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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

ITA No.410/Bang/2016
Assessment year: 2006-07

M/s. Agnus Holdings Pvt. Ltd., Star II, Opp. IIM Bangalore, Bannerghatta Road, Bilekahalli, Bangalore – 560 076. **PAN: AAHCS 6660A**	Vs.	The Deputy Commissioner of Income Tax, Circle 1(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sheetal Borkar, Advocate
Respondent by	:	Shri N.S. Shasidhar, Addl. CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	04.08.2021
Date of Pronouncement	:	01.09.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of the CIT(Appeals)-1, Bangalore dated 28.12.2015 for the assessment year 2006-07.

2. The assessee has raised the following grounds:-

"1. The Order of CIT(A) is bad and unsustainable in the eye of law and therefore, the same is liable to be set-aside.

2. The CIT(A) ought to have appreciated that the re-opening of assessment under S. 147/148 was merely on change of opinion and that the AO had no new materials with him, therefore, the re-assessment order was unsustainable in law.

3. The CIT(A) fell in serious error in sustaining the addition especially without appreciating the fact that mere entering into a Joint Development Agreement would not ipso facto result in any income much less capital Gains nor would that create any title over the property in favour of the builder.

4. Without prejudice, the CIT(A) grossly erred in not appreciating that in the afore-said facts and circumstances, there was no question of any `Transfer' as per S.2(47) of the Income-tax Act and therefore, the addition as made by the AO is liable to be deleted as unsustainable.

4.(sic) The CIT(A) ought to have appreciated that the decision of T.K. Dayalu was not at all applicable on account of distinguishing facts, especially that it was the case of construction of commercial project as opposed to Residential project, as in the case on hand.

5. The CIT(A)further erred in confirming charging of interest under S. 234B, S. 234C 85S. 234D of the Act.

6. For these and such other grounds that are urged during the hearing, it is prayed that the impugned order of the CIT(A) be set-aside granting relief to the Appellant, in the interest of Justice."

3. The assessee is a private limited company, engaged in the business of holding of investments, promoting and investing in start-up companies, investing in real estate properties and so on. The assessment for the assessment year 2006-07 was completed u/s. 143(3) of the Income-tax Act, 1961 [the Act] on 15-2-2008. This assessment was sought to be reopened under the first proviso to section 147 of the Act and a notice u/s. 148 was issued on 20-3-2013. The assessee denied that any income pertaining to the above assessment has escaped assessment and requested that the return of income filed originally may be considered as the Return filed pursuant to the notice issued under this section. After rejecting the objections, the AO passed an Order under sec 147 read with Sec 143 (3) dated 31-01-2014.

4. According to the AO, the assessee has entered into 'Joint development agreement' with M/s Plama Developers Limited, Mangalore in respect of a land owned by the assessee (along with 3 other parties) in Mangalore, which was not disclosed that led to the income chargeable to tax escaping assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.

5. Coming to the Joint Development agreement [JDA] entered by the parties with M/s Plama Developers Private Ltd. [Developer] , the AO opined that the assessee has allowed the transfer of his joint interest to the Developer by entering into the agreement dated 15-3-2006. Since for surrendering the undivided interest in the land, the assessee has to get constructed space in different phases of construction extending to more than 3 years from the Date of grant of Licence by the Mangalore City Corporation. The different phases of construction were 30months for completing the Phase II along with a grace period of 6 months and one year for completion of Phase III from the date of handing over the possession of the property. According to the AO, the value of the constructed area has to be reckoned as the consideration received on the date of signing the agreement itself and as a consequence thereof, the assessee is liable to capital gains tax in the assessment year in which the JDA has been signed.

6. The ld. AR submitted that the AO, while making the reassessment, held as under:-

1. The assessee has derived a short term capital gain by entering into a JDA on 15 3 2006 itself.

2. Since the cost of construction as per M/s Plama Developers Pvt. Ltd. is Rs 1600/per square feet (the cost for completion of the project which lasted about 4 years time from the date

of signing the JDA), the same should be adopted as the value for the land given up by the assessee.

3. The value as adopted by the assessee in the JDA for the purpose of capitalising the value in its books representing its share of the land value at Rs 99.32 lacs should be taken as cost to compute the capital gains (the AO has restricted the cost to Rs 83.66 Lacs representing 84.235 % of the land value).

