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

BEFORE SHRI T.R. SOOD, A.M AND Ms. SUSHMA CHOWLA, JM

ITA No. 448/Chd/2011
Assessment Year : 2007-08

Charanjit Singh Atwal 484-A, Model Town Extension Ludhiana ABKPA 7877 J	V	I.T.O. Ward VI(1) Ludhiana

Appellant by S/Shri Ajay Vohra & Rohit Jain
Respondent by: Dr. Amarveer Singh

ITA No. 276/Chd/2012
Assessment Year : 2007-08

A.C.I.T. Circle (1)	V	Satpal Gosain C/o G.B. Auto Industries (Regd) C-84, Phase V Focal Point Ludhiana ABDPG 9952 H

Appellant by Dr. Amarveer Singh
Respondent by: S/Shri Ajay Vohra & Rohit Jain

ITA No. 986/CHD/2011
Assessment Year: 2007-08

Mr. Avtar Singh Brar MLA Hostel, Sector-3 Chandigarh, Punjab PAN No. AIEPB8953B	Vs.	ITO, Ward 1 (3) Chandigarh Punjab

Appellant By : None
Respondent By : Shri Akhilesh Gupta

ITA No. 993/CHD/2011
Assessment Year: 2008-09

Smt. Surjit Kaur Mohali AYEPK 2549J	V	I.T.O. Ward 6(1) Mohali

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Manjit Saingh

ITA No. 1064/CHD/2011
Assessment Year: 2007-08

Shri Sucha Singh Langah #543 Phase VI Mohali AANPL 0443 K	V	D.C.I.T. C-6(1) Chandigarh

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Amarveer Singh

ITA No. 1070/CHD/2011
Assessment Year: 2007-08

Shri Madan Mohan Mittal Near Punjab & Sind Bank Ropar ABOPM 0576 G	V	A.C.I.T. C-2(1), Chandigarh

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri N.K. Saini

ITA No. 1071/CHD/2011
Assessment Year: 2008-09

Shri Surinder Singh #1721, Phase 7 Mohali BMSPS 4024H	V	D.C.I.T. C-6(1) Mohali

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Akhilesh Gupta

ITA No. 1072/CHD/2011
Assessment Year: 2008-09

Mrs. Gurdev Kaur #1721, Phase 7 Mohali ARGPM 2926 G	V	I.T.O. Ward 6(3) Mohali

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri J.S. Nagar

ITA No. 1073/CHD/2011
Assessment Year: 2007-08

Shri Tara Singh Ladal Village Bairampur P.O. Malikpur Ropar ABXPL 7832K	V	A.C.I.T, C-2(1) Chandigarh

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri J.S. Nagar

ITA No. 1074/CHD/2011
Assessment Year: 2007-08

Mrs. Satwinder Kaur Dhaliwal #965, Phase IV Mohali ACPPD 5928B	V	I.T.O. Ward 6(2) Mohali

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Manjit Singh

ITA No. 1088/CHD/2011
Assessment Year: 2008-09

Smt. Neena Chaudhary Village Behlopur Mohali ADJPC 2369N	V	I.T.O. Ward 6(1) Mohali

Appellant By : Shri Anil Batra
Respondent By : Shri Akhilesh Gupta

ITA No. 1089/CHD/2011
Assessment Year: 2008-09

Smt. Krishna Raghu Village Sialba Majri Mohali ABKPR 7174 F	V	I.T.O. Ward 6(1) Mohali

Appellant By : Shri Anil Batra
Respondent By : Shri Akhilesh Gupta

ITA No. 1090/CHD/2011
Assessment Year: 2008-09

Shri Gaurav Raghu	V	I.T.O. Ward 6(1)

Village Sialba Majri Mohali
Mohali
AIDPR 2981E

Appellant By : Shri Anil Batra
Respondent By : Shri Akhilesh Gupta

ITA No. 1092/CHD/2011
Assessment Year: 2007-08

Shri Balwinder Singh Bhunder V D.C.I.T. Circle 1(1)
#254, Sector 11A Chandigarh
Chandigarh
AAQPB1401J

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Akhilesh Gupta

ITA No. 1099/CHD/2011
Assessment Year: 2008-09

Shri Rajesh Singhal V I.T.O. Ward 6(1)
#2058, Sector 69 Mohali
Mohali
AGXPS 5193H

Appellant By : Shri Jaspal Sharma
Respondent By : Shri Akhilesh Gupta

ITA No. 1100/CHD/2011
Assessment Year: 2008-09

Smt. Neeraj Singhal V I.T.O. Ward 6(1)
#2058, Sector 69 Mohali
Mohali
AJPPS 1661P

Appellant By : Shri Jaspal Sharma
Respondent By : Shri Akhilesh Gupta

ITA No. 1156/CHD/2011
Assessment Year: 2007-08

Smt. Surjit Kaur Vs. The ITO
Phase-9 Ward 6(1)
Mohali Mohali
ADWPD7744D

Appellant By : Shri. Jaspal Sharma
Respondent By : Shri N.K. Saini

ITA No. 1178/CHD/2011
Assessment Year: 2007-08

Mrs. Bibi Jagir Kaur Phase-VI Mohali ACWPK1229P	Vs.	The ITO Ward 6(2) Mohali

Appellant By : S/Shri. Prem Singh & Gurjit Singh
Respondent By : Shri Manjit Singh

ITA No. 1204/CHD/2011
Assessment Year: 2007-08

Mr. Balramji Dass Tandon Sector 18- D Chandigarh AAJPT9737A	Vs.	The ACIT Circle 6 (1) Chandigarh

Appellant By : Shri. Atul Mandhar
Respondent By : Shri Akhilesh Gupta

ITA No. 1205/CHD/2011
Assessment Year: 2007-08

Mrs. Satwant Kaur Sandhu Mohali ALZPS2757A	Vs.	The DCIT Circle 6 (1) Mohali

Appellant By : Shri. Vineet Agarwal
Respondent By : Shri Akhilesh Gupta

ITA No. 1219/CHD/2011
Assessment Year: 2007-08

Mr. Santosh Chaudhary Sector- 15 B Chandigarh AAUPC7857R	Vs.	The DCIT Circle 1 (1) Chandigarh

Appellant By : None
Respondent By : Shri J.S. Nagar

ITA No. 1223/CHD/2011
Assessment Year: 2007-08

Mr. Tej Prakash Singh Sector- 5 Chandigarh PAN No: ACCPC5303L	Vs.	The DCIT Circle 1(1) Chandigarh

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Akhilesh Gupta

ITA No. 1238/CHD/2011
Assessment Year: 2008-09

Sh. Ranjit Singh Raj Guru Nagar Ludhiana PAN No: ADDPS6995G	Vs.	The ITO Ward VI(2) Ludhiana

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri Manjit Singh

ITA No. 3/CHD/2012
Assessment Year: 2007-08

Mr. Bhag Singh Sidhu C/o M/s Sidhu Trading Co. Jagraon ASIPS0143C	Vs.	The DCIT Circle Moga Punjab

Appellant By : Shri. Ashok Goyal
Respondent By : Shri Manjit Singh

ITA No. 310/Chd/2012
Assessment Year : 2007-08

D.C.I.T. Circle 6(1) Mohali	V	Punjabi Cooperative Housing Building Society Ltd. Village Kansal AAATP 6854 D

ITA No. 556/Chd/2012
Assessment Year : 2007-08

Punjabi Cooperative Housing Building Society Ltd. Village Kansal	V	D.C.I.T. Circle 6(1) Mohali

TA No. 765/CHD/2012
Assessment Year: 2008-09

Ms. Manmohan Kaur Sector 43-B Chandigarh PAN No: AAOPK0089P	Vs.	The ACIT Circle 5(1) Chandigarh

Appellant By : Shri Vineet Aggarwal
Respondent By : Shri N.K. Saini

ITA No. 858/CHD/2011
Assessment Year: 2008-09

Mr. Shri Parminder Singh Mavi Near Municipal Committee Morinda CROPS4461G	Vs.	The ITO Ward 2(4), Ropar

Appellant By : Shri Tej Mohan Singh
Respondent By : Shri N.K. Saini

ITA No. 196/CHD/2013
Assessment Year: 2007-08

Mr. Amrik Singh Dhillon Estate Samrala ABLPS7818Q	Vs.	The ITO Ward(1) Khanna

Appellant By : Shri S.R. Chhabra
Respondent By : Shri Amarveer Singh

ITA No. 1301/CHD/2012
Assessment Year: 2007-08

Mr. Devinder Singh Cheema Khanna Road Samrala PAN No: ACCPC5303L (Appellants)	Vs.	The ITO Ward(1) Khanna (Respondents)

Appellant By : Shri D.K. Goyal
Respondent By : Shri Amarveer Singh

Date of hearing 2.5.2013
Date of Pronouncement 29.7.2013

O R D E R

PER BENCH

In all these above cases identical issues were involved. Different assessee's were being represented by different Counsels and some of the Counsels were representing more than one assessee. All the Counsels and the ld. Department Representative for the revenue submitted that since the issues are common, therefore, only two appeal may be taken up for

detailed adjudication. With the consent of all the parties the appeals in cases of Shri Charanjit Singh Atwal and Shri Sat Pal Gosain were taken up for detailed adjudication which was argued by Shri Ajay Vohra, Advocate.

ITA No. 448/Chd/2011 – Shri Charanjit Singh Atwal V. ITO

2 This appeal is directed against the order passed by the ld. CIT(A)-II, Ludhiana dated 23.2.2011.

3. In this appeal the assessee has raised the following grounds:

> *"1 That the ld. CIT(A) erred on facts and in law in sustaining the action of the Assessing Officer in rejecting the revised return filed by the appellant during the course of assessment proceedings on 7.10.2009 without assigning reasons thereof.*
>
> *2 That the ld. CIT(A) erred in facts and in law in sustaining the addition of long term capital gains of Rs. 3,54,68,276/- u/s 45 of the Act on account of alleged transfer of property.*
>
> *2.1 That the ld. CIT(A) erred on facts and in law in confirming the finding of the Assessing Officer that there was deemed transfer of property on the date of signing of tripartite Joint Development Agreement ("the Agreement") itself, in terms of sub section (ii), (v) and (vi) section 2(47) of the Act.*
>
> *2.2 That the ld. CIT(A) erred on facts and in law in observing that the receipt of consideration and registration of property are not relevant factors while determining the transfer of the property.*
>
> *2.3 That the ld. CIT(A) failed to appreciate that under the provisions of the Act what could be brought to tax is only the real income and not an amount, which was neither received nor likely to be received by the assessee. Besides the assessee has been deprived for claiming exemption u/s 54EC and other provisions of section 54, due to non-receipt of entire sale consideration.*
>
> *2.4 That the ld. CIT(A) failed to appreciate that the Agreement entered into by the appellant was subject to various regulatory/statutory/other approvals/permissions, etc. required to be obtained by the other party(ies), which*

were not received and hence there could be no 'transfer' under the said Agreement.

2.5 That the ld. CIT(A) further erred on facts and in law in holding/observing that certain terms and conditions of the Agreement which provided that the transfer of land was subject to further condition/encumbrances, were not relevant.

2.6 That the ld. CIT(A) erred on facts and in law in not appreciating that actual physical possession of the property was not handed over by the appellant in part performance of the contract, ,in terms of section 53A of the Transfer of Property Act and hence there was no 'transfer' in law. That the relevant provisions of section 2(47) as also the provisions of section 53A of the Transfer of Property Act, 1882 qua the facts of this case, have been misconstrued by the ld. CIT(A) to confirm the ITO's order. That the ld. CIT(A) failed to appreciate that registration of terms of agreement was a precondition to the handing over the possession of the property.

2.7 That the ld. CIT(A) erred on facts and in law in affirming the value of the flats receivable towards part consideration of the proposed transfer of property, @ Rs. 4500 per sq. feet ignoring the evidence of lower value given during the course of assessment. That computation of capital gain, by assuming notional consideration of two non existent flats, not being consistent with the basic scheme of Income-tax Act, deserves not to be upheld.

2.8 Without prejudice, the ld. CIT(A) erred on facts and in law in not directing the Assessing Officer to compute capital gain with respect to the actual amount received during the relevant Assessment year.

3 Without prejudice, that the ld. CIT(A) failed to appreciate that the income, if at all, could have been assessed in the hands of the Society and not the appellant.

3.1 That the ld. CIT(A) erred on facts and in law in rejecting the application for admission of additional grounds filed by the appellant, vide letter dated 31.1.2011 holding the same to be frivolous and irrelevant. All these grounds of appeal are requested to be considered and allowed.

4. That the assessed income having far exceeded Rs. 5 lakhs of which the ITO was well aware before invoking her jurisdiction, she ought to have transferred the case to an Assessing Officer of competent jurisdiction. This legal infirmity renders the order impugned as null and void.

5 That the impugned capital gain was also not assessable as the very right to receive the projected consideration has fallen into serious jeopardy following stay granted by the Hon'ble Punjab & Haryana High Court taking cognizance of a PIL filed against the execution of impugned deal.

6 That the ld. CIT(A) has rejected the contention of the appellant that the Assessing Officer erred on facts and in law in not appreciating the amount of Rs. 30,00,000/- received under the agreement were in the nature of advance received and not the actual sales consideration.

7 That the ld. CIT(A) erred on facts and in law in upholding the imposition of interest u/s 234B and withdrawal of interest u/s 244A(3) of the Act.

8 That the orders of the authorities below are highly unjust, arbitrary, against equity and natural justice and hence liable to be set aside on this score also."

4. At the time of hearing, Ground No. 4 was not pressed and therefore, same is dismissed as not pressed.

5. The assessee has also moved a petition under Rule 29 for admission of additional evidence and has also raised ground No. 3.1 in this regard. The application for admission of this additional evidence was rejected by the ld. CIT(A) vide para 7. Relevant portion of the same reads as under:

"The appellant's plea of taking additional ground of appeal by his letter dated 31.01.2011 is frivolous and irrelevant and is not admissible to the facts of the case."

6. Before us, the ld. counsel of the assessee referred to the petition and pointed out to the list of documents which were sought to be admitted as additional evidence. It was pointed out that these came into existence because of the developments which were subsequent to assessment proceedings. These documents are very material for adjudication of appeal before us. It was also pointed out that similar documents have already been admitted by the ld. CIT(A)-I, Ludhiana in case of Appeal No. 269/IOT/CIT-I/Ludhiana/2010-11 dated 21.12.2011 in case of Satpal Gosain. The revenue is in appeal against that order in ITA No.

276/Chd/2012 and therefore, such documents have to be considered by the Tribunal, therefore, he made a prayer that these documents may be admitted.

7 On the other hand, the ld. DR for the revenue opposed the admission of the additional documents.

8 After considering the rival submissions we find that the following documents are sought to be admitted by way of additional evidence:

i) Notice dated 28.1.2011 given to Hash Builders for payment of 3rd installment as per terms of JDA – page No. 8-22

ii) Reply dated 4.2.2011 received from Hash Builders declining further payments – Page 23-24

iii) Resolution dated 13.6.2011 passed by the Society rescinding the JDA – page No. 25

iv) Letter written to the Sub-Registrar, Mohali canceling the POA, Page 26-29

v) High Court's order staying execution of the Project on filing of a PIL at page No. 30

vi) Assessment order dated 29.12.2010 passed against the Society on protective basis, Page No. 31 to 53

vii) Appellate order dated 21.12.2011 passed by ld. CIT(A)-I, Ludhiana in the case of Shri Satpal Gosain, Page 54-94

viii0 Copy of registration and other laws (amendment) Act, 2001, Page No. 95-96

9 A bare reading of above shows that these documents came into existence only after completion of assessment. In any case, the same have been admitted by the ld. CIT(A)-I, Ludhiana in case of Satpal Gosain (supra) though the Department has challenged the admittance of these additional evidence under rule 46A(2) of the Act. However, considering the facts that the documents came into existence after completion of assessment, we are of the opinion that in the interest of justice, the same should have been admitted by the

ld. CIT(A). Accordingly we admit these additional evidences mentioned in para 7 and allow **ground No. 3.1** of assessee's appeal.

10 **Ground No. 1** – After hearing both the parties we find that the assessee originally filed return of income declaring income of Rs. 2,50,175/- and agricultural income of Rs. 1,58,530/- on 7.12.2007. The case was selected for scrutiny and notice u/s 143(2) of the Act was issued. During the course of assessment proceedings a copy of revised return was filed on 7.10.2009 declaring gross taxable income amounting to Rs. 30,08,606/-. The Assessing Officer observed that this revised return was filed beyond time and accordingly the same was treated as nonest return. On appeal the action of the Assessing Officer was confirmed by the ld. CIT(A).

11 Before us, the ld. counsel of the assessee submitted that the ld. CIT(A) has not given any reason for confirming the action of the Assessing Officer for treating the revised return as nonest.

12 On the other hand, the ld. DR for the revenue submitted that since revised return was late, therefore, same was rightly treated as nonest.

