IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'B', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER and
SRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No. 477/Hyd/2013
Assessment year 2007-08

M/s. Fibars Infratech Pvt. Ltd., Hyderabad PAN: AABCF0529P Appellant	vs.	The ITO Ward-1(2) Hyderabad Respondent

Appellant by:	Sri B. Ramakrishnan
Respondent by:	Smt. Suba Shree Anantha Krishna
Date of hearing:	22.11.2013
Date of pronouncement:	03.01.2014

O R D E R

PER CHANDRA POOJARI, AM:

This appeal by the assessee is directed against the order of the CIT(A)-II, Hyderabad dated 2.1.2013 for A.Y. 2007-08.

2. The assessee raised the following ground of appeal:

1. *The order of the CIT(A) is contrary to law, facts and circumstances of the case.*

2. *The CIT(A) erred in confirming that the agricultural land given for development as a capital asset u/s. 2(14)(iii) of the Act without appreciating the facts in entirety in the correct perspective.*

3. *The CIT(A) erred in holding the transaction under development agreement-cum-GPA M/s. MAK Projects (P) Ltd., as a transfer u/s. 2(47)(v) as on the date of entering the agreement.*

4. *Without prejudice to the claim of the appellant that capital gain is not computable as the consideration has neither been received nor accrued during the year. The CIT(A) erred in*

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confirming the estimation of full value of consideration for the purpose of the computation of capital gain based on the penal clause in the development agreement.

5. *The learned CIT(A) has erred in confirming the interest u/s. 234A of the Act.*

6. *The learned CIT(A) has erred in confirming the interest u/s. 234B of the Act.*

3. The assessee raised the following additional grounds:

1. *The CIT(A) erred in confirming that the estimated full value of consideration for the purpose of computation of capital gain which was in the womb of the future ignoring the position of law that full value of consideration cannot be estimated under section 48.*

2. *Without prejudice to the above, the CIT(A) erred in confirming that the income is otherwise assessable under an adventure in the nature of trade and the income will be assessable only in the year of sale but not in the year of entering into the development agreement.*

4. The assessee filed a petition seeking admission of additional grounds and placed reliance on the judgement of Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT (229 ITR 383) (SC) and also submitted that the issue involved in the additional grounds is purely a legal issue based on material available on record and due to inadvertence these grounds were not raised in the original grounds raised before the Tribunal and omission on the part of the assessee to raise these grounds is unintentional. Accordingly, he pleaded the Bench to admit the same.

3. The learned DR not objected to the admission of additional grounds.

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4. After hearing both the parties, we are of the opinion that the issue involved in the additional grounds is purely a legal issue and all the facts relating to the issue are already on record. Accordingly, in the interest of justice, we are inclined to admit the same for adjudication.

5. Though the assessee raised several grounds, the issue revolves around the issue of taxability of capital gains on entering into Joint Development Agreement-cum-GPA with M/s. MAK Power Projects Pvt. Ltd., on 15.12.2006. In view of this, instead of adjudicating ground by ground, we are inclined to decide the entire issue in a cumulative manner.

6. Facts of the case are that the AO received information from M/s. MAK Projects Pvt. Ltd, Hyderabad during the relevant financial year that assessee company transferred lands for development to M/s. MAK Projects Pvt. Ltd. The assessee was in receipt of notice u/s. 148 on 20/10/2011. In response to the said notice the assessee filed its return of income on 23/03/2011. During the previous year 2006-07 relevant to A.Y. 2007-08, the assessee company had entered into a Development Agreement cum-GPA with M/s. MAK Projects Pvt. Ltd for development of its agricultural property situated in Survey Nos. 260 and 262, Thummaloor Village, Maheswaram Mandal, Ranga Reddy District, into a Housing Project as company under incorporation. After examination of all the documents and details filed, the AO, by order dated 28/12/2011, completed the assessment by rejecting claim of the assessee company that the land is not a capital asset, being agricultural land, and therefore no capital gain is assessable. Having held that there is a charge within the meaning of section 45, the land being a capital asset, the AO proceeded to determine the full value of consideration ignoring the plea of the assessee company that the same is not

ascertainable in the year under consideration. In other words, it was the prayer of the assessee company that the full value of consideration is only ascertainable in the year of receipt of constructed area for the purpose of computation of capital gain as the same can be worked out with certainty with reference to the cost of construction in the hands of the builder. The AO referred to the penal clause of the development agreement and adopted the same as yardstick to estimate the full value of consideration for the purpose of computation of capital gain. The AO worked out the following:

S. No.	Particulars	Amount (Rs.)
1	Full value of consideration	15,61,82,600
2	Less: Cost of acquisition	3,58,51,000
3	Short term capital gains	12,03,31,600
4	Total tax payable with Interest	7,97,92,126

7. Aggrieved with the assessment order, the assessee filed an appeal before the CIT (A)-II, Hyderabad. On appeal, the CIT(A) confirmed the additions made in the assessment order. Against this, the assessee is in appeal before this Tribunal.

8. The learned AR submitted that the land under consideration is an agricultural land. The Conditions specifying it to be an agricultural land are:

(i) The land is located 8 km away from the municipal corporation of Hyderabad.

(ii) The distance to the agricultural property is approximately 18 km from the end limits of the MCH also it is beyond the end limits of the notified GHMC limits.

(iii) Total population of the village as per 2001 census was 2850 with house holding of 615 and the area of the village is 2303 hectares.

(iv) Prior Usage of Land: The land was being used for agricultural purposes and agricultural operations like

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growing paddy and having guava orchard were carried on as on the date of sale and also on the date of conversion of the land. Thus the admitted fact is that the land in question was under agricultural operations on the date of sale/transfer for the purpose of considering the meaning of capital asset. It mattered very little as to how the subsequent purchaser intended to put the land into use.

9. The AR placed reliance on the following decisions:

(i) CIT vs. Smt. Savita Rani (270 ITR 40) (P&H)
(ii) M. Venkatesh vs CIT (144 ITR 886) (Mad)
(iii) CWT vs E. Uday kumar (284 ITR 511) (Mad)
(iv) CIT vs P.J. Thomas (211 ITR 897) (Mad)
(v) CIT vs Lilavati Thakorelal Patel (152 ITR 565) (Guj)
(vi) M.S. Srinivass Naicker vs ITO (292 ITR 481) (Mad)

10. The AR submitted that in Sarifabibi Mohamed Ibrahim and Others v. CIT (204 ITR 631) (SC) it was held by the Supreme Court that the test of whether a land is agricultural land or non agricultural land is as follows:

(i) land which is left barren but which is capable of being cultivated can also be 'agricultural land' unless the said land is actually put to some other non-agricultural purpose, like construction of buildings or an aerodrome, runway, which alters the physical character of the land rendering it unfit for immediate cultivation.

