IN THE HIGH COURT OF KARNATAKA, BANGALORE

DATED THIS THE 28TH DAY OF JULY, 2009

PRESENT

THE HON'BLE MR. JUSTICE D.V.SHYLENDRA KUMAR
AND
THE HON'BLE MR. JUSTICE ARAVIND KUMAR

I.T.A NO.16 OF 2004

BETWEEN

1. The Commissioner of Income-tax,
   C.R.Building,
   Queens Road,
   Bangalore.

2. The Deputy Commissioner
   Of Income-Tax,
   Circle-5(1),
   C.R.Building,
   Queens Road,
   Bangalore.

Appellants:

(By Sri.M.V.Seshachala, Advocate)

AND:

Sri.P.R.Seshadri,
No.21, Gulmohal Enclave,
Opposite to Airport White Field Road,
Bangalore-37.

Respondent:

(By Sri.M.Lava for A.Shankar, Advocate)

This Appeal is filed under Section 260A of Income Tax Act, 1961 to allow the appeal and set aside the order passed by the ITAT, Bangalore ITA No. 1162/Bang/2002 dated 29-8-2003 and confirm the order of the Appellate Commissioner confirming the order passed by the Deputy Commissioner of Income Tax. Circle-5(1), Bangalore.

This Appeal coming on for hearing, this day, **D.V.SHYLENDRA KUMAR J,** delivered the following:

JUDGMENT

Appeal by the revenue under Section 260 A of the Act. Assessment year is 1996-97. Assessee is an individual and had filed his return of income offering to tax income from his business activities etc, apart from capital gains.

2. The present appeal is one relating to the computation of the capital gains.

3. During the accounting period relevant for the assessment year, the assessee was holding shares in a company by name M/s Vishesh Technologies Pvt. Ltd., and held about 90% of the share held and transferred his entire share holding of Rs.40,07,000 in favour of M/s SRG

Infotech (India) Ltd., at a price of Rs.18.75 per share yielding a net receipt of Rs.75,13,125/-.

4. Apart from transferring his entire share holding in the company in favour of the buyer the assessee had under a separate agreement agreed to transfer the liabilities in connection with a soft ware that the assessee himself had developed, some of the assets of the company namely computers and some software information, Oracle Software as also intellectual property rights of all patents and copy rights which he personally owned valued as under:

1. Debtors (GTC	-	6.75 lacs	- (Rs.in lacs)
HNR	-	0.85 lacs	-
Total debtors	-		7.60
2. Computers of VT-			3.14
3. Intellectual property rights of all patents & copy rights owned by Mr.P.R.Seshadri			34.78
4. Oracle Software			0.48
		Total	45.00

Totaling a sum of Rs.45 Lakhs.

5. It appears the assessee in the computation of his capital gains from the sale of the shares and other assets whether of the company or of his own had offered to tax the capital gains attributable to the shares which he had worked as under:

Income from long term Capital Gain:

i) Sale of 400, 700 shares of M/s.Visesh Tech.(P)Ltd. @ Rs. 18.75 per share	75,13,125.00
Less Cost of 400, 700 shares @ Rs. 10/- Per share	40,07,000.00
Indexed cost of 400, 700 shares Purchased on 4.4.94 (281/259) 40,07,000/-	43,47,362.00
	31,65,763.00

and had also offered a further sum of Rs.8.78 lakhs as capital gain from the sale copy right (Computer soft ware) indicating that the price which he had received for the sale

of this item itself was the capital gain as according to the assessee the cost of acquisition was nil.

6. The assessee, it appears, had also received an amount of Rs.25,00,000/- by way of advance in respect of Rs.45 lakhs which the assessee was to receive from the transferee.

7. While assessing on the return filed by the assessee, the Assessing Officer found that the assessee had claimed an amount of Rs.20,96,008/- as a deduction in terms of Section 54 F of the Act which the Assessing Officer thought, the assessee was not entitled as it appeared to the Assessing Officer that the spouse of the assessee had claimed like benefit for the sum for which the assessee had claimed deduction by way of investment in the construction of the house and also being of the view that the sum of Rs.25,00,000/- should have been offered as capital gain in the very year and not avoided for offering on the pretext of being advance payment as in the opinion of the Assessing Officer the transaction was well over and

amount was regarded as part of the sale consideration. On such premise the Assessing Officer finalised the assessment adding a sum of Rs.20,96,008/- and Rs.25,00,000/- to the capital gain already worked out by the assessee himself and called upon the assessee to pay commensurate tax.

