आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,J,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "J", MUMBAI

Before Shri C.N. Prasad, Judicial Member, and Shri Ashwani Taneja, Accountant Member

ITA NO.1844/Mum/2012
Assessment Year: 2008-09

ACIT 17(3) R.No.614, 6th Floor, Piramal Chambers, Parel, Mumbai-400012	**बनाम**/ Vs.	Shri Jawaharlal L. Agicha 99, Ray Road, Mumbai-400033
(Revenue)		(Respondent)
P.A. No.ADJPA2926K		

Revenue by	Shri Sanjay Singh (CIT-DR)
Respondent by	Shri Hiro Rai (AR)

सुनवाई की तारीख / **Date of Hearing :**	**07/09/2016**
आदेश की तारीख /**Date of Order:**	**28/09/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Revenue against order of Ld. order of Ld. Commissioner of Income Tax(Appeals) -29 Mumbai, {(in short 'CIT'}, dated 26.12.2011 passed against the assessment order of the AO u/s 143(3) dated 24.12.2010 for A.Y. 2008-09 on the following grounds:

> *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the*

AO to delete the addition of Rs.25,81,38,515/- made under the head Capital Gain.
On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deciding that for arising capital gain registration of the document is necessary u/s.2(47)(i) & (v) of the I.T. Act r.w.s.53A of the transfer of property Act.
On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in relying on the decision of apex court in the case of Ramchandra Mahadev Jagpat & other in SLP(civil) No. 10281/2006.
On the facts and in the circumstances of the case and in law, the ld. CIT(A) not appreciated the facts that AO has rightly worked out the Capital Gain under the Income Tax Act.
The appellant prays that the order of the CIT(A) being erroneous in facts and in law be reversed and that of the Assessing officer be restored."

2. During the course of hearing, arguments were made by Shri Hiro Rai, Authorised Representative (AR) on behalf of the Assessee and by Shri Sanjay Singh, Departmental Representative (CIT-DR) on behalf of the Revenue.

3. During the course of hearing, exhaustive arguments have been made by both the parties drawing our attention on various evidences enclosed in the paper book, orders of the lower authorities and judgments of various courts on this issue as were placed before us. The central issue involved in this appeal is with regard to determination taxability of long term capital gain of Rs.25,81,38,515/- arising on account of a development agreement entered into by the assessee with M/s. Shivalik Ventures, a partnership firm with respect to pieces and parcels of land located at Bandra (E) owned by the assessee. As per the AO, the said development agreement gave

rise to transfer of land in view of section 2(47)(v) of the Act, and therefore, as per terms of the agreement amount of total consideration stipulated therein constituted sale consideration for transfer of the impugned land and accordingly the resultant gain was held by the AO as taxable in the year under consideration as long term capital gain subject to the benefit of indexation of cost of acquisition of land. Whereas, as per the assessee, said development agreement did not give rise to any kind of transfer even in terms of section 2(47)(v) of the Act, and therefore, no amount of gain should have been brought to tax in the year under consideration.

3.1. The brief facts and background of the issues brought before us are that the assessee had purchased land at Bandra by way of two sale deeds executed on 05.09.1994 and 08.01.1994. The said land was occupied by various slum dwellers and no portion was available for practical use by the assessee. The said land was declared by the Deputy Collector of the city as slum area u/s 4(1) of the Maharashtra Slum Area (Improvement Clearance and Redevelopment Act) 1971. The land acquired by assessee was held as slum area and thus use of such land could be made by the assessee only as provided under the said Act and various other regulations prescribed in the allied legislation that too after obtaining requisite permission from the competent authority. The assessee found that it was not possible for him to comply with the exhaustive conditions to relocate the slum dwellers and other numerous legal and social compliances and therefore, during the year under consideration it entered into an

arrangement with M/s Shivalik Ventures for all the procedural and substantive compliances and for making agreement with the slum dwellers for their re-location for and on behalf of the assessee and for making effective use of land after carrying out requisite development. As per the terms of the agreement, the assessee was entitled to receive 130000 sq. ft. of FSI out of total FSI and M/s. Shivalik Ventures was free to use remaining land for its own purpose in lieu of services to be rendered for relocating the slum developers after obtaining permission from the Competent Authorities and making other legal compliances. The land could be used by any person including assessee only after all the formalities are done and statutory permission is issued by the competent authorities with respect to development of land and its free use.

3.2. It was stated that cost of construction in respect to 130000 sq ft FSI to be given to assessee in pursuance to development of land by Shivalik Venture was determined at Rs 26 crores. The aforesaid cost of construction was to be incurred by Shivalik Ventures or money was to be provided to assessee for construction. Only part of this sum being Rs.10 crores was received by assessee during the year under consideration, which was shown by the assessee under the head advances as part of its liabilities in its Balance Sheet. During the course of assessment proceedings, the AO gave show cause notice that said development agreement gave rise to transfer of the impugned land, and being not satisfied with the reply of the assessee, he treated the sum of Rs. 26 crores as sales consideration and after reducing index cost of

acquisition of Rs.18,61,485/-, he computed long term capital gain of Rs.25,81,38,515/- and held the same as taxable in the year under consideration.

3.3. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein exhaustive submissions were made and various documentary evidences were also submitted to demonstrate that the impugned development agreement does not give effect to transfer of impugned land for various legal and factual reasons. Ld. CIT(A) agreed with the arguments of the assessee and after passing a detailed order, he took the view that impugned development agreement did not give rise to transfer of the impugned land and therefore, it was held that no amount of capital gain accrued to the assessee during the year under consideration and thus amount of advance received by the assessee was held to be not taxable.