(ii) if land is assessed to land revenue as agricultural land under the State revenue law, it is a strong piece of evidence of its character as agricultural and;

11. The AR submitted that in the present case, the land was used for agricultural purpose till the date of sale and the date of conversion which is evidenced by revenue record. Hence it is to be considered as agricultural land. The Gujarat High Court in

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the case of Motibhai D. Patel vs CIT (127 ITR 671) had stated that if agricultural operations are being carried on in the land in question at the time when the land is sold and further if the entries in the revenue records show that the land in question is agricultural land, then the presumption arises that the land is agricultural land in character.

12. The AR further placed reliance on the decision of Tribunal Hyderabad Bench 'B' in the case of Tulla Veerender vs. ACIT (36 taxmann.com 545) wherein held:

> *"that what had to be considered is not what the purchaser did with the land or the purchaser was supposed to do with the land, but what was the character of the land at the time when the sale took place. The fact that the land was within municipal limits or that it was included within a proposed town planning scheme was not by itself sufficient to rebut the presumption arising from actual use of the land. The land had been used for agricultural purposes for a long time and nothing had happened till the date of the sale to change that character of the land. The potential non-agricultural value of the land for which a purchaser may be prepared to pay a large price would not detract from its character as agricultural land at the date of the sale. The land in question was, therefore, agricultural land."*

13. The AR submitted that an asset which does not fall within the scope of section 2(14) would automatically be outside the scope of section 45 of the Act. The nature of the property was converted from agricultural land to non agricultural land by the authorities (RDO) vide proceedings No. 4060/06, dated 27/12/2006 which is after the execution of the development agreement dated 15/12/2006. Assuming but not admitting, if the asset transferred is capital asset whether the transaction is covered by transfer Definition specified in the Act:

> *Section 2(47) defines transfer as*
>
> *Transfer", in relation to a capital asset, includes,-*

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

(ii) (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;] 6[or]

(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 1 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative 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.

Explanation.- For the purposes of sub- clauses (v) and (vi)," immovable property" shall have the same meaning as in clause (d) of section 269UA;

14. The AR further submitted that there is no sale in the proposed transaction because the sale is governed by section 54 of the Transfer of Property Act, 1882 whereby the prime factor is receipt of monetary consideration. There is no monetary consideration whatsoever in the Development Agreement entered into by the assessee. Therefore, sale is a mode of Transfer, fails.

15. The learned AR submitted that the transaction of Development Agreement is not on account of any relinquishment of any asset as the rights in the property continued to belong to the owner, neither is there any

extinguishment of right nor any compulsory acquisition under law. Subsection (iii) and (iv) of section 2(47) of the Act are not relevant to the case under consideration. Therefore, the definition of section 2(47) in relation to capital asset either a sale, relinquishment, extinguishment or compulsory acquisition fails. The only other mode which has to be seen is exchange. In this regard, the AR submitted that on the date of execution of the Development Agreement, exchange as a mode of transfer also fails because under section 118 of the Transfer of Property Act both the properties which are the subject of exchange must exist on the date of transfer. Any right of the assessees existing on the date of Development Agreement is only land owned by the assessees. As regards the consideration which accrues or is receivable, it is only when the project is completed which as on date is pending and since the 16 villas comprising of developed land of 9602 sq. yards and built up area of 58606 sq. ft. in return which the assessee company is entitled on the date of Development Agreement, is non-existent, therefore exchange as a mode of transfer also fails. Accordingly, the transaction does not fall within the ambit of section 2(47)(i), (ii), (iii) and (iv) of the Income-tax Act, 1961.

16. The AR submitted that any transaction involving 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), then only it is to be considered as a transfer. The development agreement does not fall under the transaction of allowing possession of any immovable property to be taken or in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act. The reason being is that the development agreement is not an agreement for sale, because it is an executor contract with the developers and not

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the intended purchaser. Thus, it is essentially a business agreement. Thus, a development agreement basically postulates coming together of two parties i.e., the owners and developers. The owner owns the land but has no finance to develop the property and the developer who does not have the land but has the necessary finance. Thus coming together of land and finance for project development is necessarily a business agreement whereby the landlord allows the developers to enter the land for the limited purpose of developer retaining his share as his award. A look into the provisions of Transfer of Property Act, 1882 clearly shows that allowing possession is to be taken or retained in part performance of the contract alone could be considered as transfer and not permissive possession or any other kind possession. The AR relied on the judgment of jurisdictional High Court in the case of N. Karuna & Anr. v. Appropriate Authority & Ors. 251 ITR 230 (AP) wherein the High Court held as under:

> *"A perusal of the above referred provision shows that allowing of possession to be taken or retained in part performance of the contract of the nature referred to section 53 of the TP Act, alone could be considered as transfer and not a permissive possession or any other kind of possession delivered by the seller to the purchaser".*

17. The AR submitted that though the above judgment of the jurisdictional High Court was rendered in the context of Chapter XXC of the Income-tax Act 1961 and interpretation of section 269UA(f) of the Income-tax Act, 1961, Explanation to section 2(47) embedded these provisions. This decision throws light on the concept and nature of Development Agreement which is not referred to by any of the authorities. Therefore, it is the assessees' view that the provisions of section 2(47)(v) are not applicable to the facts of the case. Further, the AR drew our attention to the decision of the Calcutta High Court in the case

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of Baisakhi Bhattacharjee v. Shayamal Bose [2002] (4) CHN 115 wherein the Calcutta High Court has held that:

> *"Development agreement comes out of the scope of the ambit of section 53A of the Transfer of Property Act. Therefore, section 53A of the TP Act, has no manner of application to a development agreement."*

18. The AR submitted that any transaction (whether by way of becoming a member of, or acquiring shares in a co-operative 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.

> *Explanation.- For the purposes of sub- clauses (v) and (vi)," immovable property" shall have the same meaning as in clause (d) of section 269UA;*

19. He submitted that this section is also not applicable because it has no effect of transfer nor enabling of any enjoyment by either of the parties on the date of execution of Development Agreement as the owners continue to own the land and the developers have no enjoyment whatsoever as it is only the execution of a project in accordance with the terms of Development Agreement in the nature of toil and labour rather than enjoyment. The clause (vi) of section 2(47) is also not applicable to the facts of the case.