8. The aggrieved assessee appealed to the Appellate Commissioner. Before the Appellate Commissioner the assessee contended that adding a sum of Rs.8.78 lakhs was in ignorance of law and that the amount was not assessable to tax as capital gain as the capital gain could not be worked out due to the difficulty in working out the cost of acquisition of the particular asset and therefore the amount could not have been added as capital gain though had been offered by the assessee himself.

9. It was also urged that the Assessing Officer could not have taken the receipt of Rs.25,00,000/- as income due to capital gain for the very year as it was only an advance payment. It was therefore contended that the

Assessing Officer is in error in adding this amount. The further ground raised is that the assessee is invoking the benefit of Section 54F of the Act.

10. The Appellate Authority having not been impressed upon by any of the grounds taken by the assessee, dismissed the appeal in its entirety.

11. The assessee appealed further to the Income Tax Appellate Tribunal and met with success. The Appellate Tribunal was of the view that the assessee himself having contributed to the construction of the new residential building out of his funds generated by the sale of shares, irrespective of the fact that the spouse claimed on the very same provision where the assessee had made from out of the sale of share for the construction of the building, though was on a land belonging to his wife, was nevertheless entitled to the benefit under Section 54F and accordingly allowed the deduction claimed by the assessee.

12. In so far as the computation under the head of capital gains is concerned, the Tribunal for examining the

addition of Rs.25,00,000/- that it attracted the principle laid down by the Supreme Court in CIT Vs. Srinivas Shetty reported in (1981) 128 ITR 294 (SC) wherein the Supreme Court had taken the view that an asset like goodwill cannot be subjected to income tax as capital gain, as the cost of acquisition of the asset is incapable of computing and therefore the computation machinery under Section 48 fails and applying these principles to the facts and also being of the view that the taxability of such an asset was made possible only in terms of Section 55(2) of the Act which has come on the statute book only with effect from 1-4-1998 onwards which reads as under:

> "55. Meaning of "adjusted", "cost of improvement" and "cost of acquisition". – (1) For the purposes of Sections 48 and 49, -
> (a) [Omitted]
> (b) "cost of any improvement",-
> (1) in relation to a capital asset being goodwill of a business. [or a right to manufacture, produce or process any article or thing] [or right to carry on any business] shall be taken to be nil, and
> (2) in relation to any other capital asset, -

(i) where the capital asset became the property of the previous owner or the assessee before the 1st day of April, [1981], [* * *] means all expenditure of a capital nature incurred in making any additions or alterations to the capital asset on or after the said date by the previous owner or the assessee, and

(ii) in any other case, means all expenditure of a capital nature incurred in making any additions or alterations to the capital asset by the assessee after it became his property, and, where the capital asset became the property of the assessee by any of the modes specified in sub-section (1) of Section 49, by the previous owner,

but does not include any expenditure which is deductible in computing the income chargeable under the head "Interest on securities", "Income from house property", "Profits and gains of business or profession", or "Income from other sources", and the expression "improvement" shall be construed accordingly.

(2) "For the purpose of Sections 48 and 49, "cost of acquisition", -

[(a) in relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business]

[or a right to manufacture, produce or process any article or thing [or right to carry on any business]], tenancy rights, stage carriage permits or loom hours,-

(i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and

(ii) in any other case [not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of Section 49], shall be taken to be nil;"

and therefore opined that when Section 55(2) is not available for the assessment year 96-97 there is no way of suspending the applicability of the principle as evolved in Srinivas Shetty's case and directed deletion of addition of Rs.25,00,000/-.

13. The Tribunal also held the addition of Rs.8.78 lakhs is also to be deleted for the same reason as the amount was on par with the sum of Rs.25,00,000/-. The Tribunal allowed the appeal on such findings.

14. It is against this finding of the Tribunal, revenue is in appeal. The revenue has raised the following

substantial questions of Law for examination in this appeal:

(i) Whether the Tribunal was correct in holding that the assessee was entitled to claim deduction under section 54F of the Act on the income derived from sale of shares on the ground that the same had been invested on a house owned by his wife at No.797, Rustumbagh, Bangalore by taking into consideration certain unilateral agreement with contractors, tender forms for proposed construction only signed by the assessee and not by the other party and rejected by the assessing officer and certain vouchers produced for the first time before the Tribunal and consequently recorded a perverse finding?

