012-13 on the facts and circumstances of the case.*

15. *The Appellant craves leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.*

16. *For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed and justice rendered.”*

## **2. Brief facts of the case are as under:**

2.1 The assessee filed her return of income for A.Y. 2015-16 on 10/01/2017 declaring an income of Rs.17,31,950/-. The case was selected for scrutiny for verifying the large exemption claimed u/s 54F. Notices u/s 143(2) and 142(1) of the Act dated 20/09/2017 were served on the assessee. Reminder letter dated 3/10/2017 was sent to the assessee as there was no response to the above notices. On 02/11/2017, the assessee's AR furnished details of the property transferred, date of plan sanction, etc. The assessee along with Sri M.Krishnappa, Sri Yogendra Babu and Sri Hemanth Kumar jointly owned land measuring 2 acres 19 gunta bearing Sy. No.12, Siddapura Village, Varthur hobli, Bangalore .South Taluk.

The assessee's share was one-fourth of the property or 26,953 sft. of undivided share in the land.

2.2 The assessee and the other owners of the property entered into a Joint Development Agreement on 05/02/2011 with M/s Vishnupriya group of builders and developers for development of the land for construction of a residential apartment complex. As per the terms of the agreement, the assessee was entitled to receive 45% share of the super built-up area in consideration for transferring 55% of undivided share in the land equal to 14824 sft. (55% of 26,953 sft.). This translated into an unspecified' number of residential apartments together with 9,000 sft. of commercial space in proposed residential complex.

2.3 Before the Ld.AO, the assessee submitted that the developer obtained sanction plan for construction of the apartment complex on 18/07/2014 and accordingly, construction had commenced after that date. The assessee took the stand that since 18/07/2014 was the date on which the developer took possession of the property, the transfer of the asset as defined under the provisions of section 2(47)(v) of the Act r.w.s. 53A of the Transfer of Property Act took place on that date and hence the capital gains arising from the JDA was to be assessed in A.Y. 201516. The AO accepted this submission of the assessee as declared in the return of income.

2.4 In the return, the assessee had shown full value of consideration received as Rs.2,17,91,298/- from which she deducted the indexed cost of acquisition of Rs.1,51,798/- to arrive at the long term capital gains of Rs.2,16,39,500/-. From this amount, the assessee deducted an amount of Rs.1,99,07,549/-

claimed as exemption u/s 54F and offered an amount of Rs.17,31,951/- as taxable capital gains. The value of the consideration was taken by multiplying the assessee's share of the land transferred i.e. 14.824 sft. by Rs.1,470/- being the guidance value adopted for the purpose of payment of stamp duty.

2.5 The assessee claimed that she had invested the net consideration in a residential house referring to her share of the super built-up area that she was entitled to remove after completion of construction by the developer. The assessee contended that even if she received more than one residential apartment, it should be considered as one residential house and hence she was entitled to exemption u/s 54F.

2.6 However, the AO held that since the residential apartment complex was still under construction by the developer, the assessee had not taken possession of any residential apartment during the year and hence the reinvestment of the net consideration in the new asset do not take place during the year. Hence the assessee was not entitled to exemption u/s. 54F. The AO further held that since the assessee was due to receive more than one apartment as consideration as per the JDA, she was not entitled to exemption u/s 54F.

2.7 During the assessment proceedings the assessee contended that the long term capital gains of Rs.2,16,39,500/- is to be assessed in A.Y. 2012-13 as the JDA was entered into on 05/12/2011. The AO held that the assessee had changed her stand that the capital gains was assessable in A.Y. 2015-16 with the intention to escape the restrictive provisions of the amended section 54F since she was due to receive more than one residential

apartment from the developer. Accordingly, the AO rejected the assessee's contention seeking to withdraw/delete/remove the long term capital gains from the income declared in the return filed for A.Y. 2015-16. He then added back the exemption claimed u/s 54F amounting to Rs.1,99,07,549/- to the assessee's returned income.

