**(2011) 09 KAR CK 0211**

**In the Karnataka High Court**

**Case No :** ITA No''s. 20 and 21 of 2005 (A.Y. 1995-96)

CIT and Others APPELLANT

Vs

H.B. Jairaj RESPONDENT

**Date of Decision :** 16-09-2011

**Acts Referred:**

Income Tax Act, 1961 — Section 143 (3), 2 (47), 250, 45, 45 (1)
Transfer of Property Act, 1882 — Section 269 UA (d)

**Citation :** (2011) 09 KAR CK 0211

**Hon'ble Judges :** V.G. Sabhahit, J;Ravi Malimath, J

**Bench :** Division Bench

**Advocate :** Veena Jadhav, for the Appellant; A. Shankar and M. Lava, for the Respondent

**Final Decision :** Allowed

## Judgement

1. These two appeals are filed by the revenue against the common order passed by the Income Tax Appellate Tribunal, Bangalore Bench B (hereinafter referred to as the ITAT) in ITA Nos. 534/Bang/1999 and 147/Bang/2003 wherein both the appeals are allowed in part. The material facts leading up to these appeals are as follows:

The assessee filed return of income for the assessment year 1995-96 on 7-1-1996 declaring total income of Rs. 1,03,80,730 comprising of long-term capital gains of Rs. 1,32,59,786 income from salary (Rs. 1,20,000) income from business (Rs. 19,150) and income from other sources (Rs. 2,97,994). The assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called the Act) on 18-3-1998 on a total income of Rs. 1,86,62,121 which was inclusive of determination of long-term capital gains of Rs. 1,44,94,439 as against Rs. 1,32,59,986 declared by the assessee by adopting the cost of acquisition at Rs. 92,000 as against the Rs. 10 lakhs claimed by the assessee. In the assessment order, the interest claimed by the assessee in computing the income from other sources was also disallowed. The matter was taken up in appeal in ITA No. 214/CC-1/CIT-A/98-99 dated 8-6-1999 while confirming the issue relating to disallowance of interest, set aside the issue of computation of capital gains with a direction to re-do the same in accordance with the guidelines set out by him in the order. Pursuant to the said order of remand, the assessing officer passed an order u/s 143(3) read with section 250 of the Act on 27-3-2002 re-computing the long-term capital gains at Rs. 1,32,03,153 as against Rs. 1,32,59,786 shown by the appellant. Being aggrieved by the same, assessee filed an appeal in ITA No. 203/DCIT,CC-1(1)/CIT (A)-V/2002-03 before the Commissioner of the Wealth Tax (Appeals)-VI, Bangalore. The first appellate authority, by order dated 25-11-2002 dismissed the appeal confirming the order passed by the assessing officer. Being aggrieved by the same, the assessee preferred the appeal in ITA No. 534/Bang/1999 on the file of the ITAT and therefore, after re-computing the capital gain, ITA No. 147/Bang/2003 was filed by the assessee before the ITAT. The ITAT by order dated 29-4-2004 allowed the appeals in part holding that there was only diminution of the ownership of the property of 100% which came to be reduced to 47.5%, there is diminution in the ownership right to that extent and the fact remains that the assessee is the owner of the entire property and is in possession in respect of the entire property. Only the exclusive interest of the property has been converted to shared interest and capital gain cannot be assessed and wherefore, it does not fall in the ambit of capital gain u/s 45(1) of the Act. In view of the said finding, ITA No. 147/Bang/2003 which was against the order of the first appellate authority after setting aside originally, was disposed of as liability to capital gain has been decided in ITA No. 534/Bang/1999. Being aggrieved by the said common order passed by the Tribunal, these appeals have been filed by the revenue.

2. ITA No. 20/2005 was admitted on 5-12-2007 for consideration of the following question of law raised in the appeal and was ordered to be posted along with ITA No. 21/2005.

Whether the Tribunal has not recording a finding on the cost of acquisition arrived at by the assessing officer and confirmed by the appellate Commissioner?

3. ITA No. 21/2005 was admitted to consider the following question of law raised in the appeal :

Whether the Tribunal was correct in holding that transfer of 52.5% interest in the land owned by the assessee to a developer for exchange of 47.5% built up area in the residential complex constructed in the land does not amount to a transfer and consequently no capital gains tax can be levied despite the assessee himself declaring capital gains on this transaction at Rs. 1,53,93,500.