20. The provisions of section 2(47)(v) & (vi) were introduction by way of amendment with effect from 1-4-1988. The object and analysis of section 2(47)(v) & (vi) on its introduction was to include transactions that closely resemble transfers but are not treated as such under the general law. An agreement of sale by itself does not create any right or interest in or near immovable property u/s 54 of the Transfer of Property Act. Judicial precedents under the Income-tax Act took the view until a sale

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deed was executed no transfer could take place. The mischief that was sought to be remedied was to include under transfer purchasers who became members or by acquiring shares in a cooperative society, company, etc., or by way of any agreement or arrangement. Thus the amendments did not cover transactions by way of Development Agreement as they are purely commercial transactions not involving transfer until the happening of the event by which the developers had over a built up area to the owners in lieu of the developers retaining their share in the development of the property. Thus, the mischief whereby money transactions of sale were entered into, full consideration received was not regarded as transfer until they were registered. In the same manner where possession of immovable property was given, full consideration was received and transfer of properties were undertaken under power of attorneys and where consideration was received in full were all escaping the ambit of capital gains tax and to remedy this mischief, the provisions of section 2(47)(v) & (vi) were brought forth in the statute. Even the law before the aforesaid enactments, was explained by the Patna High Court in the case of Smt. Raj Rani Devi Ramna v. CIT [1993] 201 ITR 1032 (Patna) wherein it was held as under:

> *"In the absence of any provision to the contrary, the concept of sale of an immovable property which is included in the expression 'capital asset' as defined under section 2(14) of the Income-tax Act, 1961 has to be gathered from section 54 of the Transfer of Property Act, 1882. Properties do not necessarily pass as soon as the instrument is registered, for the true test is the proof of an operative transfer, if there is a condition precedent as to the payment of consideration or delivery of the deed. "Thus, the seller may retain the deed pending payment of price and in that case there is no transfer until the price is paid and the deed is delivered. The transfer under section 2(47) must mean an effective conveyance of*

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the capital assets to the transferee. Held, that, in the instant case, it was apparent that the parties had clearly intended that, despite the execution and registration of sale deeds, transfer by way of sale would become effective only on payment of the entire sale consideration and in this background of facts, it had to be held that there was no transfer of land conferred by the three sale deeds in question during the period under consideration making the assessee liable for capital gains tax under section 45."

21. Even under the law prior to the amendment from 1.4.1998, the law relating to sale stated that even if the property was registered and until the entire price was paid no transfer took place though registered. This was on the principle that transfer takes place only on the happening of events. The subsequent amendment from 1.4.1988 has not changed this legal position. If a transfer takes place and it is coupled with certain conditions and events taking place in future the transfer would take place only on the happening of the event and not earlier. Thus from the above, the AR submitted that the definition of transfer u/s. 2(47) of the Act is not complied and hence there is no transfer.

22. The AR submitted that, without prejudice to the above, if the sale is covered under the transfer definition, then the value is to be adopted as sale consideration to compute capital gains u/s. 48 of the Act.

Section 48 of the Act states that:

"The income chargeable under the head 'capital gains' shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts:

(i) Expenditure incurred wholly and exclusively in connection with such transfer.

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(ii) The cost of acquisition of the asset and the cost of any improvement thereto. "

23. The AR submitted that the consideration that accrues to the assessee depends on the facts of the case on the date of execution of Development Agreement. The constructed area of the project is not in existence and that this is subject to so many factors like non-sanction of municipal application, disputes, escalation of cost, non-availability of men and material on account of statutory prohibitions, etc. Thus, the entire consideration is the womb of uncertainty. The consideration is not capable of being ascertained. The consideration in money's worth i.e., built up area of the immovable property which is to come into existence after a period of time cannot even be estimated. Therefore, accrual of income itself fails. Capital gain is also a mode of income and unless there is an accrual of income by way of capital gains, the charging section under section 48 fails. Therefore, the question of computing and levy of any capital gains on the date of execution of Development Agreement, on the basis and assumption of consideration which is to accrue after a period of time, and on the happening of an event of the developer handing over the built up area to the owner, which is non-existent, and, therefore, the charging section and computation provisions fail.

24. He further submitted that taxation of capital gain on the point of creation of charge in the year of entering into the agreement as advanced by the AO, is dependent on the factors prevalent on the date of agreement but not on factors which would emerge in future. Therefore, when the consideration could not be ascertained on the date of agreement, the question which arises for consideration is whether, merely because there is a change, would it be workable to compute the capital gain.

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25. The AR submitted that in the case of Raghurami Reddy vs ITO in ITA No. 296/Hyd/2003 dated 30-7-2004, it was held by the co-ordinate Bench of this Tribunal that when it is not possible to estimate the consideration with reasonable accuracy on the date of signing of the Development Agreement, it is just like counting the chickens before they are hatched and the year of taxability can be only the assessment year in which the flats are handed over by the builder to the assessee and not the year in which the joint venture or development agreement was entered into. Both the AO and the CIT(A) had placed reliance in the case of Chaturbhuj Dwarakadas Kapadia vs. CIT (260 ITR 491) (Bom) and judgment in the case of Jasbir Singh Sakaria vs. CIT (164 Taxman 108) (AT) (AAR) . It is submitted that these two cases are distinguishable on facts. In the case of Chaturbhuj Dwarakadas Kapadia (supra) both the charge and consideration in monetary terms were ascertainable on the date of entering into the Development Agreement. These two factors influence the court to come to a conclusion that the gain was assessable in the year of Development Agreement. In the case of Jasbir Singh Sakaria (supra) also the consideration was ascertainable with reasonable certainty. Therefore, these two decisions are not applicable to the case of the assessee.

26. Without prejudice to the above, The AR submitted that the consideration accruing cannot be evaluated as the subject-matter is not in existence and, therefore, cannot be discounted as on the date of transfer, as it would amount to calculation of discount figures on an unknown figure for a non-existing asset and, therefore, incapable of being determined. Therefore, without prejudice to any of the aforesaid submissions, the AR submitted that the computation provisions cannot be involved and, therefore, the charge to capital gains fails. He further submitted that the Director of Town and Country Planning

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approved the plan submitted by the assessee company only on 06.03.2007. The AR submitted that there is no development activity until the end of the previous year ending 31.3.2007. Commencement of building process had not been initiated as the building approval was provided only on 06.03.2007, therefore, no income be said to accrue as laid down in section 48. Until permission is granted, a developer cannot undertake construction. As a result of this lapse by the transferee, the construction was not taken place in the assessment year under consideration. For this proposition the AR relied upon the decision of the Tribunal Chennai Bench in the case of Vijaya Production Pvt. Ltd. vs. Additional CIT (134 ITD 19) (TM).

27. Hence, the AR submitted that since there is no amount of investment by the developer in the construction activity during the previous year relevant to the assessment year 2007-08 in this project, 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. Hence, no consideration can be attributed to the AY 2007-08. The AR further submitted that the land was purchased on 13th November 2006 and Development Agreement was executed on 15th December 2006 by the assessee company. He also submitted that on both the dates the land continued to be agricultural land and the land changed its character as non agricultural land only on 27th December 2006. Hence assuming but not admitting it that the transaction amounted to transfer; there cannot be any increase in the value within a short span of one month.

28. The AR submitted that the penal rate was fixed in the Development Agreement to act as a deterrent and to ensure the

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compliance of the obligations and the promises accepted by the developer. Thus the penal value cannot be equated as the consideration. He submitted that the AO has taken the value of the land and the built up area for arriving at the consideration using penal clauses which is also incorrect as the square feet rate includes the value of land as well as building. The penal clause was deleted by the assessee and the developer through the supplementary deed dated 17.9.2010 and 10.10.2010, which granted extension of time for completing the project.