(ii) Whether the Tribunal was correct in ignoring the admission made by the assesse's wife Smt.Valsala Seshadri in Form No.34A under section 230A of the Act on 12.2.1996 that she was the absolute owner of 4,000 sq feet of house built in No.797, Rustumbagh, Bangalore owned and built by her out of funds derived from sale of her property situated at HAL 2nd stage, Bangalore and

consequently recorded a perverse finding?

(iii) Whether the Tribunal was correct in holding that a sum of Rs.25 lakhs derived by the assessee from sale of soft ware was towards advance and consequently the same could not be brought to tax in the current assessment year.

(iv) Whether the Tribunal was correct in holding that income of Rs.25 lakhs derived by the assessee from the sale of soft ware was nothing but a copy right and patent right being right to manufacture, produce or process of any article or thing under a brand name and was not liable to tax as the amended section 55(2)(a) of the Act was not applicable to the current assessment year?

(v) Whether the Tribunal was correct in holding that a sum of Rs.8.78 lakhs derived by the assessee from sale of soft ware was nothing but a copy right and patent right being right to manufacture, produce or process of any article or thing under a brand name was not liable to tax as the amended section 55(2)(a) of the Act was not applicable to the current assessment year especially when the assessee has admitted this amount as its taxable income in the return filed by him?

15.We have heard Sri. Seshachala learned standing counsel appearing for the revenue and Sri.Lava appearing for Sri.Shankar for the assessee.

16. Submission of Sri.Seshachala is that the Tribunal has committed an error in thinking that the assessee is entitled for the benefit of Section 54F; that the Tribunal failed to examine that the assessee's spouse had also claimed the very benefit for investment made for the very building and therefore two persons could not have been permitted to claim the benefit of Section 54F in respect of one building. It is also submitted that the building itself stood in the name of the spouse of the assessee and therefore also there cannot be any claim of investment by the assessee in respect of the construction of such a building etc.

17. The next argument is that the Tribunal has committed a serious error in law in simply proceeding to apply the principle evolved by the Supreme Court in

Srinivasa Shetty's case even without examining the present set of facts and circumstances and it is further submitted that the Tribunal failed to examine the possibility of bringing to tax the capital gain attributable to the transfer of copy rights technical know how by the assessee in which he had property rights. His submission is that even before the amendment to Section 55(2) of the Act, there is requirement to examine the assessability of the capital gains to tax and the Tribunal has not examined the question independently but blindly proceeded to apply the principle laid down in Srinivas Shetty's case. It is also submitted that valuing good-will cannot be said to be on par with valuing assets like intellectual property rights of all patents and copy rights owned by the assessee and also the value of soft ware etc. It is therefore submitted that the Tribunal without examination, blindly directed deletion of a sum of Rs.25,00,000/- even without going into the question of ascertaining the capital gain. The other argument advanced on behalf of the revenue is that in so

far as the amount of Rs.8.78 lakhs which the assessee himself had offered as capital gain is concerned, the Tribunal was in error in directing deletion of this amount that too on the reason this was on par with the sum of Rs.25,00,000/- which the Assessing Officer added on the premise that it amounted to a part of the sale consideration received in the accounting year relevant for the assessment year.

18. Submission is that the assessee himself admitted the receipt of Rs.8.78 lakhs and had offered this amount to tax on his own, by indicating the cost of acquisition as nil and on such premise calculated the capital gain. If there was no addition, the principle in Srinivas Shetty's case is not even attracted. This is a case where assessee himself had assessed and offered it as capital gain.

19. On the other hand appearing on behalf of the assessee Sri.Lava learned counsel for the assessee vehemently urged that the assessee had rightly claimed the benefit of the provisions of Section 54 F in this regard.