3.4. Being aggrieved, the Revenue has filed an appeal before the Tribunal. During the course of hearing, both the parties made their respective arguments. Ld. CIT-DR took us through various clauses of the development agreement dated 07.11.2007. It was submitted that assessee had received a sum of Rs.10 crores during the year under consideration. It was also submitted that this agreement gives various rights to the developers to approach the authorities and to make development of the land. Thus, for all practical purposes, the land came into control and domain of the developers. The owner of land also executed a power of attorney in favour of the developer to enable it to obtain the Letter of Intent (LOI) in respect of the said land in the name of the developer. It was

also submitted that all the ingredients of section 2(47)(v) were applicable and accordingly even if there was part performance, it amounted to transfer of the asset and therefore, full value of sale consideration was taxable in the year before us under the head of capital gains subject to the deduction of indexed cost of acquisition as has been rightly done by the AO.

3.5. Before concluding his arguments, Ld. CIT-DR submitted that development agreement is to be read as a whole and if we do so, we can easily make out an intention of granting of possession, from the bare perusal of the agreement. He submitted that transfer of exclusive physical position is not necessary. It was also submitted that full development rights were transferred and developer was free to execute the same in whatever manner without seeking any approval of the assessee. It was also submitted that amendment in Registration Act, 1908, will not have effect, on the provisions of section 2(47)(v). He concluded his arguments, by submitting that in this case possession was effectively given and substantial part of consideration was received and therefore it constituted transfer as per section 2(47)(v) of the Act, and therefore, the AO had rightly held that long term capital gain was taxable during the year under consideration. In his support, Ld. CIT-DR relied upon following judgments:

1. Chaturbuj Dwarkadas Kapadia vs. CIT 260 ITR 491(Bom)
2. Jasbir Singh Sarkaria v CIT AAR. No.724 of 2006 dt. 30.08.2007
3. Electro Zavod (I) Pvt. Ltd. vs. CIT, 278 ITR 189 (Cal)
4. Dr. Maya Shenoy vs. ACIT 124 TTJ 692 (Hyd)
5. Shri Mahesh Nemichandra Ganeshwade vs. ITO 594/PN/10 dated 29.03.2012
6. V. Ramchandra Const. P. Ltd. 11 taxmann.com415(Agra)

7. Sureshchandra Agarwal vs. ITO (2011) 15 taxmann 115(Mum)
8. Smt. Binderchokh vs. ACIT (2013) 36 taxmann 503 (CHD)
9. G. Srinivasan vs. DCIT (2012) 28 taxman 200 (Cochin)
10. Hussanlal Puri vs. ITO (2013) 28 taxmann 7 (CHD)
11. Vrajchandra Karar Varma Rathod (264 taxmann 391 (Hyd)
12. Mahesh Nimichandra Ganeshwade vs. ITO 21 taxmann.com 136 (Pune)
13. Smita N Shah vs. JCIT (2005) 94 ITD 492 (Mum)

3.6. Per contra, Ld. Counsel of the assessee vehemently opposed the argument of Ld. CIT-DR. He began his arguments by reading the detailed finding of Ld. CIT(A) on this issue and vehemently relied upon these findings. It was submitted that Ld. CIT(A) has correctly analysed the facts and aptly applied the legal position while deciding this issue and rightly held that the said development agreement did not give rise to transfer of the impugned land, even if we apply provisions of section 2(47)(v) of the Act.

3.7. Further, it was submitted by him that the AO had made a serious error by presuming that the impugned development agreement was a registered document and on that erroneous premise he held that impugned development agreement gave rise to transfer of impugned land in view of provisions of section 2(47)(v) of the Act. He submitted that an amendment has been made in the Registration Act, wherein newly inserted section 17(1A) of the Registration Act 1908, clearly provided that documents contemplating to transfer for consideration, any immovable property for the propose of section 53A of the Transfer of Property Act, 1882, shall be registered and if these documents are not registered, they shall have no effect for the

purpose of section 53A. He, thus, submitted that in absence of registration of documents, provisions of section 53A cannot give rise to a valid transfer and consequently provisions of section 2(47)(v) also cannot be pressed into service to hold that the asset had been transferred for the purpose of computing taxable amount of capital gains. In this regard, he placed reliance on a recent judgment of Hon'ble Punjab and Haryana High Court in the case of C.S. Atwal v. CIT 378 ITR 244 which is directly on this issue. Further reliance was placed on the judgment of Mumbai Bench of the Tribunal in the case of Dr. Devendra H. Dave Udgith v. ITO 49 ITR (Trib) 561 (Mumbai) wherein the aforesaid judgment of Hon'ble Punjab and Haryana High Court has been followed and identical view has been taken that in absence of registration of the document, the provisions of section 2(47)(v) could not have been invoked and since AO had confined himself to 2(47)(v) only and did not hold it taxable even *de-hors* section 2(47)(v), therefore, the whole action of Ld. AO becomes illegal especially in view of these decisions. It was further submitted by him that various clauses of the agreement clearly suggest that no possession whatsoever has been given by the assessee to the developer. The land still remains under domain and control of the assessee. It was further submitted that factually speaking the physical possession is not retained by the assessee, and therefore, no question arises of handing over its physical possession to the developer. Since, no physical possession has been given by the assessee to the developer, this transaction cannot be tested under the provisions of section 2(47)(v) of the

Act. Thus, the impugned transaction could give rise to taxable capital gains only in accordance with the main provisions of section 45, wherein, admittedly, no transfer of the impugned land can be said to have taken place during the year under consideration.

3.8. It was further submitted that situation of the impugned land as well as impugned development agreement under consideration are not comparable to other normal cases, since, in this case, various strings were attached and there were various fetters on the legal rights of the assessee as well as the developer for making free use of the land, in view of the admitted fact that said land was occupied by the slum dwellers and therefore, it was subjected to various regulations imposed by slum development authorities and land could not have been used for development in absence of letter of intent (i.e. permission from Slum Rehabilitation Authority). Our attention was also drawn on various clauses of the development agreement wherein this fact was clearly mentioned. It was shown that the Developer would be in position to make use of the land only after the issuance of requisite permissions from Slum Rehabilitation Authority.