29. The AR submitted that the CIT(A) referred to an advertisement put on the web site www.abodesindia.com on 16/11/2011, purportedly by the developer M/s MAK Projects P. Ltd., for sale of villas, for a consideration ranging from Rs. 0.75 crores to Rs. 1.25 crores to each, justifying the reasonableness of the consideration receivable on transfer of villas under the Development Agreement. This is incorrect, since the date of the above advertisement is almost 5 years after the date of original agreement dated 15/12/2006. Further, the advertisement was not put up by M/s. MAK Projects as evidenced from their letter dated 26/05/2012 stating that they have not issued any advertisement and that the sale prices mentioned in the website are very high compared to their selling price. An affidavit under Rule 10 of ITAT Rules, 1963 has been filed to this effect before the Tribunal. From the transactions made during the financial year 2007-08, the average sale price of each villa works out to Rs. 45 to Rs. 47 lakhs and that if translated as average sale price per square feet of built up area works out to Rs. 1550 per square feet. Therefore, he submitted the value adopted by the AO is not justified.

30. The AR submitted that the AO alternatively held that if income is not assessable under the head 'capital gains', it can

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be assessed under the head 'profits & gains from business and profession' on the ground that the development agreement is an adventure in nature of trade. The assessee has not sold the undivided share in the land during the assessment year. It can be treated as an adventure in the nature of trade only when there is a sale of the land within a short span of time. In the instant case, the land is only put to development and not sold. Hence it cannot be considered as adventure in the nature of trade. It would be taxable only in the year when the undivided share in the land is sold. He relied on the following judgements/decisions:

(a) Baisakhi Bhattacharjee vs. Shayamal Bose & Ors. [2002 (4) CHN 115] (Cal.) wherein held :

(i) *In the present case, it has not been shown nor has a finding been recorded by the learned Trial Court that plaintiff' is in possession of the property, which is the first ingredient for application of section 53A TP Act. As rightly pointed out by the learned Counsel for the defendants/ respondents, the plaintiff had prayed for all injunction restraining the defendants form making any construction on the land. This itself shows that the defendants were capable of raising construction on the land, which pre-supposes possession of the defendants. Even on the terms contained in the agreement, the defendants were supposed to demolish the building and remove the building materials. which they have done. It also shows that the defendants are in possession of the land, at least prima facie. Therefore, it is difficult on the part of the Court at this stage to come to a prima facie finding on the materials produced that the plaintiff is in possession of the property (Para 6.1)*

(ii) *In order to attract the application of section 53A TP Act., the agreement has to be an agreement for transfer of the land coupled*

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with delivery of possession. (Para 6.2)

(iii) *As soon as the plaintiff submits to the provision of 1993 Act, and applies for permission under section 3 of the 1993 Act, she accepts herself to be a promoter within the meaning of section 2(g) of the 1993 Act. (para 6.4).*

(iv) *As soon it is not an agreement for transfer and is an agreement for development, the case comes out of the scope and ambit of section 53A TP Act. Therefore, section 53A TP Act has no manner of application in the present case (Para 6.5)*

(v) *Until the provisions of 1993 Act are complied with, the plaintiff would not be entitled to undertake the construction in terms of the agreement. Unless it is whom that the plaintiff is entitled to perform her part of the contract. It cannot be said that she has been able to make out a prima facie case in her favour. (Para 7)*

(vi) *The agreement is for construction of building by the plaintiff on the land belonging to the owner. They are two different persons. As such, the plaintiff is a promoter within the meaning of sub-clause (ii) of clause (g) of section 2. (Para 8)*

(vii) *The expression defined in clause (j) of section 2 "to construct a building" means to construct a new building or re-construct a building or convert a building or any part of a building not being a flat or block into a flat or block with its grammatical variation. (Para 8)*

(viii) *The agreement at page 18 (page 113 of the P. B.) in clause XII provides negative covenants restraining the wner/defendants from terminating the agreement. But this is qualified by a condition that so long the developer act in terms of these presents and her acts and deeds are not prejudicial and contrary thereto, the owners shall not*

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be entitled to terminate this agreement in any manner and shall not prevent or be a party to any act or deed, which may prevent the developer from constructing the said building or performing this contract. (Para 9)

(ix) *Failure to get the registration or withdrawal of registration under the provisions of 1993 Act has to be construed in the light of the conditions under which the negative covenant is qualified. (Para 9.2)*

(x) *An agreement is a contract. Contract is valid if it is contrary to law. Therefore, all agreements or contracts are subject to the provisions or law for the time being in force. Admittedly, though the agreement was entered into before the commencement of the 1993 Act, yet the provisions of the said Act are applicable to the agreement. Inasmuch as, as soon the 1993 Act came into force, all contracts by a promoter/developer are to be governed by the provisions of the said Act, except in those cases where the construction has already commenced. (Para 9.3)*

(xi) *The registration of' the developer is the primary condition that makes developer eligible to apply for permission and then undertake construction: Until registered, a developer cannot apply for permission. Until permission is granted, a developer cannot undertake construction. (Para 9.3)*

(xii) *Readiness and willingness imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so as they depend upon the plaintiff's performance. 'Ready' means a prepared or having all preparations made to do, something; 'willingness' means a ready will. In other words, the expression implies that he abides by the contract and does not anticipate a breach by the other party. The burden of proving readiness and willingness up to the date of trial is upon*

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the plaintiff and is not discharged simply because the defendant has repudiated the contract: (Para 10)

(xiii) Readiness and willingness to perform the contract must be readiness and willingness to perform, but not as the plaintiff evinced it, nor in the way the plaintiff evinced it before the suit, nor in the way the plaintiff wanted to fashion it at the trial, but according to the real agreement between the parties. (Para 10.1)

(xiv) The terms of contract performable by the plaintiff may be of two kinds: (1) those to be performed before the other side can be called upon to fulfil his promise and (2) others that may have to be subsequently performed. The actual performance of or readiness to perform, the former must be shown and an offer to perform the latter must be made. If the plaintiffs obligations have been disregarded or are incapable of being simultaneously carried out, the court will not interfere in this behalf. The defendant may, therefore, plead and prove that the plaintiff has forfeited his rights under the contract by his conduct. For instance, it can be shown that he had violated any essential terms that on his part remains to be performed or he may have done acts in contravention of or at variance with the contract and tending to subvert the relation established by it or he may have refused to fulfil some stipulation on his part, which adds to the contract, but which was a part of the inducement to its, as contemplated under section 18 SR Act. The word "ready" implies that the plaintiff has taken steps to make himself eligible to undertake the performance of the contract, which are the primary ingredients that makes a person eligible and entitle to make the construction. The word "willingness" implies that he is inclined to do what is required. Unless it is shown that these ingredients are satisfied, no case for specific performance can be said to have

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made out. The averment of readiness and willingness in the pleading is not a empty formality. (Para 10.2)

(xv) *The requirement of law is simple. The continuous readiness and willingness on the part of the plaintiff to perform his part of the contract through out from the commencement of the agreement till the hearing of the suit. But that does not mean the plaintiff has to move around, showing his readiness at every stage. It is a finding of fact whether such readiness and willingness is established or not. The readiness and willingness cannot be determined through a straight jacket formula. It has to be determined from the totality of facts and circumstances relevant to the case and also to the conduct of the party concerned and in order to be ready has to be backed by capacity to do so. (Para 10.31*