7. The ld. AR submitted that thus by extrapolating the data obtained from the developer which is supposed to represent the cost of construction of the area to be handed over subsequently as the sale value for the land developed as part of the JDA. According to him, the AO raised a wholly fictitious and notional demand, since he presumed that the capital gains arose in the year of signing the agreement itself and the same should be assessed as short term capital gains.

8. On appeal, the CIT(Appeals) confirmed the order of AO on both the reopening of assessment as well as addition made holding that there was a transfer u/s. 2(47)(v) of the Act so as to bring the capital gain to tax. Against this, the assessee is in appeal before us.

9. We have heard both the parties and perused the material on record. Regarding the reopening of assessment, it was submitted that the original assessment u/s. 143(3) was completed on 15.02.2008. Notice u/s. 148 of the Act was issued on 20.3.2013, which is beyond four years from the end of relevant assessment year and there is no obligation on the part of assessee to disclose fully and truly all the material facts for the purpose of assessment. As such, according to the assessee, the reopening is bad in law.

10. The ld. DR relied on the order of CIT(Appeals).

11. In this case, originally assessment was completed u/s. 143(3) of the Act on 15.2.2008. There was no discussion whatsoever with regard to the earning of capital gain by entering into JDA with the Developer on 15.3.2006. The assessee has not disclosed anything about this transaction either in its return of income or in its computation. There is a total failure on the part of assessee to bring these facts to the notice of the assessing authority. Vide JDA dated 15.3.2006, the assessee being land owner with regard to 38 cents situated at 13/2A, 89, Kodialbail Village, Mangalore Taluk. As per JDA the assessee has to receive 24,000 sq.ft. of built-up area in the apartment for handing over the property. Since the capital gain arising out of this transaction has escaped from assessment and assessee has not disclosed fully and truly all material facts for the purpose of assessment, the case is attracted to the provisions of section 147. After necessary approval, notice u/s. 148 was issued on 20.3.2013. Being so, we do not find any infirmity in the reopening of assessment in this case.

12. The next ground is with regard to the finding of the lower authorities that there was a transfer in terms of section 2(47)(v) of the Act when the JDA was entered with the Developer on 15.3.2006. The contention of the ld. AR is that the JDA was entered into with regard to joint development of the property measuring 38 cents and the assessee was to receive 24,000 sq.ft. of built-up area in the apartment project and on the day of entering into agreement the assessee has not received any consideration and the condition laid down in section 53A of the Transfer of Property Act [T.P. Act] has not been satisfied on entering into JDA. Conditional possession was handed over to the Developer and assessee remained to be the owner of the property which does not amount to transfer in terms of section 2(47)(v) of the Act r.w.s. section 53A of the T.P. Act. According to her, the provisions of section 2(47)(v) of the Act will not apply in this situation and this JDA cannot be construed as an agreement in the nature of contract

referred to in section 53A of the T.P. Act. As such, no capital gain could be assessed in this assessment year under consideration. Further, she submitted that as per provisions of section 53A of the T.P. Act, transaction would constitute "transfer" for the purpose of computing capital gain only if all the conditions laid down in the provisions are satisfied. In this case, other than entering into JDA, no other condition stipulated u/s. 53A of the T.P. Act is complied with. The provisions of deemed transfer u/s. 2(47)(v) of the Act cannot be invoked in the assessee's case since no consideration was received and also no construction activity actually took place during the FY 2005-06 relevant to AY 2006-07. Even the developer did not obtain the building plan so as to construct the building thereon. No income accrued to the assessee in the assessment year under consideration. The JDA was entered at the fag end of financial year i.e. on 15.3.2006 and no activities relating to the development of the property has taken place and no right to receive the consideration has accrued to the assessee, as such assessee cannot be placed with any tax liability in this assessment year. Further it was the stand of the assessee that just by signing the JDA, capital gain will not be attracted which is now accepted by way of newly inserted sub-section (5A) of section 45. For this purpose, she relied on the decision of Cochin Bench in the case of DCIT v Smt. Hema Mohanlal, 54 CCH 393. Further she relied on the judgment of Hon'ble Supreme Court in the case of *CIT v. Balbir Singh Maini, 398 ITR 531 (SC)* wherein it was held that after the amendment to Registration Act, 1908 in the year 2001, unless documents containing the contract to transfer any immovable property is registered, the transaction shall not have any effect in law.