3.9. He placed reliance on various judgments to argue that the impugned development agreement did not give rise to any transfer in the eyes of law. He placed reliance on the judgment of Hon'ble Supreme Court in the case of Ajay Kumar Shah Jagati vs. CIT 168 taxman 53 wherein provisions of section 2(47)(v) of the Income Tax Act 1961, as well as section 53A of Transfer of Property Act, were considered and it was held that

possession was essential element to be considered for ascertaining transfer of the property. It was emphasized that judgment of Hon'ble Supreme Court was dated 24th January 2008 which was later in time as compared to the judgment of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia v. CIT (supra) which was dated 13th February 2003. It was thus submitted that view expressed in more recent judgment should be followed. Reliance was also placed on the judgment of CIT v. Geetadevi Pasari 17 DTR 280 (Bom) dated 10th July 2008 wherein it was held that relevant year for the purpose of computation of capital gain will be the assessment year in which purchaser was actually and physically put in the possession. It was emphasized that in this judgment, earlier judgment of Hon'ble Bombay High Court, in the case of Chaturbhuj Dwarkadas Kapadia v. CIT (supra) has also been considered. It was stated that similar view has been taken by the Hon'ble Karnataka High Court in the case of CIT v. Dr. T. K. Dayalu 202 taxman 531, wherein similar view has been taken after considering the aforesaid judgment of Hon'ble Bombay High Court.

3.10. Ld. Counsel concluded his argument by submitting that peculiar facts of the case before us are that there were various legal fetters upon the rights of the assessee for making use of impugned land for his own purpose and therefore, when the assessee himself did not have absolute legal rights, these could not have been transferred to the developer and therefore, no transfer of the impugned land could be said to have taken place by the impugned development agreement which was not

more than an understanding in regard to the proposed transfer which was to come into effect only when proper scheme was sanctioned by the Slum Rehabilitation Authority and other requisite legal compliance in this regard were made.

3.11. We have gone through the orders of the lower authorities and documentary evidences, copies of judgment placed and also the arguments made by both the parties before us. The only issue which we have been called upon to decide is whether the impugned development agreement dated 07.11.2007 entered into by the assessee with M/s. Shivalik Venture gives rise to transfer of the impugned land owned by the assessee in terms of provisions of section 2(47)(v) or any other provision of Income Tax Act, so as to bring to tax the amount of long term capital gain as has been computed by the Ld. AO or not, as was claimed by the assessee in its return of income. Before thrashing out the facts and applicable legal position, it is noted by us that Ld. CIT(A) has recorded detailed and well reasoned findings while deciding this issue, therefore, we find it appropriate to first reproduce these findings to make our task simple and easy:

> *"3.2. I have carefully considered the facts of the case, arguments of the Assessing Officer and the written submissions of the Authorised Representative of the appellant have perused the evidence on record. The brief facts in the case may he recapitulated. The assessee was owner of land which was acquired in the year 1994 by obtaining two Sale Deeds on 05/09/1994 and 18/01/1994. The aforesaid lands were fully occupied by various slum dwellers. In respect to such lands appellant has entered into an arrangement with M/s Shivalik Ventures who has undertaken responsibilities for making all statutory compliance as well as*

agreement with Slum dwellers for development of aforesaid lands in accordance with the scheme to be sanctioned by the slum Rehabilitation Authority. The aforesaid arrangement has been formalized into an agreement dated 7/11/2007 copy of which is placed on record. Perusal of various clauses of agreement submitted indicates that basically it is an arrangement with Shivalik Ventures whereby the aforesaid party was to make various compliances for availability of aforesaid land for development under the scheme formulated by State Government for redevelopment of slum dwellers area. The action of the Assessing Officer in holding that there is a complete transfer of land and determination of capital gain amounting to Rs 25,81,38,515/- cannot be sustained for the following reasons.

3.2.1. The land owned by assessee is fully occupied by slum dwellers. The provisions of section 22 of Maharashtra Slum Area (Improvement Clearance and Redevelopment) Act 1971 provides protection to occupiers in slum areas from eviction and distress warrants. Any action with regard to eviction of such slum dwellers has to be only after previous permission in writing from the competent authorities The slum rehabilitation authorities has been constituted to take care of various slum dwellers in respect of protection provided under statute. The land owned by assessee cannot be used for development unless there is prior permission from SRA for development of land. It is undisputed fact on record that no permission has been accorded by slum rehabilitation authorities for development of land in favour of assessee or developer during the year under consideration.

3.2.2. Perusal of map placed in paper book indicates that various portions which are marked in red colour are area of land belonging to assessee. The various areas in between two portions of land of the assessee does not belong to assessee but belongs to developer and other persons from whom developer has agreed to purchase. ***The land owned by assessee is thus evidently fragmented and not contiguous.*** *The terms and conditions of MOU would indicate that*

developer has to provide contiguous portion of land wherein FSI 1,30,000 Sq, ft, can be built (clause 8) The total area of land may be used for development of slum building or free use for public amenities or free sale building to be taken by the developer after providing land to assessee. On the date of execution of agreement, no such conclusion can be drawn and it is only after the requisite permissions are granted to developer for a project as whole and land owned by assessee and other land owned by developer the project can be implemented. M/s Shivalik Ventures has agreed to make compliances and also incur expenses to obtain sanction from Slum Rehabilitation Authorities so that land owned by assessee can be developed.

3.2.3. It is seen that agreement/arrangement with M/s Shivalik Ventures is in respect to two aspects. The first being obtaining sanctioned scheme from Slum Rehabilitation Authorities so that land can be available for development and construction. The second aspect is that aforesaid land be given to M/s Shivalik Ventures after clearance from SRA for development of land. The assessee was eligible for 1,30,000 sq. ft. FSI of constructed area in the aforesaid land owned by assessee as consideration towards granting of development rights to M/s. Shivalik Ventures. It is seen that right of development of land commences only after development scheme is sanctioned by Slum Rehabilitation Authorities and clearance of land from slum dwellers and prior to that an agreement/arrangement only gives authority to Shivalik Ventures for making compliances on behalf of assessee to seek permission so as to make land available for the purpose of development under Slum Development Scheme. It is seen that cost of construction in respect to 130000 sq ft FSI to be given to assessee in pursuance to development of land by Shivalik Venture has been determined at Rs 26 crores. The aforesaid cost of construction was to be incurred by Shivalik Ventures or money was to be provided to assessee for construction. Only part of this

sum being Rs.10 crores is received by assessee during the year under consideration.