13 After considering the rival submissions we do not find any force in the submissions of the ld. counsel of the assessee. Section 139(5) which deals with the revised return reads as under:

> *"139(5) – If any person, having furnished a return under sub-section (1) or in pursuance of a notice issued under sub-section (1) of section 142, discovers any omission any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant Assessment year or before the completion of the assessment, whichever is earlier."*

14 The above clearly shows that revised return can be filed at any time before the expiry of one year from the end of relevant assessment year or before completion of assessment

which ever is earlier. In case before us, limitation of one year would expire on 31.3.2009 whereas revised return has been **filed on 7.10.2009 which is clearly beyond the limitation prescribed u/s 139(5). In any case no disadvantage has occurred** to the assessee because in the revised return the assessee has included a sum of Rs. 27,58,436/- on account of capital gain and the whole dispute in the assessment relates to capital gain arising out of sale of plot in Punjabi Cooperative Housing Building society Ltd., Mohali (herein after refereed to "Society"). In fact the Assessing Officer has ultimately assessed much higher amount of capital gain which the assessee is disputing. In view of these facts **we reject the first ground**.

15 **Grounds No. 2 to 2.8, 5 & 6**

16 The ld. counsel of the assessee at the time of hearing had clearly admitted that in above noted grounds basically various facets of the dispute have been highlighted, therefore, all these grounds are being taken together for adjudication.

17 Brief facts of the case are that while making discreet enquiries in the cases of housing societies, it was gathered that housing society consisting of 95 present and Ex-MLAs of Punjab Legislative Assembly is owner of the 21.2 acres of land in village Kansal, Distt. Mohali. The village Kansal shares its boundary with capital city of Chandigarh. On 25.2.2007 the Housing Society of MLAs entered into a tripartite Joint Development Agreement (herein after referred as "JDA") with HASH Builders (P) Ltd (hereinafter referred to "HASH") and M/s Tata Housing Development Company Ltd. (hereinafter referred as "THDC"). By virtue of this tripartite agreement it was agreed upon among these parties that the Society which is owner of 21.2 acres of land, shall transfer its land to THDC/HASH in lieu of monetary consideration and consideration in kind. As per the agreement each Member of the Society having a plot of 500 sqyd in the Society was to receive monetary consideration of Rs. 82,50,000/- and the Members holding plot of 1000 sqyd was

to receive a sum of Rs. 1.65 crores. In addition to this Member holding a plot of 500 sqyd was to receive fully furnished flat measuring 2250 sqft to be constructed by THDC/HASH and Members having 1000 sqyd were to get two such flats. According to the Assessing Officer total consideration to be received by all the Members was Rs. 1,06,42,35,000/- and furnished flats as mentioned above. Before entering into the tripartite agreement the Society in its Executive Committee meeting held on 4.01.2007 which was approved in the General Body meeting held on 26.2.2007, passed a resolution to the effect that all the Members would surrender their all rights in the property to the Society and the Society would enter into an agreement on behalf of the Members with THDC/HASH. The Assessing Officer has referred to this resolution as well as various important clauses of the JDA and has placed lot of reliance on clause 2.1 of the JDA which is as under:

> *"The owner hereby* ***irrevocaboy and unequivocally grants and assigns in perpetuity all its rights to develop, construct, mortage, lease, license sell and transfer the property along with any and all the constructions, premises, hereditaments, easements, trees thereon in favour of THDC for the purpose of development, construction, mortgage, sale, transfer, lease, license and/or exploitation for full utilization of the Property (Rights)*** *and to execute all the documents necessary to carry out, facilitate and enforce the Rights in the Property including to execute Lease Agreement. License Agreements, Construction contracts, Supplier Contracts, Agreement for Sale. Conveyance, Mortgage Deeds, Finance documents and all documents and agreements necessary to create and register the mortgage, conveyance, lease deeds, license agreement, POA, affidavits, declarations, indemnities and all such other documents, letters as may be necessary to carry out, facilitate and enforce the Rights and to register the same with the revenue/Competent authorities and to appear on our behalf before all authorities, statutory or otherwise and before any court of Law (The "Development Rights').* ***The Owner hereby hands over the original title deeds of the Property as mentioned in the list Annexued hereto and marked as Annexure IV and physical, vacant possession of the Property has been handed over to THDC simultaneously to the execution and registration of this Agreement to develop the same as set out herein."***

18 It was further noticed that till date a Member having 500 sqyd plot in Society had received Rs. 33.00 lakhs each and a Member having 1000 sqyd plot had received Rs. 66.00 lakh. The assessee was also a Member and President of the Society and was owner of a plot measuring 1000 sqyd. Therefore, as per JDA, he was to receive Rs. 1.65 crores as monetary consideration and two furnished flats as consideration in kind and the cost of the same as per Assessing Officer was Rs. 2,02,50,000/- and total consideration would be Rs. 3,67,50,000/-.

19 According to the Assessing Officer since the Society has assigned all rights in 21.2 acres of land belonging to the Society in terms of JDA to THDC/HASH and also handed over the physical vacant possession of the property to THDC/HASH, therefore, the assessee became liable to capital gain tax on his share of consideration. Accordingly a letter dated 7.12.2008 was issued intimating the assessee that after consideration of the various clauses of JDA dated 25.2.2007 and the resolution passed by the Society on 26.2.2007, capital gain was to be charged in the hands of the assessee in Assessment year 2007-08 by taking full value of the construction at Rs. 3,67,50,000/-. The assessee filed various replies which have been extracted by the Assessing Officer as under:

> *"This has reference to your letter dated 7.12.2009, we submitted that under:*
>
> *"1 The agreement under reference is only in the nature of an agreement to sell and not a sale deed and therefore no capital gain can arise under the said agreement.*
>
> *2 The amounts received under the said agreement are actually the advances received and not the sale consideration and the land transferred in favour of THDC Ltd. is only on account of security. A letter from M/s Hash Builders to that effect is enclosed herewith.*
>
> *3 There are many conditions envisaged in the agreement which need to be fulfilled before the full execution of the agreement and transfer of property to THDC Lid. and receipt of the consideration.*
>
> *4 Under the partial execution, the part of property measuring approx, 72 sq yards was registered in favour of THDC and sum of Rs. 12*

lacs was received As stated earlier, the amount was received as advance under the agreement and the property was transferred as security towards that advance. There were different legal opinions on the taxability of the amounts received. However in discharge of the duties as responsible citizens and avoid litigation, the members decided to pay capital gain tax on the amounts received voluntarily and such as the assessee has paid due amount of taxes voluntarily during the course of proceedings It may kindly be appreciated that tax liability will arise only to extent of completed transactions i.e. the capital gain arising on the land which has been transferred and for which consideration has been received. The assessee has fully discharged his liability to that extent There cannot be any tax liability on Incomplete transaction I.e. where the land has not been transferred and the Consideration has not been received,

5 *In your letter under consideration, you have considered the national 'value of the proposed flat measuring 2250 sq. feet as a part of the consideration Here the following points need to be considered.*

1.) The flat shall be given only after the full land i.e. 500 sq. yard, has been transferred to the buyer.

2) There is no provision in the agreement to allot proportionate flat or make equivalent proportionate payment. So for the present transaction where only a part of the land has been transferred, no consideration on account of flat is available. So no question of any tax liability arise.

3) It may kindly be appreciated that the developer has not even ' acquired the land till date and has not even obtained permission to start development. So there is no question of any construction of fiats now or near future that is to say, there is no capita! asset in existence as on date for which the national value can be considered.

4) Clause No 14 is termination clause of the agreement under reference (copy enclosed), very clearly states the rights of THDC to terminate the agreement and in that situation, the land already transferred to THDC will be retained by them and no further land will be purchased by THDC and no further payment shall be made by them. In that event the amount received by assessee will be considered as full, and final consideration. So there is no question of considering the national value of proposed flat as the unrealized consideration for the purpose of capital gain of the assessee. The assessee is a Hon'ble citizen and regular Income Tax Payee and shall discharge his liability under Income Tax when the whole land will be transferred.

5.) While making the calculation of capital gain tax, the amount of consideration has been wrongly taken of Rs. 15 lacs Instead of Rs,12 lacs. As per the agreement, sum of Rs. 3 lacs is adjustable advance. You are requested to kindly recomputed tax liability,

6.) There are various judgments on this issue. The following cases are enclosed herewith for the reference.

- *a. CIT vs. Atam Prakash & Sons (2008) 219 CTR (Del)*
- *b. Smt. Raj Rani Devi Ramna vs. CIT (1993) 201 ITR 1032 (PAT)*

c. *Zuari Estate Development & Investments Co. (P) Ltd. Vs. J.R.Kanekar, Deputy CIT. (2004) 191 CTR (Bom)*

In view of the above you are requested to kindly consideration the capita! gain as submitted by us."

9. The case was further fixed for 24.12.2009, On the said date the counsel of the assessee fifed another reply which is reproduced as under:

1 As per Para 6.1 of your letter, you have mentioned that there is a transfer of property upon the surrender of allotment rights. You may kindly refer to the agreement dated 25,02.2007 wherein it is clearly mentioned that allotment rights have been surrendered by the members in favour of the owner i.e. "Punjabi Co-operative House Building, Society Ltd" and not In favour of the buyers. So therefore, there is no transfer of property u/s 2(14) and 2(47).

2 Regarding your observation of having accepted the position of transfer, please note that we understand that transfer of property is only to the extent of the land transferred by way of sale deed.

3 It is very clear from the agreement that no transfer of property have taken place only the development right has been transferred. Therefore, there is no transfer of property under section 53A of Transfer of property Act,

4. Clause 9.3 of the agreement is very clearly stating that the ownership has not been transferred.

in view of our submission you are requested to complete the Capita! Gains Tax in accordance with our return. The assessee wants to be personally heard and make further submission. You are requested to kindly adjourn the case till 29-12-2009."

11. Vide the above said letter the assessee requested to be personally heard however on 29.12.2009 he did not appear. The counsel of the assessee filed written submission which is reproduced as under:

1 In para 6,1 of your letter dated 7.12.2009, you have written that there is grant and assignment of development rights in the property and there is transfer of property upon the surrender of allotment right. This is not a true factual position. The allotment rights have not been surrendered by the members in favour of THDC LTD or M/s Hash Builders Ltd. The factual position is that the society I.e. M/s Punjabi Co-op House Bldg. Society Ltd. has entered into an agreement with M/s THDC Lid.

M/s Hash Builders Ltd. As per clause 2.1 of the agreement it is very clearly mentioned that the possession of the

property has been handed over to THDC Ltd. only to develop the same. A close examination of the agreement clearly reveals that the agreement is a Joint development agreement. The Society intended to develop the land owned by it. However since the requisite expertise were not available with the society, the other two developers were involved in the project. The cost of development was to be borne by the THDC. The payment to the society was to be made pro-rata on transfer of land in favour of THDC Ltd, It is very clear from the agreement that no consideration was payable to the assessee unless the land was transferred. So there is a clear cut relation between the land transfer and consideration. No consideration will be received if the land is not transferred. As far as the possession as mentioned in the agreement is concerned, the same is for development only and the termination clause very clearly states that if the agreement is terminated, THDC Ltd will retain only that much land which has been transferred to them and the remaining land will be retained by the society/members. The actual position is such that no development work has till date been undertaken by the THDC Lid because the various conditions stipulated in the agreement have not been fulfilled. The possession as mentioned in the agreement and which is being made the basis by you to consider the transaction as transfer u/s 53A of the Transfer of Property Act is actually not of any consequences and actually there is no transfer except to the extent of land transferred by way of registered sale-deed.

2 Clause 6.1 of the agreement clearly states that handing over the original title -deeds is as security for the adjustable advance.

3 As per clause 9.2 of the agreement, it is very clearly mentioned that the owner shall execute in favour of M/s THDC Ltd: the sale-deeds to complete the aforesaid transaction. So it is evident that the execution of sale-deeds is an integral part of the transaction and the transaction shall remain incomplete. if the sale deeds are not executed.

4 The clause 13 very clearly states that the rights transferred relate to Development/construction work and M/s THDC Ltd shall not do anything which adversely affect the right of the owner to receive the entire consideration.

5 Keeping in view the conditions in the agreement and to the fact that M/s THDC Ltd: M/s Hash Builder Ltd have not done any development work on the land under consideration till date in pursuance of the agreement dated 25.2.2007 or in furtherance of the said

agreement, no transfer should be considered to have been taken place in respect of the land which is not yet transferred,

if the views of the department are held to be correct for the sake of discussion, the following situation will arise:

1, Assesses will be deprived from availing the exemption u/s 54EC since no funds are available with the assessee for investment.

2, Assessee will be deprived from availing exemption u/s 54F as no residential house has yet been constructed.

This is an ironical situation where assessee is having to pay tax on the notional value of the flat to be given in the future to him as consideration but exemption under section 54F will be denied because the residential house did not exist,

3. Further as per the termination clause of the agreement various conditions have been prescribed under which the agreement can be terminated. It is very clearly mentioned in the agreement that in the event of termination of the agreement the land transferred by the members will be retained by THDC Ltd and consequently no further consideration shall be given to the members. It is evident from the facts in the case that inordinate delay has already taken place In this case. The agreement was originally envisaged to be fully executed In F.Y 2007-08. But now even FY 2009-10 is also going to expire. In that case the assessee will have no remedy available against the tax paid on consideration which will never be received by him. Under such circumstances it will be fully unlawful to charge tax.

4. The value of proposed flat is undeterminable and there is no way to determine the same. There is no provision to pay tax on the notional value. Clause 6.18 of the agreement entitled the assessee to surrender his proposed flat to THDC Ltd. and in that case only 75% of the future market-price will be received by him.

In the light of above discussion it is once again requested that tax may be calculated as per the return filed by the assessee.

However If the department choose to disagree with our submissions then It Is submitted that the capita! gain should be charged in the hands of the Punjabi Co-operative House Bldg. Society. It will be pertinent to note here that the proceedings in the case of the society have been reopened u/s 148 of the I.T Act 1961 by the learned D.C.I.T Mohali. In the reasons recorded by the learned D.C.I.T, it has clearly been mentioned that he proposes to tax the capital-gain in the hands of the Society. Copy of the reasons recorded is enclosed. It may be appreciated that the same amount can't be taxed twice".

On 29,12,2009 again the counsel of the assessee filed a letter and

submitted as under:

"This being referred to the captioned proceedings Regarding your query about the cost of acquisition is Rs. 11 lacs which is paid as per following dates.

Receipt No, 307	*09-11-01*	*5,04,000/-*
Receipt No. 426	*12-02-04*	*7,00,007/-*

Out of above amount Rs. 1,00.000/- was refunded to the assessee and Rs, 4000/- was towards membership charges and other funds of the society.

In continuation to our earlier reply submitted, we once again reiterate that the possession given by the assessee is only to the extent of land sold by way of registered sale deed. There are certain addendums to the agreement which are not presently available with the assessee & cannot be submitted immediately."

20 The Assessing Officer after considering the submissions did not find any force in the same and observed as under:

(i) There is no force in the argument that the JDA was only an agreement to sell and not a sale deed because JDA resulted in the transfer of assets. All the ingredients of transfer i.e. consideration from schedule of payments, rights and liabilities of the parties etc. were mentioned in the JDA, Capital gain arose because of the fact that it was a case of transfer of capital asset in view of Section 2(47)(ii), 2(47)(v) and 2(47)(vi). According to him as per clause 2.1 of the JDA owner of the land made agreement and irrevocably and unequivocally granted and assigned in perpetuity all of its rights to develop, construct, mortgage, lease, license, sell and transfer the property (21.2 acres of land) along with any and all constructions trees etc. in favour of THDC/HASH for the purpose of development, construction, mortgage, sell, transfer, lease, license and/or exploitation for full utilization of the property and to execute all documents necessary to carry out facilities and rights in the property. Thus transfer of property was effected through this agreement.

(ii) The owner had also handed over the original title deeds of the property and also handed over the physical, vacant possession of the property to THDC/HASH simultaneously to the execution and registration of this JDA and therefore, the

case of the assessee was covered by the provisions of section 2(47)(v) of the Act r.w.s 53A of T.P. Act. as part consideration had also been received. According to the Assessing Officer the facts of the case were similar to the facts in case of CIT V. K. Jeelani Basha, 256 ITR 282 (Mad) wherein Hon'ble High Court after analyzing the provisions of section 2(47)(v) had held that once the possession even for a part of the property was handed over to the transferee, for the purpose of Section 2(47)(v) r.w.s 45, the transfer was complete.

(iii) The assessee's case was also covered by the provisions of section 2(47)(vi) which deals with any transaction which had effect of transferring or enabling the enjoyment of any immovable property and assigning various rights in the property in favour of THDC and handing over the original title deeds as well as handing over of the physical vacant possession of land has the effect of transferring or enabling the enjoyment of the said property to THDC/HASH.

(iv) There was no force in the contention that the amounts received under the said agreement were advances received and not the sale consideration because total consideration was structured in the JDA and the consideration was to be received as per clause 4(iv) of the JDA. In fact the assessee has himself shown the receipt and returned the same as capital gain which contradicts these arguments of the assessee. As per Section 45 of IT Act, income-tax was to be charged under the head "capital gain" on transfer of a capital asset and shall be deemed to be the income of the previous year in which transfer took place. The year of transfer is the crucial year and not the time of the receipt.

(v) There was no force in the contention that the value of the flat should not be included because the assessee has not received such flat, because the flat was to be received by each Member of the Society was part of the entire consideration as per clause 4.2 of JDA. In any case as per Section 45 r.w.s. 48,

its full value of consideration received or accrued which has to be considered.

(vi) It was also observed that surrender of allotment letter by the Members including assessee was processed in order to enable the Society to enter into tripartite JDA with HASH and THDC. By surrendering the allotment letter, the right of the assessee in immovable property owned by him got extinguished and this extinguishment was in lieu of entire consideration which was received by the Members including the assessee. thus this case was also covered u/s 2(47)(ii) of the Act.