Learned counsel for the assessee would take us through the computation of the amount for capital gain and has also drawn our attention to the amount offered by way of capital gain and the benefit claimed in respect of capital gain by the spouse of the assessee which is referred to in the assessment order (page 63) and would point out the spouse of the assessee had claimed benefit of deduction under Section 54F only to the extent of 8.78 lakhs whereas the value of the building in respect of which the benefit had been claimed by the assessee was about Rs.25,00,000/- and assessee had claimed to the extent of Rs.20,95,612/-. Submission of Sri.Lava is that the amount of Rs.8.78 lakhs claimed by the spouse of the assessee for the benefit of Section 54F in fact was not even sufficient for the value of the land which was valued at Rs.9,10,000/- and it was not as though the assessee's spouse had any benefit in respect of the construction of the building in terms of the provisions of Section 54F of the Act.

20. With regard to the deletion of amounts of Rs.25,00,000/- and Rs.8.78 lakhs by the Tribunal, the learned counsel would submit that it is quite justified for the reason the Tribunal had followed the ratio laid down by the Supreme Court in the case of Srinivas Shetty and as the opinion of the Tribunal the said principle was applicable to the case of the assessee and therefore the appeal has to be inevitably allowed in this respect. He also submitted that if for any reason the matter requires re-examination at the hands of the Tribunal held the entire computation of capital gain has also to be re-examined and therefore the same principal should have applied in the matter of computation of capital gain in respect of sums of Rs.8.78 lakhs or Rs.25 lakhs both of which are directed to be deleted by the Tribunal. In this regard Sri.Lava would submit that it is well settled on the authority of the rulings of the Supreme Court in the matter of taxation that consent cannot be the basis for fixing the liability which is not found in the statutory provision. The mere fact that

the assessee himself had offered a sum of Rs.8.78 lakhs for tax by itself would not put against the assessee.

21. Sri.Lava in support of his submission has relied on the following decisions

(i) 287 ITR 271

(ii) 91 ITR 18

So far as the submission relating to the applicability of the ratio of the Supreme Court in the case is concerned while it is true that consent does not confer jurisdiction on an assessing authority to subject a citizen to tax, over and above the statutory provisions, the said decision is not attracted to the present situation for the simple reason that it is not as though by consent the additional liability over and above the statutory liability is created but the assessee himself had worked out the method for computation of capital gain and had by himself ascertained both the cost of acquisition and the sale price and when both are available there is no difficulty in computating the capital gain for the purpose of Section 45

of the Act and therefore the Tribunal was not required to examine the applicability or otherwise of the principle laid down by the Supreme Court in Srinivas Shetty's case.

22. We have perused the order of the Tribunal, the records inclusive of the orders of the First Appellate Authority and the assessment order, the grounds raised in the appeal and bestowed our attention to the rival submission made by the learned counsel for the parties.

23. The first question relating to the benefit of Section 54F being availed by the assessee in our opinion has to be answered against the revenue and in favour of the assessee for the reason that though the land may be in the ownership of assessee's spouse, nevertheless the Tribunal has recorded a categorical finding that construction work was in progress during 21-4-1995 till 31-8-1996 and the wife of the assessee could have included the value of construction for mortgage purposes and this by alone does not mean that construction was carried out by the wife of the assessee out of her own funds so as to deny the assessee the benefit of deduction under Section 54F of the Act.

24. If that is to be accepted as finding of fact then we find no impediment in the assessee's claim for relief under Section 54F, as the assessee had claimed relief to the extent of Rs.20,96,008/- as his contribution towards the cost of construction of the building and this amount we find that will fall within the cost of the building. Accordingly questions (i) and (ii) are answered in the affirmative and against the revenue.

25. In so far as the question relating to the addition of Rs.25,00,000/- by the assessing officer and the direction of the Tribunal to delete this amount is concerned, we find that the Tribunal has simply proceeded to apply the ratio of the decision of the Supreme Court in Srinivasa Shetty's case to this situation also and also for the reason that the provision of Section 55(2) had not come in the statute for the assessment year relevant for the accounting period. We find that the Tribunal has in fact not examined the facts and circumstances of the case before applying the principle as evolved in Srinivas Shetty's

case and recording a finding that principle is attracted to the facts and circumstances of the case.