3.2.4. The various clauses which are relevant for the purpose of adjudicating the issue in appeal are reproduced hereunder for ready reference.

Clause 3: (Para4)

The owner hereby grant development rights to the developers and the developers hereby accepts the development rights in respect of the said property in accordance with the scheme to be sanctioned by the Slum Rehabilitation Authority and by implementing the said scheme by construction of separate building or buildings for rehabilitating the slum dwellers (for short Rehabilitation buildings) and other separate and independent residential or commercial buildings which are permitted to be sold in the open market to any third party (for short free sale components) by consuming the FSI as may be granted by the Competent Authority as also by loading outside TDR available in the market however subject to the Development Control Registrations and the rules and regulations of Municipal Corporation.

Clause 6 (Para 6)

On the issuance of letter of intent and on issuance of Annexure-II, the developer shall be entitled to enter upon the said property for the purpose of implementation of scheme of SRA'.

Clause- 14 (Page 9)

"Notwithstanding anything stated in this agreement the owner shall always be deemed to be in physical and exclusive possession of the said property until issue of Annexure-II by S.R.A."

3.2.5. The perusal of aforesaid clauses as well as reading of agreement as whole clearly indicates that there is no possession given by assessee to M/s Shivalik Ventures during the previous year under consideration It is undisputed fact on record that land was not available for development during the previous year under consideration in as much as there was no sanction available from Slum

Rehabilitation Authorities during the year under consideration or even on the date of assessment as is evident from assessment order. The land is not clear from slums and available for development under the Slum Development Scheme as no permissions are available with assessee or developer as is evident from evidence on record. As per clause 14 of the development agreement, appellant will be in physical and exclusive possession of the property till such permission from SRA is obtained.

3.2.6. The Assessing Officer at page 9 has observed that agreement with Shivalik Ventures is a registered conveyance deed. The Assessing Officer based on above finding held that since conveyance deed of immovable property in question has been executed and registered in the year under scrutiny and therefore capital gain arises in Asstt. Year 2008-09. The agreement /arrangement with M/s Shivalik Ventures is not a registered document but is on Stamp Paper of Rs 100/- as is evident from bare perusal of agreement/arrangement placed in paper book. ***The facts and evidence on record clearly depict that agreement is no registered conveyance deed as observed by Assessing Officer. The observation of Assessing Officer that agreement with M/s Shivalik Ventures is a registered conveyance deed is factually incorrect. As the basic factual premise of Assessing Officer is incorrect the conclusion of Assessing Officer that capital gain arises in Asstt. Year 2008-09 is unjustified. The assessment records have been requisitioned during the appeal proceedings and it is found that the so called deed is not a registered one.***

3.2.7. The Assessing Officer has held that land of assessee is transferred as per provisions of sec 2(47) of I. T. Act 1961 and thus assessee is liable to be assessed under the head capital gain in respect of surplus arising on sale of land. The Assessing Officer has referred to provisions of section 2(47)(i) & (v) of IT

Act 1961 at page 7 of assessment order. The provisions of sec 2(47)(i) & (v) are reproduced hereunder for ready reference:

Sec. 2(47) transfer", in relation to capital asset, includes,

(i) the sale, exchange, or relinquishment of the asset: 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 (4 of 1882), or

3.2.8. In the facts of present case there is no transfer under clause (i) of sec. 2(47) in as much as no registered conveyance deed is executed by assessee. The capital asset in question is land and is immovable property. The provisions of sec 54 of Transfer of Property Act 1882 are reproduced hereunder;

"54. "Sale" defined -- 'Sale" is a transfer of ownership in exchange for a price paid or promised or part - paid and part - promised.

Sale how made -- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upward, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale -- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in, or charge on, such property."

3.2.9. Considering the provisions of sec 54 of Transfer of Property Act, the transfer of capital asset cannot be said to have taken place in the absence of a registered conveyance deed. A document of sale, exchange or relinquishment in respect to immovable property has necessarily to be a registered document. This view finds support in the decision of Apex Court in the case of Alapati Venkataramiah vs. CIT reported at 57 ITR 185 (SC). As regard to applicability of provision of sub clause (v) of sec 2(47) of I T Act 1961, it can be seen from the arrangement executed by assessee with M/s. Shivalik Ventures that no possession is given by assessee to the said party. Bare perusal of sec 2(47) (v) would indicate that to invoke the provisions to hold that assessee has transferred land, possession of property should be given to purchaser in part performance of contract of the nature referred to in sec 53A of Transfer of Property Act, 1882. The provisions of sec 53A of Transfer of Property Act, 1882 are reproduced hereunder:

'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 the 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 where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore 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 properly of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

3.2.10. Before invoking the provision, it has to be established that person contracts to transfer for consideration any immovable property and transferee in part performance has taken possession of property and has performed or is willing to perform his part of contract. Thus, unless the above ingredients of transactions are present, provision of sec. 2(47)(v) cannot be pressed into service. In the facts of present case, no possession of property is given by assessee to M/s Shvalik Ventures. On the contrary evidence on record being agreement on the basis of which AO has assessed long term capital gain indicates that possession is with assessee and has not been parted with. The Assessing Officer has not brought any evidence on record to demonstrate that possession of land has been given to Shivalik Ventures during the year under consideration The perusal of various clauses of agreement corroborates the submission of assessee that possession of land is with assessee and has not been transferred to Shivalik Ventures during the previous year under consideration. The arrangement is only to make compliance with Slum Rehabilitation Authorities for sanction of scheme for and on behalf of assessee. It is only after such sanction scheme is obtained in the name of assessee from Slum Rehabilitation Authorities the question as to giving of possession by assessee to Shivalik Ventures would arise, The above facts are substantiated from agreement/arrangement considered by AO in assessment order. It is undisputed fact on record that no sanction scheme has been received from Slum