4. The contention of the assessee in these appeals is that the development agreement was entered into between the owner of the land '' assessee and the developer residing at No. 26 A/2, Sankey Road, Bangalore in respect of the schedule property on 25-1-1993 wherein the assessee who is the absolute owner

 

of the schedule property being the portion of the property forming part of Sy. No. 5/2 of Old Malena Hally village, Kasaba Hobli, Bangalore North Taluk (hereinafter called the schedule property), now forming part of Bangalore City Corporation and being a portion of 12/3, 105 and 105/2 of I Main, Seshadripuram, Bangalore, the total area of the plot is 4,054 sq. yards i.e., 36,486 sq.ft. along with all structures therein. As per the development agreement, the title of the owner is narrated in the agreement. It is averred that the assessee became owner of the property being in continuous possession of the schedule property, free from any encumbrances, liens, charges and the property has been acquired under the sale deed dated 31-10-1967. Whereas, the developers approached the owner to purchase 52.5% of undivided share, right, title and interest in the schedule property on certain terms and conditions to which the owner has agreed. Thereafter, the agreement recites that it is mutually agreed that the owner does hereby agreed to sell to the developers or their nominees 52.5% of the undivided share, interest, right and title of the schedule property as a whole or in part of the undivided share and interest together with a right to the developers to develop a Multi Storeyed Residential Complex on the schedule property to the extent of 52.5% super built up area for themselves or their nominees and 47.5% of super built up area for and on behalf of the owner subject to the following options :

I. ''First option :

...A sale consideration of Rs. 1,34,00,000 (Rupees One Crore thirty four lakhs) only payable by the ''Developers'' to the ''Owner'' within a period of four months from this day.

...In case the owner does not give notice of exclusive option within a period of 4 months in writing to the builder, the builder will assume that the owner will be eligible for second option only.

OR

II. Second Option

...A total built up area or the FAR as the case may be whichever is higher along with available car parking space, to be constructed/developed on the schedule property shall be shared between the owner and the ''Developers'' in the following ratio:

(1)

Owner

''

47.5%

(2)

Developer

 

''

52.5%

...The developer was permitted to enter upon the land for putting up constructions as per the terms/clauses of the development agreement which would be considered while answering the substantial questions of law.

5. Thereafter, the agreement was entered into between the owner and developer and also Small Industries Development Bank of India which is styled as ''Agreement for sale and construction'' on 29-12-1993 and the said tripartite agreement provided for sale of the property which was conveyed to the builder for the purpose of construction of certain flats, subject to the terms and conditions mentioned in the said tripartite agreement dated 29-12-1993. The said document also refers to the development agreement entered into between the owner and the developer on 25-11993.

6. It is the contention of the assessee that though he had shown the amount of Rs. 1,36,80,730 as long term capital in the return filed for the assessment year 1995-96 filed on 17-1-1996, subsequently an application was filed that the said capital gain was shown erroneously as transaction of development agreement and it is not amount to sale or conveyance of title as defined u/s 2(47) of the Act so as to attract payment of capital gain u/s 45(1) of the Act.

7. It is the contention of the revenue that the assessee was the absolute owner of the property and by virtue of the development agreement, there is diminution of right of ownership as he has agreed to convey 52.5% of his undivided share, title or interest in the schedule property to the builder, subject to the options given to the owner and according to the assessee, first options was not exercised and therefore, assessee is deemed to have accepted the second option as referred to above and therefore, there is no conveyance of immovable property to attract the provisions of section 45(1) of the Act.

8. It is also contended by the revenue that as the assessee has permitted the developer to enter the premises to put up construction on the entire property, to the extent of 52.5% by the developer in his own right as per the development agreement, as also 47.5% on behalf of the owner, though there is no recital that possession has been handed over, it must be deemed that possession was handed over on the date of development agreement as the developer has gained access to the property without being disturbed by the owner to put up construction on the entire property. Therefore, the possession must be deemed to have been handed over on the date of development agreement dated 25-1-1993 and the capital gain has rightly been shown by the assessee and it cannot be withdrawn by the assessee as the transaction would attract the capital gain.

