

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI. INTURI RAMA RAO, ACCOUNTANT MEMBER

AND

SHRI. LALIT KUMAR, JUDICIAL, JUDICIAL MEMBER

I.T.A No.235/Bang/2016  
(Assessment Year : 2006-07)

Smt. Y. S Mythily,  
No.8, 3<sup>rd</sup> Main, 5<sup>th</sup> Cross, BEML Layout,  
5<sup>th</sup> Stage, Rajarajeshwari Nagar,  
Bengaluru 560 098  
PAN : BCTPM8476L

.. Appellant

v.

Income-tax Officer,  
Ward – 2(1), Bengaluru

.. Respondent

Assessee by : Shri. H. Guruswamy, ITP  
Revenue by : Smt. Swapna Das, JCIT

Heard on : 01.05.2017  
Pronounced on : 09.06.2017

ORDER

PER LALIT KUMAR, JUDICIAL MEMBER:

This is an appeal filed by the assessee, against the order of the CIT

(A)-3, Bengaluru, dt.25.12.2015, for the assessment year 2006-07.

02. The assessee has raised the following grounds of appeal :

1. *The impugned Appellate order dated: 25-12-2015 passed by the Ld. CIT(A), Bangalore-3 is opposed to law, facts and circumstances of the case.*
2. *The Ld. CIT(A) has erred in upholding the consideration determined by the AO amounting to Rs. 1,08,13,930/- at the rate of 1238/- per sq.ft as per the cost of construction provided by the builder in their letter dated: 10-03-2014 as against the FMV of the 55% of the land as on the date of JDA.*
3. *The Ld. CIT(A) ought to have not held the Builders cost as basis for determination of the consideration of the 55% of the land transferred measuring 3153 sqft without appreciating the facts and circumstances of the case.*
4. *The Ld. CIT(A) ought to have held that the FMV as on the date of JDA based on the value of Sub-Registrar was the consideration in respect of the 55% of land transferred in favor of Developer and not the Developer's cost of construction.*
5. *The Ld. CIT(A) ought to have not held that the facts of the Appellant's case were different than the facts in the case of Ved Prakash Rakara mealy on the Ground that no price was mentioned in the JDA ignoring the ratio laid down by the Hon'ble Jurisdictional High Court, wherein it was categorically held that the Builders cost cannot be the basis for determination of consideration of the land transferred in the scheme of JDA*
6. *The Appellant craves leave to add, alter, amend and delete any of the grounds at the time of hearing.*

*For these and other grounds that may be urged at the time of hearing, the Appellant respectfully prays that your Hon'ble*

*Authority be pleased to pass orders deleting the Capital Gain amounting to Rs. 88,96,056/- on the basis of the consideration of Rs. 1,08,13,930/- determined by the AO on the basis of the builders cost at the rate of Rs. 1238/- per Sq.ft of Built-up area measuring 8735 sq.ft and further be pleased to pass such other orders granting such other relief that your Hon'ble Authority may deem fit in the interest of equity and justice.*

03. The Assessee had owned a Vacant site Bearing No. 22, 3rd Cross, Sultanpalya (B.B.M.P Ward No. 95) measuring 5733 sq.ft., The Assessee had entered into a JDA, dated 23-07-2005 with a Developer M/s. Sai Dwaraka Builders and Developers represented by its Managing Partner Sri. G. Prem Kumar Reddy for construction of residential Flats on the above Site.

04. The Assessee submits that as per the terms of JDA the Assessee had agreed to transfer 55% of the undivided portion of land measuring 3153 sq.ft out of the total extent of 5733 sq.ft and the remaining undivided portion of land measuring 2580 sq.ft was retained by the Assessee. The proposed built-up area was about 19836 sq.ft., out of which the Assessee was entitled to 45% of the Built-up area measuring 8735 sq.ft., in exchange of 3153 sq.ft of undivided portion of land and the Developer was entitled to 55% of built-up area measuring 11100 sq.ft.

05. The Ld. AO issued a notice u/s. 148 of the Act, in order to assess the income of the assessee. In the course of the Scrutiny Assessment proceedings, the AO proposed to adopt the cost of construction incurred by the Builder as consideration for the exchange of 55% of the undivided portion of land measuring 3153 sq.ft. The cost of construction as stated by the AO on the basis of the information provided by the Developer was of Rs. 1,238/- per sq.ft., and accordingly, the consideration was determined by the AO at Rs. 1,08,13,930/- in respect of 55% of the undivided portion of the land transferred in favour of the developer.