Rehabilitation Authorities during the previous year under consideration. The AO has brought no evidence on record to show that assessee has received sanction for development of Slum area from Slum rehabilitation Authorities during the previous year, under consideration. The conclusion to AO to assess capital gain is solely based on agreement entered into by assessee with M/s Shivalik Ventures and nothing else. The evidence on record clearly indicates that legal possession of property is with assessee only. On above undisputed factual position provision of section 2(47)(i)&(v) of I.T. Act 1961 cannot be invoked to hold that there is transfer of land by assessee to assess the long term capital gain in the case of assessee. The observation of A.O. that provisions of section 2(47)(i)&(v) are attracted in the case of assessee has no merit in as much as there is no registered conveyance deed executed by assessee nor any possession of impugned property which is held to have been transferred by A.O. is parted with by assessee to M/s Shivalik Ventures. In view of facts that there being no transfer in terms of provisions of 2(47) of IT Act 1961, the question of making assessment of any long term capital gain at the hands of appellant does not arise.

3.2.11 The reliance placed on various decisions and as recorded hereinabove and submission before me, substantially support the submission of the appellant. In the decision of ***Apex Court*** *in the case of* ***Ramchandra Mahadev Jagpat & others*** *in SLP (Civil) No. 10281/2006, the scheme of development of slums at Mumbai has been considered in detail and it has been held that SRA has to make various verifications before issuing the letter of intent to the developers. The relevant portion of judgment is reproduced herein below:*

'At the time of hearing, our attention was also drawn to the guidelines and the several conditions to be fulfilled by the slum dwellers/the society/ as well as the developers and the remarks required to be obtained on the proposal from the concerned authorities before issuing letter of Intent. The SRA has also to verify the

resolution as passed by the general body of the slum dwellers proposed society by majority for appointing or replacing the developers for the development of the scheme, It is also necessary for SRA to verify and to see whether the plot under the development is not affected by any reservation such as playground or recreation ground in view of the stay granted by the High Court in writ petition No. 1152 and also to verify whether the proposed appointed developer has the financial capacity to undertake and complete the scheme."

"The SRA is also directed to consider as to whether the guidelines and other conditions are fulfilled by the slum dwellers/ the society/as well by the developers and issue notice to the society also and hear them pass appropriate speaking order within 3 months from today. The above direction is issued in the larger interest of the slum dwellers and in order to rehabilitate the poor slum dwellers and needy slum dwellers at the earliest."

The perusal of aforesaid portion of judgment indicates that for development of land occupied by slum dwellers there are various essential steps to be taken which are conditions precedent for making any development of such land. In the facts of the present case as no letter of intent has been issued by SRA the question of transfer of land for the purpose of development by assessee does not arise. On above admitted factual position assessment of capital gain in the case of assessee is not justified and cannot be sustained.

3.2.12. The Hon'ble ITAT Mumbai Bench, Mumbai in the case of ACIT Vs. Mrs Geetadevi Pasari reported at 104 TTJ (Mum) 375. The Hon'ble ITAT has held as under:

'In any event, in terms of clause 9 of the development agreement, the possession was to he delivered only after the complete payment was made. Admittedly, this condition was not complied with till the end of the relevant previous year. In these circumstances, when only a small portion of sale consideration was received as earnest/deposit money and when the developer could not have, therefore, exercised his rights under the contract which were to

crystalise on making the payments after the receipt of no objection certificate from the authorities, it cannot be said that there is anything to indicate, leave aside establish, "passing of or transferring of complete control over the property in favour of the developer which is sine qua non for taking the date of contract as relevant for the purpose of deciding the year of chargeability of capital gains. Therefore, on the facts of the present case, the date of development agreement would not really be relevant to decide the year of chargeability."

The perusal of judgment would indicate that it was held that date of development agreement would not be relevant to decide chargeability of capital gains as condition as to making of payment was not fulfilled till the end of previous year in the facts of the present case Assessing Officer has assessed the tax on capital gains on the basis of date of development agreement although the various basic conditions for execution of 'arrangement' took place at much later date. In the facts in the case of assessee various conditions were not complied by developer before the end of previous year and in fact has not been complied even before the date of assessment. On above admitted factual position, assessment of capital gain during the year taking the date of agreement in the absence of fulfilling of various conditions in arrangement is not justified and unsustainable.

3.2.13. In view of above and considering the facts on record it is concluded that there is no possession of land given by assessee to M/s Shivalik Ventures, it is needless to observe that capital gain shall be chargeable to tax in the case of appellant in the year in which transfer of land takes place in terms of provisions of sec. 2(47) of I.T. Act 1961. It will be charged to tax when appellant hands over possession of the land in substantial fulfillment of contract as per the provisions of section 2(47) of the Act. As I have concluded on facts that no transfer has taken place u/s. 2(47) during the year under consideration no capital gain is chargeable in) Asstt Year 2008-09.

3.2.14. Considering the facts and evidence on record it is concluded that there no transfer as envisaged u/s 2(47) of I T. Act 1961 during the previous year and

consequently there is no liability to capital gain tax during the year under consideration The action of Assessing Officer in assessing long term capital gain on transfer of and cannot be sustained. The addition made by Assessing Officer amounting to Rs 25.81.38.515/- is hereby deleted." (emphasis supplied in bold).