(vii) It was observed that there is no merit in the contention that the assessee would not be covered u/s 54EC due to lack of funds or exemption u/s 54 was not relevant to the issue about taxability of long term capital gains which was dependent only on transfer.

(viii) It was observed that there was no force in the contention that the value of the flats was undeterminable because the value of the flat was very much determinable as per the market rate prevailing which could also be ascertained from the rate at which the flats were being offered to the general public.

(x) The Assessing Officer was of the view that the case laws relied on by the assessee were distinguishable for which the reasons have been given at page 23 and 24 of the assessment order.

21 In this background the assessee was charged to capital gain tax u/s 45 for the total consideration received and receivable by being a Member of the Society in view of JDA.

22 On appeal before the ld. CIT(A) detailed submissions were made (In the impugned order reference is made to written submissions without discussing the arguments). The ld. CIT(A) referred to the provisions of section 45 and 2(47) of the Act and observed that clauses (v) to (vi) were inserted in section 2(47) w.e.f. 1.4.1988. He observed that before insertion of this

provision, it was always possible to avoid or postpone capital gain by either not executing conveyance deed or postpone such execution because vendor of the property could give the privilege of ownership or enjoyment of the property by executing a Power of Attorney etc. To avoid such leakage of revenue clauses (v) and (vi) were inserted to section 2(47) of the Act. He then discussed the decision of Hon'ble Bombay High Court in case of Chaturbhuj Dwarkadas Kapadia V. CIT, 260 ITR 491 (Bom) and extracted the following conditions which were required to be satisfied to cover the case u/s 2(47)(v) r.w.s. 53A of T.P. Act.

(a) There should be contract for consideration

(b) It should be in writing

(c) It should be signed by the transferor or on his behalf

(d) It should pertain to transfer of immoveable property

(e) Transferee has in part performance of contract has taken possession or part possession of the property.

(f) Lastly, transferee should be ready and willing to perform his part of contract.

23 If the above conditions were satisfied then the transfer can be said to have taken place for the purpose of Section 45. According to him as per the decision of Chaturbhuj Dwarkadas Kapadia V. CIT (supra) once the possession or part possession of the property was given by the transferor to the transferee then the transfer can be said to have taken place. He also referred to the decision of Authority for Advance Ruling in case of Jasbir Singh Sarkaria, 164 Taxman 108: 294 ITR 196. He referred to various observations of the Authority in this case and concluded that the receipt of entire consideration was not a factor to be seen for application of Section 2(47)(v). Once these two decisions were considered along with the provisions of section 45 r.w.s. 2(47)(v) then it would emerge as under:

"(a) The Joint development agreement has been entered into between the Punjab Coop Housing Building Society Ltd. Mohali, of which assessee is member, and. M/s Hash Builders (P) Ltd. and M/s Tata Housing development Company Ltd. Mumbai as on 25.2.2007.

b) The members of the society surrendered their allotment rights and the society on behalf of members entered into the joint development agreement in lieu of 'entire consideration' as described in the Joint Development agreement in the previous year 2006-07.

(c) The receipt of consideration was structured and the assessee received part of the 'entire consideration' during the financial year 2006-07. This clearly shows that the transferee is ready and willing to perform his part of contract.

(d) In view of clause 2.1 of the Joint Development agreement, the owner has at the time of making the agreement irrevocably and unequivocally granted and-assigned in perpetuity all its rights to develop, construct, mortgage, lease, license, sell and transfer the property i.e (21.2 acres of land) alongwlth any and all constructions, trees etc. in favour of M/s Tata Housing development Company Ltd, for the purpose of development, construction, mortgage, sale , transfer, lease, license and/or exploitation for the full utilization of the property and to execute all the documents necessary to carry out, facilitate and enforce the rights in the property. Thus, in fact the owner has irrevocably and unequivocally granted and assigned in perpetuity all the rights which an owner can have in an immoveable property. All these rights have been given on date of agreement i.e. 25.02.2007 and even possession has been handed over in the financial year 2006-2007. The para 2.1 clearly states that " the owner hereby hands over the original title deeds of the property as mentioned in the list Annexed hereto and marked as Annexure IV and physical, vacant possession of the property has been handed over to THDC simultaneously to the execution and registration of this agreement to develop the same as set out therein". Thus possession in part performance of contract has been handed over to the transferee without any ambiguity in the previous year 2006-07 itself.

e) An irrevocable transfer has thus been made which is not dependent on any condition to be fulfilled.

f) Further coining to "consideration" part . As per Para 4,1 Rs,6,00,000 per holder of 1000 Sq,Yards has to be paid by transferee on account of earnest money , which has been paid to the assessee, Further as Per Para 4.1 (ii) clearly states that in lieu of. Rs, 12,00,000 per plot holder of 500 Sq. Yards and Rs.24,00,000 per plot holder of 1000 Sq. Yards is being paid on the execution of agreement against' which the Society on behalf of members will transfer 3.08 Acres of the contiguous land out of property, It has been confirmed that against the above payment the land measuring,3.08 acres has been transferred in the •name of THDC and registered vide sale deed dated 02/03/2007 i.e. in the previous year 2006-07.

g) Thus it is clear from above transactions that transferee, M/s Tata Housing development Company Ltd,, Mumabi, has performed and is willing to perform his part of contract and in

this part performance of contract, the assessee and other members of the Punjab Coop Housing Building Society Ltd, Mohali have given possession of the whole of land of 21.2 acres to the THDC and have further irrevocably and unequivocally granted and assigned all rights in perpetuity to THDC in the said previous year i.e. 2006-07.

h) Hence it is established beyond doubt that transfer has taken place as envisaged as per Section 2(47)(v) of the-Income Tax Act and since it has taken place through Society of which assessee is also member so Sections 2(47) (vi) and 2(47)(ii) would also support Section 2(47)(v) of the income Tax Act.

(i) Now once it has been established that transfer has taken place, then the next important question is the year in which the transfer has taken place and it is the year in which the transfer has taken place, whole of the consideration , whether received or receivable in cash or kind, would be chargeable to capital gains u/s 45, whether the entire consideration has been received in the year of transfer or not.

j) From the discussion in above paras it is clear that not only agreement has been entered into in, the pervious year 2006-07 but the owner has at the time of making the agreement irrevocably and unequivocally granted and assigned in perpetuity all its rights to develop, construct, mortgage, lease, license, sell and transfer the property i.e (21.2 acres of land) alongwith any and all constructions, trees etc. in favour of M/s Tata Housing development Company Ltd.

k) Furthur M/s Tata Housing development Company Ltd has also in part performance of contract has made the payments to the owners and is willing to perform his part, of contract and the members of society in this part performance of contract have assigned full rights in the favour of transferee in the previous year 2006-07 itself and surrendered allotment letters to enable the Society to enter into tripartite agreement with HASH and THDC.

l) Most importantly physical and vacant possession of whole of the land of 21.2 acres has been handed to M/s Tata Housing development company Ltd. in the previous year 2006-07, Same is clear from Para 2.1 of the Joint Development Agreement and discussed in detail in preceeding paragraphs.

m) Thus the "transfer" would be deemed to happen in the previous year 2006-07 itself.

n) It has already been discussed in detail that registration of conveyance deed and receipt of entire consideration is not at all important in the year in which deemed transfer u/s 2(47)(v) of IT Act has taken place.

o) Further the Agreement is clear and there is no ambiguity regarding irrevocable rights being given to the transferee. As regards certain petty conditions and provisions relating to

termination of the contract, it Is observed that these clauses are necessary part of such type of joint development agreement. At the same time such agreements including this agreement has the provisions of 'disclaimer' 'partial invalidity' 'indemnity' and 'arbitration'. The disputes arising, if any, shall be resolved as per the provisions and awards shall be granted, in appropriate cases by the arbitrator. These provisions are there to safeguard the interest of all the parties to the joint development agreement and parties would be indemnified by each other and shall also receive award if the terms/conditions are not fulfilled.

p) As regards applicability of Section 54F, there are-certain conditions which are attached with Section 54F also which have to be fulfilled before which exemption under that section is available to the assessee. The assessee has not even tried to make any claim by showing that he has fulfilled the said conditions to be eligible for exemption under Section 54F, So exemption cannot be given in such a situation u/s 54F.

q) The judgment relied upon by the assessee are not applicable to the case of assessee as most of them pertain to the previous year before Section 2(47)(v) and 2(47)(vi) was inserted w.e.f. 1.4.1988. Other judgments referred by assessee are distinguishable as follows:

ACIT vs Puspa Devi: This ruling has been in fact in favour of revenue and completely ratifies the principles laid down in the judgment of Chaturbhuh Dwarkadas Kapadia vs CIT as it says that transfer of capital asset took place by virtue of agreement dated 07/09/1991 in the financial year 1991-92 and as such, the AO was fully justified in levying capital gains in the same previous year.

ii) CIT vs K. Jeeiani Basha: This ruling supports the contention of revenue that entire consideration receivable for that part of property would 'be' taxable which has been parted with or transferred even when whole of the consideration lies not been received.

iii) Zuari Estate Development & Investment Co. (P) Ltd, vs DCIT: This case is also not relevant as it pertains to agreement entered into in 1984 much before Section 2(47(v)

was inserted .

r) As stated earlier also the assessee's case is also covered by the general provisions of section 45 and Section 2(47)(ii) – extinguishment of any rights therein. The case is also covered by Section 2(47)(vi) - any transaction which has effect of transferring or enabling the enjoyment of any property. The assessee due to these provisions is also precluded from contending that the capital gains would accrue to society and not assessee.

s) Hence amount of Rs. 30,00,000/- received by assessee is towards part performance of contract by transferee and not mere advance.

t) As regards valuation of the said flat at Rs.4500 per square feet, the rate has to be taken as per the rate offered to the genera! public. That would be the actual rate of flat at which the builder would offer to any person. The sum of Rs.4500/- per sq. feet is rate as per which HASH is liable to buy from THDC. It is a clear indicative of the value of flat, devoid of any special benefit to the members . The rate which could be offered to general public would in any case be not less than Rs. 4500/- per sq.feet. Therefore according to facts the rate of flat taken at Rs.4500 per sq.feet to arrive at the full value of consideration, adopted by the Assessing Officer, is held to be correct."

In view of the above, the order of Assessing Officer was confirmed.

24. Before us, the ld. counsel of the assessee made detailed submissions. Further written submissions has also been filed. He carried us through the facts of the case by referring to various documents in paper book and also case laws as well as commentary by, "Mulla – Dinshaw Frederick Mulla" on the interpretation of Section 53A of Transfer of Property Act. The submissions can be summarized as under:

I First of all he referred to provisions of section 2(47)(v) of IT Act and Section 53A of T.P. Act and submitted that following conditions emerged for attracting these provisions-

a There must be contract of transfer for consideration for an immovable property;

b Contract must be in writing

c Terms necessary to constitute transfer should be ascertainable with reasonable certainty.

d The transferee must have in part performance taken the possession of the property or part thereof from the transferor and if already in possession, continues in the possession in part performance of the contract.

e Transferee must have done something in furtherance of the contract.

f The transferee must have performed or willing to perform his obligations in such contract.

In view of the above conditions in the present case, condition no. (d) and (f) have not been complied because the assessee and/or society has not handed over the possession to THDC/HASH. In this regard he particularly referred to clause 2(1) of the JDA and pointed out that the possession was to be handed over to THDC/HASH simultaneously with the execution and registration of the JDA. Since the JDA was not registered therefore, it is clear that the possession was not handed over. In any case the possession if at all was granted as permissive license with right to developers i.e. THDC/HASH only for the purpose of development of the land and not as part of performance of the contract of transfer of land. The fact that possession was not handed over to the THDC/HASH also becomes clear from the sale deed dated 2.3.2007 (Placed at page 119 to 136). He referred to clause A of recitation clauses

at page 120 which clearly provides that vendor i.e. the Society was owner and in possession of total land measuring 160 kanal and 7 marlas equivalent to 21.2 acres in village Kansal Distt. Mohali. This deed was for sale of part of the property measuring about 3.08 acres out of total land contracted to be given to THDC/HASH measuring about 21.2 acres. He pointed out that sale deed has been executed on 2.3.2007 whereas JDA was executed on 25.2.2007. Thus it is clear that no possession was given on 25.2.2007 otherwise the Society would not be in possession on 2.3.2007. Similarly one more part of the land was sold by second deed executed on 25.4.2007 wherein similar clause 'A' as in the first deed is there (Refer page 138 of the paper book) shows that the Society was in possession of the land on later date. These two sale deeds clearly show that no possession was given on the date of execution of the JDA. In any case the JDA makes it clear that the possession was to be given simultaneously to the registration of JDA and since JDA was not registered, no possession was given.

II It was submitted that the possession, if at all, was given to the developers i.e THDC/HASH which was a permissive license to develop the project and not as performance of the contract. Reference was made to Section 52 of the Indian Easement Act, 1882 which reads as under:

> "52. "Licence" defined
>
> *"where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property all the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in which the property, the right is called a license."*

It was contended that Section 2(47)(v) r.w.s. 53A of T.P Act refers to legal possession whereby the transferee has a legal right to enter upon and exercise rights of possession i.e. control over the property. In this connection he referred to the observation of Authority for Advance Ruling in case of Jasvir

Singh Sarkaria, 294 ITR 196. He particularly referred to para 26 to 28 of the judgment. He further referred to clause “F” (page 17 of the paper book) i.e., clause 2.1 of the JDA (page 24 of the paper book) and submitted that contents of these clauses will entirely show that possession was given and was envisaged in the shape of license to the developers for undertaking the development of property and legal possession was neither handed over or intended to be handed over.

III Money which is received at the time of execution of JDA can be termed as advance payment. In any case when these amounts were adjusted as part of sale consideration for sale of part of the property and the same have been retuned by the assessee as long term capital gains through revised return in the year of receipt.

IV It was emphasized that in any case Section 53A of T.P. Act has been amended by Amendment Act, 2001 whereby registration of agreement has been made mandatory for the same to be enforceable. Since JDA was never registered therefore, recourse could not be taken to Section 2(47)(v) of the Act because JDA was not registered. Pursuant to amendment in Section 53A of T.P. Act with effect from 24.9.2001 it was only the amended provision which can be read with Section 2(47)(v) of the Act. In this regard he referred to decision of Hon'ble Supreme Court in case of Surana Steels P Ltd. V. CIT, 237 ITR 777. In that case it was observed that when a section or an Act of Parliament is introduced into another Act, it must be read in the sense it bore in the original Act. In other words, the meaning attached to the original section which has been referred in another act, has to be understood as same. Therefore, once the original section 53A of T.P. Act undergoes amendment the same has to be read in Section 2(47)(v) as amended and therefore, as JDA is not registered Section 2(47)(v) will not be applicable.

V The ld. counsel of the assessee referred to the decision of Hon'ble Bomay High Court in case of Chaturbhuj Dwarkadas

Kapadia V CIT (supra) and tried to distinguish the same. He submitted that this decision cannot be taken as an authority for the proposition that date of agreement should be reckoned as date of transfer. In any case, the decision has to be seen for what has been held in the decision and in this case ultimately the appeal of the assessee was allowed which means the transfer was held to have taken effect only after receipt of substantial payment of consideration.

VI The ld. counsel of the assessee further pointed out that there is another important condition in invoking Section 2(47)(v) of the Act r.w.s 53A of T.P. Act i.e. the transferee must have performed or willing to perform his part of the contract. It was argued that willingness of the transferee to perform his part of the contract is not an empty formality and it has to be absolute and unqualified. Thus willingness cannot be conditional or contingent on subsequent events. In the JDA following obligations were to be complied by the transferee –

(a) As per clause “J” of the JDA the Government approvals were to be obtained by the transferee i.e. THDC/HASH.

(b) As per clause 3.1 of JDA all building, plans and designs and drawings etc. for construction of the project were to be prepared by the transferee i.e. THDC/HASH.

(c) Clause 4.1 and 7.10 of JDA provided regarding timely payment of consideration.

(d) Clause 7.9 of the JDA provided that THDC/HASH shall obtain all approvals and commence construction within 6 months of hand over of final plans.

(e) Clause 8.4 provided obligation to take timely approval and clause 8.6 provided for payment of various statutory charges in respect of development charges, license fee and external default etc.

Further to above obligation, time was of essence in the contract which becomes clear from clause 1.2(a), 4.1 and 7.10 regarding timely payment and clause 14(iv) regarding termination of contract.

In the case before us, there was no willingness on the part of developer i.e. THDC/HASH to perform the above obligation because of the following –

(i) THDC/HASH failed to obtain necessary approval and did not undertake any development work on land.

(ii) THDC/HASH i.e. developer has not paid timely payment in timely installments of agreed consideration.

(iii) HASH has not obtained approval from various authorities and had not commenced construction within six months of handing over all final plans. (Reference was made to page 34 of the paper book).

(iv) THDC/HASH vide letter dated 4.2.2001 (Page 23 to 24 of the additional evidence) refused to make further payment as stipulated in the agreement.

(v) The transferor has gone back on their representation to complete construction in the time bound manner and in handing over the flats to the Society /its Members.

In this regard he also referred to para 16 of the commentary by "MULLA – Dinshaw Frederick Mulla" (copy of which has been filed at page 102 and 103 of the paper book). He pointed out how the ld. authors have discussed the significance of the willingness of the transferee to perform their part of the contract. In this regard he also referred to various observations in the following case laws:

General Glass Co. Pvt Ltd. V DCIT, 14 SOT 132 (Mum)

K Radhika V DCIT, 149 TTJ 736 (Hyd)

DCIT V. Tej Singh, 138 ITD 489 (Agra)

The facts of these case laws and the facts in the present case before us are identical and therefore, since as per these decisions there was no willingness on the part of the transferee to perform his/its obligation the provisions of Section 2(47) (v) r.w.s. 53A of T.P. Act could not be applied.