06. The Assessee submits that the Ld. AO has not followed the ratio laid down by the jurisdictional High Court of Karnataka in the case of Sri. Ved Prakash Rakhra (2015) 370 ITR 762 (Kar) that the cost of construction incurred by the Builder cannot be the consideration for exchange of land in the scheme of Joint Development in determining the consideration at Rs. 1,08,13,930/-.

07. The consideration of Rs. 1,08,13,930/- determined by the AO based on the Builder's cost was opposed to the law and facts of

the case in view of the decision of the Hon'ble High Court of Karnataka (Supra) and therefore, the Assessee having been aggrieved with the Assessment order has filed an Appeal before the Ld. CIT(A)-3, Bangalore.

08. The Ld. CIT(A) has passed an Appellate order dated: 25-12-2015 and dismissed the Appeal on the ground that the decision of the Honble High Court of Karnataka in the case of Ved Prakash Rakhra (2015) 370 ITR 762 (Kar) was not applicable since the facts of the Assessee's case are distinguishable from the facts in the case of Ved Prakash Rakhra (2015) 370 ITR 762 (KAR).

09. The Ld. CIT(A)-3 got misdirected by mis-reading the judgment of the Honble High Court of Karnataka in the case of Ved Prakash Rakhra (2015) 370 ITR 762 (KAR). The Ld. CIT(A) has mis-read the facts of the Assessee's case and erroneously held that the facts of the Assessee's case are different from the facts in the case of Ved Prakash Rakhra (2015) 370 ITR 762 (KAR), ignoring the ratio laid down by the Hon'ble High Court of Karnataka. The Ld. CIT(A) has held that the facts of the Assessee's case were different than the facts in the case of Ved

Prakash Rakhra wherein the consideration was specified in the JDA but in the case of Assessee no such consideration was mentioned in the JDA.

10. The Assessee begs to reproduce herewith, the relevant substantial question of law formulated by the Hon'ble High Court of Karnataka in the case of Ved Prakash Rakhra (2015) 370 ITR 762 (Kar) as under relating to the determination of the consideration attributable to the exchange of land in the Scheme of JDA:

*"(ii) Whether the Tribunal was right In holding that the estimated cost of construction of Rs. 66 lakhs shown in the joint development agreement for the development of the property situated at Aga Abbas All Road, Bangalore, should be taken into account and not 50 percent.(1.43 Crores) of Rs. 2.86 Crores actually spent by the builder in working out the Sale Consideration for the purpose of section 45 of the Act ?"*

11. The Assessee submits that a question of law formulated as stated above was answered by the Hon'ble High Court of Karnataka by laying down the ratio which is reproduced as hereunder:

*"Held, (i) that the exchange value as specified in the project development agreement could be taken as the basis for computation of the construction in the joint development. The cost incurred by the developer need not necessarily represent cost of construction. The detailed*

*particulars were not given. The transaction of the joint development is one of exchange. The consideration specified in the document represents the market value on the date of entering into the agreement. Therefore, the estimated cost of construction shown in the joint development agreement for development of the property should be taken into account in working out the sale consideration for purposes of section 45 and not the sum actually spent."*

12. The Assessee submits that the non-mentioning of the price of the land transferred could not have been held as ground to hold the differentiation in facts. The Assessee submits even though no specific price was mentioned in JDA, the FMV as on the date of JDA shall be the consideration for the exchange of 55% of land. The Ld. CIT(A) has not appreciated the facts that the consideration of Rs.66,00,000/- mentioned in the case of Ved Prakash Rakhra represented the FMV as on the date of JDA and similarly the Ld. CIT(A) ought to have held that in the absence of consideration in the JDA, the FMV as on the date of JDA should have be considered for quantifying the consideration of the land transferred.

13. The Assessee submits that the AO and the CIT(A) have relied upon the information provided by the Developer wherein the cost of Rs. 1238/- per sq.ft was reported by the Builder and the same was adopted by the AO and Confirmed by the CIT(A) for quantification of the

consideration which was determined at Rs. 1,08,13,930/- determined by the Ld. AO. The findings of the CIT(A) as regards adoption of Builders cost of Rs. 1238/- per sq.ft is completely opposed to the ratio laid down by the Hon'ble High Court of Karnataka.

14. On the other hand, the learned DR relied upon the order passed by the lower authorities and has also relied on the judgment of the Hon'ble jurisdictional High Court in the case of Ved Prakash Rakhra (supra). In the facts and circumstances of the case, the DR pleaded that the order passed by the authorities below is required to be upheld.