3.12. It is noted by us that Ld. CIT(A) has analysed the facts threadbare and the factual findings recorded by him are based upon the evidences held on record. Therefore, in absence of any contradictions or doubts in the facts recorded by the Ld. CIT(A) having been brought before us, we are inclined to endorse and uphold the same. However, since exhaustive arguments were made by both the sides before us, therefore we find it our duty also to give our detailed analysis and views supplementing the reasoning given by Ld. CIT(A) hereunder:

3.13. The first issue that was raised before us for our consideration is whether possession has been given by the assessee to the developer or not. In this regard, it is noted by us that as has been rightly noted by Ld. CIT(A) also that clause 3, clause 6 and clause 14 of the Development Agreement clearly laid down that the possession shall be given to the developer only upon fulfillment of certain conditions i.e. sanctioning of scheme by Slum Rehabilitation Authority and obtaining the 'letter of intent' and other requisite permissions from the Competent Authorities. It has also been clarified in clause 14 that owner (assessee) shall always be deemed to be in physical and exclusive possession of the said property until the issuance of Annexure -II by SRA. It is an admitted fact on record that even till date no permission or scheme has been granted by the SRA in respect in the impugned land. Thus,

there could not have been any question of parting with the physical possession by the assessee with the developer. Even otherwise, no material has been brought on record by the AO or by Ld. CIT-DR before us indicating any contradiction in the factually findings recorded by Ld. CIT(A). In other words, nothing has been brought on record to show that physical possession was given by the assessee to the developer.

3.14. Without prejudice to the above, even otherwise, physical possession is held by the slum dwellers. Under these circumstances, apparently there was nothing to show that assessee could have given physical possession to the developer. Under these circumstances, even the very applicability of provisions of section 2(47)(v) becomes doubtful on such type of transaction having such a peculiar features. Thus, taking support from the judgment of Hon'ble Supreme Court in the case of **Ajay Kumar Shah Jagati v. CIT (SC) (supra), CIT vs. Geetadevi Pasari (Bom) (supra) and CIT vs. Dr. T.K. Dayalu, (Karnatka) (supra)**, we find that no transfer of the impugned land had taken place during the year under consideration, even under the provisions of section 2(47)(v).

3.15. The other important aspect that cannot be ignored here is that the AO had held this transaction to be a case of transfer by erroneously presuming that development agreement was 'registered' with the concerned authorities. The correct fact has been noted by Ld CIT(A) that impugned document was not 'registered' with the registrar under the Registration Act, 1908. This factual finding has not been negated or controverted by Ld. CIT-DR before us. Thus,

decision taken by the AO was under a mistaken belief of a fact which did not actually exist. Thus, on this very ground, the whole action of Ld. AO in treating impugned transaction as a case of 'transfer' becomes seriously doubtful.

3.16. But another legal issue has been raised before us by Ld CIT-DR i.e. whether there is any legal requirement of registration of the document for invoking the provisions of section 2(47)(v) since it only talks about contract of the nature as referred to in section 53A of the Transfer of property Act, and therefore it is not mandatory that whole of the section 53A needs to be complied with while applying the provisions of section 2(47)(v). It was further submitted that if we analyse the object of bringing on the statute the provisions of section 2(47)(v), it would be noted that the purpose was to tax capital gains arising in those cases where the properties were actually transferred by way of agreement to sale but these were not registered and therefore few assessees even after transferring their properties were not paying the taxes and thus for the purpose of stopping revenue leakage in such cases, clause (v) was introduced in section 2(47). It was further submitted that applying 'Haydon's mischief rule' of interpretation, the interpretation of sections 2(47)(v) was to be done only by reading to the extent as was necessary so as to achieve the object of the legislation. Reliance has been placed by Ld. CIT-DR for this proposition on the judgment of Mumbai Bench of the Tribunal in the case of Suresh Chandra Agarwal v. ITO 15 taxman 115 (Mum).

3.17. On the other hand, Ld. Counsel of the assessee also analysed before us the position of law in detail on this issue and relying upon the recent judgment of Hon'ble Punjab and Haryana High Court in the case of C.S. Atwal v. CIT (supra) as well as judgment of Mumbai Bench of the Tribunal in the case of Dr. Devendra H. Dave Udgith (supra), it was submitted that a provision of the Act cannot be broken into pieces and interpretation cannot be done in such a manner which allows choosing some pieces and leaving the other. It was submitted that the "Doctrine of Legislation by Incorporation" suggest that provisions of section 17(1A) of Registration Act, 1908, have to be necessarily read into section 53A of Transfer of Property Act and thereafter these provisions should then be read into section 2(47)(v) of the Income Tax Act, 1961 so as to make complete reading of the law. It was stressed that by reading the law in this manner only the correct position of law shall emerge.

3.18. We have considered these facts very carefully. Ld. CIT-DR has suggested us to follow Haydon's mischief rule whereas Ld. Counsel of the assessee emphasised upon applicability of Doctrine of Legislation by Incorporation, on the given facts of this case. We did some thinking on this tricky situation. In our view, both the rules of interpretation are well accepted rules of interpretation and none of them can be discarded. Therefore, in our view, both the rules should be applied in their respective chronology and relevance. Thus, for the sake of completeness, first we should apply the Doctrine of Legislation by Incorporation and after applying the same, once the law

before us becomes complete, then we should interpret the provisions so combined by applying Haydon's mischief rule. In other words, we should first read the provisions of section 17(1A) of the Registration Act into provisions of section 53A of the Transfer of Property Act, and the provisions so combined together, should be read into section 2(47)(v) of the Act. In our view, the provisions of section 2(47)(v) should be read *in toto*. When section 2(47)(v) talks about contract of the nature referred to in section 53A of the Transfer of Property Act, then we should also read the conditions attached in section 53A and one of the main requirements is for registration of the document as per the provisions of section 17(1A) of the Registration Act 1908. Thus, registration of the document becomes one of the essential ingredients to invoke provisions of section 2(47)(v). It is noteworthy that subsequent to insertion of clause (v) to section 2(47) of the Act, amendments have been made in section 53A of Transfer of Property Act as well as section 17(1A) of Registration Act for mandating the requirement of registration of the documents. Clause (v) of section 2(47) was drafted by the legislature in the light of pre-amended provisions of section 53A and 17(1A). Thus, in our view, when there is a drastic 'change' in the source legislation [i.e. sections 53A and 17(1A)], it would be unwise, unsafe and contrary to cardinal principles of jurisprudence, to ignore the said 'change' while reading the dependent legislation [i.e. clause (v) to section 2(47)]. As a reader of law, we cannot afford to make adventures by reading the interplay between various sections of different legislations in a manner which

results into choosing some part of the interplay while leaving the other, that too as per our discretion. Otherwise, at times, such an approach (where two inter-dependent provisions are not read in complete manner but in bits and pieces as per the requirement) may prove to be a risky and may not be found to be universally acceptable in legal parlance. It is further noted by us that this issue is no more *res-integra*, since **Hon'ble Punjab & Haryana High Court** in the case of **C.S. Atwal v. CIT 378 ITR 244** has decided this issue in the similar fashion by observing as under:

"21. The Registration and Other Related Laws (Amendment) Act, 2001 (in short, "the 2001 Act") has brought about a radical change in the rights flowing on the basis of agreements executed in part performance of the contract under Section 53A of the 1882 Act. The amendments have been made in Section 53A of 1882 Act and Sections 17 and 49 of the 1908 Act. The amendment vide 2001 Act which stood enforced with effect from 24.9.2001, the words ***"the contract, though required to be registered, has not been registered, or"*** *in Section 53A of 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended clarifying that unless the document containing contract to transfer for consideration any immovable property for the purpose of Section 53A of 1882 Act is registered, it shall not have effect for purposes of Section 53A of 1882 Act. Section 17(1A) as incorporated and Section 49 of the 1908 Act as amended read thus:-*

"17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of

section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A."

"49. Effect of non-registration of documents required to be registered.--No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

The words "or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882" have been omitted from the Proviso to Section 49.

22. Section 17(1A) of the 1908 Act introduced by the 2001 Act provides that no benefit would be admissible on the basis of unregistered contract for the purposes of Section 53A of 1882 Act. Equally, deletion of the words "or as evidence of part

performance of a contract for the purposes of Section 53A of the Transfer of Property Act" from Proviso to Section 49 of 1908 Act clarifies the effect of non-registration of a contract executed in terms of Section 53A of 1882 Act.

……

23. Having elaborated the scope and legislative intent of Section 2 (47)(ii), (v) and (vi) of the Act and also the mandatory ingredients for applicability of Section 53A of 1882 Act, it would be essential to notice that the provisions of section 53A of 1882 Act have been introduced in Section 2 (47)(v) of the Act by incorporation. The concept of inclusion of a provision of another statute by incorporation has been dealt with by the Apex Court in detail in Surana Steels Pvt. Limited vs. DCIT, (1999) 237 ITR 777. The issue before the Apex Court in Surana Steels Pvt. Limited's case (supra) was relating to computation of book profit under Section 115J of the Income Tax Act, 1961. Section 205 of the Companies Act, 1956 provided that past losses or unabsorbed depreciation, whichever is less shall be allowed as set off against the book profits of the current year for determining profits for the purpose of declaring dividend. Explanation clause (iv) to Section 115J of the Act incorporated that book profits shall be reduced by the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (6) of the first proviso to sub section (1) of Section 205 of the Companies Act, 1956 are applicable. It was pronounced that there is no reason to assign to the term "loss" as occurring in Section 205, Proviso clause (b) of the Companies

Act, a meaning different from the one in which it is understood therein solely because it is being read alongwith Section 115J of the Act. While dealing with the principles relating to interpretation of taxing statute where there was inclusion of a provision of another statute, it was held that provision must be construed in the sense it bore in statute from which it is taken. It was recorded as under:-

"Section 115J, Explanation clause (iv), is a piece of legislation by incorporation. Dealing with the subject, Justice G.P. Singh states in Principles of Statutory Interpretation (7th edition-1999):

"Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been "bodily transposed into it". The effect of incorporation is admirably stated by LORD ESHER, M.R. "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it. " (p.233) "Even though only particular sections of an earlier Act are incorporated into later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by LORD BLACKBURN: "When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense

it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the sections meant, though those other sections are not incorporated in the new Act".

……

Thus, it would mean that Section 53A of 1882 Act has been bodily transposed into Section 2(47)(v) of the Act and the effect of it would be that Section 53A of 1882 Act shall be taken to be an integral part of Section 2 (47)(v) of the Act. In other words, the legal requirements of Section 53A of 1882 Act are required to be fulfilled so as to attract the provisions of Section 2(47)(v) of the Act."

3.19. Thus, as per mandate of law, as explained by Hon'ble High Court in above said judgment, we must make conjoint reading of all three aforesaid sections to understand and give effect to its full meaning. Having done so, we can now apply Haydon's mischief rule to interpret the law so as to achieve the objective of the legislation, in the light of the facts of the case before us. Undoubtedly, the purpose of the legislation [i.e. section 2(47)(v)] was to bring to tax those transactions where though the properties were actually transferred, but in certain cases assessees were avoiding payment of capital gain taxes on the ground of non-execution of sale deed. With a view to plug revenue leakage under such cases, clause (v) to section 2(47) was brought on the statute. Thus, in our opinion also section 2(47) (v) can for sure be pressed into service where transfer of the property has been completed in substance and

assessee is trying to camaflouge the transaction by not executing a sale deed and/or by creating false impression of no transfer. But, before invoking these provisions, the burden is upon the Revenue to demonstrate with the help of cogent material that transfer has been completed in substance.

3.20. Further, we have analysed the development agreement independently also to find out whether the impugned property has actually been transferred by virtue of this agreement. It is generally seen that there may be several stages or events arising in a joint development arrangement made between owner of the land and the developer. For the purpose of determining the actual date of transfer of the land by the land owner, all these stages / events needs to be collectively analsysed and after evaluating overall effect of the same we can determine the actual date of transfer. These stages / events may be described as date of entering into JDA, date of executing power of attorney authorising the developer for taking various approvals / permissions etc., handing over the possession of the land to the developer for various purposes, receipt of part / full sale consideration from the developer, date of execution of power of attorney in favour of developer authorising him for the sale of developed units to the customers at his absolute discretion; and transfer of developed units to the customers etc. There may be few more stages / events to complete the transaction. Though, one single event may trigger the process of transfer but may not necessarily complete it also. Whether the transfer has, in substance, taken place, can be determined by analysing the inter-play

and effect of all these stages / events combined and put together. For example, possession may be given for various purposes, viz. possession given to a contractor, or to a tenant also, but such an event in itself cannot be regarded as "transfer" of land. Possession of land may also be handed over as licensee only for the purpose of development of real estate on land. Here again, it shall not give rise to "transfer". Thus, when the possession is given along with other legal rights to the developer resulting into entitlement of the developer for full use and enjoyment of the property as well as its further sale after converting it into developed units at its full, own and sole discretion, then it may result into 'transfer' provided other conditions also suggest so. Thus, handing over of the possession has to be necessarily coupled with the intention of transferring the rights of ownership and enjoyment of the property to the developer. Handing over of the possession for the limited purpose of developing the land while still retaining the ownership and control of various legal rights upon the property by the land owner would not fall in clause (v) of section 2(47).