(xvi) *The substance of the averment of the plaintiff's readiness and willingness to perform his part of the contract must be present in substance. The surrounding circumstances must also indicate the readiness and willingness continued from the date of the contract till the hearing of the suit. The plaint cannot be construed in a pedantic manner. It is not only to be shown in a suit for specific performance that the plaintiff has performed some part of the contract, but it has also to clearly show that he was still ready and willing to abide by the essential terms of the contract. Where the plaintiff opted to sue on equity for specific performance instead of a suing for damages, he must comply with the second. Unless the averment regarding readiness and willingness continues up to the date of decree, there is no cause of action for specific performance. Compliance with section 16(c) need only be subsequential to the satisfaction of the court, whose duty it is to find out the truth and do justice between the parties. Compliance has only*

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to be in spirit and not to form. It is enough if the averment indicates in substance a continuous readiness and willingness. (Paras 10.4 & 10.5)

(xvii) Section 16(c) (of the Specific Relief Act) provides that the plaintiff has to aver that he had always been ready and willing to perform the essential terms of the contract, which are to be performed by him. Thus, it is a mandatory requirement to show that the plaintiff was always ready and willing. The conduct and surrounding circumstances are also material for the purpose of deciding whether the plaintiff was always ready and willing (Para 10.7)

(xviii) Unless it is an agreement for sale, the special equity cannot be claimed. When the developer wants to acquire and sell it to the intending buyers, there cannot be any special equity. It is only when the developer intends to acquire the property for its personal use, then it can claim special equity. A special equity is an equity when a particular interest is attached to the property on account of some personal liking on account of the person's intention, when such person wants to utilise such property for his personal use. But for commercial exploitation or for acquisition for the purpose of selling it out to someone else, would not create a special equity. (Paras 13.1 & 13.2)"

(b) CIT vs. Smt. Najoo Dara Deboo (38 Taxmann.com 258) (All) wherein the High Court held as under:

"9. It may be mentioned that the capital gain can be charged only on receipt of the sale consideration and not otherwise. How can a person pay the capital gain if he has not received any amount. In the instant case, the assessee has honestly disclosed the capital gain for the assessment year 1998-99 to 2000-01, when the flats/areas were sold and consideration was received. During the year under consideration, only

> *an agreement was signed. No money was received. So, there is no question to pay the capital gain. When it is so, then we find no reason to interfere with impugned order passed by the Tribunal. The same are hereby sustained along with reasons mentioned therein."*

(c) Mrs. K. Radhika & Ors. vs. DCIT (149 TTJ 736) (Hyd) wherein the Tribunal held that

> *"handing over of the possession of the property is only one of the conditions u/s. 53A of the TP Act, but it is not the sole and isolated condition and it is necessary to go into whether or not the transferee was "willing to perform its obligation under the consent terms; on the facts, provisions of section 2(47)(v) will not apply in the assessment year under consideration and the capital gain could not be taxed in the assessment year under consideration."*

31. On the issue of whether the asset under consideration is a capital asset, the DR submitted that the land transferred by the assessee is not an agricultural land as by the time of registration of supplementary agreement, the same was converted into non-agricultural land by virtue of the land conversion certificate issued by the RDO on 27.12.2006. It was also submitted that the supplementary Development Agreement cum GPA though executed and also presented for registration on the same day i.e., 15.12.2006, the registration was delayed awaiting approval from the RDO for land conversion and as soon as the approval was received on 27.12.2006 the document was got registered on 04.01.2007. He also submitted that though formal approval was received from the RDO on 27.12.2006, the land had shed its character of agricultural land much before when the application for conversion was made sometime in September 2006 and hence for all practical purposes it was not an agricultural land even at the time of the

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acquisition of part of the land by the company in November 2006.

32. The DR made reference to the objects of the assessee company in the Memorandum of Association where it has clearly been spelt out the activities to be carried out by the assessee company for which the company has been incorporated and this shows that the assessee would be doing real estate business and the land owned and purchased by it before the Development Agreement was entered into was clearly for the purpose of commercial transaction. He submitted that as seen from the Development Agreement, it is evident that the assessee company was aware that the developer was aiming to build an integrated township and for this purpose the company also acquired the adjoining land for giving the same for development to the MAK Projects Limited. Therefore, the contention of the DR that no prudent person would invest substantial amounts for acquiring dry agricultural lands while the output on account of agricultural activity is meagre compared to the investment, it sought for the conversion of land for non agricultural purposes from the appropriate authorities, and the land shed its character of agricultural land once it has entered into development agreement for an integrated township with MAK Projects Pvt. Ltd., clearly establishes the fact that the asset in question is not an agricultural land. Therefore, the contention of the AR that the asset in question is not a capital asset exigible to income tax cannot be accepted.

33. The DR submitted that on the issue of the transfer/ chargeability to tax, the contention of the assessee that no charge is created u/s 45 in the year of Development Agreement even assuming that the subject land is a capital asset because the full value of consideration cannot be ascertained with

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certainty on the date of Development Agreement cannot be accepted. As pointed out by the DR as per clauses 1 & 2(a) (page 17 of the Development Agreement) the owners granted irrevocable rights to the developer not only for the purpose of development but also for executing and registering sale deeds to the prospective purchasers and the landlords were prohibited from interfering with the development work at any point of time as per clauses 27 to 30 of the agreement, there is transfer of the rights in the property to the developer for the development of the property, thereby the provisions of section 45 are clearly attracted. In this connection, the DR referred to clause 32 which conveys of specific performance and arbitration which is as below:

> (a) *In the event of default by the developer the owners are entitled to enforce specific performance of this contract. Similarly in the event of the default by the owners the developer shall be entitled to enforce specific performance of this agreement or take action as per this agreement.*
>
> (b) *The parties hereto shall resolve and settle any differences or disputes arising from and/or touching upon the terms and conditions in this agreement through arbitration by sole arbitrator. In the event of both the parties not being able to settle upon the sole arbitrator, then in such an event, both parties shall nominate one arbitrator each and such arbitrators shall elect a third arbitrator/umpire, before commencement of the arbitration proceedings. The arbitration proceedings shall be conducted in accordance with the provisions of Arbitration and conciliation act, 1996, and shall be conducted in English and the venue of the sittings shall be Hyderabad only. The award passed by such arbitration tribunal shall be final and binding on both the parties.*

34. From the above clause, he observed that the land owner has no power to reclaim the possession of the property without

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referring the matter to the arbitration whose decision is binding on them. Hence it is stated that the possession given is not permissive possession.