VII It was contended that revenue has also held that clause (vi) of Section 2(47) is also applicable which is not correct because that provision is applicable where a person becomes owner of the immovable property pursuant to taking Membership of Cooperative Society etc. In the present case, the JDA was entered into between Society and two developers i.e. THDC/HASH and therefore, there was no transaction involving Membership of Cooperative Society/ company etc. Therefore, clearly clause (vi) of sec 2(47) is not applicable in the present case.

VIII The ld. counsel of the assessee also submitted that as per clause 4.1 of the JDA transfer/sale of 21.2 acres of land was to be made in favour of THDC/HASH on a pro-rata basis corresponding to pro-rata payments received by the Society and respective Members of the Society from THDC/HASH by executing the sale deed. This clearly shows that transfer was wholly dependent on timely receipt of the consideration. As pointed out earlier only two sale deeds could be executed and whatever payments have been received, have been offered for taxation under the head “Capital gain”. However, the Assessing Officer has subjected to tax whole of the consideration under the JDA as capital gain which is totally uncalled for particularly in view of the fact that an agreement has been subsequently terminated and this action of the Assessing Officer amounts to taxation of notional sum which is not permissible under the law. Under the various provisions of the Act, only real income can be taxed which has been earned by the assessee and no notional income can be subjected to tax. In this regard, reliance was placed on the following decisions of the Hon'ble Supreme Court:

Shoorji Vallabhdas & Co., 46 ITR 144 (S.C)

CIT V. Raman and Co. 67 ITR 11 (S.C)

Godhra Electricity Co. Ltd. V CIT, 225 ITR 746 (S.C)

CIT V. Balrampur Commercial Enterprises Ltd., 262 ITR 439 (Cal)

CIT V. K. Jeelani Basha, 256 ITR 282

FOBEOZ India (P) Ltd. V ITO, ITA No. 9231/Mum/2010 (copy filed)

It was claimed that since the flats were never constructed and given to the assessee, therefore, if the value of the flat is added in the total consideration then it will be totally on notional basis and since notional income cannot be taxed, therefore, the value of these flats, in no case, should be considered in the total consideration. Further if notional receipts were taxed then the assessee would be deprived to take benefit available in the IT Act. For example if whole consideration was received the assessee could have easily taken benefit of Section 54EC and other provisions like Section 54 by investing in any specified asset or a house. Since full consideration has not been received and the assessment of the whole consideration will lead to unintended consequences like denial of deduction u/s 54 EC etc.

IX It was contended that since JDA has already been terminated vide Society's resolution dated 13.6.2011 and thereafter on 31.10.2011 even special Power Of Attorney executed earlier has been revoked, therefore, in view of the subsequent events, the balance of consideration receivable could not be taxed in the hands of the assessee. Subsequent events to the date of transactions have to be reckoned before taxing a particular transaction. He also submitted that in almost similar circumstances, subsequent events were reckoned by Mumbai Bench of the Tribunal in case of Chemosyn Ltd. V ACIT, 139 ITD 68. He referred to various paras and pointed out how the subsequent events were reckoned by the Tribunal.

X The ld. counsel of the assessee submitted that without prejudice to the above if it is considered a case of transfer then the value of flat to be allotted to each of the Member of the Society has not been valued correctly. The Assessing Officer has referred to clause 3.5 of inter-se agreement entered into between THDC and HASH. The ld. counsel of the assessee submitted that the assessee was not party to such agreement and price at which THDC was selling flats to HASH could not be adopted in the case of the assessee. It was submitted that if clause (5) was referred to it can be seen that reference has been made to two prices ie. Rs. 2000/sqft for 126 flats and Rs. 4500 per sqft for three flats. This price is notionally fixed by two developers and did not reflect the price of the flats. In any case the Developers have not been able to obtain necessary approval from the concerned authorities, therefore, construction of such flats has not commenced and no flats have been constructed and allotted to the assessee, therefore, notional value of the same could not be adopted and taxed in the hands of the assessee. At best the Assessing Officer could have taken the price of Rs. 2000 per sqft.

XI It was contended that if the value of the flat was to be recognized for the purpose of computing the capital gain, the corresponding deduction u/s54F of the Act should have been allowed particularly in view of Circular No. 472 dated 15.10.1986. In this regard he relied on the following decisions:

CIT V. Sardarmal Kothari and another, 302 ITR 286 (Mad)

CIT V. R.L. Sood, 245 ITR 727 (Delhi)

CIT V. Mrs. Hilla J.B. Wadia, 216 ITR 376 (Bom)

Mrs. Seetha Subramanian V ACIT, 59 ITD 94 (Mad Bench)

Usha Vaid v ITO, 53 SOT 385

Smt. Ranjit Sandhu v DCIT, 133 TTJ 46 (Chd)

25 On the other hand, the ld. CIT DR for the revenue made detailed submissions and have also filed written submissions. It was pointed out by the CIT-DR for the revenue that though

copy of the special power of attorney has been filed at pages 153 to 165 but two of the most important crucial pages containing clause "u" to "z" and last page No. 9 are missing. He made an allegation that this has been done deliberately which was controverted by the ld. counsel of the assessee and he submitted that this is a simple mistake and he would file those papers. The ld. DR for the revenue in view of these submissions submitted that these pages can be referred in case of Punjabi Coop House Building Society Ltd. in ITA No. 310& 556/Chd/2012 at page 40 to 52 of the paper book in that case. The submissions of the revenue can be summarized as under:

(I) The Society passed a resolution in its executive committee on 4.01.2007 which was confirmed / ratified in the General Body Meeting on 25.2.2007. In the Society there were two types of Members holding plots of 500 sqyd and 1000 sqyd. It was resolved that members would surrender the respective plots of 500 sqyd and 1000 sqyd in favour of the Society for further transfer of the entire land by the Society in favour of THDC/HASH for the development of property in lieu of consideration of Rs. 82,50,000/- to a Member holding 500 sqyd plot and Rs. 1,65,00,000/- to a Member holding 1000 sqyd plot to be paid in four installments by HASH directly to the Members of the Society. In addition to this consideration member holding 500 sqyd plot was to receive a furnished flat with super area of 2250 sqft to be constructed by THDC/HASH and two flats in case of Members holding 1000 sqyd plots. It was also resolved through this resolution to hand over the possession of the property and original title deeds of the property to THDC/HASH. The Society was further permitted to allow THDC/HASH to mortgage, sell the property and create change in property. The Society also resolved to execute irrevocable power of attorney in favour of THDC/HASH which was actually executed on 26.2.2007 which was duly registered also. Pursuance to this resolution, the JDA was executed on 25.2.2007. Through clause 2.1 it was specifically agreed that owner i.e. the Society has irrevocably and unequivocally

granted and assigned in perpetuity all the rights to develop / construct / mortgage / lease / license, sell and transfer the property. Clause 6.7 of the JDA provides for execution of irrevocable special power of attorney through which rights of development were granted in favour of THDC/HASH and right to raise finance by mortgage in the property and to register the charge with competent authority and further power of sale etc. were also given through this power of attorney. It was agreed that the Society would not revoke such power of attorney without obtaining a specific prior written consent of THDC/HASH. The above clauses clearly show that possession of the property was handed over to THDC/HASH and further rights to mortgage and sale of the property was also given. The combined reading of various clauses in the JDA and power of attorney show that:–

(i) All the Members of the Society expressly and willingly had surrendered their respective plots in favour of the Society and the Society was authorized to sell/transfer the entire land in favour of THDC/HASH for a consideration which was set out in the clauses of JDA. The society was also authorized to hand over original title deeds and possession of land to THDC/ HASH.

(ii) The Society handed over the possession of the land and original title deeds of the property to THDC/HASH.

(iii) Society permitted THDC/HASH to mortgage, sell and create charge in the property.

(iv) The Society resolved to execute an irrevocable special power of attorney which could not be revoked in any circumstances without proper consent of THDC/HASH and such power of attorney was actually executed on 26.2.2007. Through this power of attorney THDC/HASH has been authorized to mortgage or create charge by the Society. THDC/HASH was authorized to give the possession of the property or any part thereof to the authorities to whom same was required to be handed over which was not possible unless THDC/HASH was

handed over the possession of the property and the rights of the ownership. Through this power of attorney the right to sell was also given which is again not possible without transfer of possession or ownership. These clauses clearly show that complete control over the property confirming all privilege of ownership was given in favour of THDC/HASH and thus such transfer of ownership satisfies the requirements of Section 45 r.w. clause (ii), (v), (vi) of Section 2(47) of the Act.

(II) The Ld. CIT DR for the revenue contended that Hon'ble Supreme Court in case of Sunil Sidhharath Bhai V CIT, 156 ITR 509 and CIT V. Narang Products, 219 ITR 478 has clearly held that definition of transfer u/s 2(47) is inclusive one and does not exclude contextual or ordinary word meaning of "Transfer". Further in case of Ajay Kumar Shah Jagati V CIT, 168 Taxman 53 it was observed that for the purpose of Section 45 of the Act the word "Transfer" as defined in IT Act is required to be considered and not sale as indicated in the Transfer of Property Act. Therefore, u/s 2(47) of the Act, it is "Transfer" which is one of the most important ingredient for levy of taxation u/s 45 which is to be complied with. For invoking Section 2(47) (v) what is required is that an agreement to sell has been entered by the Transferor with the transferee and possession has been handed over by the transferor to the transferee in part performance of the contract u/s 53A of T.P. Act. In this regard he relied on the following decisions:-

1) *Authority for Advance Ruling (AAR) New Delhi in the case of Jasbir Singh Sarkaria 294 ITR 196*

2) *Chaturbhuj Dwarkadas Kapadia v CIT 260 ITR 491 (Bom.)*

3) *C.Ravi Vs DCIT in 325 ITR 417 (Ker)*

4) *CIT v Dr. T.K. Dayalu 202 Taxman 531 (Kar.)*

5) *D. Kasturi v CIT & Anr 323 ITR 40 (Mad.)*

6) *CIT V Dhir & Co. Colonisers (P) Lta 288 ITR 561 (P&H)*

(III) The Ld. CIT DR further submitted that assessee's case apart from being covered under clause (v) of section 2(47) is also covered by clause (vi) of section 2(47) of the Act. Clause (vi) is applicable in cases where any transaction is entered into which has the effect of transferring and enabling the enjoyment of immovable property. In this regard he relied on the decisions of Mumbai Bench 'D' of the Tribunal in Ms Rubab M. Kazerani v JCIT 91 ITR 429(Mum.), ITAT Hyderabad 'A' Bench in D. Achutha Rao Vs ACIT 106 ITD 388 (Hyd) and ITAT Delhi Bench 'D' Bench in ACIT v Smt. Pushpa Devi Jain 93 ITD 289 (Delhi).

(IV) He further submitted that clause (v) & (vi) of section 2(47) of the Act were inserted w.e.f. 1.4.1988 by Finance Act, 1987. Before that, passing of the title in the property was necessary condition to constitute a transfer under the Act in view of the various pronouncements of the Courts. In the meantime it was noticed by the Government that many properties were being transferred without execution of sale deed through various documents what is popularly known as 'power of attorney' transactions. To curb the leakage of Revenue, through such transaction, clauses (v) & (vi) were added to section 2(47) which defines transfer. This has been explained by Circular No. 495 dated 22.9.1987. The Board has clarified through paras 11.1 & 11.2 that newly inserted clauses (v) & (vi) would enlarge the definition of transfer whereby the cases of transfer what is popularly known as 'power of attorney' transaction which allows the enjoyment of right in the property would be covered by new definition. The new clauses would also cover arrangements by which the property could be enjoyed by becoming a member of the company or such other arrangement. According to him it may not be out of place to invoke Heydon's Rule of interpretation of statutes for interpreting these clauses. The Heydon's Rule is mainly applicable wherever the true meaning of amended provisions is to be understood. If the amendments are seen through prism of Heydon's Rule, it would become clear that amended clauses have been brought on the statute to overcome the earlier mischief. Properties could be

transferred without execution of proper sale deeds and the same could be enjoyed by the respective buyers without any taxation on the part of sellers.

(V) The Ld. DR pointed out that there is no force in the submissions that since section 53A of the transfer of property Act has itself gone under amendment w.e.f. 24.9.2011 wherein the registration of the agreement has been made mandatory and, therefore, since JDA was not registered it cannot be construed to be covered under clause (v) of section 2(47). It was contended that doctrine of part performance was given statutory recognition in section 53A of the Transfer of Property Act and it was desired only to protect possession of a transferee when the transfer falls short of requirement laid down by law. The plea of the part performance could be taken only as shield in defence and not as a sword. The most import ingredient of section 53A of T.P. Act was the change of possession. The amendment to section 53A of the Transfer of Property Act has been done perhaps to collect Revenue. In any case, the same cannot have a impact on the clause (v) of section 2(47). This is so because clause (v) clearly employs language by using the expression “part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act”. The Legislature intentionally not employed the expression “in part performance of contract as defined under section 53A of Transfer of Property Act”. Therefore, it is nature of contact which is similar to the nature of contract u/s 53A of the Transfer of Property Act which is relevant to section 2(47)(v). In any case Hon'ble Supreme Court in the case of CIT Vs Podar Cement (P) Ltd 226 ITR 625 has clearly held that ‘principle of common law, the Transfer of Property Act and the Registration Act were not conclusive for interpretation of provision of Income Tax Act on the question of ownership of the property. If consequent to the amendment in section 53A of the Transfer of property Act, the registration of Agreement was considered as one of the essential ingredient then section 2(47)(v) would become redundant. The Income Tax Act cannot be interpreted in such a way that a particular provision

becomes redundant. In any case it has been held by Mumbai Bench of the Tribunal in the case of Suresh Chand Aggarwal Vs ITO (48 SOT 2010) that amendment made in section 53A of the Transfer of Property Act by which requirement of registration of transfer has been brought on statute need not be applicable for construing the meaning of the 'transfer" with reference to section 2(47) of the Act. Similar view has been taken by the ITAT Cochin Bench in the case of G. Sreenivasan Vs DCIT 140 ITD 235 and Pune Bench of the Tribunal in the case of Mahesh Memichandra Ganeshwade 51 SOT 155.

(VI) It was contended that there is no force in the submissions of the Ld. Counsel for the assessee that THDC/HASH were not willing to perform their part of the contract. It was pointed out that developers i.e THDC/HASH have made payments as per clause 4(i)(ii) &(iii) of the JDA. The developers have also approached the concerned authorities for permissions and approvals as per the obligation agreed in the JDA. However, a PIL was filed against the developers against TATA Camelot Project (this is the name of the project which was to be developed by THDC on the land acquired from the Society). The PIL was dismissed vide order dated 26.3.2012 (copy of order filed on record). A reference to paras 3, 4, 25 & 26 of this order would clearly show that Hon'ble High Court has observed that against the rules of sanction under the Environment (Protection) Act, the respondent i.e. Developers have sought a review of the order because of the findings arrived at were ex.parte. No order in the Review matter has been passed by the competent authority because the interim order passed in the PIL which was later on clarified by the Hon'ble Supreme Court vide order dated 31.01.2012 permitting the concerned authorities under the different statutes governing the matter to exercise their respective jurisdiction in accordance with the law and such clarifications came in later decision of the High Court. As the rejection under the Wildlife (Protection) Act has been made by the authority not competent to do so, the promoters have sought review of the order which is still pending for some other reasons. All these steps clearly

shows that developers were willing to perform all the obligations undertaken under JDA and were perusing the matter of sanction of the project at different levels vigorously. The copy of the order of Hon'ble Punjab & Haryana High Court and Hon'ble Supreme Court filed at pages 172 to 174 of the paper book are on the issue of land falling within catchment area of Sukhna lake and litigation in this case is being vigorously followed by developers. The assessee has not led any evidence to show that either the HASH or THDC have shown reluctance to take the various steps required for execution of project. The Ld. CIT DR also contended that it was argued on behalf of the assessee that developer have not made the payments as agreed in the JDA, which is not correct. In this connection, he referred to clause 4 (iv) which clearly states that payment of Rs. 31,92,75,000/- was to be made to the owner and or respective members of the owner within six months from the date of execution of this agreement or within two months from the date of approval of plan / design and the grant and drawings of final license to develop whereupon the construction can commence which ever is later. This clearly shows that payments was to be made on happening of two events and the time limit was to be applied on the event taking place later on. As per clause 3.3 of the THDC/HASH was required to take permission from competent authority and the competent authority has been defined in JDA as Punjab Urban Planning and Development Authority (PUDA), Department of Town and Country Planning, Nagar Panchyat, Nayagon, Department of Local Bodies (Punjab) and any other Authority under Municipal Authority. It also includes Department of Environment, Electricity Board etc. Since permission from Department of Environment etc was not available because of ongoing litigation which was filed through a PIL, therefore, it cannot be said that Developer was not wiling to make the payment. As per the JDA, the payment would become due only when such permission were granted by various authorities. In fact M/s Hash Builder wrote a letter on 04.02.2011 through which it was stated that since High Court has stayed the construction, therefore, payment could not be made. Further,

as PIL was filed in the Hon'ble High Court and the matter had gone even to the Hon'ble Supreme Court and THDC/HASH has vigorously defended the same. This fact clearly shows that developer i.e. THDC/HASH was willing to perform in all respects to the JDA.