26. We would like to sound a word of caution to the Tribunal passing orders on the premise of question involved in a case being covered by an authority either of the High Court or Supreme Court, the ratio of the case being applied is only when the Tribunal primarily records a finding about the facts and circumstances of the case and finds that to the facts and circumstances the ratio is attracted and therefore the question is covered and issue can be decided by applying the ratio of the case as enunciated by the High Court or the Supreme Court. In the absence of examination facts and circumstances of the case there is no way of the Tribunal directly applying the ratio of the High Court of Supreme Court. In the instant case, we find the Tribunal had not embarked on the exercise of finding the decision in so far as the assessee is concerned later recording a finding as to the applicability of the ratio. Here again the ratio evolved in the case in the

facts and circumstances of the case cannot blindly applied in all situation particularly by applying the principle as evolved by Srinivas Shetty's case, failure to examine the provisions of Section 48 of the Act, the factual situation of impossible to ascertain the initial goodwill though the goodwill itself might have been quantified and sold for a value.

27. In this regard we find that the subsequent judgment of the Supreme Court in A.R.Krishnamurthy & Another Vs. Commissioner of Income Tax reported in (1989) 176 ITR 417(SC) on which reliance was placed by Sri.Seshachala, learned counsel for the revenue governs the facts of the present case, more than Srinivas Shetty's case which was not applicable to the situation on hand.

28. In Krishnamurthy's case as in the case of valuing the leasehold right it was possible to ascertain the initial value or cost of acquisition which in fact was nil in the situation and likewise there may be several situations where it is possible to ascertain the capital gain by

applying but if the provisions of Section 48 the machinery Section fails in turn the charging section failing is only in a situation where it is impossible to ascertain the capital gain by the impossibility of ascertaining either the value of acquisition or the precise value of the asset itself fetches from out of the value of sale when a particular asset forms part of a compendious sale and when the value of sale of the particular asset cannot be ascertained there is a failure of machinery provision.

29. If these principles are applied we find that the Tribunal has without examining such aspects, simply opined that by applying the principle of Srinivas Shetty's case, the addition of Rs.25,00,000/- has to be deleted. Here again we have to notice that the Tribunal has not bothered to find out about the receipt of the amount in the assessment year as indicated by the Assessing Officer and as to whether it was assessable as the assessee's sale of goodwill was not a receipt, was also not examined.

30. It is for this reason we have to answer the question Nos. (iii) and (iv) in the negative and in favour of the revenue and remand the matter to the Tribunal to examine the facts situation and to give a finding on the question of computation of capital gain on the amount of Rs.25,00,000/- lakhs by applying the principle as indicated above and by reexamining the matter.

31. In so far as the question of amount of Rs.8.78 lakhs being assessed to capital gain as offered by the assessee being directed to be deleted by the Tribunal is concerned, we find and as rightly submitted by Sri.Lava learned counsel for the assessee this amount forms part of value 33.78 lakhs towards transfer of Intellectual Property Rights of all patents and copy rights owned by the assessee and the valuation of the assessee was while the assessee had received the total sum of Rs.33.78 lakhs on this account the sum of Rs.8.78 lakhs had been offered to tax in the accounting year relevant for the assessment year 1996-97 whereas the balance of Rs.25,00,000/- was by

way of advance payment and therefore was not taxable for the assessment year.

32. Be that as it may. As we have indicated that the Tribunal is in error in simply applying the principles of Srinivas Shetty's case without even examining on facts the applicability of the principle of the case and as on this case we have remanded the question to be decided afresh by the Tribunal in respect of the sum of Rs.25,00,000/- but the sum of Rs.8.78 lakhs being part of the very agreement and transaction and part of the consideration of Rs.33.78 lakhs towards the transfer of Intellectual property Rights of all patents and copy rights owned by the assessee while we answer the question in favour of the revenue and against the assessee nevertheless remand this question also to be considered by the Tribunal with a further direction to the Tribunal to bear in mind that the assessee himself had offered to tax, as an amount capable of being ascertained for capital gain and on his own shown an initial cost of acquisition of asset as nil and in this background to

examine the question of tax liability under the head capital gain in respect of entire amount of Rs.33.78 lakhs.

33. Therefore this appeal is allowed to the extent indicated above and the matter remanded to the Tribunal to examine afresh only the question of tax liability on the addition of Rs.25,00,000/- and also as to the correctness of the addition of Rs.8.78 lakhs and the direction of the Tribunal to delete 8.78 lakhs out of the total capital gain of the assessee.

Sd/-
JUDGE

Sd/-
JUDGE

Sbb/-