35. The DR submitted that as per the terms of the agreement the developer was given unfettered rights over its share of the project as long as it was willing to perform the contract, and the developer has started selling its share of villas from the FY 2006-07 itself and received advances from customers in the same year which shows that the transfer was complete on the date of execution of the Development Agreement. He placed reliance on the decision of the Hon'ble Mumbai High Court in the case of Chaturbuj Dwarakadas Kapadia vs. CIT (2003) 260 ITR 491, wherein it was held that giving irrevocable power of attorney amounts to transfer and hence liability to capital gains tax arises on the date of execution of such irrevocable power of attorney and it was also held that even arrangements confirming privileges of ownership without transfer of title could fall u/s. 2(47)(v) of the Act. The DR further relied on the following cases:

i) Jasbir Singh Sarkaria 164 Taxman 108 (AAR)
ii) R. Kalanidhi Vs. ITO Chennai 314 ITR (AT) 266 Chennai
iii) CIT Vs. K. Jeelani Basha (Chennai) 256/282 (Madras)
iv) Maya Shenoy Vs. ACIT 124 TTJ 692 (Hyd)
v) T. Achyutha Rao Vs ACIT 1-3(1), Hyd 106 ITD 388 (Hyd)
vi) CIT Vs. Dr T.K. Oayalu (2011)- TIOL-559-HC-KAR-IT

36. The DR submitted that execution of Development Agreement by the landlords amounted to transfer within the meaning of section 2(47)(v) of the IT Act. He submitted that the clauses of the agreement clearly show that there has been a transfer exigible to capital gains during the year under consideration.

37. Regarding the quantification of the consideration receivable by the assessee company of its entitled share of the

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areas under the development agreement, the DR submitted that it could be ascertained with a reasonable certainty on the date of transfer. As per Schedule-D to the agreement, the assessee company is entitled to receive 16 villas comprising 9602 sq. yards of plotted area along with 58606 sq. ft of built up area. As per clause 2(d) of the agreement, it was agreed upon among the parties to the document that the owners/developer as the case may be should be compensated for any variation in future in the plotted area as well as the built up area which was allotted towards their respective share in the development agreement. The agreed rates of compensation are Rs. 6,500 per sq. yard in respect of plotted area and Rs. 1,600 per sq. ft in respect of built up area. From this clause, it is clear that the plotted area was valued at Rs. 6,500 per sq. yard and the constructed area was valued at Rs. 1600 per sq. ft and at these rates the full value of consideration accruing as a result of transfer of assessee's land has been worked out by the AO and the total consideration was arrived at Rs. 15,61,82,600.

38. The DR submitted that the developer M/s MAK Projects Pvt. Limited has put up an advertisement in a website called www.abodesindia.com on 16.11.2011 under property code RS47770. The details of amenities being provided and the specification relating to the construction of the villas are also mentioned in the advertisement. As per the said advertisement the sale price of villas admeasuring 2900-3600 sq. ft. has been mentioned at Rs. 1.25 cr. - Rs. 1.75 cr. If these rates are taken into account the consideration accruing to the assessee will be more than the amount computed by the AO as all the 16 villas which assessee is entitled to receive are admeasuring about 3666 sq. ft of area each. Thus the said advertisement further confirms that the values assigned to the plotted area as well as the built up area in clause 2(d) were true values which were

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arrived at by the parties keeping in view the superior standards of the construction and the amenities sought to be provided. Even if a discounted rate of Rs. 1.5 Cr per villa is adopted the consideration occurring to the assessee works out to Rs 24 Cr. Since this amount is worked out based on the present market value the same is not being taken into account. However, these present day values further confirm that the rates mentioned in the said clause of the agreement were the correct rates as on the date of agreement.

39. The DR submitted that it is not appropriate to accept the contention of the assessee that SRO rates have to be applied as the facilities provided in the township being developed are world class and these details are mentioned in the website of the developer www.makoprojects.com. Further, the clubhouse being provided is spread on a sprawling 50,000 sq. ft. and is world class in every aspect, as per details available on the said website. The specifications of villas mentioned in the website show that the villas are being constructed with superior quality, furnishings including laminated wooden flooring for master bedroom, vitrified tile flooring in other areas of the villa(s) and other fittings of superior brands. Hence, the SRO rates which are meant for normal constructions of ordinary quality without any luxurious decorations are not applicable to the kind of the project being developed.

40. The DR submitted that according to the assessee clause 2(d) of the development agreement was incorporated as a penal clause only to compensate the affected parties for variation, if any, that may occur in the allotted plotted area and built up area at the time of handing over of possession of villas by the developer. The assessee also requested to adopt SRO rates for the purpose of computing the consideration. It was further

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submitted that the compensation clause was later removed by way of supplementary agreement which was entered into on 17.09.2010. The removal of the clause in the supplementary agreement was not acceptable on the ground that the supplementary agreement was not registered, not all the land owners signed the said agreement and it is contrary to the clause No. 32 in the original agreement where it was stipulated that any dispute between the parties arising from or touching upon the terms and conditions of the agreement have to be resolved through arbitration in the manner mentioned in the said clause.

41. The DR submitted that during the appeal proceedings by the CIT(A), the assessee had submitted that the supplementary agreement requires registration under the Registration Act, 1908, but it is not necessary for the purposes of the TP Act, as the original Development Agreement was duly registered and that the supplementary agreement was not varying the entitlement of the share of property of each of the parties to the development agreement; there were two supplementary agreements entered into - One on 17.9.2010 with the assessee company and 4 others and another on 10.10.2010 with Mrs M. Neeraja & Mr. G. Kutumba Rao; and there was no dispute between the parties including the assessee which had to be resolved through arbitration and the supplementary agreement was executed with mutual consent of all the parties concerned because of the recession in the real estate market.

42. The DR submitted that the contention of the assessee is not acceptable because the supplementary agreement is only a self serving document and since it is not registered, the same cannot have any evidentiary value and when there is no dispute between the parties there was no reason why the parties have to

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resort to amending the provisions by a supplementary deed. Once the terms are sealed by way of agreement, how can there be an amicable settlement? Besides, if there is further boom in real estate, would there be a revision of the terms so amicably? Hence the contention of the assessee is not acceptable. The assessee's claim that because of the recession in the real estate market they have amended the terms cannot be accepted as per clause 9 of the Developmental Agreement. There is stipulated time frame for completion of the project within 30 months from the date of approval of the building plan with a grace period of 6 months and hand over the same to the respective owners and in case the construction of the residential villas falling to the share of the owners (in Schedule-B) is delayed beyond the period specified in clause 9(a) above, the developer shall pay compensation to the owner at Rs. 5/- per month per sq. ft of built up area allotted to the share of the owners as per schedule-D. This is the penal clause but not the clause 2(d), while clause 2(d) has been intended only to compensate the areas of shortage after completion of the project in respect of the agreed share between the owners and the developer. It is once again emphasized that clause 2(d) is not a penal clause and therate quoted therein is the prevailing market rate at the time of entering into the Development Agreement and this argument is supported by the fact that the sale rate of villas by the owners and the developers which is between Rs. 1633 -1675 per sq. ft. as per the details furnished by the assessee. Now the assessee's contention that the construction could not be completed, that is why they have to revise the terms of the agreement with regard to the rate, has no basis because the original agreement was very categorical about the allocation of the share of plotted and built up area and the rates applicable and also the clause for penalty for delay in completion of the project. It is a transaction

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which is binding on both the parties and subsequent unregistered supplementary agreement is only a self serving document intended to evade the tax which the assessee company is bound to pay as per the terms of the agreement.