15. We have heard the rival contentions and perused the materials on record. Relevant clauses, viz., 2(f), (g), 4.1, 4.2, 5.1 to 5.6, 6.1, 8.1 to 8.3 and 12.1 to 12.3 of the JDA are reproduced hereunder for the purposes of record, as neither AO nor the CIT (A) had adjudicated as to the date of transfer i.e as to when the property would be transferred after built up to the assessee in term of JDA. In our opinion, prima facie the property would not be transferred to the assessee during the assessment year under consideration in terms of JDA, we are not adjudicating this issue on merit as this has not been urged before us .

**Clause 2(f) & (g) :**

- (f) WHEREAS the DEVELOPER shall develop the Schedule Property into a residential apartment complex and has offered to allocate to the share of the FIRST PARTY/OWNER being 45% of the super built up area in the said Development and the owner shall retain 45% undivided share in the land and in consideration thereof the OWNER permitting the DEVELOPER to sell the remaining 55% of the super built up area with 55% undivided share in the land in favour of the nominees of the SECOND PARTY/DEVELOPER.
- (g) WHEREAS the OWNER have accepted the above offer and the assurance of the DEVELOPER to complete and deliver 45% of the super built up area in the aforesaid project being allotted to the OWNER within the stipulated period.

**4. COST OF CONSTRUCTION**

4.1) The entire cost of construction, including Architects fee and charges/fee if any, to be paid for obtaining licence sanctioned plan, payments for the temporary connection of water and electricity during construction and development of the Schedule Property including the area falling to the share of the OWNERS shall be borne by the DEVELOPER. The OWNER shall not be required to contribute any amount towards the preparations of drawing, plan sanction, development and constructions of the Schedule Property including the OWNERS share of constructed area as set out in this Agreement.

4.2) The land tax in respect of the schedule property shall be paid by the OWNERS until the completion of the project and from the date of delivery of possession of the OWNERS 45% share in the residential complex, the OWNERS shall become liable to pay the property tax as may be determined by the authorities to the extent of the share allotted to the OWNERS. The DEVELOPER or its nominee/s shall be liable to pay the property tax on the completed residential units to the extent of 55% allotted to the share of the DEVELOPER.

**5. SHARING OF SUPER BUILT AREA:**

5.1) In consideration of OWNERS agreeing to transfer an undivided 55% (Fifty Five Percent) share in the land in favour of the DEVELOPER or its nominee/s, the DEVELOPER does hereby agree to construct and deliver to the OWNERS or their nominee/s or assignee/s free from encumbrances and all claims of 45% (Forty Five Percent) of the Super built-up area in the building with 45% of the Super built up area in the building with 45% share in the car parking slots to be provided in the complex as per the specifications agreed to by the PARTIES and which is more fully mentioned in the "ANNEXURE" annexed to this Agreement and which shall be part and parcel of this Joint Development Agreement. The remaining 55% super built up area in the complex shall be the share of the DEVELOPER along with 55% share in the car parking slot together with 55% undivided share in the land is hereby allotted to share of the DEVELOPER and the DEVELOPER shall have the right to sell the same to any prospective purchaser or nominee as may be appointed or nominated by the DEVELOPER without any reference or concurrence of the OWNERS.

5.2) In consideration of the DEVELOPER agreeing to deliver the OWNER'S CONSTRUCTED AREA as per Para 5.1 supra, the OWNERS hereby agree and binds and undertakes to transfer/convey/sell to the DEVELOPER or their nominee/s, or assignee/s an undivided 55% (Fifty Five Percent) of such proportionate undivided share in the Schedule Property as in proportionate undivided share in the Schedule Property as in proportionate to the DEVELOPER CONSTRUCTED AREA either in one lot or in several shares or in the form of undivided shares or otherwise at the sole discretion of the DEVELOPER. The OWNERS have executed a registered Power of Attorney in favour of the DEVELOPER who shall exercise such powers as enumerated therein in respect of 55% undivided share of the DEVELOPER in the land. However, the OWNERS

covenant to execute supplemental power of Attorney as and when requested by the DEVELOPER

5.3) The OWNER'S CONSTRUCTED AREA shall be the absolute Property of the OWNER and she shall be entitled to hold, sell, mortgage, gift, lease and alienate or otherwise dispose of the same or any part thereof, along with her proportionate undivided share 45% (Forty Five Percent) in the land proportionate to the super built area retained by the OWNER and she shall be entitled to all income, gains, capital appreciation and benefit of all kinds of description accruing, arising or flowing there from.

5.4) The DEVELOPER'S CONSTRUCTED AREA shall be the absolute property of the DEVELOPER and they shall be entitled to hold, sell, mortgage, gift, lease and alienate or otherwise dispose of the same or any part thereof along with proportionate undivided share or such undivided share as will be proportionate to the super built area retained by the DEVELOPER in the land in Schedule Property and they shall be entitled to all income, gains, capital appreciation and benefits of all kinds and description accruing, arising or flowing there from.