9. The contention of the revenue was accepted by the assessing officer and the first appellate authority and the ITAT reversed the said finding by accepting the

contention of the assessee, by holding that mere diminution of title in the absence of any sale deed and as the owner continues to be in possession of the property, there was no conveyance of the property and the said transaction would not attract capital gain u/s 45(1) of the Act read with section 48 of the Act and the assessee cannot be made liable to pay the capital gain.

10. The learned counsel appearing for the appellant-revenue submitted that in view of the development agreement entered into between the assessee and the developer dated 25-1-1993 the contents of which have not been disputed, the owner-assessee has agreed to sell the developer or his nominee 52.5% of the undivided share, interest, right and title to the schedule property as a whole or any part of undivided shares or interest together with a right to develop Multi Storeyed Residential Complex to the extent of 52.5% super built up area for themselves or their nominees and 47.5% of super built up area for and on behalf of the owner. The contents of the agreement would clearly show that there is conveyance of 52.5% of undivided share of the assessee and since assessee was the absolute owner, there is diminution of interest to the property to the extent of 52.5% and his become the owner of 47.5%. The clauses 8, 9, 12, 16, 21 & 22 would clearly show that though actual execution of the sale deed is postponed, the developer is permitted to enter into possession of the property which cannot be obstructed by the assessee and power of attorney has also been executed in favour of the developer and is entitled to put up construction on the basis of the portion which is conveyed to him and is also entitled to sell the same and so far as interest of the assessee at 47.5% is concerned, he is permitted to put up construction on the said structure also on behalf of the assessee and therefore when the possession has been handed over in pursuance of development agreement, it would attract capital gain and therefore, the order passed by the ITAT holding that the transaction did not attract capital gain is clearly erroneous and perverse. She has relied upon the decision of the Bombay High Court in Chaturbhuj Dwarkadas Kapadia Vs. Commissioner of Income Tax, in support of her contention that section 45 of the Act and clauses (v) and (vi) introduced in section 2(47) of the Income Tax Act, 1961 would cover the said transaction as held by the Bombay High Court and the date of transfer should be taken as from the date of development agreement; when developer gained possession of the property and the said explanations have been added to section 2(47) of the Act only to scotch the method followed by the developers of postponing the actual execution of the sale deed and payment of capital gain and in view of the said decision, the order passed by the ITAT cannot at all be sustained. She also submitted that the reasoning assigned by the ITAT that it is not possible to compute the capital gain u/s 45 of the Act and section 45(1) of the Act is not attracted to the development agreement in the present case dated 25-1-1993 and the capital gain would not arise during the assessment year 1995-96 is clearly erroneous and substantial question of law may be answered in favour of the revenue.

11. The learned counsel appearing for the respondent-assessee submitted that in

 

view of the contents of the development agreement dated 25-1-1993, there is only diminution in the quantum of ownership of the assessee and there is no conveyance of the property and therefore, capital gain is not payable during the assessment year 1995-96 and the clauses in the development agreement do not show that irrevocable possession has been taken over by the respondent and it amounts to conveyance. He further submitted that the finding of the Tribunal that when the assessee continues to be the owner of the entire property and has possession in respect of the entire property, there is only diminution of his interest, which would not attract capital gain as there is no transfer of asset for consideration, though there is a transfer in respect of diminution in the ownership of the assessee, it cannot fall within the ambit of section 45(1) read with section 2 (47) of the Act and therefore, there cannot be capital gain eligible to tax in the year and appeal (1995-96).

12. The learned counsel appearing for the respondent further submitted that the decision relied upon by the learned counsel appearing for the appellant in Chaturbhujs case cited supra, is not helpful to the appellant in the present case and in the present case, there is no conveyance for consideration to attract the provision of section 45(1) of the Act and in view of the provisions of section 45 of the Act, full value of the consideration has not been received and only when the full value of consideration has been received, the question of paying the capital gain would arise during the relevant year and in any view of the matter, capital gain is not attracted during the assessment year 1995-96. He has relied upon the decision of the Hon''ble Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, wherein the Hon''ble Supreme Court has held that charging section and the computation provisions together constitute an integral code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section.