43. The learned DR submitted that the assessee's contention that the rates applied by the AO are penal rates and the rates of SRO should be adopted has no basis because clause 2(d) clearly mentioned the rates applicable at the time of execution of the deed. This fact is reinforced by the rates at which the villas were sold by the assessee itself, for instance, as per statement of sale of villas by MAK Projects in respect of house site no. 111, the sale value was shown at R. 45,75,000 while SRO rate was Rs. 4,11,000. In such a situation how can the SRO rate be adopted for the value of the properties received/to be received by the assessee? It is also noted that the average sale price of the built up area sold worked out to Rs. 1633 to Rs. 1675 per sq. ft. and the rate mentioned in clause 2(d) of Rs. 1600 per sq. ft cannot be held to be higher than the market rate. Therefore, the AO is justified in applying the rate as per clause 2(d) since it is based on some concrete material taken out from the Development Agreement and subsequent sale of villas. It may also be noted that the AO has utilized the material from the website not for adopting the rate quoted therein but to show the quality of the construction and the amenities in order to show as to how the SRO rates cannot be applied to the villas sold in the project. In view of the reasons cited above, the rates adopted by the AO are the true rates reflecting the value of the property under consideration at the time of entering into the Development Agreement and, therefore, the capital gains arrived at by the AO is to be confirmed.

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44. We have heard both the parties and perused the material on record. The primary contention of the assessee's counsel is that the land given for development is an agricultural land in terms of section 2(14)(iii) of the Income-tax Act, 1961 as on the date of Development Agreement i.e., 15.12.2006 and the land was converted on 27.6.2006. But the facts brought on record clearly establish that the impugned land was converted from agricultural purposes to non-agricultural purposes by permission from competent authority on 27.12.2006 and the registration of supplementary Development Agreement cum GPA was executed on 4.1.2007 though it was presented for registration on 15.12.2006. It was an admitted fact that the registration was delayed awaiting approval from RDO for land conversion and only after the approval was received on 27.12.2006 the document was registered on 4.1.2007 and at the time of registration of Development Agreement, the land was no more remained as agricultural land and it was non-agricultural land by valid conversion on approval from the competent authority. Being so, we do not find any merit in the argument of the assessee's counsel that the land is agricultural land. This ground is dismissed.

45. The next argument of the assessee's counsel is that there is no transfer on account of development agreement cum GPA in terms of section 2(47)(v) of the Act on entering agreement with MAK Projects Pvt. Ltd., as there is no quantification of consideration to be received by the assessee from M/s. MAK Properties Pvt. Ltd.

46. We have heard the rival contentions at considerable length. We have also perused the material on record and duly considered factual matrix of the case as also the applicable legal position. The learned representatives have addressed us on

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different aspects of the matter and also filed written submissions along with the judicial precedents which are placed on record.

47. As the Revenue has placed heavy reliance on the judgment of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia v. CIT (supra), and it is based on this judgment that the impugned addition has been made by the AO, and sustained by the CIT(A), it is necessary to first appreciate what this judgment lays down.

48. Their Lordships of Hon'ble Bombay High Court were examining the scope and import of Section 2(47)(v) which was introduced w.e.f. 1st April, 1988. This provision, which covers one of. the modes of deemed 'transfer', lays down that the scope of expression 'transfer' includes "any transaction involving the allowing of, the possession of any immovable property (as defined) 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'. Elaborating upon the scope of Section 2(47)(v), their Lordships observed as follows:

> *"Under section 2(47)(v), any transaction involving allowing of possession to be taken or retained in part performance of the 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 contract for consideration; it should be in writing; it should be signed by the transferor; it should pertain to the transfer of immovable property; the transferee should have taken possession of property; lastly, transferee should be ready and willing to perform the contract. That even arrangements confirming privileges of ownership, without transfer of title, could fall under Section 2(47)(v)".*

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49. Their Lordships, having made the above observations, took note of the fact that Section 2(47)(v) was introduced in the Act w.e.f. asst. yr. 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of conveyance. It was also noted by their Lordships that, in this scenario, assessee used to enter into agreements for developing properties with the builders and under 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.

50. There was no dispute on whether or not the conditions of Section 53A of the Transfer of Property Act were satisfied on the facts of the case before the Hon'ble Bombay High Court. It was in this context, and after elaborate analysis of the facts of the case before their Lordships, their Lordships also observed as follows:

> *"If on a bare reading of a contract in its entirety, an AO comes to the conclusion that in the guise of agreement for sale, a development agreement is contemplated, under which the developer applies for permission from various authorities, either under power of attorney or otherwise and in the name of the assessee, the AO is entitled to take the date of contract as the date of the transfer under Section 2(47)(v)."*

51. It is important to bear in mind that Section 2(47)(v) refers to possession to be taken or retained in part performance of the contract of the nature referred to in Section 53A of the Transfer of Property Act and in the case before Hon'ble Bombay High Court, there was no dispute that the conditions of Section 53A were satisfied. In other words, the proposition laid down by their Lordships can at best be inferred as that when conditions under Section 53A are satisfied, and when the assessee enters into a

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contract which is a Development Agreement, in the garb of agreement of sale, it is the date of this Development Agreement which is material date to decide the date of transfer. However, by no stretch of logic, this legal precedent can support the proposition that all Development Agreements, in all situations, satisfy the conditions of Section 53A which is a *sine qua non* for invoking Section 2(47)(v).

52. In order to invoke the principles laid down by the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra), it is, therefore, necessary to demonstrate that the conditions under Section 53A of the Transfer of Property Act are satisfied. This section is reproduced below for ready reference:

> *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*

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notice of the contract or of the part performance thereof.
(Emphasis, italicized in print, supplied by us now)

53. A plain reading of the 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 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".*

54. 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 there under."*
>
> 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……..”

55. We are in considered agreement with the views so expressed in this commentary on the provisions of the Transfer of Property Act. It is thus clear that 'willingness to perform' for the purposes of Section 53A is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of Section 53A of the Transfer of Property Act will come into play on the facts of that case. It is only elementary that, unless provisions of Section 53A of the Transfer of Property Act are satisfied on the facts of a case, the transaction in question cannot fall within the scope of deemed transfer under Section 2(47)(v) of the IT Act. Let us, therefore, consider whether the transferee, on the facts of the present case, can be said to have 'performed or is willing to perform' its obligations under the agreement.