13. On the other hand, the ld. DR submitted that the assessee entered into JDA along with irrevocable Power of Attorney on 15.3.2006 through which the assessee handed over the possession of the impugned property for construction. Further a reading of JDA along with the GPA shows that

assessee authorized the developer to sell/transfer its constructed area to their clients. The assessee parted with the possession of land to the developer in lieu of that assessee would receive consideration in the form of 24,000 sq.ft. of constructed area. The assessee had relinquished its rights in the schedule property which the developer has got possession of property to develop the same. In lieu of relinquishment of rights in the said property, it would ultimately vest in the hands of the Developer and assessee would receive 24,000 sq.ft. of constructed area. It amounts to accrual of right to receive the consideration in kind which has a value, it cannot be said that no transfer took place in favour of assessee.

14. The ld. DR submitted that assessee has given a bundle of rights in favour of the Developer to do all the necessary acts in relation to construction of the flats in the schedule premises and also given right to mortgage the said property and to sell the property which is evident from Clause 12 of the JDA. He also relied on the judgment of the Hon'ble High Court of Karnataka in *CIT v. Dr. T.K. Dayalu (202 Taxman 531)* wherein it was held that if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability.

15. Further he submitted that sub-section (5A) to section 45 was inserted by the Finance Act, 2017 w.e.f. 1.4.2018 and hence it cannot be applied to the present AY 2006-07. He also submitted that the order of Tribunal in the case of *DCIT v. Smt. Hema Mohanlal (supra)* cannot be applied to the facts of the case. In that case, though JDA was entered into on 21.6.2009. Permission for construction was obtained from Trivandrum Corporation to construct the building on 8.6.2009. The condition for handing over construction was 36 months. However, it was actually handed over on 12.4.2016 with a long delay of 7 years. In such peculiar facts and

circumstances, the Tribunal held that there was no transfer in the year in which the JDA was entered into. Accordingly the ratio of that decision cannot be applied.

16. We have heard both the parties and considered the rival submissions. In this case, the assessee entered into JDA with the Developer along with the other parties on 15.3.2006 and also executed irrevocable Power of Attorney on 07.11.2005 with Plama Developers Pvt. Ltd. with regard to the property bearing No. 13/2A, 89, Kodialbail Village, Mangalore Taluk. As per this agreement, assessee has to receive 24,000 sq.ft. of constructed area in the apartment in this project. The contention of the ld. AR for the assessee is that there was no transfer for the AY 2006-07. The actual transfer of property was in the assessment year when the assessee received constructed area of flats, which was offered for taxation in the AY 2013-14. As such, it cannot be brought to tax for the AY 2006-07.

17. It is appropriate to refer to the provisions of section 2(47)(v) of the Act which are as follows:-

> "Section 2(47)
>
> 'transfer', in relation to a capital asset, includes
>
> (i) & (iv)** ** **
>
> (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in s. 53A of the Transfer of Property Act, 1882 (4 of 1882);"

A bare reading of the above provision would reveal that in order to determine the capital gain arisen to an assessee, there are basically three ingredients:-

(i) There must be a capital asset;

(ii) It must have been transferred during the accounting period relevant to the assessment year.

(iii) Capital gain must have arisen to an assessee of such an asset.

18. We will also go through the provisions of section 53A of the T.P. Act reproduced below:-

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

19. A plain reading of section 53A of the Transfer of Property Act shows that in order that a contract can be termed to be "of the nature referred to in section 53A of the Transfer of Property Act" it is one of the necessary preconditions that transferee should have or is willing to perform his part of

the contract. This aspect has been duly taken note of by the Hon'ble Bombay High Court when their Lordships observed as follows:

> "That, in order to attract section 53A, the following conditions need to be fulfilled.
>
> (*a*) There should be contract for consideration;
>
> (*b*) It should be in writing;
>
> (*c*) It should be signed by the transferor;
>
> (*d*) It should pertain to the transfer of immovable property;
>
> (*e*) The transferee should have taken possession of property;
>
> (*f*) Lastly, transferee should be ready and willing to perform the contract".