(VII) It was also contended that the society has already terminated the contract and in this respect reference was made to the Resolution passed by general body of the meeting dated 13.6.2011 and legal notice was issued to THDC/HASH. First of all, there is no evidence on record to show that such notice was served upon THDC/HASH. In any case, as contended earlier, power of attorney could not have been revoked because it was irrevocable power of attorney as per clause 6.7 of the JDA. Further, there was arbitration clause and that means a notice for arbitration was required to given otherwise such unilateral cancellation was not valid in the eyes of law. If the JDA was canceled then there should be document showing return of whatever possession was given by the society. The documents showing cancellation is only a self serving document, which cannot be relied to refuse the existence of JDA and fact of giving possession by the Society to the Developer. Further, the subsequent event cannot invalidate the contract for transfer of the property because under the tax laws income has to be determined for each year separately and once transfer took effect in assessment year 2007-08, then a subsequent event taking place in 2011 will not have any effect on such transfer. It has been contended through written submissions that total consideration of the property was 2,37,03,75,000/- which was calculated as under:-

(i)	*Consideration in cash (Rs. 82,50,000 x 129 plots)*	*Rs. 106,42,50,000/-*
(ii)	*Consideration in kind (Rs. 101,25,000/- x 129 plots)*	*Rs. 130,61,25,000/-*
	Total	*Rs. 237,03,75,000/-*

The above total consideration would be enhanced figure because total consideration received and or agreed against the sale of property by the Members is required to consider the value of flats which were contracted to be received by the Members. On the basis of above calculation, the consideration per acre of land would come to about Rs. 11.18 crores whereas Society had registered a sale deed for land measuring 3.08 acres for only Rs. 15.48 crores whereas the actual consideration should be ` 34.43 crores. This only shows that value of the flats to be received was not reflected in such sale deed. Now, if it is believed that contract was cancelled and Developer was allowed to retain the land which has already been registered in the name of developer then what would happen to the flats which were to be received by the various Members of the Society. No legal action was taken against the Developer for recovery of balance of consideration in the form of flats. This only goes to prove that cancellation is only a make believe story and actually no cancellation has been done.

(VIII)It was contended that there is no force in the submissions that the value of the flats which has not been constructed, cannot be included in the total consideration because that would be a case of taxing the notional income. He referred to clause 4 of the JDA which deals with the consideration and pointed out that allotment of flat was part of the consideration. As per the resolution of the Executive Body of the Society which was latter ratified by the General Body as well as the terms of the JDA very clearly show that in addition to monetary consideration each Member having 500sqyd plot was entitled to receive one fully furnished flat measuring 2250 sqft and the Members holding 1000 sqyd plot were entitled to two such flats. This clearly shows that upon entering the JDA, the Members got vested rights to receive such flats and therefore, as per the definition of capital gain in Section 45 such flat has also arosen from the JDA and therefore, has to be included in the total consideration. He again emphasized that receipt of consideration has nothing to do with its taxability u/s 45 and it is the accrual of consideration which means a portion of the

consideration which can be received later also. He also submitted that as far as the value of the flat is concerned, the same has been taken by the Assessing Officer on the basis of agreement entered between THDC and HASH among themselves and the rate adopted is the same at which THDC had agreed to sell the flat to Hash. He also referred to a few paper books filed by other assessees wherein various News Paper clipping has been included which clearly show that flats were booked @ Rs. 8000/- approximately in the Pre Launch bookings. Such Pre Launch bookings generally take place at lower rates offered then in the general bookings by the public. Therefore, the value of Rs. 4500/- is most reasonable which has been adopted by the Assessing Officer.

26 In the rejoinder, the ld. counsel of the assessee submitted that the assessee and Society had never handed over the possession, therefore, there is no question of executing the documents at the time of cancellation of the agreement for reversing the possession. As no possession was given, therefore, there is no question of taking the back possession. He further submitted:

(a) that normal rules of interpretation should be applied to understand the meaning of clause (v) and (vi) of Section 2(47) and this is not a fit case for invocation of Heydon's Rule. He submitted that lot of emphasis has been laid by the ld. DR for the revenue on para 2.1 of JDA to prove that the possession was handed over. However, a careful reading of this para would show that what was contemplated through this para, was to hand over the possession on the execution and registration of the agreement. When an agreement is read it has to be read in whole and therefore, it may not be proper to ignore the word "Registered".

(b) He also contended that lot of emphasis was given on the irrevocability clause in respect of special Power of Attorney which is not correct because once the JDA is terminated, irrevocable Power of Attorney would come to an end automatically.

(c) He contended that simply saying that the cancellation was an unilateral act of the assessee, would not serve any purpose because the revenue can not sit in the judgment when the assessee should cancel the agreement or not. Clause 14 of the JDA specifically provided for termination of the agreement only in the event of default and the assessee was required to give notice of 30 days in terms of clause 14(iv) and such notice has already been given. JDA was entered in 2007 and ended in 2011 and that is why the assessee was forced to cancel this agreement. In any case THDC/HASH are not related to the assessee, therefore, it was not possible to create self serving documents.

27. We have considered the rival submissions and carefully gone through the written submissions filed by both the parties in the light of material on record, paper books and various judgments cited by the parties. The main issue is whether assessee is liable to capital gain tax in the year under consideration i.e assessment year 2007-08 in view of the JDA. For charging capital gains, the charging section is 45 and the relevant portion is as under:-

> *Section 45. [(1)] Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections [54, 54B, [[54D, [54E, [54EA, 54EB,] 54F [54G and 54H], be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.*

28 The plain reading of the above provision would show that charging an item of income under the head 'Capital gains" require three ingredients i.e. (i) there should be some profit. (ii) Such profit must be arising on account of transfer and (iii) there should be capital asset which has been transferred. There is no dispute that a capital asset was involved and there was some profit also i.e. why assessee has himself returned income under the head 'capital gains;. The dispute is mainly on account of transfer and that too whether the transfer could be covered under clauses (ii), (v) & (vi) of section 2(47) so as to bring into picture the whole of consideration arising on

transfer of such assets. We shall deal with each of the aspect in detail at appropriate time.

29. Apart from charging provisions u/s 45 another important provision is section 48 which deals with the mode of computation and relevant portion reads as under:-

> *48. 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, namely :—*
>
> *(i) expenditure incurred wholly and exclusively in connection with such transfer;*
>
> *(ii) the cost of acquisition of the asset and the cost of any improvement thereto*:

30 Again plain reading would show that capital gain would be computed by considering the full value of consideration whether received or accruing as a result of the transfer. Therefore, it is not only the consideration received which is relevant but the consideration which has accrued is also relevant.

31. The expression 'transfer' has been defined u/s 2(47) of the Act which reads as under:-

> *2 (47) ["transfer", in relation to a capital asset, includes,—*
>
> *(i) the sale , exchange or relinquishment of the asset ; or*
>
> *(ii) the extinguishment of any rights therein ; or*
>
> *(iii) the compulsory acquisition thereof under any law ; or*
>
> *(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ;] [or]*
>
> *[(iva) the maturity or redemption of a zero coupon bond; 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

(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;]

Clauses (v) & (vi) to section 2(47) of the Act have been inserted by Finance Act, 1987 w.e.f. 1.4.1988. The purpose of this insertion has been explained by CBDT in Circular No. 495 dated 22.9.1987. The relevant part 11.1 and 11.2 of the circular reads as under:-

"11.1 The existing definition of the word " transfer " in section 2(47) does not include transfer of certain rights accruing to a purchaser, by way of becoming a member or acquiring shares in a co-operative society, company, or as way of any agreement or any arrangement whereby such any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are a common mode of acquiring flats particularly in multi-storeyed constructions in big cites. The definition also does not cover cases where possession is allowed to be taken or retained in part performance of a contract, of the nature referred to in section 53A of Transfer of Property Act, 1882. New sub-clauses (v) & (vi) have been inserted in section2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above.

11.2 The newly inserted sub-clause (vi) of section 2(47) has brought in to the ambit of transfer", the practice of enjoyment of property rights through what is commonly known as Power of Attorney arrangements. The practice in such cases is adopted normally where transfer of ownership is legally not permitted. A person holding the power of attorney is authorized the powers of owner, including that of making construction. The legal

ownership in such cases continues to be with the transferor."

32 Before insertion of the clause (v) & (vi) to section 2(47) of the Act, the position of law was that unless and until a sale deed was executed for transfer of immovable property, the same could not be construed as transfer for the purpose of charging capital gain tax. This was particularly so in the light of various judgments particularly the judgment of Hon'ble Apex Court in the case of Alapati Venkatramian v CIT (57 ITR 185) (SC). In this case it was held that in the context of transfer for the purpose of capital gain tax, what is meant by transfer is the effective conveyance of the capital asset by a transferor to the transferee. Delivery of possession and agreement to sell by itself could not constitute conveyance of the immovable property. In the meantime apart from this decision a practice came into vogue by which certain properties were being transferred without executing the proper sale deeds. This was being done because there was restriction on sale of properties in various towns e.g. in case of lease hold plots and flats in Delhi if the same were to be transferred, permission was required to be taken from the Government / DDA and transferor was required to pay 50% of the market value – cost (i.e. unearned increase) to the Government. To avoid such payments and / or also to avoid the payment of stamp duty or cumbersome procedure of obtaining permission, some properties were being sold by way of sale agreement and also execution of General Power Of Attorney and possession was given on receipt of full consideration without executing the proper sale deeds etc. which as mentioned earlier was not even permissible in some cases. These transactions are popularly called "power of attorney" transactions. To avoid these and to stop the leakage of Revenue, the Parliament has inserted clauses (v) & (vi) to section 2(47) so as such type of transactions are also be brought in to taxation net. However, interpretations of these clauses has led to lot of litigation and the main point of litigation was that at what point of time the possession can be said to have been given. In the present

case, the Revenue has mainly relied on two decisions namely (i) Chaturbhuj Dwarkadas Kapadia v CIT 260 ITR 491 (Bom.) and; (ii) Authority for Advance Ruling (AAR) New Delhi in the case of Jasbir Singh Sarkaria 294 ITR 196.

33. In the case of Chaturbhuj Dwarkadas Kapadia v CIT (supra), the facts before the Hon'ble Bombay High Court were that assessee who was an individual had 44/192 undivided share in an immovable property in Greater Bombay which consisted of various lands and buildings. By Agreement dated August 18, 1994, the assessee agreed to sell to Floreat Investment Ltd, (herein referred to 'Floreat') his share of immovable property for a total consideration of Rs. 1,85,63,220/- with right to said Floreat to develop the property in accordance with the rules / regulations framed by local authorities. For this purpose, the assessee also agreed to execute a limited power of attorney authorizing Floreat to deal with the property and also obtain permissions and approvals from various authorities. Under clause 11 of the agreement, it was provided that after Floreat was given an irrevocable license to enter upon the assessee's share of property and after Floret investment have obtained all necessary approvals, the Floret was entitled to demolish various buildings for settling the claims of the tenants. Under clause 14 of the agreement, the assessee was entitled to receive proportionate rent till the payment of last installments and till that time assessee was bound to pay all outgoings. Under clause 20 of the Agreement, it was agreed that sale shall be completed by execution of conveyance, however, till the matter was adjudicated by the Hon'ble High Court, no conveyance was executed. Pursuant to this agreement, Floreat obtained various permissions namely (i) clearance from CRZ Authority dated February 7, 1996; (ii) letter from ULC for redevelopment of property dated April 26, 1995. Other permissions were also obtained during the financial year ending March 31, 1996 relevant to assessment year 1996-97. By March, 31, 1996, Floreat had paid almost the entire consideration expect for a small sum of Rs. 9,98,000/-. However, the commencement

certificate permitting construction of the building was issued on November 15, 1996. The power of attorney was executed on March 12, 1999. The question arose whether liability of the assessee for capital gain arose in the assessment year 1996-97 or 1999-2000. The observation of the Court has been summarized in head note as under:-

> *"Clauses (v) and (vi) were introduced in section 2(47) of the Income-tax Act, 1961, with effect from April 1, 1988. They provide that "transfer" includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882, and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property. Therefore, in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of the immovable property is not effective or complete under the general law. Under section 2(47)(v) any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act would come within the ambit of section 2(47)(v). In order to attract section 53A, the following conditions need to be fulfilled. There should be a contract for consideration ; it should be in writing ; it should be signed by the transferor ; it should pertain to transfer of immovable property ; the transferee should have taken possession of the property ; lastly, the transferee should be ready and willing to perform his part of the contract. Even arrangements confirming privileges of ownership without transfer of title could fall under section 2(47)(v). Section 2(47)(v) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Assessees used to enter into agreements for developing properties with builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, section 2(47)(v) came to be introduced in the Act.*
>
> *……..*
>
> *Held, that section 2(47)(v) read with section 45 indicates that capital gains was taxable in the year in which such transactions were entered into even if the transfer of immovable property is not effective or complete under the general law. In this case, the test*

had not been applied by the Department. No reason had been given why that test had not been applied, particularly when the agreement in question, read as a whole, showed that it was a development agreement. Once under clause 8 of the agreement a limited power of attorney was intended to be given to the developer to deal with the property, then the date of the contract, viz., August 18, 1994, would be the relevant date to decide the date of transfer under section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter would not arise……"

34. The Hon'ble Court referred to clauses (v) & (vi) of section 2(47) and made the following observations at page 499 of the report:

"…….. The above two clauses were introduced with effect from April 1,1988. They provide that "transfer" includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property (see section 269UA(d)). Therefore, in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of the immovable property is not effective or complete under the general law (see Kanga and Palkhivala's Law and Practice of Income-tax-VIII edition, page 766). This test is important to decide the year of chargeability of the capital gains."

35 The above observations were made on the basis of opinion expressed by Ld. author in the commentary – "The Law and Practice of Income Tax by Kanga and Palkhivala Eighth Edition at page 766. Relevant observations read as under:

"Cls. (v) and (vi) of s. 2(47), inserted by the Finance Act 1987 with effect from 1st April 1988, provide that "transfer" includes (a) any transaction which involves the allowing of the possession of an immovable property (s. 269UA(d)) to be taken or retained in part performance of a contract of the nature referred to in s.53A of the transfer of Property Act 1882, and (b) any transaction entered into in any manner which has the effect of transferring, or enabling the enjoyment of, any immovable property (s. 269UA(d)). Therefore in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of the immovable property is not effective or complete under general law."

36 From the above, it is clear that Court was of the view that in case any transaction covered by clause (v) and (vi) to section 2(47) the liability for capitol gain would arise on the date when such transactions are entered into. In the judgment at some other places, the similar observations have been made. However, despite this observation the case was decided in favour of the assessee. The reason for the same have been given in the judgment itself. Firstly it is observed that provision of section 2(47)(v) of the Act were not invoked by the Revenue itself. This becomes clear from the following para:

> *"It was argued on behalf of the assessee that there was no effective transfer till grant of irrevocable licence. In this connection, the judgment of the Hon'ble Supreme Court were cited on behalf of the assessee, but all those judgment were prior to introduction of the concept of deemed transfer u/s 2(47)(v). In this matter, the agreement in question is a development agreement. Such development agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a development agreement is to enable a professional builder / contractor to make profits by completing the building and selling the flats at a profit. That the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements. That such agreements are only a mode of remunerating the builder for his services of constructing the building (see Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society [2003] 3 Mah LJ 131). It is precisely for this reason that the Legislature has introduced section 2(47)(v) read with section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law.* ***In this case that test has not been applied by the Department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a development agreement. There is a difference between the contract on the one hand and the performance on the other hand.*** *In this case, the Tribunal as well as the Department have come to the conclusion that the transfer took place during the accounting year ending March 31,1996, as substantial payments were effected during that year and substantial permissions were obtained. In such cases of development agreements, one cannot go by substantial performance of a contract.* ***In such cases, the year of chargeability is the year in which the contract is executed. This is in view of section 2 (47)(v) of the Act.***"

Secondly it is mentioned in the order of the Court that law was not very clear on this point and since the assessee has admitted and paid capital gain in the Assessment year 1999-2000, therefore, tax was held to be chargeable in Assessment year 1999-2000.

Thirdly certain shortcomings were also noted in the order of the Tribunal where certain documents were mentioned to have been executed before March 31, 1996 e.g. the following observation of the Tribunal was not found correct as something is done on Ist April, 1997 then the same cannot fall in the year ending 31.3.1996.

> *"From the dates it is evident that from the very next day, i.e., April 1, 1997, from the end of the financial year ending on March 31, 1996, the builder was using the well water against payment of relevant charges to the assessee."*

37 Thus it is very clear that in cases where an arrangement had been entered into by an assessee in terms of clause (v) of Section 2(47) which has effect of handing over the possession then the transfer is said to have been taken place on the date of entering into such arrangement.