2.8 Aggrieved by the order of Ld.AO, assessee preferred appeal before Ld.CIT(A).

2.9 Before the Ld.CIT(A), assessee primarily alleged that permission may be granted to assessee to withdraw the offer of capital gain in the year 2015 which was made by the assessee in its return of income and the capital gains may be taxed for A.Y. 2012-13. The assessee also alleged against denying the claim of exemption on the ground that assessee has not taken the possession of any residential apartment during the year under consideration.

3. The assessee had filed additional evidence wherein a subsequent building plan taken 01.03.2012 was placed before the first appellate authority. Assessee relying on the decision of *Hon'ble Karnataka High Court* in case of *CIT v. Dr T.K Dayalu ITA No 3165/2005 (Kar)* case argued that the building approval plan was dated 01.03.2012 and assessee had transferred the entire right title and interest in the land to the developer by the JDA entered into between the assessee and the developer dated 05.02.2011. The above submission was rejected by the Ld.CIT(A) by observing as under:

*“4.3.3 From the facts of the present case, it is apparent that the date of the sanctioned plan has been taken both by the AO and the appellant as the date of transfer of the capital asset. However, it is also pertinent to ascertain whether construction commenced immediately after the*

*sanctioned plan as that would establish that the possession had in fact been handed over to the developer and the transfer of the capital asset had taken place. Certain portions of the JDA are relevant in this regard. Para 5 a) of the JDA dated 05.12.2011 which details the manner of development is reproduced below:*

*"5. MANNER OF DEVELOPMENT AND DEVELOPMENT RIGHTS OF THE DEVELOPER: -*

*a) The Developer shall commence construction on the schedule property after the refundable security deposit more fully explained in clause 13 hereunder is paid in full to the Owner by the Developer and after obtaining the sanctioned plan from the competent authorities."*

*Further, para 9(a) reproduced below states that:*

*"9. COMPLETION OF CONSTRUCTION:*

*a) The Developer shall commence construction immediately after obtaining Conversion from the concerned authorities and plan approval for the competent authority as envisaged in Clause I and 2 above."*

*The developer was also required to commence construction within 9 months of the date of signing of the JDA as specified in para 13(d) reproduced below:*

*"13 d) The Developer shall commence construction only after obtaining the applicable sanction plan, drawings, designs, licenses, permission etc, from the competent authority for developing the schedule property in accordance with the development scheme envisaged under this agreement within 9 months from this day as envisaged in Clause 1 and 2 above."*

*Thus from the above portions of the JDA, it emerges that it is only after the developer had obtained the conversion and the sanctioned plan that it could commence construction. This implies that the fact of possession of the property by the developer and consequently the transfer of the asset would have to be established with reference to the date of commencement of construction. Neither during the assessment proceedings nor during appellate proceedings has the appellant submitted any proof that the construction had commenced during F.Y. 2011-12. In light of the same, the appellant's contention that the income from capital gains is taxable in A.Y. 2012-13 cannot be upheld. The grounds of appeal nos.2 and 4 are accordingly dismissed.*

*4.4 Ground of appeal no.3 relates to the denial of exemption u/s 54F to the appellant.*

*The AO had rejected the appellant's claim for exemption u/s 54F on the grounds that the construction was still in progress during F.Y. 2014-15 and hence the appellant had not got possession of the new asset. Neither during assessment proceedings nor during the appellate proceedings has the appellant adduced any evidence that construction of her share of the super built-up area was complete and that she had received possession of the flats pursuant to the JDA. Further, the AO held that as per the terms of the JDA, the appellant was to get an unspecified number of flats and also commercial space hence in view of the 'provisions of the- amended section 54F, the appellant could not claim the benefit of such exemption. W.e.f. 01/04/2015, section 54F stipulates that the capital gains is to be invested in one residential house. The relevant provision is reproduced below:*

*54F. Capital gain transfer of certain capital assets not to be charged in case of investment in residential house.*