13. The learned counsel appearing for the respondent has also relied on a decision of the Hon''ble Supreme Court in Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, wherein it is held that when the assessee has transferred his shares to the partnership firm, he received no consideration within the meaning of section 48 of the Act nor did any profit or gain accrues to him for the purpose of section 45 of the Act. Where a partner of a firm makes over capital asset to the firm as contribution towards capital, there is no capital gain within the terms of section 45(1) of the Act. This is because exclusive interest of the partners in the asset is reduced on their entry into the firm into a shared interest.

14. The learned counsel has also relied on a decision of the Hon''ble Supreme Court in Manish Maheshwari Vs. Asstt. Commissioner of Income Tax and Another, wherein the Hon''ble Supreme Court has observed that a taxing statue is well known, must be construed strictly. While dealing with a taxing provision, the principle of strict interpretation should be applied. The court shall not interpret

 

the statutory provision in such a manner which would create an additional fiscal burden on a person. It is also trite that while two interpretations are possible, the court ordinarily would interpret the provision in favour of a tax payer and against the revenue.

15. The learned counsel appearing for the respondent further submitted that even if there is conveyance under the development agreement, capital gain cannot be computed at this stage and therefore, capital gain is not attracted and is not covered by any of the provisions of section 45(1) and 45(7) of the Act. He also submitted that fiction created in section 45(3) and 45(4) of the Act cannot be extended to transactions other than those mentioned in the sub-sections. Therefore, the order of the ITAT is justified and the substantial questions of law may be answered in favour of the assessee and against the revenue.

16. We have given careful consideration to the contentions of learned counsel appearing for the parties in the light of the principles laid down in the decisions relied upon by learned counsel appearing for the parties.

17. The material on record would clearly show that the assessee had filed return of income tax for the assessment year 1995-96 on 17-1-1996 declaring total income of Rs. 1,36,80,730 and the same was completed on 18-3-1998 determining the total income of Rs. 1,86,62,181. it included the long-term capital gain of Rs. 1,44,94,439 as against Rs. 1,32,59,786 shown by the assessee in the return of income. Therefore, the assessee himself had shown the capital gain of Rs. 1,32,59,786 in the return filed for the assessment year 1995-96. However, enhancement on the long term capital gain resulted, as per the reasoning assigned by the assessing officer, due to adopting the cost of acquisition of the asset transferred before indexation of Rs. 92,000 in place of Rs. 10,00,000 claimed by the assessee. The assessee filed an appeal against the enhancement of the long-term capital gain in the assessment order. The appeal was disposed of by the first appellate authority in appeal No. ITA 214/CC-1/CIT (A)-I/98-99 dated 8-6-1999. As regards the cost of acquisition of the asset before indexation, the first appellate authority held that the value claimed at Rs. 10,00,000 by the assessee should be adopted to the purpose of assessment. However, the first appellate authority observed that certain discrepancies have crept in with regard to the full value of sale consideration shown for the transfer of asset and the cost of improvement claimed as a deduction in the computation of long-term capital gains. The first appellate authority observed that the assessee owned a landed property measuring 36486 sq.ft area at Gattahalli, Bangalore which was acquired on 31-10-1967 for a consideration of Rs. 92,000. The assessee entered into the joint development agreement with M/s. Alpine Housing Corporation (Developers) on 25-1-1993 according to which the assessee would transfer 52.5% of his undivided share, interest, right and title in the land to the developers or to their nominees for developing a multi-storeyed residential complex. As a consideration for the transfer, the assessee was entitled to either monetary consideration of Rs. 1,34,00,000 as the first option or 47.5% share in