20. Elaborating upon the scope of expression "has performed or is willing to perform", the oft quoted commentary "Mulla-*The Transfer of Property Act*" (9th Edn. : Published by Butterworths India), at p. 448, observes that:

> "The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as a statutory right, is conditioned upon the transferee's willingness to perform his part of the contract in terms covenanted thereunder.
>
> Willingness to perform the roles ascribed to a party, in a contract is primarily a mental disposition. However, such willingness in the context of section 53A of the Act has to be absolute and unconditional. If willingness is studded with a condition, it is in fact no more than an offer and cannot be termed as willingness. When the vendee company expresses its willingness to pay the amount, provided the (vendor) clears his Income-tax arrears, there is no complete willingness but a conditional willingness or partial willingness which is not sufficient…….
>
> In judging the willingness to perform, the Court must consider the obligations of the parties and the sequence in which these are to be performed……."

21. Now the dispute is whether the capital gain accrued to the assessee on the date of signing the JDA on 15.3.2006 which was at the fag end of the financial year. On going through the admitted facts, it shows that in the assessment year under consideration, the transferee/transferor has neither performed nor was it willing to perform its obligation under the JDA under consideration. Based on the JDA, capital gain is sought to be taxed in the assessment year under consideration. But this agreement was not acted upon by the assessee in this assessment year under consideration. The transferor has not received a penny as consideration in the assessment year under consideration. Even there is no evidence to suggest that the Developer has taken any steps to prepare and get approved the building plan to construct the proposed construction in the schedule property. Admittedly, there is no progress in the development during the year under consideration. No municipal sanction for development was obtained in the assessment year under consideration. Sanction of building plan is utmost important for implementation of JDA entered into between the parties. Without sanction of building plan, very genesis of the agreement fails. To enable execution of the JDA, firstly plain is to be approved by the competent authority. In fact, the building plan was not got approved by the Developer in the assessment year under consideration. Only permission is granted to the Developer to undertake construction of the project. Until permission is granted, a developer cannot undertake construction. As a result of this lapse by the transferee, the construction has not taken place in the assessment year under consideration. There is no progress in the Development activities in the assessment year under consideration. Nothing is brought on record by authorities to show that there was development activity in the project during the assessment year under consideration and cost of construction was incurred by the builder/Developer. Hence it is to be inferred that no amount of investment was made by the Developer in the construction activity and it would amount

to non-incurring of required cost of acquisition by the Developer. In the assessment year under consideration, it is not possible to say whether the developer prepared to carry out those parts of the agreement to their logical end. The Developer has not shown any readiness or having made preparation for compliance of the agreement dated 15.3.2006. The Developer has not taken any steps to make it eligible to undertake the performance of the agreement which are the primary ingredients that make a person eligible and entitled to make the construction. The act and conduct of the developer in this assessment year shows that it had violated essential terms of the agreement which tend to subvert the relationship established by the development agreement. Being so, in the year under consideration, it is not possible to say that transfer took place in terms of section 2(47)(v) of the Act. In our opinion, handing over of possession of property is only one of conditions u/s. 53A of the T.P. Act, but it is not the sole and isolated condition. It is necessary to go into whether or not the transferee was 'willing to perform' its obligation under these consent terms. When transferee, by its conduct and by its deeds, demonstrates that it is unwilling to perform its obligations under the agreement in this assessment year, the date of agreement ceases to be relevant. In such a situation, it is only the actual performance of transferee's obligations which can give rise to the situation envisaged in section 53A of the Transfer of Property Act. On these facts, it is not possible to hold that the transferee was willing to perform its obligations in the financial year in which the capital gains are sought to be taxed by the Revenue. We hold that this condition laid down under section 53A of the Transfer of Property Act was not satisfied in this assessment year under consideration. Once we come to the conclusion that the transferee was not 'willing to perform', as stipulated by and within meanings assigned to this expression under section 53A of the Transfer of Property Act, its contractual obligations in this previous year relevant to the present assessment year, it is only a corollary to this finding that the

development agreement dated 11-5-2005 based on which the impugned taxability of capital gain is imposed by the Assessing Officer and upheld by the CIT(A), cannot be said to be a "contract of the nature referred to in section 53A of the Transfer of Property Act" and, accordingly, provisions of section 2(47)(*v*) cannot be invoked on the facts of this case.