*(1)(Subject to the provisions of sub-section (4) where, in the case of an assessee being an individual or a Hindu undivided family), the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or (two years) after the date on which the transfer took place purchase or has within a period of three years after that date ( constructed, one residential house in India) (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section,*

*From a reading of the above, it is clear that the appellant would not be entitled to claim exemption under the amended provisions since she was due to receive more than one apartment in lieu of transferring her share of the land as per the JDA. Accordingly, it is held that the AO was justified in denying the appellant's claim for exemption u/s 54F. This ground of appeal is therefore dismissed.”*

4. Aggrieved by the order of Ld.CIT(A), assessee is in appeal before this Tribunal.

5. Before us the Ld.AR submitted that assessee wrongly offered capital gains to tax for the year under consideration based on the sanction plan dated 18.07.2014 obtained by the developer whereas subsequently, by way of additional evidence assessee tried to

adduce a building plan approved on 01.03.2012 wherein the entire right title and interest in the land stood transferred to the developer by virtue of clause (i) (c) of the agreement dated 05.12.2011. He placed reliance on the following clauses that reads as under:

*“c) The Owner hereby irrevocably permits and authorizes the Developer to enter upon the Schedule Property and to develop the same with state of the art amenities in accordance with the approved sanction plan to be sanctioned by the competent authorities or any other appropriate and competent authority.”*

6. The Ld.AR relying on the decision of *Hon’ble Karnataka High Court* in case of *CIT v. Dr T.K Dayalu (supra)*, argued that the JDA was not mere permission to enter but was a transfer as per section 53A of the Transfer of Property Act r.w.s. 2(47) of IT Act.

7. In support of his arguments, he placed reliance on following decisions.

- *Decision of Hon’ble Hyderabad Tribunal in case of JCIT vs. M/s. Nancy Divakar Hospital & Research Centre Pvt. Ltd. in ITA Nos. 852 & 853/Hyd/2018 vide order dated 11.02.2022*
- *Decision of Hon’ble Karnataka High Court in case of CIT v. Khivraj Motors reported in [2015] 62 taxmann.com 305 (Karnataka)*
- *Decision of Hon’ble Karnataka High Court in case of Pr.CIT vs. Smt. Sarojini M. Kushe P.V.S Beedies (P.) Ltd. reported in [2022] 135 taxmann.com 365 (Karnataka)*

8. On the contrary, the Ld.DR submitted that clause (1)(e) does not grant the transfer of right title and interest in the scheduled land to the developer and it was only a permission and authority given by the owner for the purposes of development in accordance with the JDA. He referred to the following clause that reads as under:

(e)

9. The Ld.DR further referred to clause (9) wherein that reads as under:

*"9. COMPLETION OF CONSTRUCTION:*

*a) The Developer shall commence construction immediately after obtaining Conversion from the concerned authorities and plan approval from the competent authority as envisaged in Clause 1 and 2 above. The Developer hereby agrees to complete the construction in all respects of the entire multistoried residential apartment complex on the Schedule Property including the Owners' constructed Area within 30(Thirty) months from the date of obtaining the sanctioned plan as envisaged in Clause 1 and 2 above, however, thereafter the Developer will be entitled to an extension of 6 (six) months grace time ("extension period") to complete the construction.*

*b) If the Developer fails to complete the construction within the extension period, the developer will be entitled to one more extension of 6 (six) months time ("penalty extension period") to complete the construction provided he pays damages to a tune of Rs 12,000/- (Twelve thousand only) per month for every two bedroom flat the owner is entitled to as envisaged in Clause 8 obo e and Rs 15,000/- (Fifteen thousand only) per month, for every three bedroom flat the owner is entitled to as envisaged in Clause 8 above.*

