

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

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

ITA No.745/Bang/2017
Assessment year : 2007-08

Smt. K. R. Yashodha, #102/5, 7 th “A” Main, 3 rd Block, Jayanagar, Bengaluru-560011. PAN : AESPS5529J	Vs.	The Income Tax Officer, Ward-7[2][1], Bengaluru
APPELLANT		RESPONDENT

Assessee by	:	Shri. V. Srinivasan, Advocate
Revenue by	:	Shri. Dandapani, JCIT

Date of hearing	:	24.08.2017
Date of Pronouncement	:	06.10.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of CIT(A), *inter alia*, on the following grounds:

1. *The orders of the authorities below in so far as they are against the appellant, are opposed to Law, equity, weight of evidence, probabilities, facts and circumstances of the case.*
2. *The learned CIT[A] is not justified in upholding the validity of the reopening without appreciating that the order of re-assessment was bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with and consequently, the order of re-assessment passed by the learned A.O. ought to have been cancelled.*
3. *Without prejudice to the above, the learned CIT[A] is not justified in upholding the assessment of Rs.55,08,127/- as income from Long Term Capital Gains on the joint development of the appellant's property during the year under*

appeal under the facts and in the circumstances of the appellant's case.

4. *Without prejudice to the above, the learned CIT[A] ought to have appreciated that the long term capital gains computed by the learned A.O. at Rs.55,08,127/- based on the cost of construction of the built up area incurred by the Developer is unjustified and unwarranted as the same cannot be regarded as the full value of consideration received on transfer and hence, the Capital Gains so assessed requires to be reduced substantially.*

5. *Without prejudice to the above, the learned CIT(A) is not justified in upholding that the appellant was not entitled to exemption u/s. 54F of the Act, as the appellant had not claimed the same in the return of income under the facts and in the circumstances of the appellant's case.*

6. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies herself liable to be charged to interest u/s.234A, 234B and 234C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.*

5. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.*

2. Ground No. 1 is general in nature and needs no independent adjudication. Apropos ground No. 2 relates to validity of its reopening of the assessment and facts borne out from the record are that the assessee along with 4 others viz., Smt. K. Saraswathi, Smt. Lakshmi, Sri. R. Ravishankar and Smt. K. R. Anuradha had entered into Joint Development Agreement (JDA) with M/s. Latitude Projects Private Limited on 11.07.2006 and consequent thereto assessee with others handed over possession of 31,615 Sq.Ft. residential immovable property bearing Municipal No. 10, Sarakki Main Road, Shakambarinagar, Bangalore for construction of residential flats/buildings. In consideration of transfer of land to the builders, the promoter agreed to construct and deliver to the assessee & others 50% of super built area in the building for the absolute use or benefit of the assessee.

3. After verification of records, it was found that assessee has not declared capital gain income from this JDA transaction. This is a transaction which falls within the definition of transfer as per IT Act and the capital gain arises to the

assessee in the assessment year 2007-08 in which the land owner entered into the JDA and handed over the possession/transferred complete control over the property in favour of the developer/builder/promoter. The view taken by the AO was supported by the recent judgments of the jurisdictional High Court in the case of T. K. Dayalu 202 taxman 531. The AO accordingly came to the conclusion that capital gain chargeable to tax has escaped assessment by reason of omission/failure on the part of the assessee to make true and correct return of income within the time allowed as per provisions of the Act.

4. Having reopened the assessment under section 147 of the Act by issuing notice under section 148 of the Act, the AO determined the capital gain on account of transfer of land to the builder/developer.

5. The validity of the reopening of the assessment was challenged before the CIT(A) with the submission that the assessment was reopened after 4 years from the end of the relevant assessment year. Therefore onus is upon the AO to bring something on record that income chargeable to tax has escaped the assessment for such assessment year for the reasons of failure on the part of the assessee to make a return under section 139 or in response to notice under section 142(1) or section 148 or disclose fully and truly all material facts necessary for assessment for that assessment year. The CIT(A) re-examined the validity of the reopening of the assessment in the light of various judicial pronouncements and finally came to the conclusion that the assessee has not disclosed the capital gain in the original return of income and the AO was seized the information that the assessee has entered into JDA with the developer for raising the construction of the building therefore the capital gain income accrued to him and chargeable to tax has escaped assessment. The relevant observation of the CIT(A) is extracted hereunder for the sake of reference:

“7.2 *The power of assessment or reassessment of any income*

chargeable to tax that have escaped assessment has been provided under section 147 rws 148 of Income Tax Act 1961. If the assessing officer has the reason to believe that any income chargeable to tax has escaped assessment then the assessing officer may subject to the provisions of section 147 to 153 assess or reassess such income. Before issuing any notice under section 148 the assessing officer must have reason to believe that any income chargeable to tax has escaped assessment. To constitute a valid reason to believe there must be some new material coming into light with the assessing officer, merely a change of opinion cannot constitute a reason to believe. If the assessee has disclosed basic and all the true facts during the course of assessment and the assessment is completed. Later on notice u/s 148 cannot be issued merely because there is another inference possible from the same documents and the facts placed before the assessing officer during the course of assessment as it will amount to change of opinion. There must be some new material coming into light for action u/s 147/148. But if the assessee has suppressed some relevant facts which leads to concealment of income and later those facts come before the assessing officer the notice u/s 147/48 can be issued validly.

7.3 The apex court in the case of ACIT vs Rajesh Jhavery Stock Brokers P. Ltd. reported in (2007) 291 ITR 500 after considering various decisions rendered by it in the past, construed the words 'reason to believe' in section 147 of the Act and held that, if the AO has cause or justification to know or suppose that any income has escaped assessment, then it could be said that the AO had reason to believe that the income chargeable to tax has escaped assessment. The apex court further held that the expression 'reason to believe' in section 147 of the Act cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. The apex court also held that, at the stage of issue of notice u/s 148 of the Act, the only question to be considered is, whether there was relevant material on which a reasonable person could have formed a requisite belief and not whether the materials would conclusively prove escapement of income.

"16. Section 117 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion.

The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces in Central Provinces Manganese Ore Co. Ltd. v 17'0 (1991) 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact or escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is also because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction [see ITO v Selected Dalurband Coal Co. P. Ltd. (1996) 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v ITO (1999) 236 34(SC)].

17. *The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly, the Assessing Officer must have reason to believe that income, profits or gains chargeable to income-tax have escaped assessment, and, secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words, if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the provision to section 147. The case at hand is covered by the main provision and not the proviso.*

18. So long as the ingredients of section are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

7.4 Applying the ratio laid down by the apex court in the aforesaid case, it has to be seen in the present cases whether the AO had any cause or justification to form a reasonable belief that income chargeable to tax has escaped assessment. The Appellant has not brought any material in contrary to this. Viewed in this manner, the AO's action in initiating proceedings u/s 147 of the Act for these assessment years in question is reasonable and, therefore, upheld."

6. Aggrieved, the assessee has preferred an appeal assailing the order of the CIT(A) with the submission that CIT(A) has not properly appreciated the arguments of the assessee with regard to the validity of the reopening of the assessment. Besides he reiterated all the arguments which has been raised before the CIT(A).

7. The learned DR on the other hand has contended that assessee has not offered the capital gain in the relevant assessment year though he has entered into JDA and transferred the possession of land to the developer/builder for raising construction thereon. The learned DR further contended that in light of judgment of jurisdictional High Court in the case of Dr. T K Dayalu (supra), the capital gain accrued on transfer of land under JDA in the year of transfer of land. Therefore, in the impugned assessment year, the capital gain was accrued to the assessee and the assessee has not offered it to tax. Thus the AO has a reason to believe that income chargeable to tax has escaped the assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year.

8. Having carefully examined the orders of the authorities below in the light of rival submissions, we find that undisputedly assessee has entered into JDA with

the developer and possession of land was transferred to developer but he has not offered the capital gain accrued to him to tax in the original return of income. Therefore, the AO has received the information in this regard and he has reason to believe that income chargeable to tax has escaped the assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year.

9. The CIT(A) has examined all the facts in his order before upholding the validity of the reopening of the assessment. Since the AO has made out the case that income has escaped the assessment on account of failure on the part of the assessee to disclose fully and truly all material for the assessment of that assessment year, the reopening under section 147 is valid and we confirm the order of the CIT(A) in this regard.