5.5) That after allotment of OWNERS CONSTRUCTED AREA as aforesaid in Para 5.1 on sanction of license and plans, the DEVELOPER shall be entitled to sell or otherwise dispose of the DEVELOPER'S CONSTRUCTED AREA etc., Viz. the remaining Super Built area in the buildings and car parking areas, areas and the benefits and advantages available with proportionate undivided share in the land in the Schedule Property.

5.6) That after the sanction of plans, the OWNERS and DEVELOPER shall mutually decide upon the apportionment of their respective built up areas falling to their shares by mutual discussions and reduce the same into writing in the form of Supplemental Sharing Agreement. Both the Parties shall share both the advantages/disadvantages in proportion to their respective shares on equitable basis and in such manner that the value of the areas is of more or less equal value and importance, both the parties shall co-operate with each other in executing the Supplemental sharing agreement without any delay.

#### 6. DELIVERY:

6.1) The Promoter shall commence construction immediately and the Owner shall hand over the vacant possession of the Schedule Property for the purpose of construction. The Promoter hereby agrees to complete the construction in all respects the Apartment Building and the Owner's constructed Area within 15 (Fifteen) months time from the date of commencement of construction after obtaining the plan approved by the competent authority, with an extended period of 3 months. However, the Promoter shall not incur any liability for any delay in delivery of possession of the Owner's Constructed Area, by reason of non-availability of Cement and/or Steel and/or by Government Restrictions and/or by reason of Civil Commotion, any act of God or due to any Injunction or Prohibitory order (not attributable to any action of the Promoter) or conditions of force majeure. In any of the aforesaid events, which are beyond the control of the Promoter, the promoter shall be entitled to corresponding extension of time, for delivery of the said Owner's constructed area. The Owner shall be compensated at the rate of Rs.50,000/- P.M. for delay in delivery of Owners share of built up area over & above the stipulated time allowed for Construction (18 months) by the Promoters.

### 8) TRANSFER OF PROMOTER SHARE:

8.1) The Owner shall convey/transfer Promoter's 55% (Fifty Five percent) share in the land comprised in the Schedule property to the promoter or persons nominated by the promoter in terms of this agreement;

8.2) After the commencement of construction, the Promoter will be entitled to enter into Agreements for sale of undivided shares in the Schedule Property to an extent of 55% (Fifty Five percent) with persons intending to own units and enter into Construction Agreement with such intending Unit Holders entirely at the risk as to cost and consequences of the Promoter;

8.3) The stamp duty, registration charges and expenses in connection with the preparation and execution of the Deed/s of conveyance and/or other documents relating to the 55% (Fifty Five percent) share in the land rights in the Schedule Property agreed to be conveyed to the Promoter or Promoter's nominee/s shall be borne by the Promoter or their nominee/s;

### 12. OBLIGATIONS OF THE FIRST PARTY:

12.1) The Owner shall on the execution of this Agreement and payment mentioned in Clauses above grant a specific Power of Attorney in favour of the Promoter or its nominees, empowering to proceed with obtaining of Licences Plans, consents and in regard to the Building/s to be constructed on the Schedule Property and authorizing the Promoter to represent before all and any of the Statutory Authorities and General Power of Attorney to sell Promoter's share;

12.2) The Power of Attorneys mentioned in clauses above shall be duly registered before the jurisdictional Sub-Registrar. The Owner agrees not to revoke the said Power of Attorneys till the sale of the Promoter's 55% (Fifty Five ) share in the Schedule Property;

12.3) The Owner shall sign and execute necessary application, papers, documents and do all acts, deeds and things as the Promoter may lawfully require to obtain any licences, Plan, and consents as well as to and in order to legally and effectively vest in the Promoter's nominee/s title to the undivided 55% share in the Schedule Property.

19. For the purposes of determining the cost of construction, in identical facts and circumstances of the case, the Hon'ble jurisdictional High Court in the case of Ved Prakash Rakhra (supra), has held that the date of entering into JDA would be "the date" for the purposes of arriving at the cost of transfer i.e. cost of structure as on the date of agreement would be the cost of transfer instead of cost of actual construction in term of JDA. We are bound to follow the law laid down by the Hon'ble jurisdictional High Court (supra).

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

Order pronounced in the open court on the 9th day of June, 2017.

Sd/-

Sd/-

(INTURI RAMA RAO)  
ACCOUNTANT MEMBER  
MCN\*

(LALIT KUMAR)  
JUDICIAL MEMBER

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order  
Assistant Registrar