*If the Developer fails to complete the construction within the time frame as envisaged in Clause 9(a) and 9(b) above, the Owner shall take over the project and shall complete the same at his cost either by himself or through his nominee and the Owner will be entitled to 100% (hundred percent) share of the built up area on the schedule property and this agreement will stand automatically cancelled from that day and it is also specifically agreed between the parties herein that all the rights accrued under this agreement will be extinguished and the Developer will be entitled only to the cost of construction incurred by him until the date the Owner takes over the project and the Developer will have no claim over the Refundable deposit as envisaged in Clause 13 of this agreement,*

*c) If the Developer after commencing the construction, for any reason directly or indirectly attributable to the Developer abandons the construction for a continuous period of 3(three) months, this agreement will stand automatically cancelled from that day and it is also specifically agreed between the parties herein that all the*

*rights accrued under this agreement will be extinguished and the Developer will be entitled only to the cost of construction incurred by him until the date the Owner takes over the project and the Developer will have no claim over the Refundable deposit as envisaged in Clause 13 of this agreement.*

*d) In the event the Owner takes over the project as envisaged in Clause 9(c) and 9(d) above, the cost of construction incurred by the Developer will be assessed by an approved valuer and the Owner shall pay the Developer the cost of construction within 6 months from the date of completion of the project by the Owner or his nominee.”*

10. Referring to the above clauses, the Ld.DR submitted that it is abundantly clearly that there was no transfer of land in respect of the developer's undivided share being 45% as per the JDA. The Ld.DR placed reliance on the decision of *Coordinate Bench* of this *Tribunal* in case of *N.A. Haris vs. ACIT* reported in (2021) 124 *taxmann.com* 354 in support of the above contention. He also relied on the written submission filed that is reproduced hereunder:

**Written submissions in the case of Smt. Vanishree ITA 383/B/19, for the A.Y 2015-16. Date of Hearing 09/06/2022.**

In continuation of oral submissions during the course of hearing conducted on 09/06/2022. the following few lines are placed for your kind consideration.

1. The assessee Smt. Vanishree had filed her return of income on 10/01/2017. for the A.Y 2015-16. wherein she had shown income from Capital Gains and had claimed deduction U/S 54/F of the IT Act.
2. During the course of scrutiny proceeding the assessee through her AR contended that the Capital Gains on transfer of her property under JDA was exigible for Capital Gains in the year 2015-16. She had also covenanted that allowing the developer to obtain sanction for construction of residential apartments and obtaining other necessary license / permissions will not amount to transfer of the assessee's property U/S 2(47) of the IT Act. However, when the assessing officer required to Show Cause why the claim of deduction U/S 54F of the IT Act. should not be disallowed, then the assessee changed the stand and started claiming that Capital Gains was exigible for the A.Y 2012-13 and not for A.Y 2015-16. This change of stand by the assessee was due to the fact that there was amendment to the Act U/S 54F wherein a Residential house was amended as one Residential house.
3. In order to not lose the benefit of claiming deduction U/S 54F on multiple units falling into her share the assessee then changed stand by a letter of her AR letter dated 26/12/2017. The Assessment was getting barred by limitation on 31/12/2017. This act of the assessee shows the intent of the assessee to evade tax and thus defraud the revenue by changing her stand only in order to get benefit by illegal means.

4. Thus the assessee has changed her stand frequently to suit her needs and to take advantage by any means. Before the bench also it was canvassed to give a direction to reopen the assessment U/S 148 for the A.Y 2012-13. In order to assess the income from the capital gain resulting from the JDA. This stand of the assessee amounts to shifting of the post to suit its need which is not a proposition accepted in taxation. Further it is also brought to your kind notice, the assessee has failed to demonstrate before both the assessing officer, and CIT (Appeal). the completion of the construction of the property and handing over the possession of the same, and also any reasonable cause which prevented the assessee from furnishing additional evidence before them. The assessee cannot decide in which year it has to be taxed. that need to be decided by the authorities as per the law.

In view of the foregoing facts of the case it is humbly requested that the appeal of the assessee may kindly be dismissed. and the prayer of the AR for direction to reopen the assessment U/S 148 for the A.Y 2012-13. may kindly be negated.