 

the total built-up area of the proposed to be constructed residential complex on the said land as second option. The assessee exercised the second option of receiving 47.5% share in the total built up area as the consideration for the transfer of 52.2% share of the undivided interest in the land. Subsequently a tripartite agreement of sale and construction was made on 29-12-1993 with the assessee, the developer and SIDBI '' purchaser as the three parties to the agreement. As per this agreement, it was agreed that 52.5% of the total built-up aera, being the share of the developer will be sold by SIDBI for a consideration of Rs. 1100 per sq.ft. of the built up area. It was also agreed that 52.5% of the undivided interest in the land were subsequently registered during the previous year relevant to assessment year 1995-96. Further, the assessee has sold 265/36395th share in the land to Sri S. A. Kabir for a consideration of Rs. 2,13,500. The assessee has therefore, computed the full value of sale consideration for transfer of 52.5% share of undivided interest in the land at Rs. 1,53,93,500 (Rs. 1,51,80,000 + 2,13,500). However, the consideration mentioned in the sale deeds for transfer of undivided interest in the land at Rs. 1,53,93,500 is the amount which has been received by the developers and not by the assessee. As per the joint development agreement between the assessee and the developer dated 25-1-1993 and as per the second option in the said agreement exercised by the assessee, the assessee was entitled to 47.5% of the total built up area as a consideration for transferring 52.5% of his undivided interest in the land to the purchaser who is the nominee of the developer. The sale consideration shown in the document of transfer to SIDBI and the nominee of the developer is not the real consideration for the transfer as far as the assessee is concerned. The consideration in this case as far as the assessee is concerned, is to be received from the developers in the form of ownership and occupancy right in 47.5% of the immovable property to be constructed by the developer. Therefore, in this case, there is transfer of one capital asset for another in the form of exchange. The monies worth of the assets to which the assessee became entitled as a result of the transfer can be calculated on the basis of cost for acquiring similar units by SIDBI (excluding the cost of share in interest in land) and the same would represent the full value of consideration due to the assessee arising from the transfer of assessees 52.5% share in the property. The cost of improvement claimed by the assessee as a deduction in the computation of long term capital gains consists of the payments made during the financial years 1993-94 towards electricity charges, corporation taxes and betterment charges paid by the assessee towards the property transferred by him. However, as per the joint development agreement entered into between the assessee and the developer on 25-1-1993, the assessee did not have any obligation to bear the expenses for development of the property after the date of agreement. Normally, whatever expenses were to be incurred for development of the 52.5% of the developers share, in the subject property transferred has to be borne by the developer only. Moreover, the assessee has not furnished the necessary details during the appellate proceedings to show that the payment made towards improvement is from accounted sources. On the basis of the said observations, the appellate authority held that the assessing officer had adopted wrong standards to determine the full value of consideration and that the assessing officer did not examine the claim of cost of improvement which appears to be prima facie wrong and accordingly remitted the matter for consideration. However, it must be remembered that the finding on the question as to whether the transaction, development agreement and the tripartite agreement involving transfer of capital asset would attract capital gain, was confirmed and what was remitted to the assessing officer was only computation of the actual capital gain and the cost of improvement.

18. After remand, the assessing officer by order dated 27-3-2002 computed the full value of the property. Before the assessing officer, assessee had shown details of cost of improvement before indexation in respect of undivided interest in the land transferred and the assessing officer redetermining the actual sale price on the basis of the price at which property was sold to the purchaser under the tripartite agreement, arrived at the full value of sale consideration of Rs. 1,48,71,655. So far as the determination of cost of improvement, the assessee was given an opportunity to furnish documents as observed by the first appellate authority while setting aside the order of the assessing officer. Notice was issued and the books of accounts for the financial years 1993-94 and 1994-95 were also produced for verification of the sources for incurring expenditure towards cost of improvement. The break up of items of expenditure which are claimed as cost of improvement, as furnished by the assessee are as follows :

Financial year

Date

Amount

Nature of expenditure

1993-94

21-5-1993

29,130

Payment of electricity charges to KEB

12-7-1993

5,54,039

Payment of betterment charges to BDA

22-10-1992

15,380

Payment of corporation tax

 

Total :

5,98,549

1994-95

15-9-1994

1,39,419

Payment of electricity charges to KEB

Total :

1,39,419

Grand Total

7,37,968

The assessing officer held that so far as the payment of betterment charges to BDA, the same can be considered as cost of improvement as it was an obligation of the owner to pay betterment charges. However, so far as the payment of electricity charges to KEB and payment of corporation tax are concerned, the same were disallowed as the same do not amount to cost of improvement in the value of the property and as per the agreement, the developer had to pay the same and there was no obligation on the part of the assessee to make payment to KEB and to the Corporation and accordingly, rejected the cost of improvement claimed towards payment of electricity charges to KEB and payment of corporation tax and accepted the improvement to the extent of Rs. 5,54,039 i.e., cost incurred for payment of betterment charges and accordingly passed the assessment order by holding that assessee was entitled to refund of cost of Rs. 62,746.