38. We do not find any force in the contention of the Ld. Counsel for the assessee that judgment has to be read in the context of the decision made in such judgment. In fact, it is well settled that doctrine of precedent which means what needs to be followed later on particularly by subordinate Tribunals and Courts is the ratio of a particular judgment given by the higher Court or Forum. Further, there is no force in the contention that decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia v CIT (supra) does not show that the date of agreement itself constitute the transfer. Again there is no force even in the contention that in that case it was ultimately decided that capital gain taxes is chargeable in Assessment year 1999-2000 because of the reasons given in above noted paras particularly because the Revenue itself never invoked the provisions of section 2(47)(v) of the Act and held it to be taxable in Assessment year 1996-97. No doubt in that case ultimately it was held that capital

gain was in assessment year 1999-2000 but Court had made it very clear that this is first time that law is being laid down and guidelines are being issued which means that there was a confusion earlier. Clauses (v) & (vi) to section 2(47) were introduced in the year only in 1998. Perhaps Court took a lenient view because of these reasons and held that capital gain was taxable in Assessment year 1999-2000. **It is quite clear that ratio of the above decision is that in case of any arrangements or transactions whereby the other party becomes entitled to enjoy the property then that date of such transaction itself needs to be construed as the date of transfer.**

39. The second relevant decision cited by the Revenue is by Authority for Advance Ruling (AAR) New Delhi in the case of Jasbir Singh Sarkaria (supra). In that case the assessee was co-owner of agricultural land measuring about 27.7 acres and his share was 4/9. The co-owner decided to develop the land by constructing residential complex through developer and entered into a Collaboration agreement on 8.6.2005 with M/s Santur Developer Pvt Ltd, New Delhi (herein after called 'Developer'). According to the terms of agreement, the Developer should obtain a letter of intent from the concerned government department and obtain other permissions and sanctions for developing the land at its own risk and cost. The Developer was to take 84% of the built up area and balance 16% would belong to assessee and other co-owner. The consideration for the agreement was taken as the built up area to be handed over to the owners free of cost. The owners were entitled to visit the site in order to review the progress of the project. It was clarified by clause 18 that ownership would remain exclusively with the owners till it vests with both the parties as per their respective shares on the completion of the project. The other clauses and the steps in the agreement were that a sum of Rs. 1 crore towards payment of earnest money at the time of entering into agreement; a special power of attorney was to be executed in favour of the Developer to enable to deal with the Statutory authorities etc. for obtaining necessary approvals / sanctions; letter of intent was to be

obtained not later than March 8, 2006 and in case of a failure to do so, the agreement shall stand terminated. Letter of intent is basically a license granted by the Director of Town Planting to Developer of land for the purpose of constructing residential flats subject to payment of certain charges and compliance of other conditions. It was further stated in the agreement that on fulfillment of the requirement in the letter of intent, owners will have to execute irrevocable general power of attorney in favour of the Developer authorizing the Developer to took and sell the dwelling units out of developer's share and collect the money for the same. However, finally sale deeds could be executed only after the owner received their share of constructed area. Three months later, a supplementary agreement was entered on September 15, 2005 between the assessee and other co-owners and Developers through which it was agreed that owners will sell their 16% share in the built up area to the Developer or its nominee for consideration of Rs. 42 crores. A sum of Rs. 2 crores was received. This collaboration agreement and balance of Rs. 40 crores was payable by the Developer to the owners in six installments from March 06, 2008. The installments could be extended subject to payment of interest and further subject to maximum extension of three months. There were various other clauses which are not relevant for our purposes. The question arose whether capital gain accrue / arise to the assessee during the financial year 2006-07 relevant to assessment year 2007-08 or during financial year 2007-08 relevant to assessment year 2008-09.

40. On the above, the Hon'ble Authority after referring to the provisions of section 45 and observed as under:-

"…….The section can be analysed thus :

(a) transfer of a capital asset effected in the previous year,

(b) resultant profits or gains from such transfer,

(c) those profits or gains would constitute the income of the assessee/ transferor

(d) such income shall be deemed to be the income of the same previous year in which the transfer had taken place.

Two aspects may be noted at this juncture. Firstly, the expression used is "arising" which is not to be equated with the expression "received". Both these expressions and in addition thereto, the expression "accrue" are used in the Income-tax Act either collectively or separately according to the context and nature of the charging provision. The second point which deserves notice is that by a deeming provision, the profits or gains that have arisen would be treated as the income of the previous year in which the transfer took place. That means, the income on account of arisal of capital gain should be charged to tax in the same previous year in which the transfer was effected or deemed to have taken place.

The effect and ambit of the deeming provision contained in section 45 has been considered in decided cases and leading text books. The following statement of law in Sampath Iyengar's Commentary (10th Edition— Revised by Shri S. Rajaratnam) brings out the correct legal position :

"Section 45 enacts that the capital gains shall by fiction 'be deemed to be the income of the previous year in which the transfer took place'. Since this is a statutory fiction, the actual year in which the sale price was received, whether it was one year, two years, three years, four years etc. previous to the previous year of transfer, is beside the point. The entirety of the sum or sums received in any earlier year or years would be regarded as the capital gains arising in the previous year of transfer.

. . . . In the words of section 45, the capital gains arising from the transfer 'shall be the income of the previous year in which the transfer took place'. So, the payments of consideration stipulated to be paid in future would have to be attributed, by statutory mandate, to the year of transfer, even as payments made prior to the year of transfer."

41. Thereafter, the Authority referred to section 2(47) and objects of the introduction of clauses (v) & (vi) and also referred to paras 11.1 & 11.2 of the Board Circular No. 495 (which we have already discussed earlier). The Hon'ble

Authority has discussed various implications of clause (v) of section 2(47) and also implication of section 53A of the Transfer of Property Act as well as observations of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia v CIT (supra). The Authority observed that to understand this provision properly meaning of 'possession' has to be understood properly and went on to discuss the meaning of term 'possession, and how the same is to be understood in the context of clause (v). These are very important observations and have been discussed in most elucidated fashion. These observations will answer many of the questions raised before us and, therefore, we are extracting these observations as under:-

"Meaning of "possession" and how should it be understood in the context of clause (v)

> *The next question is, in what sense we have to understand the term "possession" in the context of clause (v) of section 2(47). Should it only mean the right to exclusive possession—which the transferee can maintain in his own right to the exclusion of everyone including the transferor from whom he derived the possession ? Such a criterion will be satisfied only after the entire sale consideration is paid and the transferor has forfeited his right to exercise acts of possession over the land or to resume possession. In our view, there is no warrant to place such a restricted interpretation on the word "possession" occurring in clause (v) of section 2(47). Possession is an abstract concept. It has different shades of meaning. It is variously described as "a polymorphous term having different meanings in different contexts" (per R. S. Sarkaria J. in Superintendent and Remembrance of Legal Affairs, W. B. v. Anil Kumar Bhunja [1979] 4 SCC 274 and as a word of "open texture" (see Salmond on Jurisprudence, paragraph 51, Twelfth Edition, Indian reprint). Salmond observed : "to look for a definition that will summarize the meanings of the term "possession" in ordinary language, in all areas of law and in all legal systems, is to ask for the impossible". In the above case of Anil Kumar Bhunja [1979] 4 SCC 274, Sarkaria J. speaking for a three-judge Bench also referred to the comments of Dias and Hughes in their book on Jurisprudence that "if a topic ever suffered too much theorizing it is that of 'possession'". Much of the difficulty is caused by the fact that possession is not a pure legal concept, as pointed out by Salmond. The learned judge then explained the connotation of the expression "possession" by referring to the well known treatises on jurisprudence (page 278) :*

"'Possession', implies a right and a fact : the right to enjoy annexed to the right to property and the fact of the real intention. It involves power of control and intent to control, (see Dias and Hughes)

14 . . . .

15. While recognizing that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed., 52) describes possession, in fact, as a relationship between a person and a thing. According to the learned author, the test for determining 'whether a person is in possession of anything is whether he is in general control of it'."

In Salmond's Jurisprudence, at paragraph 54, we find an illuminating discussion on "immediate" and "mediate possession". The learned author states "in law one person may possess a thing for and on account of some one else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as 'immediate or direct'." Salmond makes reference to three types of mediate possession. In all cases of "mediate possession", two persons are in possession of the same thing at the same time. An allied concept of concurrent possession has also been explained in paragraph 55 of Salmond's Jurisprudence in the following words :

"It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. As a general proposition this is true : for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realized at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realization. Hence, there are several possible cases of duplicate possession.

1. Mediate and immediate possession co-exist in respect of the same thing as already explained.

2. Two or more persons may possess the same thing in common, just as they may owe it in common ...."

On a fair and reasonable interpretation and on adopting the principle of purposive construction, it must be held that possession contemplated by clause (v) need not necessarily be sole and exclusive possession. So long as the transferee is, by virtue of the possession given, enabled to exercise general control over the property and to make use of it for the intended purpose, the mere fact that the owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of agreement does not introduce any incompatibility. The concurrent possession of the owner who can exercise possessory rights to a limited extent and for a limited purpose and that of the buyer/developer who has a general control and custody of the land can very well be reconciled. Clause (v) of section 2(47) will have its full play even in such a situation. There is no warrant to postpone the operation of clause (v) and the resultant accrual of capital gain to a point of time when the concurrent possession will become exclusive possession of developer/transferee after he pays full consideration.

Further, if "possession" referred to in clause (v) is to be understood as exclusive possession of the transferee/developer, then, the very purpose of the amendment expanding the definition of transfer for the purpose of capital gains may be defeated. The reason is this: the owner of the property can very well contend, as is being contended in the present case, that the developer will have such exclusive possession in his own right only after the entire amount is paid to the owner to the last pie. There is then a possibility of staggering the last instalment of a small amount to a distant date, may be, when the entire building complex gets ready. Even if some amount, say 10 per cent., remains to be paid and the developer/transferee fails to pay, leading to a dispute between the parties, the right to exclusive and indefeasible possession may be in jeopardy. In this state of affairs, the transaction within the meaning of clause (v) cannot be said to have been effected and the liability to pay capital gains may be indefinitely postponed. True, it may not be profitable for the developer to allow this situation to linger for long as the process of transfer of flats to the prospective purchasers will get delayed. At the same time, the other side of the picture cannot be over-looked. There is a possibility of the owner with the connivance of the transferee postponing the payment of capital gains tax on the ostensible ground that the entire consideration has not been received and some balance is left. The mischief sought to be remedied, will then perpetuate. We are, therefore of the view that possession given to the developers need not ripen itself into exclusive possession on payment of all the instalments in entirety for the purpose of determining the date of transfer.

> *While on the point of possession, we would like to clarify one more aspect. What is spoken to in clause (v) of section 2(47) is the "transaction" which involves allowing the possession to be taken. By means of such transaction, a transferee like a developer is allowed to undertake development work on the land by assuming general control over the property in part performance of the contract. The date of that transaction determines the date of transfer. The actual date of taking physical possession or the instances of possessory acts exercised is not very relevant. The ascertainment of such date, if called for, leads to complicated inquiries, which may frustrate the objective of the legislative provision. It is enough if the transferee has, by virtue of that transaction, a right to enter upon and exercise acts of possession effectively pursuant to the covenants in the contract. That tantamounts to legal possession. We are referring to this aspect because the authorized representative has submitted when he appeared before us in the last week of May, 2007, that even by that date the development work could not be commenced for want of certain approvals, and therefore, the developer was "not willing to take possession of the land". Such an unsubstantiated statement which is not found in the original application or even written submissions filed earlier need not be probed into especially when it is not his case that the developer was not allowed to take possession in terms of the agreement."*

42. After the above discussion, the Authority discussed the facts of the case before it. It was observed that paragraph 18 of the Collaboration Agreement provides that on issuance of letter of intent, the owners will allow and permit the Developer to enter upon and survey the land, erect site / sales office, carry out the site development work and do activities for advancing & sale promotion, construction etc. The Authority further observed that if this clause is read in isolation this would suggest on passing of possession but according to Authority the other factors are to be considered. Clause 15 provided that on fulfillment of the requirements laid down in the letter of intent which is provisional license, the owners should execute an irrevocable general power of attorney in favour of the developer allowing inter alia to book and sell the dwelling unit failing under their share. This was possible only after deposit of requisite charges etc. and perhaps there was litigation regarding ownership of land which has also to be withdrawn. The Authority has discussed the significance of

general power of attorney and the terms of the general power of attorney at para 33 and the relevant portion of the same is as under:-

> *"A copy of the irrevocable GPA executed in terms of paragraph 15 of the agreement has been furnished by the applicant. It authorizes the developer : (i) to enter upon and survey the land, prepare the layout plan, apply for renewal/extension of licence, submit the building plans for sanction of the appropriate authority and to carry out the work of development of a multi-storied residential complex, (ii) to manage and control, look after and supervise the property in any manner as the attorney deems fit and proper, (iii) to obtain water, sewage disposal and electricity connections. The developer is also authorized to borrow money for meeting the cost of construction on the security and mortgage of land falling to the developer's share. The other clauses in the GPA are not relevant for our purpose. The GPA unequivocally grants to the developer a bundle of possessory rights. The acts of management, control and supervision of property are explicitly mentioned. It is fairly clear that the GPA is not a mere licence to enter the land for doing some preliminary acts in relation to the development work. The power of control of the land which is an incidence of possession as explained supra has been conferred on the developer under this GPA. The developer armed with the GPA cannot be regarded merely as a licensee or an agent subject to the control of the owners. His possession cannot be characterized as precarious or tentative in nature. The fact that the agreement describes the GPA as irrevocable and an express declaration to that effect is found in the GPA itself is not without significance. Having regard to the second and supplemental agreement by virtue of which the entire developed property including the owners' share has been agreed to be sold to the developer or his nominees for valuable money consideration, the developer has a vital stake in the entire property. As far as the quality of possession is concerned, he is on a higher pedestal than a developer who apportions built up area with the owner. Even if he is an agent in one sense in the course of developing the land, that agency is coupled with interest. For these reasons, the prefix "irrevocable" is deliberately chosen. As discussed earlier, the owner's limited right to enter the land and oversee the development work is not incompatible with the developer's right of control over the land which he derives from the GPA. Exclusive possession, as already pointed out, is not necessary for the purpose of satisfying the ingredients of clause (v) of section 2(47). We are therefore, of the view that the irrevocable GPA executed by the owners in favour of the developer must be regarded as a transaction in the eye of law which allows possession to be taken in part*

performance of the contract for transfer of the property in question……..”

43 Thus, the above clearly shows that irrevocable general power of attorney which leads to over all control of the property in the hands of the Developer, even if that means no exclusive possession by the Developer would constitute transfer. It can be said that it has to be construed as ‘possession’ in terms of clause (v) of section 2(47) of the Act.

44 A question may arise that why the transfer was not held to be taken place in Assessment year 2006-07 when first agreement was entered into on June 8, 2005. The supplementary agreement was also entered into on Sept 15, 2005 both of which fall in Financial Year 2005-06 relevant to Assessment year 2006-07. Then why transfer was not construed in Assessment year 2006-07 it was because the first agreement itself contained a condition that “letter of intent” should be procured not later than March 8, 2006. In case of failure to do so the agreement shall stand terminated. Therefore, obtaining the “letter of intent” was the crucial factor. It has been explained in the decision that the “letter of intent” basically is a license issued by the Director of Town and Country Planning, Haryana which gives permission for construction of the flats. The other crucial point was execution of irrevocable of GPA which was executed on May 8, 2006 which according to the ld. authority depicts the intention of the handing over of the possession. Therefore, it becomes very clear that it is not necessary that transfer would take place on the signing of development agreement but the same has to be inferred only when the possession has been handed over by the transferor to the developer which can be inferred from the documents e.g. Power of Attorney. After above discussion Hon'ble authority has summarized the decision in para 41 which is as under:

“The following is the summary of conclusions:

1. *Where the agreement for transfer of immovable property by itself does not provide for immediate transfer of possession, the date of entering into the agreement cannot be considered to be the date of transfer within the meaning of clause (v) of section 2 (47) of the Income-Tax Act.*

2. *To attract clause (v) of section 2(47), it is not necessary that the entire sale consideration up to the last installment should be received by the owner.*
3. *In the instant case, having regard to the terms of the two agreements and the irrevocable GPA executed pursuant to the agreement, the execution of the GPA shall be regarded as the "transaction involving the allowing of the possession" of land to be taken in part performance of the contract and therefore, the transfer within the meaning of section 2(47)(v) must be deemed to have taken place on the date of execution of such GPA. The irrevocable GPA was executed on May 8, 2006, i.e., during the previous year relevant to the assessment year 2007-08 and the capital gains must be held to have arisen during that year. Incidentally, it may be mentioned that during the said year, i.e., financial year 2006-07, a final license was granted and the applicant/owners received nearly 2/3rds of the consideration. "*

45. Legal position has been discussed in above noted paras and now let us discuss the facts of the case in the light of above noted legal position.