11. We have perused the submissions advanced by both sides.
12. The Ld.AR submitted that, the assessee has raised additional grounds of appeal wherein following issue has been alleged before the *Tribunal*:

*“1. The authorities below failed to appreciate that the appellant is entitled to exemption u/s 54F of the Act for AY 2012-13 on the facts and circumstances of the case.*

*2. The appellant denies itself liable to be charged interest under section 234A and 234B of the Act on the facts and circumstances of the case.*

*3. The appellant craves leave to add, alter, modify, delete or substitute any or all of the grounds at the time of hearing the appeal.*

*4. In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed and appropriate relief may be granted in the interest of justice and equity.”*

13. It has been submitted that no new facts needs to be considered in order to dispose of the additional ground raised by the assessee vide application dated 28/02/2019. It is submitted that the additional grounds is a legal issue that goes to the root cause of the proceedings. The Ld.AR, thus prayed for the admission of additional grounds so raised by assessee.

14. On the contrary, the Ld.CIT.DR though opposed admission of the additional grounds, could not bring anything on record which would challenge such a right available to assessee under the Act.

15. We have perused the submissions advanced by both sides in light of records placed before us.

16. The Ld.DR did not object for the additional grounds being admitted.

17. We note that one of the additional grounds is directly connected with the main issue of disallowance and no new facts needs to be investigated for adjudicating the same. Another issues alleged by the assessee is a legal issue that does not require investigation of any facts.

18. Considering the submissions and respectfully following the decisions of *Hon'ble Supreme Court* in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in (1998) 229 ITR 383 and *Jute Corporation of India Ltd. Vs. CIT* reported in 187 ITR 688, we are admitting the additional ground raised by the assessee.

**Accordingly, the additional grounds raised by assessee stands admitted.**

19. The assessee in lieu of JDA dated 05/02/2011 was entitled to receive super built-up area of residential flats representing his 45% share that amounted to residential apartments, along with 9000 sq.ft of commercial space in the proposed residential complex. The assessee offered capital gains arising out of the JDA in the year 2015-16. We note that in the return of income assessee offered Capital Gains was offered to tax in the year under consideration, as the developer took possession of the land after the construction plan was approved on 18/07/2014 and the construction commenced. The net consideration utilized for purchase of the new house was claimed to be exempt.

Subsequently, the assessee during the assessment proceedings, contended that, the capital gains is to be taxed in the year of JDA, as the transfer of land to the developer took place in the year 2012-13.

The Ld.AO took the year under consideration to be the year in which transfer took place, and denied exemption under section 54F, as claimed by the assessee. The Ld.AO thus rejected the stand of the assessee, that capital gain is taxable in the year 2012-13.

20. The dispute, that arises for consideration, before us relates to the year of assessability of capital gains, arising on the property, which was the subject matter of development agreement, i.e.,

- whether, is assessable in the year in which the development agreement entered into( as argued by the Ld.AR before this Tribunal), or,

- in the year under consideration when the construction started(as offered by the assessee in the original return of income).

21. As per clause 9, reproduced hereinabove, the time limit to complete the project was 30 months, with an extension of 6 months. Meaning thereby, the developer was to complete the construction within a period of 2 ½ years, with an extension of 6 months, totaling to 3 years. Further as per JDA, the period of construction starts from the time the developer obtains conversion of the land and approval of the plan from the competent authorities.

22. In the assessment year 2012-13, nothing moved towards the construction of the schedule property. We note that the assessee had obtained a plan approved on 01/03/2012, that was placed as additional evidence in support of his argument to shift the burden of capital gains being taxed to assessment year 2012-13. However the construction started in the year 2015-16 based on the plan that was approved on 18/7/2014 and the construction commenced after this date. Thus, in the financial year, relevant to assessment year 2012-13, the developer had not performed its obligation under the JDA. Therefore, the argument of the Ld.AR that the capital gains are to be taxed in the assessment year 2012-13 cannot be accepted. The developer had not adhered to complete any act as mentioned in JDA. The developer only made payment of refundable deposit of Rs.2,17,91,298/- as on the date of execution of the JDA Other necessary permission so as to commence the construction did not commence, and there was no progress in the development of property in the assessment year 2012-2013.