56. Coming to the facts of the present case, the assessee entered into Development Agreement with MAK Projects Pvt. Ltd. with reference to the land measuring 79 acres 2.5 guntas situated at Sy. Nos. 260 and 262 at Tummaloor village, Ranga Reddy District. At the time of entering into development

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agreement on 15th December, 2006, the land was in the promoter's name. The assessee was under incorporation. The same agreement was presented for registration on 29th December, 2006. Later the assessee-company was incorporated on 4th January, 2007. On the basis of this agreement, the AO taxed the capital gain on the transaction treating that there was a transfer in terms of section 2(47)(v) of the Act. Through this is a Development Agreement cum GPA the assessee has not received any monetary benefit. Being so, there is no receipt of any part of the sale consideration. Further, we cannot say that there is any sale in terms of section 2(47)(i), (ii) or (iii) of the Act so as to say that there is sale, relinquishment, extinguishment or compulsory acquisition.

57. Now we will proceed with reference to the exchange as mentioned in section 2(47)(i) of the IT Act, 1961. To say that there is an exchange u/s. 2(47)(i) of the Act, both the properties which are subject matter of the exchange in the transaction are to be in existence at the time of entering into the transaction. It is to be noted that at the time of entering into development agreement as on 15.12.2006, only the property i.e., land pertaining to the assessee is in existence. There is no quantification of consideration or other property in exchange of which the assessee has to get for handing over the assessee's property for development. The contention of the DR is that the consideration accrued to the assessee in the form of 16 villas comprising of developed land of 9602 sq. yards and built up area of 58606 sft which the assessee has to get on completion of the project. In our opinion, there was no progress in the development work in the assessment year under consideration as the project is only in conception stage and it is not appropriate to tax the assessee on imaginary reasons.

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Admittedly, there is no progress in the development of the project.

58. Even a cursory look at the admitted facts of the case would show that the transferee had neither performed nor was it willing to perform its obligation under the agreement in the previous year relevant to assessment year under consideration. The agreement based on which capital gains are sought to be taxed in the present case is agreement dated 15.12.2006 but no consideration was passed between the parties. As such, the assessee has received no consideration. Admittedly, there is no progress in the Development Agreement in the assessment year under consideration. It is submitted that the Director of Town and Country Planning approved the plan submitted by the assessee company only on 06.03.2007. The assessee submitted that there is no development activity until the end of the previous year relevant to the assessment year 2007-08. Commencement of building construction had not been initiated as the building approval was granted only on 06.03.2007. Therefore, no income be said to have accrued, as laid down in section 48, in A.Y. 2007-08. More so, building/villas has to be constructed as per the approved plan within 36 months from the date of agreement. The construction was not taken place in the assessment year under consideration. The sanction of the building plan is utmost important for the implementation of the agreement entered between the parties which was granted only in the last month of the year i.e., on 6.3.2007. Without sanction of the building plan, the very genesis of the agreement fails. To enable the execution of the agreement, firstly, plan is to be approved by the competent authority. Since there was no amount of investment by the developer in the construction activity during the previous year relevant to the assessment year in this project, it would amount to non-incurring of required

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cost of acquisition by the developer. Hence no consideration can be attributed to the AY 07-08. 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 there was no amount of investment by the developer in the construction activity during the assessment year in this project 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 in this assessment year had not shown its readiness or having made preparation for the compliance of the agreement. The developer has not taken steps to make it eligible to undertake the performance of the agreement which are the primary ingredient that make a person eligible and entitled to make the construction. The act and conduct of the developer in this assessment year has to be seen to decide the taxability on transfer. Being so, it was clear that in the year under consideration, there was no transfer of not only the villas as superstructure but also the proportionate land by the assessee under the joint Development Agreement. But the fact remains that the transferee has not performed its obligations under the agreement, in the assessment year under consideration. Even otherwise, the assessing authority has not brought on record the actual position of the project even as on the date of assessment or he has not recorded the findings whether the developer started the construction work at any time during the assessment year under consideration or any development has taken place in the project in the relevant period. He went on to proceed on the sole issue with regard to handing over the possession of the property to the developer in

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part performance of the Development Agreement-cum-General power of Attorney. In our opinion, the handing over of the possession of the property is only one of the condition u/s 53A of the Transfer of Property 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.

59. 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. Once we come to the conclusion that the transferee's 'willing to perform' the contract is ascertainable in the assessment year, as stipulated by and within the 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 dt. 15.12.2006, based on which the impugned taxability of capital gain is imposed by the AO 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. The judgement in the case of Chaturbhuj Dwarkadas Kapadia v. CIT (supra) undoubtedly lays down a proposition which, more often

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that not, favours the Revenue, but, on the facts of this case, the said judgment supports the case of the 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 Transfer of Property Act. The Revenue does not get any assistance from this judicial precedent. The very foundation of Revenue's case is thus devoid of legally sustainable basis.

60. That is clearly an erroneous assumption, as the provisions of deemed transfer under Section 2(47)(v) could not have been invoked on the facts of the present case and for the assessment year in dispute before us. In the present case, the situation is that the assessee has not received any consideration, and there is no evidence brought on record by the Revenue authorities to show that there was actual construction taken place at the impugned property in the previous year relevant to the assessment year under consideration and also there is no evidence to show that the right to receive the sale consideration was actually accrued to the assessee. Without accrual of the consideration to the assessee, the assessee is not expected to pay capital gains on the entire agreed sales consideration. When time is essence of the contract, and the time schedule is 30 months to complete construction with additional grace period of 6 months, it cannot be said that such a contract confers any rights on the vendor/landlord to seek redressal under Section 53A of the Transfer of Property Act. This agreement cannot, therefore, be said to be in the nature of a contract referred to in Section 53A of the Transfer of Property Act. It cannot, therefore, be said that the provisions of Section 2(47)(v) will apply in the situation before us. Considering the facts and circumstances of the present case as discussed above, we are of the considered view

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that the assessee deserves to succeed on the reason that the capital gains could not have been taxed in the in this assessment year in appeal before us.

61. The other grounds raised by the assessee in this appeal had become irrelevant at this point of time as we have held that provisions of section 2(47)(v) will not apply to the assessee in the assessment year under consideration. However, we make it clear that the AO is at liberty to examine the taxability of capital gain in any other assessment year when substantial consideration has passed to the assessee with reference to the Development Agreement.

62. Even otherwise, we cannot say that the assessee carried on the adventure in the nature of trade so as to bring the income under the head 'income from business'. This is so, because the assessee has not sold any undivided share in the landed property to the developer in the year under consideration. The assessee remains to be the owner of the said property and the land was put for development for the mutual benefit. In our opinion, we find merit in the argument of the assessee's counsel. Even if we consider the transaction as business transaction, then it would be taxed only when the undivided share in the land is transferred.

63. In the result, assessee appeal is partly allowed.

Order pronounced in the open court on 3rd January, 2014.

Sd/-	Sd/-
(SAKTIJIT DEY)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 3rd January, 2014
tprao

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1. M/s. Fibars Infratech Pvt. Ltd., M. No. 16-2-836/7/4/B, Rahmatkada, Saidabad, Hyderabad.
2. The ITO, Ward-1(2), Hyderabad.
3. The CIT(A)-II, Hyderabad.
4. The CIT-I, Hyderabad
5. The DR – 'B' Bench, ITAT, Hyderabad

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