19. Being aggrieved by the said order, the appeal was filed before the first appellate authority in ITA 203/DCIT CC-1(1)/CIT (A)-VI/2002-03 and the first appellate authority declined to consider the contention regarding computation of capital gain in view of the fact that the said finding of the assessing officer holding that assessee was liable to pay the capital gain as the transaction involved sale of capital asset was confirmed by the first appellate authority in the earlier proceedings and therefore, it was not open for the assessee to now contend that the transaction did not amount to capital gain attracting tax under sections 45(1) and 48 of the Act. He further held that in view of the fact that the assessing officer was only required to consider the actual sale price and cost of improvement u/s 143(3) read with section 250 of the Act, the said contention cannot be taken and the first appellate authority confirmed the finding of the assessing officer by holding that actual sale price as calculated by the assessee with reference to the sale price to the customer by the tripartite agreement was justified. So far as the cost of improvement is concerned, there was no obligation on the part of the assessee to pay the corporation tax and electricity charges and

 

therefore, payment of the said amounts do not amount to cost of improvement and therefore, assessing officer has rightly excluded the amount paid towards development charges towards cost of improvement and confirmed the finding of the assessing officer to that effect and the first appellate authority further held that since payment of interest is not compensatory in nature, payment of interest is mandatory and upheld imposition of interest and dismissed the appeal. Therefore, there is concurrent finding by the first appellate authority and the assessing officer regarding actual sale price and cost of improvement and indexation and about the amount which would attract tax on capital gain u/s 45(1) read with 48 of the Act.

20. However, the ITAT has proceeded on the basis that the effect of transaction of development agreement entered into between the assessee and the developer was only diminution of the ownership right of the assessee and in view of the conditions of the development agreement, it was clear that total ownership right in the property of 100% came to be reduced to 45.5% and there is diminution in the ownership right to that extent; but the assessee is still the owner of the entire property and that he is in possession of the entire property, only the exclusive interest of the property has been converted to shared interest. Further, consideration received for such transfer got diverted by overriding title and became the consideration of the developer, who factually received the same and was also entitled to receive the same under law. No matter, the developer was obliged to give a constructed portion to the assessee, but the consideration so received by the developer is not the full value of the consideration received or accruing to the assessee for providing the property for joint development and therefore, the principle laid down in Sunil Siddharthabhais case (supra) applies and this is not a case of sale or transfer of asset for cash, but part of the development arrangement. A larger interest in the whole property becomes a shared interest and the assessee still retains the property. Though, there may be transfer in respect of the diminution in the ownership of the assessee, it cannot fall within the ambit of section 45(1) read with section 48 of the Act as full value of the consideration cannot be computed. Therefore, there cannot be capital gain exigible to tax for the year under appeal and mere execution of the conveyance deed cannot make the assessee liable to pay capital gain for the assessment year 1995-96.

21. It is clear on consideration of the reasons assigned by the assessing officer and the first appellate authority, which is based upon sound reasoning, the reasoning given by the ITAT as referred to above is clearly erroneous.

22. In a recent decision in Commissioner of Income Tax, Faridabad Vs. Ghanshyam (HUF), the Hon''ble Supreme Court had an occasion to consider the scope and ambit of provisions of section 45 wherein capital gain is taxed and Hon''ble Supreme Court has observed as follows :

16. ...The following conditions need to be satisfied for taxing a transaction as capital gains viz., the subject matter must be a capital asset, the transaction

 

must fall in the definition of transfer, there must be profit or loss called capital gains and that the taxpayer has claimed exemption in whole or in part by complying with legal provisions (like section 54F).

17. ...Section 45(1) of the 1961 Act speaks about capital gains arising out of transfer of a capital asset. The definition of the expression transfer is contained in section 2(47) of the 1961 Act. It has very wide meaning. What is taxable u/s 45(1) of the 1961 Act is ''profits and gains arising from a transfer of a capital asset'' and the charge of income tax on the capital gains is a charge on the income of the previous year in which the transfer took place.