23. The Ld.AR placed reliance on the decision of *Hon'ble Hyderabad Tribunal* in case of *JCIT vs.M/s.Nancy Divakar & Research Center Pvt.Ltd* in ITA nos.852&853/Hyd/2018 by order dated 11/02/2022, wherein, *Hon'ble Tribunal* observed that, part performance of the JDA took place in the year of JDA by transferring the land to the developer. On such facts, *Hon'ble Tribunal* reached to the conclusion that the year in which Capital arose was the year of JDA. However, in the present facts as observed hereinabove, nothing was performed by the developer in the Year of JDA. The essence of the JDA is specifically listed in clause 9 of the JDA and all necessary permission started after the end of the financial year relevant to assessment year 2012-13. Further in the JDA the parties have very clearly recorded in clause 1(e) as under:

*“e) It is clarified that the permission and authority given by the Owner to the Developer to enter upon the Schedule Property as contemplated in clause 1(c) and 1(d) above and elsewhere in this agreement is not intended to and shall not amount to delivery of possession in part performance of contract, under the provisions of the Transfer of Property Act 1882 or Section 2(47) of the Income Tax Act.”*

24. We refer to certain clauses in the JDA between the assessee and the developer, that are as under:

Clause III (I) (a) to (f) of the JDA

**III. NOW THIS JOINT DEVELOPMENT AGREEMENT WITNESSETH AS FOLLOWS:**

*That in, pursuance of the foregoing and subject to mutual obligations undertaken by the First Party/Owner and the Second Party Firm/Developer under this Joint Development Agreement, the First Party/Owner and Second Party/Developer hereby mutually agree to develop the Schedule Property jointly upon the following terms and conditions:*

**1. PERMISSION/LICENCE FOR DEVELOPMENT:**

- a) *The Owner hereby authorizes the Developer to obtain conversion certificate for the Schedule Property at the cost of the Developer within 9 months from this day and the Owner undertakes, assures*

---

and confirms to extend full co-operation to the Developer to obtain conversion certificate for the Schedule Property.

- b) The Second Party Firm/Developer shall at its own cost obtain the applicable sanction plan, drawings, designs, licenses, permission etc., from the competent authority for developing the Schedule Property in accordance with the development scheme envisaged under this agreement within 9 months from this day.
- c) The Owner hereby irrevocably permits and authorizes the Developer to enter upon the Schedule Property and to develop the same with state of the art amenities in accordance with the approved sanction plan to be sanctioned by the competent authorities or any other appropriate and competent authority.
- d) The Owner has this day irrevocably permitted and authorized the Developer to enter upon the Schedule Property free from all hindrance, encumbrance or obstructions to enable the Developer to enter upon and remain on the Schedule Property to carry out the development as provided under this Agreement. The Developer and its staff, associates, contractors, agents etc., shall have unlimited access to the Schedule Property i.e., 24 hours a day, 7 days a week and 365 days a year.
- e) It is clarified that the permission and authority given by the Owner to the Developer to enter upon the Schedule Property as contemplated in clause 1(c) and 1(d) above and elsewhere in this agreement is not intended to and shall not amount to delivery of possession in part performance of contract, under the provisions of

*the Transfer of Property Act 1882 or Section 2(47) of the Income Tax Act.*

*f) The parties hereby declare that this agreement is not and does not tantamount to an agreement of sale of the Schedule Property and the subject matter of this agreement is the joint development of the Schedule Property by and on behalf of the Owner only.*

Further in Clause 10(a) it has been agreed between the parties as under:

*“The Owner shall convey / transfer Developer’s 55% (Fifty Five Percent) share in the land comprised in the Schedule property to the Developer or persons nominated by the promoter in terms of this Agreement only after the 8<sup>th</sup> (eighth) floor slab of the development scheme envisaged by the Developer is completed.”*

25. From the above, it is also obvious that the assessee only permitted the developer to develop the project in their land. Therefore, it cannot be construed that the possession of the immovable property of the assessee vested with the joint developer as per the provisions of the Act. Thus we reject the argument of the Ld.AR that, the land was transferred to the developer in the assessment year 2012-13 and capital gain arose in the hands of the assessee in the year 2012-13. The ratio of *Hon’ble Karnataka High Court* in case of *CIT v. Dr T.K Dayalu (supra)* relied on by the Ld.AR cannot be appreciated.

Even the decision of *Hon’ble Hyderabad Tribunal* in case of *JCIT vs. M/s.Nancy Divakar & Research Center Pvt.Ltd(supra)* cannot come to the rescue of the assessee.

26. Now coming to the plea of the Ld.AR that the plan was first sanctioned on 01/03/2012, a copy of which has been filed by the Ld.AR as additional evidence. It is the submission of the Ld.AR that,

the plan was first sanctioned on 01/03/2012 being financial year relevant to assessment year 2012-13, and therefore, the capital gain arose in the hands of the assessee in assessment year 2012-13. To analyse this argument, we carefully looked into the plan filed by the assessee. We note following irregularity:

- In the right column where Area Statement by BBMP is mentioned, the possible FAR computed, is as per Zoning regulation 2015.

27. It is surprising to note that BBMP could forecast the future Zoning Regulations that would be applicable in the year 2012 as on the date of approving plan filed before us as additional evidence. We therefore, do not agree with the submission that the alleged plan allegedly sanctioned on 01/03/2012 is to be considered to determine that part performance as per the JDA.

A careful perusal of the provisions of section 53A of the Transfer of property Act would show that, the transferee should have taken possession in part performance of the contract and has done some act in furtherance of the contract. In the instant case, development agreement clearly specifies that the possession of the property was not given, and what was given was only license to enter the property. In the instant case it is noted herein above that the assessee has given permissive possession and not 'legal possession', as contemplated within the meaning of section 53A of the Transfer of Property Act. Hence, it is held that, the provisions of section 53A of the Transfer of Property Act, are not applicable to the impugned Joint Development Agreement. Based on the above facts, the conditions laid down in section 2(47)(v) of the Act, cannot be invoked, so as to bring the capital gains into tax in the assessment year 2012-2013 as argued by the Ld.AR.

**We therefore dismiss Grounds 6-12 raised by the assessee.**

**28. Ground No.3-5 &14** are in respect of claiming exemption under section 54F.

We have held that the transaction of taking over the possession of the land by the developer cannot be regarded as transfer within the domain of provisions of section 45 r.w.s 2(47) of the Act. The legal position of taxing a transaction as income under the head capital gains is that there should be a capital asset, the capital assets has to be transferred within the meaning of section 2(47) of the Act and it has to be chargeable to tax as per section 45 of the Act. Insofar as the present facts are concerned, the assessee is eligible to receive 1/4<sup>th</sup> of the owner's share in the developed property as and when it is received. And the deduction u/s. 54F shall be applicable to the facts in accordance with the provisions of the act applicable at that relevant time.

Accordingly the claim u/s. 54F has been rightly denied by the Ld.AO for relevant year under consideration.

**Accordingly these grounds raised by the assessee stands dismissed.**

**In the result, the appeal filed by the assessee stands dismissed.**

Order pronounced in open court on 28<sup>th</sup> July, 2022.

Sd/-  
(LAXMI PRASAD SAHU)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 28<sup>th</sup> July, 2022.  
/MS /

**Copy to:**

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

By order

Assistant Registrar,  
ITAT, Bangalore