10. With regard to ground Nos. 3 and 4 relating to accrual of the long term capital gain for the execution of the JDA with the developer, the facts borne out from the record are that vide JDA dated 11.07.2006, the assessee has handed over the possession of the property to the developer/builder/promoter for raising construction of the residential flat therein and in lieu thereof 50% of super built up area in the form of apartment/flats and similar 50% of the car parking and the other benefit in the constructed area would be given to the assessee by developer.

11. Having carefully examined these facts in the light of judgment of jurisdictional High Court in the case of T K Dayalu, the AO was of the view that since land was transferred to the developer during the impugned assessment year, capital gain accrued to the assessee and he accordingly estimated the long term capital gain.

12. Aggrieved, assessee preferred an appeal before the CIT(A) with the submission that the long term capital gain did not accrue in the impugned

assessment year as the assessee has not transfer the possession of land to the developers. Besides, the assessee has also claimed deduction under section 54F/54 on account of acquisition of residential house out of the sale proceeds. The learned CIT(A) re-examined the issue in the light of judgment of jurisdictional High Court in the case of Dr. T K Dayalu and came to the conclusion that land was transferred during the impugned assessment year therefore the long term capital gain has accrued to the assessee during the impugned assessment year.

13. Aggrieved, assessee preferred an appeal before the Tribunal and reiterated its contentions. He has also invited our attention to the copy of JDA appearing at page No.1 of the compilation in support of his contentions.

14. The learned DR on the other has contended that though the assessee has taken a stand that in the impugned assessment year the possession of the land was not transferred to the developer therefore capital gain cannot be accrued in the impugned assessment year as per the judgment of jurisdictional High Court in the case of Dr. T K Dayalu. But nothing has been placed on record in support of his contentions. Therefore CIT(A) has rightly held that capital gain has accrued in the impugned assessment year on transfer of land to the developer.

15. Having carefully examined the orders of the authorities below and the JDA available at page No. 1 to 56 of the compilation and on its careful perusal we find that possession was stipulated to be handed over after certain period or on certain conditions. This JDA was executed for the construction of residential house on the land within a specific period and part of work and duty has been assigned to the developer as well the owner. On careful perusal we find that on execution of the JDA, developer was authorised to apply for license and necessary permission to start construction over the land. The time was fixed to raise the construction within a period of 18 months. This JDA was executed on 11.07.2006, therefore

the project is to be completed in 1 ½ year. The possession is to be handed over within the impugned assessment year. Therefore, we find no force in the contention of the assessee that possession was not handed over in the impugned assessment year. It has been repeatedly held by the Tribunal that in the light of judgment of jurisdictional High Court in the case of Dr.T K Dayalu, capital gain is to be accrued once the possession is given to the builder for construction of housing project and since possession was handed over in the impugned assessment year, the CIT(A) has rightly held that the capital gain has been accrued in the impugned assessment year. So far as the calculation of capital gain is concerned, we find that AO while computing the capital gain take the assistance of provisions of section 50D of the IT Act hereinafter called as an Act which was introduced w.e.f. 01.04.2013 and has calculated the consideration received in the form of super built area of flats in exchange of 50% of land. Since we do not find any infirmity in the calculation of the long term capital gain by the AO and confirmed by the CIT(A) we are of the view that no interference therein is called for.

16. So far as ground 5 relating to claim of exemption under section 54F is concerned, we find that since the assessee has not offered long term capital gain in the original return of income, there would be no question of claiming the exemption under section 54F of the Act. Now the long term capital gain is to be computed in the hands of the assessee the claim of exemption under section 54 should have been examined by the lower authorities. But the lower authorities have denied the claim of exemption on the ground that it was not raised in the original return of income. In this regard, we are of the view, that since assessee has raised the claim of exemption under section 54 of the Act in the reassessment of the proceedings, the same should be examined. We accordingly set aside the order of the CIT(A) and restore the matter to his file with the direction to re-examine the claim of exemption under section 54 of the Act in accordance of law.

Accordingly the appeal of the assessee stands partly allowed for statistical purpose.

17. In the result, appeal of the assessee is partly allowed for statistical purposes.

Pronounced in the open court on 6th October, 2017.

Sd/-

(JASON P BOAZ)
Accountant Member

Bangalore.

Dated:6th October, 2017.

/NShylu/*

Copy to:

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| 1. Appellants | 2. Respondent |
| 3. DR | 4. CIT |
| 5. Guard file | |

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

By order

Sr. Private Secretary,
ITAT, Bangalore.