18. ...Capital gain(s) is an artificial income. It is created by the 1961 Act. Profit(s) arising from transfer of capital asset is made chargeable to income tax u/s 45(1) of the 1961 Act. From the scheme of section 45, it is clear that capital gains is not an income which accrues from day-to-day during a specific period but it arises at a fixed point of time, namely, on the date of the transfer. In short, section 45 defines capital gains, it makes them chargeable to tax and it allots the appropriate year for such charge. It also enacts a deeming provision. Section 48 lays down the mode of computation of capital gains and deductions therefrom.''

23. Section 2(47) of the Act defines as follows :

''transfer'' in relation to a capital asset, includes,--

(i) ...the sale, exchange or relinquishment of the asset; or

(ii) ...the extinguishment of any rights therein; or

(iii) ...the compulsory acquisition thereof under any law; or

(iv) ...in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment;

(iva) ...the maturity or redemption of a zero coupon bond; or

...Clauses (v) and (vi) were inserted by Finance Act, 1987 with effect from 1-4-1988 which read as follows :

(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 section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(vi) ...any transaction (whether by way of becoming a member of, or acquiring shares in, a cooperative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring or enabling the enjoyment of, any immovable property.

24. The ITAT was not at all justified in holding that facts of this case as referred to above would attract the principles laid down in Sunil Siddharthbhais case

(supra). It is clear from the decision of the Hon''ble Supreme Court in the case of Sunil Siddharthbhai (supra), the said decision was prior to the inclusion of clauses (v) and (vi) to section 2(47) of the Act and even otherwise, in the said case, the Hon''ble Supreme Court has observed that the point that arise for determination in the said case was whether the capital contribution by a partner to the assets of the partnership firm at an appreciated value can be said to give rise to a capital gain in his hands liable to income tax. In the said case, the partner who owned shares, transferred the same to the firm and the value of his asset was enhanced amounting to Rs. 1,49,819 but the date on which he contributed shares to the partnership firm, he valued the shares at the market value of Rs. 1,60,279 and credited the resulting difference of Rs. 10,460 to his capital account. In those circumstances, the Hon''ble Supreme Court held that when the assessee brought the shares of the limited companies into the partnership firm as his contribution to its capital, there was transfer of a capital asset within the meaning of the terms of section 45 of the Act. However, in regard to the question whether assessee had received any consideration as that expression is understood in the scheme of capital gain under the Act, the Hon''ble Supreme Court has referred to the observations made in B. C. Srinivasa Settys case (supra), wherein it was held that charging section and the computation provisions under each head of income constitute an intergrated code and when there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Having regard to the facts and the concept of partnership firm, the Hon''ble Supreme Court has also held that the consideration received by the assessee on the transfer his shares to the partnership firm does not fall within the contemplation of section 48 of the Act and further no profit or gain can be said to arise for the purposes of the Act and accordingly held that the case fall outside the scope of section 45 of the Act. The Hon''ble Supreme Court has also held that (1) there was a transfer of the shares when the assessee made them over to the partnership firm as his capital contributions; and (2) when the assessee transferred his shares to the partnership firm, he received no consideration within the meaning of section 48 of the Act nor did any profit or gain accrue to him for the purpose of section 45 of the Act and it was specifically observed that those observations are given by them subject to the reservations made by them in the preceding paragraph that they decided the appeals on the assumption that the partnership firm in question is a genuine firm and not the result of a sham or unreal transaction and that the transfer by the partner of his personal asset to partnership firm represents a genuine intention to contribute to the share capital of the firm for the purpose of carrying on the partnership business. Therefore, the said decision that is relied upon by the ITAT in holding that the transaction did not attract capital gain in the present case is clearly erroneous since the assessee himself had calculated the capital gain but contended that it was erroneously shown in the said assessment year as it did not accrue in the said assessment year and both the assessing officer and the first appellate authority have calculated the sale value. The decision in B.C.

 

Srinivasa Shetty (supra) is also not helpful to the assessee in the present case.