46 Undisputed facts of the case are that the assessee is a Member of Punjabi Coop House Building Society Ltd. which had 96 members (Number of members were stated as 95 during arguments but clause 13 of the JDA refers to number of members as 96). The Society was owning 21.2 acres of land in village Kansal Distt. Mohali adjacent to Chandigarh. There were two types of members firstly the members who were owning plot of 500 sqyd and secondly the members who are holding plot of 1000 sqyd. Somewhere in 2006 it was decided to develop a Group Housing commercial project and do development as per the applicable municipal building bye-laws in force and accordingly a bid was invited through advertisement in the Tribune dated 31.5.2006. HASH a developer, approached the Society with proposal for development of the property. Since Hash did not have sufficient means to develop the property, Hash had approached THDC for development of the property by constructing the building and/or structures to be used for interalia residential, public use and commercial purposes. This proposal was discussed by the Society in its Executive Committee meeting

on 4.1.2007. Minutes of the meeting are placed at page 58 to 65 of the paper book. In the Executive committee it was decided to appoint Hash who was acting alongwith the joint developer THDC as joint developer on the terms and conditions to be mentioned in the JDA. It was further resolved that member owing plot of 500 sqyd would receive a consideration of Rs. 82,50,000/- each to be paid in four installments by Hash directly in favour of the members and one flat with super area of 2250 sqf to be constructed by THDC. The members who held the plot of 1000sqyd were to receive a consideration of Rs. 1,65,00,000/- and two flats consisting of 2250sqft to be constructed by the THDC. It was further resolved to enter into a JDA with THDC/HASH. It was also resolved to execute irrevocable Power of attorney by the Society in favour of THDC for this purpose. This resolution was ultimately ratified in the General Body meeting held by the Society on 25.2.2007. Pursuant to the above resolution, tripartite JDA was executed (copy of the same is available at page 15 to 54 of first paper book). Through recitation clause it has been mentioned that owner is in possession of land measuring about 21.2 acres of land which has come in the purview of Nagar Panchayat, Naya Gaon vide Notification issued on 18.10.2006 duly substituted by another notification dated 21.11.2006 and that no part of land of the property falls under Forest Area under the Punjab Land Preservation Act. It has been further recited that the Society has agreed to accept the proposals of Hash and further executed this agreement with THDC/HASH. Hash was responsible to make payment to the owner as described earlier and the flats were to be provided by THDC. In case of Hash fails to make the payment, THDC agreed to make the payments. Copy of the resolution of the Executive Committee of the Society dated 4.1.2007 as well as resolution of the General Body Meeting of the Society dated 25.2.2007 were made part of JDA by way of annexure. The Society agreed to execute an irrevocable Special Power of Attorney in favour of THDC and all other necessary documents, at the request of the developers.

47 In clause 1 of JDA various expressions have been defined. Clause 2 describes the project as under:

> ***"2.1 The owner hereby irrevocably and unequivocally grants and assigns in perpetuity all its rights to develop, construct, mortgage, lease, license, sell and transfer the property along with any and all the construction, premises, hereditaments, easements, trees thereon in favour of THDC for the purpose of development, construction, mortgage, sale, transfer, lease, license and or exploitation for full utilization of the Property (Rights)*** *and to execute all the documents necessary to carry out, facilitate and enforce the Rights in the Property including to execute Lease Agreement, License Agreements, Construction Contracts, Supplier Contracts, Agreement for sale, Conveyance, Mortgage Deeds, finance documents and all documents and agreements necessary to create and register the mortgage, conveyance, lease deeds, license agreement, Power of Attorney, affidavits, declaration, indemnities and all such other documents, letters as may be necessary to carry out, facilitate and enforce the Rights and to register the same with the revenue/Competent authority and to appear on our behalf before all authorities, statutory or otherwise, and before any court of law (the 'Development Rights').* ***The owner hereby hands over the original title deeds of the Property as mentioned in the list Annexed hereto and marked as Annexure IV and physical, vacant possession of the property has been handed over to THDC simultaneous to the execution and registration of this agreement to develop the same as set out herein.***
>
> *It is hereby agreed and confirmed that what is stated in the recitals hereinabove, shall be deemed to be declarations and representations on the part of the Owner as if the same were set out herein verbatim and forming an integral part of the agreement.*
>
> *2.2 The Project shall comprise of development/construction of the Property into the premises as permissible under Punjab Municipal Building Bye-laws/Punjab Urban Development Authority or any other Competent Authority by the Developer at their own cost and expense. The Project shall be developed as may be sanctioned by the concerned local authority i.e. Department of Local Bodies, Punjab/Punjab Urban Planning and Development Authority (PUDA) or any other Competent Authority.*
>
> *2.3 The owner hereby irrevocably and unequivocally grants and assigns all its Development Rights in the property to THDC to develop the property and undertake the project at its own costs, efforts and expenses whereupon the Developer shall be entitled to apply for*

and obtain necessary sanctions, licenses and permissions from all the concerned authorities for the commencement, development and completion of the project on the property."

48 Clause 3 describes the obligations of the developers & Society for getting the plans, etc. sanctioned from competent authority / applications to be signed by owner for plans, drawings etc., construction. Clause 4 deals with consideration clauses 5 to 8 deals various aspects of project and obligations of Society and Developer. Clause 9 talks about ownership and rights and read as under:

"9 Transfer of ownership/Rights

9.1 ***The owner shall simultaneously on receipt of Payment as set out in Clause 4.1 above, execute an irrevocable Special Power of Attorney to THDC for development of the property authorizing THDC to do all lawful acts, deeds, matters and things pertaining to the development of the property for the project along with interalia right to mortgage the property and/or premises, sell, lease, license the premises and receive/collect monies in it's name in respect of the same and approach*** *interact, communicate with the Competent authorities and for doing all acts, deeds, matters and things to be done or incurred by THDC in that behalf as also to sign all letters, applications, agreements and register the same if necessary, documents, court proceedings, affidavits and such other papers containing true facts and correct particulars as made from time to time be required in this behalf.*

9.2 The owner shall execute in favour of THDC the sale deed is in accordance with the provisions of clause 4.1(ii) to Clause 4.1(iv) of this Agreement and execute all other necessary documents and papers to complete the aforesaid transaction.

9.3 That all the original title deeds pertaining to property as mentioned in Annexure IV ***has been handed over to THDC by the owner at the time of signing of this Agreement and in furtherance of the common interest of the Parties for the development of the Project and except the Sale Transaction made by the Owner*** *in favour of THDC as et out in Clause 4.1 above. THDC hereby undertake and assure the owner that they shall use the title deeds only for the purpose of furtherance of the Project in the manner that it does not adversely effect the Owner/Allottee in any manner whatsoever."*

49 Clause 10 describes the consent given by the Society to THDC for raising finance for development and completion of project. Clause 11 talks about formation of maintenance Society for the project after its completion. Clause 13 talks about transfer of rights which reads as under:

"13 Transfer of Rights

The owner herein i.e. The Punjabi Coop House Building Society Ltd. along with all its ninety six (96) members have given their express, free and clear consent in writing in the form of an Affidavit/No Objection Certificate/Consent Letter whereby the Developers have been allowed to develop the property in accordance with the Project and that THDC shall be entitled to transfer the rights obtained under this agreement to any third party and to get the development / construction work completed on such terms and conditions as THDC may deem fit so long as it does not adversely effect the Owner in terms of their right to receive Entire consideration as mentioned in this agreement subject to all other conditions mentioned therein as well. The owner shall at all times provide full support to the Developers herein."

50 Other clauses provide for termination, General provisions, Disclaimer, Partial Invalidity, Arbitration, Notices and Force Majeure & Jurisdiction.

51 In addition to above an irrevocable Special Power of Attorney has also been executed by the Society in favour of the developers i.e. THDC. (Copy of which is available at pages 40 to 52 of the paper book in case of Society in ITA No. 556 of 2012 as discussed earlier in para 25 (complete copy of Supplementary Power of Attorney was not available in the paper book of the assessee, therefore, reference was made to the paper book in case of the Society).

52 The first major contention of the ld. counsel of the assessee is that the possession was not given by the Society because according to him as per clause 2.1 of the JDA the possession of the property was to be handed over simultaneously to the execution and registration of JDA and since the JDA was not registered, therefore, the possession

was not given. We can not accept this contention because in "Power of Attorney" transactions, it is not necessary to register the JDA if a special Power of Attorney has been given and same is registered. Secondly clause 9.3 of the JDA as reproduced above clearly show that original title deed which have been mentioned along with the possession in para 2.1 which according to the ld. counsel of the assessee were to be handed over simultaneously to execution and registration of the JDA, is not correct because clause 9.3 clearly mention that original title deed of the property have been handed over to the THDC at the time of signing of this agreement because clause 9.3 there is no mention about registration of JDA.

53 Special Power of Attorney which has been executed on 26.2.2007 and has been registered also. The irrevocable special Power of Attorney has been executed as provided in clause 6.7 of the JDA which reads as under:

> *"6.7 The Owner shall execute an irrevocable special Power of Attorney granting its complete Development Rights in the Property in favour of THDC interalia including the right to raise finance by mortgaging the property and register the charge with the Competent Authority and execute registered sale deeds) as set out in* ***Clause 4.1 (ii), (iii), (iv) and (v) and the Owner confirms, undertakes, declares and binds itself not to revoke the same for any reason whatsoever out of its own will and discretion without obtaining a specific prior written consent of THDC or any of its duly constituted attorneys."***

Through this Power of Attorney various powers have been given like to assign, file, amend etc. various plans, designs to represent before various authorities, to appoint architect, Lawyers. Some of the specific clauses relevant, are extracted below:

> (j) To negotiate and agree to any/or to enter into agreement(s) to construct/sell and to undertake construction/sale of the Premises on the Property or any portion thereof with/to such persons(s) or body and for such consideration and upon such terms and conditions as the Attorney deem fit.

(n) To enter upon the Property either alone or with others for the purpose of development, Coordination, execution, implementation of the Project and commercialization of the Property/Premises.

(t) To amalgamate the Property with any other contiguous, adjacent and adjoining land sand properties wherein development and/or other right, benefits and interests are acquired and/or proposed to be acquired and developed or proposed to be developed by THDC and/or their associate and/or group concerns/s and/or utilize the FSI, FAR, DR and TDR of the contiguous, adjacent and adjoining lands for the purpose of constructing buildings and/or structures thereon and/or on the Property or utilize such lands and properties for making provision of parking spaces thereon, and/or may utilize the same for any other lawful purpose, as THDC and/or their associate and/or group concerns may in their sold, absolute and unfettered discretion think fit.

(w) To hand over the possession of the Property or any part or portion thereof to the authorities to whom the same is required to be handed over or otherwise and to execute and deliver any undertakings, declarations, affidavits, bonds, deeds, documents, etc. as may be required by the authorities concerned for vesting such a part or portion in such authority and to admit execution thereof before the concerned Competent Authority and get the same registered with the concerned sub-registrar.

(y) Reasonable opportunity of hearing shall be given to mortgage, encumber or create a charge on the Property or any part or portion thereof and execute the necessary security documents in favour of any bank/financial institution to raise funds for the construction/development of the Property and for the said purpose to deposit title deeds (if required) in respect of the Property in favour of such bank/financial institution, execute the necessary documents and register the charge created on the Property if so required in the revenue records and/or desired by the Attorney.

(aa) To sell, transfer, lease, license the Premises that may be constructed on the Property on ownership basis, lease, license and/or in any other manner for such price as the Attorneys may deem fit and proper. To collect and receive from the purchased, transferees, lessees, licensees of the Premises, monies/price and/or consideration and/or maintenance charges and to sign and execute and/or give proper and lawful discharge for the receipts.

(bb) To execute from time to time all the writing, agreement, deeds etc. in respect of the premises which maybe constructed on the Property and also to execute

and sign conveyance, transfer or surrender in respect of the Property or any part thereof.

(cc) To sign, execute and register the conveyances or assignments and/or Power of Attorney's and/or other documents and/or agreements and/or any other writings in respect of the Property in part or full and/or the Premises constructed thereon or any part thereof in favour of any person as the Attorneys may determine including in favour of any individual and/or legal entitles and/or Co-operative Society and/or Limited Company and/or any other entity that may be formed for such purpose.

(dd) To issue letter of lien/NOC's and to sign documents on behalf of the Owner as required by the prospective buyers/lending instructions to create a charge on the allotted premises.

(gg) To look after and maintain the Property and the Premises constructed thereon till its transfer in favour of the Co-operative Society or Limited Company or any other Organisation.

54 It is pertinent to note that power/authorization which have been given by the Society to the developer, were in fact were required to be given in terms of various clauses of the JDA. Clause 6.7 reproduced above itself shows that the Society was required to give powers to raise finance to mortgage the property and even the registration of charge was also required to be given. Further through clause 6.15 it was agreed that documents of original title deeds of the property would be handed over to the developer i.e. THDC/HASH so that same can be used in furtherance of development of the Project as well as security for the money paid by the owner. Through clause 6.24 it was agreed that developer THDC/HASH was always permitted by owner to amalgamate the property with any other contiguous, adjacent and adjoining land and the properties wherein developmental and or other rights, benefits and interest were acquired by the developer or would be acquired in future. This clearly shows that the Society was under obligation in terms of agreement itself to allow the developer to amalgamate the project. Towards the end of clause 6.24 it has been clearly stated that in the event of termination of JDA, provision of clause 6 would be surviving which clearly shows that developer continues to be in possession for the purpose of development, mortgage etc. even after termination. Clause 8 which describes the obligation and

undertaking of the THDC/HASH and provides specifically that all environmental clearance shall be obtained by THDC/HASH out of its own sources. Thus it was clearly understood by the parties that requisite environmental clearances had to be obtained before start of the project. Clause 10 again casts specific obligation on the owner Society to give consent to THDC/HASH to raise finance for the development and completion of the project on the Security of the property by way of mortgaging the property. Thus whatever power/authorization have been given through irrevocable special Power of Attorney are emanating from the terms and conditions agreed to among the parties from the JDA.

55 The combined reading of the above clauses of the Irrevocable Special Power of Attorney and JDA clearly show that the developer was authorized to enter upon the property for not only for the purpose of development but other purposes also. THDC was authorized to amalgamate the project with any other project in the adjacent area or adjoining area as per clause (t) of the special Power of Attorney. If the possession was never given to the developer by the Society then how the developer could amalgamate the project with another project which may be acquired latter in the adjoining area. Through clause (w) THDC was authorized to hand over the possession of property or portion thereof to the authority to whom the same is required. In large Housing Society Projects sometimes Municipal authorities takes some portion of land for the purpose of roads, parks or other general utility purposes like installation of electricity transformers and before sanctioning the plans the developer is required to undertake that such portions of land would be given for such a common purpose. If possession was not given then how THDC was authorized to hand over such land or portions thereof which have not been identified in the JDA out of the total land. Similarly through clause (y) THDC has been authorized to mortgage, encumbrance or create charge on the property in favour of any bank or financial institution for raising the funds for the project. In the absence of possession such powers cannot be given. Clause (aa) clearly authorized the THDC to sell,

transfer, lease, license the premises which were to be constructed on ownership basis and further to receive moneys against such sale etc. and to issue final receipt. Nowhere it is mentioned in this clause that such sale deeds were to be singed by the Society as confirming party. In the absence of possession it is just not possible for the developer to sell and transfer the premises which were to be constructed. This is further clarified by clause (bb) and (cc) which gives the power of execution of conveyance and other documents involving in respect of the premises to be constructed without any interference of the Society being made confirming party. All these clauses clearly show that the possession was given by the Society and/or its members to THDC/HASH on the execution of irrevocable Power of Attorney. Through these clauses of JDA and irrevocable Power of Attorney the developer was able to completely control the property and make use of it not only for the purpose of development but also for the purpose of amalgamation, sale, mortgage etc. When the above clauses are compared on touch stone of the discussion on possession in para 26 to 28 in the case of Jasbir Singh Sarkaria (supra) which we have reproduced above, it becomes clear that the possession has been given.

56 In that discussion, it has been clearly mentioned that the position contemplated by clause (v) of section 2(47) of the Act need not to be exclusive possession. What is required is that the transferee by virtue of possession should be able to exercise control from overall intended purposes. We do not think in the present case the assessee has given only a license as claimed by ld. counsel of the assessee because of the powers of selling, amalgamating etc. mentioned in the JDA and irrevocable Special Power of Attorney. The issue has been discussed in he judgment of Jasbir Singh Sarkaria (supra) in further discussion which has been made in para 33 regarding Power of Attorney (which has been reproduced earlier). In that case the powers were given to enter upon and survey the land, prepare lay out plans, submit building plan for sanction with the appropriate authorities to control, manage and look after

and supervise the property, to obtain water and sewerage, disposal and electricity connection. In that case the developer was authorized to mortgage the property to obtain money for meeting the cost of construction on security and mortgage of land falling only to the developer's share. In that case it was held that GPA was not a license to enter upon for doing some preliminary acts in relation to development of work but the power to control the land has also been confirmed. It has also been noted that the agreement described the Power of Attorney as irrevocable and extra declaration to that effect in the Power of Attorney is not without significance. In case before us, many more powers have been given to THDC in addition to powers which have been described in that judgment and Power of Attorney has been described as irrevocable in clause 6.7 of JDA. Therefore, it is clear that the assessee's plea that the possession was to be given only at the time of registration of the JDA, is not correct. Once irrevocable power was given then it cannot be said that the possession was not given. The issue regarding revocation of irrevocable Power of Attorney and cancellation of the JDA would be discussed later on while dealing with that contention.