3.21. Now, in this legal background, if we analyse the undisputed facts of the case before us, we find that in the situation given before us, by no stretch of imagination, we are able to reach upon the conclusion that the impugned land has actually been transferred. In fact, the land is attached with so many fetters and ifs and buts that it cannot to be held as transferred unless various conditions attached to it are duly complied with. Detailed findings have been recorded in this

regard by Ld. CIT(A) after analyzing various clauses of the development agreement and other relevant facts of this case and also discussed briefly by us in earlier part of our order. It is noteworthy that the admitted fact on record is that requisite permissions from Slum Rehabilitation Authority have not been received even till date. The developer was not authorised to enjoy/sell his share of property unless he hands over to the owner its share of developed portion of FSI, which in turn was not possible unless all the formalities pertaining to SRA were completed. In fact, the developer, as per terms of the agreement, was to get proper permission for receiving rightful possession of the land only after obtaining all requisite permissions from SRA. Thus, under such peculiar facts and circumstances and applying any provision of law and interpreting the same in any manner, one cannot conclude by any stretch of imagination that the impugned property has indeed been transferred. Thus, viewed from any angle, we have no option but to affirm the detailed finding of Ld. CIT(A) on this issue.

3.22. Ld. CIT-DR had also heavily relied upon the judgment of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia v. CIT, (supra) for upholding the action of the AO on the ground that as per the said judgment the amount of capital gain shall be charged to tax in the year of entering of Joint Development Agreement, and the moment the possession is handed over irrespective of the fact that whether any conveyance deed was entered or not and whether the registration is done or not. We have carefully gone through the

judgment of Hon'ble Bombay High Court as well as order of the AO. In fact, in the given facts of the case before us, the aforesaid judgment of Hon'ble Bombay High Court helps the assessee. Our reading of the said judgment suggest that ratio coming out from the same is that in the case of a development agreement, if the contract, read as a whole, indicates passing or transferring of complete control over the property in favour of the developer, then the date of contract would be relevant to decide the year of chargeability of capital gains and substantial performance of the contract would be irrelevant. Now, if we look into the facts of the case as has already been discussed and analysed by us in above paras that when the agreement was read as a whole, and compared with the conditions attached thereto as well as real facts and circumstances of the case, it does not transpire that there was clear intendment of the assessee to make transfer of the said land by virtue of this agreement itself, in view of the detailed reasoning and analyses given by us in earlier part of our order. Further, the distinguishing features and facts of the above said case were that in the said case, the admitted case of the said assessee was that transfer had taken place, and the only dispute in the said case was confined to the year of chargeability. Further, the fact of possession having been handed over by the assessee to the developer was also admittedly on record and the same was not denied. Whereas, on the other hand, in the case before us neither the possession has been handed over nor it is an admitted case of the assessee that transfer has taken place even till date.

Further,Hon'ble Bombay High Court got an occasion to analyse the aforesaid judgment in the case of CIT v. Geeta Devi Pasari Supra) dated 10th July 2008 wherein it was clearly held that unless the purchaser was actually physically put in possession, even though the agreement was entered, it cannot be said that transfer had taken place in view of section 2(47)(v) and therefore capital gain could not be charged to tax. Similar view was taken by Hon'ble Supreme Court in its order dated 24.1.2008, in the case of Ajay Kumar Shah Jagati, wherein their lordships clearly held that possession is essential element to be considered for deciding whether transfer had taken place in view of extended meaning of "transfer" in section 2(47)(v) read with section 53A of the Transfer of Property Act. It is to be further noted here that judgment of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra),was delivered on 13.2.2003. Subsequently,an amendment has been made under Registration Act,1908 in 2001 by which section 17(1A) was inserted which provided that registration of the agreement shall be mandatory to give effect to the provisions of section 53A of Transfer of Propter Act. Thus, the said judgment was delivered, keeping in view the pre-amended law.The development agreement under consideration before us is admittedly not registered.The effect of non-registration after the said amendment has been analysed by Hon'ble Punjab and Haryana High Court in the case of C.S. Atwal which has been already discussed by us in earlier part of our order. Thus, taking into account, totality of facts and circumstances of the case, it can be said

that no transfer of the impugned land had taken place during the year before us.

3.23. Before parting with, we shall like to deal with an alternative issue raised by the Ld. CIT-DR that the impugned amount of Rs.10 crores received by the assessee should be brought to tax as income from other sources. We shall deal with the argument of Ld. CIT-DR on this aspect also. The impugned amount of Rs.10 crores is stated to be in the nature of advance money received by the assessee for the proposed contracts of the land and to deal with such a situation a specific section i.e. section 51 exists on the statute. Section 51 provides that under such circumstances, amount of advance received shall be deducted from the cost for which impugned asset was acquired. Thus, we direct the AO to treat this amount of Rs.10 crores as per provisions of section 51 of the Act and the consequences as per law should follow. The AO is directed to re-compute the income accordingly after giving opportunity of hearing to the assessee. Thus, subject to the aforesaid directions, grounds raised by the Revenue are dismissed.

4. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 28th September, 2016.

Sd/-	Sd/-
(C.N. Prasad)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/09/2016

*Patel, P.S.*नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**