25. The other decisions produced by the learned counsel appearing for the assessee is regarding strict interpretation of the provisions of the Act and two interpretation were possible and interpretation favourable to the assessee should be accepted. It is clear from the nature of transaction in the present case that in view of the development agreement, the assessee agreed to convey 52.5% of his right in the property of which he was the absolute owner to the developer and two options were given to him i.e., payment of consideration of Rs. 1,34,00,000 and if the assessee would not accept the said offer, he would be entitled to construction put up at 47.5% share in his property. The assessee did not exercise his option. Therefore, he is deemed to have accepted the second option but he is entitled to total built up area of the construction/development made on the schedule property in respect of 47.5% of the land. Therefore, there was transfer of property belonging to 52.5% of the ownership belonging to the assessee in favour of the developer and the process in the development agreement contained in clauses 8, 9, 10, 11, 12, 13, 15, 21 and 22 would clearly show that from the date of the said agreement, developer came in to possession of the property and for the purpose of construction, the assessee has accepted power of attorney as per the clause to enable the developer to put up construction and the assessee is restrained from interfering in the developer and his nominee entering into possession of the property and putting up construction in the entire area of the property belonging to the assessee. Thereafter, a tripartite agreement has been entered into between the owner, developer and the purchaser '' Small Industries Development Bank of India regarding sale of construction put up on 52.5% of the property which was agreed to be conveyed to the purchaser by accepting the consideration and therefore, there was transfer of capital asset for consideration and the relevant date on which the possession was handed over would be the date on which possession was taken by the developer excluding possession of the assessee and the assessee had also accepted the General Power of Attorney by the developer and was restrained from interfering with the possession of the property of the developer in putting up construction and therefore under the said circumstances, it is clear that there was transfer of capital asset for consideration in view of clauses (v) and (vi) of section 2(47) of the Act defining transfer of capital asset and therefore, the same amounted to consideration amount which was calculable in this case with reference to the material on record, constituted capital gain which attracted tax u/s 45(1) read with section 48 of the Act. Under similar circumstances, the effect of insertion of clauses (v) and (vi) in section 2(47) of the Act and as to why the said clauses were inserted into the provisions of the Act has been narrated by the Bombay High Court in Chaturbhujs case (supra) wherein after considering the provisions of section 2(47) clauses (v) and (vi), it is observed as follows :

The above two clauses were introduced with effect from 1-4-1988. They provide that transfer includes (i) any transaction which allows possession to be taken/ retained in part performance of a contract of the nature referred to in section

 

53A of the Transfer of Property Act, and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property (see section 269UA(d)). Therefore, in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of the immovable property is not effective or complete under the general law (see Kanga and Palkhivalas Law and Practice of income tax '' VIII edition, page 766). This test is important to decide the year of chargeability of the capital gains.

While giving the finding, the Bombay High Court has held 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 u/s 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 assesses used to enter into agreements for developing properties with the builders and under the arrangement 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.

In the said case also, having regard to the fact that the development agreement granted irrevocable licence to the developer to enter in to possession of the property and power of attorney had been executed to deal with the property and irrevocable licence to enter upon the property after the developer obtains requisite approvals of various authorities. The Bombay High Court held that the said transaction would amount to capital gain and attracted tax u/s 45(1) of the Act. Accordingly, we hold that the ITAT was not at all justified in holding that transfer in the present case do not attract capital gain and was not exigible to tax under sections 45(1) and 48 of the Act. Therefore, the substantial questions of law have to be answered in favour of the revenue and against the assessee and the order passed by the first appellate authority confirming the orders of the assessing officer has to be restored by setting aside the order of the ITAT.

26. The ITAT had disposed of ITA No. 147/Bang/2003 on the ground that since the finding is given in ITA No. 534/Bang/1999 that transaction did not attract capital gain and it was unnecessary to go into the contentions raised in the appeal in ITA No. 147/Bang/2003 and therefore, it had become infructuous. In view of the above, the order passed by the ITAT in ITA No. 534/Bang/1999 and

 

ITA No. 147/Bang/2003 are liable to be dismissed.

27. Accordingly, we pass the following :

ORDER

The appeals are allowed. The order passed by the ITAT in ITA No. 534/ Bang/1999 and 147/Bang/2003 dated 29-4-2004 is set aside. The orders passed by the first appellate authority confirming the order of the assessing officer is restored.

 