22. We have carefully gone through the conditions laid down in the JDA dated 15.3.2006 to the Developer. As seen from Clause 12 of the JDA, it suggests that the assessee authorized the Developer to enter into agreements for sale of his proportionate undivided right along with the partly or fully constructed residential apartments allotted to the Developer and the assessee also authorized to execute the Sale Deed conveying the undivided interest in the schedule property along with partly or fully constructed apartment thereon and to present the same for registration and to receive consideration. According to the ld. DR, it shows that that the assessee transferred the absolute right over the new property to the Developer to the extent of undivided share on entering into the JDA on 15.3.2006. At this point, it is appropriate to mention the ratio laid down by the Hon'ble High Court of Karnataka in the case of *Dr. T.K. Dayalu (supra)* as follows:-

> "The Hon'ble Supreme Court (sic) has referred to the contention of the assessee and the earlier judgments of the Supreme Court cited by him and held that those judgments were prior to introduction of the concept of deemed transfer under section 2(47)(v) of the Act and if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability. Therefore, in these appeals, we hold that capital gain is to be taxed in the year 1997-98 and not in the year 2003-04 as contended by the assessee. Accordingly, we answer the substantial questions of law framed in ITA No.3209/2005 in favour of the revenue and substantial

> questions of law framed in ITA No.3105/2005 against the assessee …… ”

23. The Hon'ble Bombay High Court in *Chaturbhuj Dwarkadas Kapadia* v. *CIT* [2003] 260 ITR 491/ 129 Taxman 497 held that the date relevant for attracting capital gain having regard to the definition under section 2(47) of the Act is the date on which possession is handed over by the developer and has observed as follows:-

> “Under section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act would come within the ambit of section 2(47)(v). That, in order to attract section 53A, the following conditions need to be fulfilled. There should be a contract for consideration; it should be in writing; it should be signed by the transferor; it should pertain to transfer of immovable property; the transferee should have taken possession of the property; lastly, the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall under section 2(47)(v). Section 2(47)(v) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessees used to enter into agreements for developing properties with the builders and under the agreement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, section 2(47)(v) came to be introduced in the Act."

24. The ld. DR argued that the assessee being owner of the property entered into JDA on 15.3.2006 in terms of which the assessee had given the bundle of rights as mentioned above and possession of the property to the Developer, against which the assessee recovered 24,000 sq.ft. constructed area of flats. The assessee’s argument that it has offered the same for taxation in AY 2013-14 holds no merit. The judgment in

Chaturbhuj Dwarkadas Kapadia v. CIT (supra) undoubtedly lays down a proposition, which more often than not, favours the Revenue, but, on the facts of this case, the said judgment supports the case of assessee inasmuch as 'willingness to perform' has been specifically recognized as one of the essential ingredients to cover a transaction by the scope of section 53A of the T.P. Act. The Revenue does not get any assistance from this judicial precedent. More so, there is binding precedent of decision of *CIT v. Balbir Singh Maini (supra)* in which it was held as follows:-

> " An agreement of sale which fulfilled the ingredients of section 53A of the Transfer of Property Act, 1882 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 1882 Act and sections 17 and 49 of the Registration Act, 1908. The effect of the aforesaid amendment was that, on and after the commencement of the Amendment Act of 2001, if an agreement 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 in law under section 53A of the 1882 Act. A reading of section 17(1A) and section 49 of the 1908 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 of the 1882 Act.
>
> Under sub-clause (vi) of section 2(47) of the 1961 Act, any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The expression 'or in any other manner whatsoever' in sub-clause (*vi*) would show that it is not necessary that the transaction refers to the membership of a cooperative society. The object of section 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 is 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."

25. Since we have followed the binding precedent of the Hon'ble Supreme Court judgment in *CIT v. Balbir Singh Maini (supra)*, we have not considered the judgment cited by the ld. DR.

26. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 1st day of September, 2021.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 1st September, 2021.
/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.