57 We find force in the submissions of the ld. DR for the revenue that interpretation of clause (v) to section 2(47) should be made in the light of Heydon's Rule. There is no force in the objection of the ld. counsel of the assessee that this clause should be interpreted on general rules of interpretation particularly in the light of the fact that no reason has been given for the same. Heydon's Rule has been applied by the Indian Courts many times. The Rule was applied and initiated in Heydon's case (1584) 3 Co. Rep 7a. This Rule was upheld by the Constitution Bench of Hon'ble Apex Court in case of Bengal Immunity Co. Ltd. V State of Bihar (1955) 2 SCR 603 for consideration of Article 286 of the Constitution. It has been held in case of Dr. Baliram Waman Hiray V. Mr. Justice B. Lentin and another, 176 ITR 1 that for understanding amendment in the Act, perhaps Heydon's Rule is best rule for interpretation of such amendment. We find that without

mentioning this rule Ld. Authority For Advance Ruling has discussed this issue in para 27 of the judgment which we have extracted above. It has been held that if 'possession' referred to in clause (v) is to be understood as exclusive basis of the transferee then very purpose of the amendment or enlargement of the definition of transfer would get defeated. We are reproducing following head note of the Hon'ble Apex Court in case of Dr. Baliram Waman Hiray V. Mr. Justice B. Lentin and another (supra):

> *"The following principles enunciated in Heydon"s caase (1584) 3 Co. Rep 7a and firmly established, are still in full force and effect: "that for the sure and true interpretation of all statutes in generals (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) what was the common law before the making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy Parliament has resolved and appointed to cure the disease of the common wealth and (4) the true reason of the remedy. And then, the office of all the judges is always to make such construction as shall suppress the evasions for the continuance of the mischief and pro private commando and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono public." There is now the further addition that regard must be had not only to the existing law but also to prior legislation and to the judicial interpretation thereof."*

58 Going by the Heydon's Rule of interpretation if we analyze the purpose of clause (v) of Section 2(47) then it would emerge that law before making the amendment was that capital gain could be charged only if a transfer has been effected and transfer was interpreted by various Courts including the decision of Hon'ble Supreme Court in case of Alapati Venkatramian V CIT, 57 ITR 185 (SC) that proper conveyance of the property has been made under the common law. The mischief was with regard to transfer in the sense that there was common practice that properties were being transferred in such a manner that transferee could enjoy the benefit of the property without execution of the conveyance deed. Thirdly we need to examine the remedy which was insertion of clause (v) and (vi) so that cases of giving possession of the property, were also covered by the definition of transfer. Fourthly, true reason for

this amendment was to plug a loop hole in the law. Therefore, considering the purpose of insertion of clause (v) and (vi) of section 2(47) and various clauses of Power of Attorney and JDA it becomes absolutely clear that the Society has handed over the possession of the property to THDC/HASH.

59 Second important contention on behalf of the assessee is that JDA was executed on 25.2.2007 and if possession was given then how the assessee was having possession in terms of later sale deeds executed on 2.3.2007 and 25.4.2007. The Society has executed two sale deeds for conveyance of parts of the total land. First sale deed has been executed on 2.3.2007 for 3.08 acres and recitation clause (A) reads as under:

> *Clause (A)- The vendor is the absolute owner and in possession of land total measuring 169 kanal 7 marlas equivalent to approx. 21.2 acres in Village Kansal, Tehsil Mohali and more particularly described in Schedule A hereunder written and delineated in green colour boundary line in the Shizra Plan issued by the Patwari dated 23.2.2007."*

60 According to the ld. counsel of the assessee if Society had already given the possession then the Society would not have / had possession on 2.3.2007 of the land. At face value this argument looks attractive but when examined in terms of possession which has been explained in case of Jasbir Singh Sarkaria (supra), actual reality will come forward. In this judgment concept of concurrent possession has also been discussed and following extract of paragraph 55 of Salmond's Jurisprudence has been extracted which reads as under:

> *"It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. As a general proposition this is true: for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realized at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realization. Hence there are several possible cases of duplicate possession.*
>
> > *1 Mediate and immediate possession Cross-objections-exist in respect of the same thing as already explained.*

2 Two or more persons may possess the same thing in common; just as they may owe it in common.

The concurrent possession of the owner who can exercise possession right to a limited extent and for a limited purpose and that of the buyer/developer who has a general control and custody of the land can very well be reconciled."

61 In further discussion in para 26 to 28 of the above decision it has been held that it is not necessary in terms of clause (v) that the developer should have exclusive possession. The concurrent possession of the owner is possible which gives rights to a limited extent for a limited purpose. Thus it is very much possible to hold concurrent possession. Mere recitation in the sale deed to the effect that the Society was owner of and in possession of land measuring 21.2 acres, does not show that the Society was having actual possession. What the Society was having is only ownership right and the possession was only concurrent as the possessary right. Further it is a standard clause in the conveyance deed and it does not prove or indicate anything except that a portion of land measuring 3.08 acres, has been sold / conveyed to the developer. In the light of this position, this contention is rejected.

62 We find no force in the next contention of the ld. counsel of the assessee that possession if at all was given should be held to be only a license as defined in Section 52 of Indian Easement Act because clearly as per Section 52 of this Act, where one person grants to another or many other persons to do something upon immoveable property which in the absence of such right would be unlawful.

63 Here in case before us, the right has not been given for the purpose of doing something but all the possible rights in property including right to sell, right to amalgamate the project with another project in the adjoining area which may be acquired later, right to mortgage etc. clearly show that rights given by the Society are much more larger than what is covered in the term "license".

64 Fourth contention is that the money received at the time of execution of JDA can be termed as advance and whatever money has been received has already been shown as capital gain. We find no force in this submission because Section 45 which has been extracted above clearly provide for taxing of profits and gains arising from the transfer. We have already discussed the implication of Section 45 r.w.s. 48 while discussing the legal position. We had also discussed this issue in the light of the decision in case of Jasbir Singh Sarkaria (supra) and pointed out that when Section 45 is read along with Section 48 it becomes clear that whole of the consideration which is received or accrued is to be taxed once capital asset is transferred in a particular year.

65 We would like to discuss this aspect of the issue in little more detail and try to understand why the whole of the consideration is required to be taxed. At the cost of repetition let us again reproduce the observations of the Ld. authority in case of Jasbir Singh Sarkaria (supra) which we have earlier extracted at para 40 and the relevant portion is as under:

> "40. On the above, the Hon'ble Authority after referring to the provisions of section 45 and observed as under:-
>
> *".....The section can be analysed thus :*
>
> *(a) transfer of a capital asset effected in the previous year,*
>
> *(b) resultant profits or gains from such transfer,*
>
> *(c) those profits or gains would constitute the income of the assessee/ transferor*
>
> *(d) such income shall be deemed to be the income of the same previous year in which the transfer had taken place.*
>
> *Two aspects may be noted at this juncture. Firstly, the expression used is "arising" which is not to be equated with the expression "received". Both these expressions and in addition thereto, the expression "accrue" are used in the Income-tax Act either collectively or separately according to the context and nature of the charging provision. The second point which deserves notice is that by a deeming provision, the profits or gains that have arisen would be treated as the income of the previous year in which the transfer took place. That means, the income on account of arisal of capital gain*

should be charged to tax in the same previous year in which the transfer was effected or deemed to have taken place.

The effect and ambit of the deeming provision contained in section 45 has been considered in decided cases and leading text books. The following statement of law in Sampath Iyengar's Commentary (10th Edition— Revised by Shri S. Rajaratnam) brings out the correct legal position :

"Section 45 enacts that the capital gains shall by fiction 'be deemed to be the income of the previous year in which the transfer took place'. Since this is a statutory fiction, the actual year in which the sale price was received, whether it was one year, two years, three years, four years etc. previous to the previous year of transfer, is beside the point. The entirety of the sum or sums received in any earlier year or years would be regarded as the capital gains arising in the previous year of transfer.

. . . . In the words of section 45, the capital gains arising from the transfer 'shall be the income of the previous year in which the transfer took place'. So, the payments of consideration stipulated to be paid in future would have to be attributed, by statutory mandate, to the year of transfer, even as payments made prior to the year of transfer."

66 The above clearly shows that it is because of expression used in Section 45 that is "arising" which cannot be equated with "receipt". In this respect the ld. authority has quoted a very old decision of Hon'ble Madras High Court in case of T.V. Sundaram Iyengaar and Sons Ltd. V. CIT, 37 ITR 26 (Mad). At para 13 of the said decision is extracted in the following manner:

"13. In T.V. Sundaram Iyengar and Sons Ltd. V. CIT [1959] 37 ITR 26, a Division Bench of the Madras High Court while construing section 12 B of the Indian Income-tax Act, 1922 clarified the import of the expression "arise" as follows

" Section 12B does not require that profits should have been actually received. It is sufficient if they have arisen. Throughout the Income-tax Act the words "accrue' and "arise" are used in contradistinction to the word "receive" and indicate a right to receive. This was explained by Fry L.J., in Colquhoun v. Brooks. The learned judge observed:

' I think, therefore, that the words "arise or accruing" are general words descriptive of a right to receive profits.'

See also CIT v. Anamallais Timber Trust Ltd. To attract the operation of section 12B it is therefore sufficient if the profits arose. They need not have been actually received."

14. Thus the criterion of right to receive the profits / gains was applied in that case.

15. The legal position does not therefore admit of any doubt that the actual receipt of the entire sale consideration during the year of "transfer" is not necessary for the purpose of computing capital gains."

Further the expression arising has been defined in the Advanced Law Lexicon by P. Ramanatha Aiyer edited by Y.V. Chandrachud, Former Chief Justice of India:

"The words "Arising or accruing" describe a right to receive profits, and that there must be a debt owed by somebody. Ld. Commissioner of Income Tax, West Bengal-II, Calcutta V. Hindustan Housing and Land Development Trust Ltd. AIR 1986 S.C 1805, 1807."

The expression "accrual of income" has been defined in the same Lexicon as under:

"Accrual of income. E.D Jassoon & C. Ltd. V Ld. Commissioner of Income Tax, AIR 1954 S.C 470 quoted – Income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. Bhogilal V Income Tax Ld. Commissioner, AIR 1956 Bom 411, 414 (Income Tax Act (11 of 1992) Ss. 16(1) and (3)}"

67 The combined reading of these two definitions show that it (i.e. accrual) is not equal to the receipt of income. In fact it is a stage before the point of time when the income becomes receivable. In other words, once the vested rights come to a person then it can be said that such right or income has accrued to such person. The concept of accrual or arousal of income has also been discussed by the ld. author S. Rajaratnam in the commentary of Law of Income Tax by Sampath Iyengar XIth Edition by discussing the meaning of "accrued and arise" at page 1300 it has been observe as under:

"(1) Important principles.- (a) Meaning – 'Accrue' means 'to arise or spring as a natural growth or result', to come by way of increase'. 'Arising' means 'coming into existence or notice or presenting itself'. 'Accrue' connotes growth or accumulation with a tangible shape so as to be receivable. In a secondary

sense, the two words together mean 'to become a present and enforceable right' and 'to become a present right of demand'. In the Act, the two words are used synonymously with each other to denote the same idea or ideas very similar, and the difference lies only in this that one is more appropriate than the other, when applied, to a particular case. It will indeed be difficult to distinguish between the two words, but it is clear that both the words are used in contradistinction to the word 'receive' and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income, which is more or less inchoate and which is something less than a receipt. An unenforceable claim to receive an undetermined or undefined sum does not give rise to accrual."

68 Therefore, it is not only the money which has been received by the assessee which is required to be taxed but the consideration which has accrued to the assessee is also required to be taxed. In view of this, this contention is rejected.

69 The fifth contention made by the Ld. Counsel for the assessee was that since section 53A of the Transfer of Property Act itself has undergone amendment w.e.f. 24.9.2001 by which the agreement referred to in that section is required to be registered and therefore, now in section 2(47)(v) only the amended provisions can be read. We find no force in this contention. It is well known that section 53A of the Transfer of Property Act was passed on equitable doctrine so as to protect the taking over or retention of the possession by the transferee. It was not a source by which title of immovable property could be acquired. Section 53A of TP Act read as under:-

53A. Part performance.- Where any person contracts to transfer for consideration any immoveable 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 the contract, [***]where

there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor 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 a right expressly provided by the terms of the contract"

70 A plain reading of the above provision shows that it provides a safety measure or a shield in the hands of the transferee to protect the possession of any property which has been given by the transferor as lawful possession under a particular agreement of sale. This position of law was incorporated in the definition of 'transfer' by insertion of clauses (v) & (vi) in section 2(47) of the Act. It is important to note that clause (v) uses the expression "contract of the nature referred to in section 53A of T.P. Act, therefore, clearly the idea is that an agreement which provides some defense in the hands of transferee was incorporated under the definition of 'transfer' in the Income Tax Act. Now originally section 53A of T.P. Act provided that even if "the contract though required to be registered has not been registered", which means the right of defending the possession was available even if the contract was not registered but by Amendment Act 48 of 2001, the expression "though required to be registered has not been registered", has been omitted which means for the purpose of possession u/s 53A of T.P. Act, a person has to prove that possession has been given under a registered agreement. In other words, now u/s 53A of T.P. Act, the agreement referred is required to be registered. This requirement cannot be read in clause (v) of section 2(47) because that refers only to the contract of the nature of section 53A of T.P. Act without going into the controversy whether such agreement is required to be registered or not. The Ld. Counsel for the assessee had referred to the decision of Hon'ble Supreme Court in the case of Surana Steels v DCIT 237 ITR 777 (SC) for the proposition that when a section of a particular statute is introduced into another Act it must be read in the same sense as it bore in the original Act. The careful perusal of that judgment would show

that situation is applicable only when a particular provision of an Act has been incorporated in the later Act. In that case a question arose that for the purpose of MAT provision what is the meaning of past losses or unabsorbed depreciation. It was found that in explanation to section 115J clause (iv), the following expression was used:-

> "*(iv) 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 (b) of the first proviso to sub section (i) of section 205 of the Companies Act, 1956 (1 of 1956) are applicable.*

71 The Hon'ble Apex Court referred to the Principles of Statutory Interpretation by Shri G.P.Singh and extracted following piece:

> " 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. (p.244)

72 On the basis of above observation, it was held that meaning of past losses or unabsorbed depreciation has to be taken same as was defined in the Companies Act. In this case it is clear that provision itself refers to clause (b) of sub section (1) of section 205 of Company's Act 1956 and therefore, same meaning was given to past losses or unabsorbed depreciation as is given under the Companies Act, 1956.

73 In case of clause (v) to section 2(47), clearly the expression used is "contract of the nature referred to in section 53A of T.P. Act", which means it is not a case of incorporation of one piece of legislation into another piece of legislation. If that was the intention of the Parliament, obviously clause (v) would contain the expression "contract as defined under section 53A of Transfer of Property Act, 1882". Further, it is settled position of law that any interpretation which could render a particular provision redundant should be avoided. If the contention of the Ld. counsel was to be accepted, obviously the provisions of clause (v) of section 2(47) of the Act would become redundant in the sense that registration of agreement would again be made compulsory but since properties were being sold in the market on "power of attorney" basis through unregistered agreements which would make this provision redundant. This position we have already discussed earlier while discussing the Heydon's Rule in the interpretations of this clause. Further the issue of interpretation of clause (v) and amendment to section 53A of the Transfer of Property Act came for consideration before the Mumbai Bench of the Tribunal in the case of Suresh Chander Aggarwal vs ITO 48 SOT 2010. The Tribunal discussed this issue at page 7 and after quoting the provisions of section 2(47) and also section 53A before and after amendment as wall as para Nos. 11.1 to 11.2 of the Board's Circular No. 495 dated 22.9.1987 observed as under:-

"The above clearly shows that there was certain situation where properties were being transferred without registration of transfer instruments and people were escaping tax liabilities on transfer of such properties because the same could not be brought in the definition of "transfer" particularly in many States of the country properties were being held by various people as leased properties which were allotted by the various Govt. Departments and transfers of such lease were not permissible. People were transferring such properties by executing agreement to sell and general power of attorney as well as Will and receiving full consideration, but since the agreement to sell was not registered and though full consideration was received and even possession was given, still the same transactions could not be subjected to tax because the same could not covered by the definition of "transfer". To bring such transactions within the tax net, this amendment was made. It has to be appreciated that clause (v) in section 2(47) does not lift the definition of part performance from section 53A of the Transfer of Property Act, 1882. Rather, it defines any transaction involving allowing of 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. This means such transfer is hot required to be exactly similar to the one defined u/s.53A of the Transfer of Property Act, otherwise legislature would have simply stated that transfer would include transactions defined in sec. 53A of the Transfer of Property Act. But the legislature in its wisdom has used the words "of a contract, of the nature referred in section 53A". Therefore, it is only the nature which has to be seen. As discussed above, the purpose of insertion of clause (v) was to tax those transactions where properties were being transferred by way of giving possession and receiving full consideration. Therefore, in our humble opinion, in the case of a transfer where possession has been given and full consideration has been received, then such transaction needs to be construed as "transfer". Therefore, the amendment made in section 53A by which the requirement of registration has been indirectly brought on the statute need not be applied while construing the meaning of "transfer" with reference to the Income-tax Act.

8. The above situation further becomes clear if we refer to the celebrated decision of Hon'ble Supreme Court in the case of Podar Cement (P.) Ltd. (supra}. In that case, the assessee was owner of four flats in a building called "Silver Arch"/on Nepean Sea Road, Bombay. Out of these four flats, two were purchased directly from the Builders, Malabar Industries Pvt. Ltd., and two were purchased by its sister concerns which were later purchased by the assessee. The possession of the flats was taken after full payment of consideration. The flats were let out. The assessee contended that the rental income from these

flats was assessable as "income from other sources" because the assessee was not the legal owner because the title of the property had not been conveyed to the Co-operative Society which was formed by the purchasers of the flats. The Hon'ble Court noted that section 27 had been amended vide clause 3(a) wherein when a person was allowed to take possession of the building in part performance of the nature referred to in section 53A, such person shall be deemed to be the owner. It was further observed that for all practicable purposes the assessee was the owner and possibly there cannot be two owners of same property at the same time. In fact, the amendments to section 27 were made later on but were taken into cognizance on the basis of above principle and ultimately it was held as under:

> *"Hence, though under the common law "owner" means a person who has got valid title legally conveyed to him after comply with the requirements of law such as the Transfer of Property Act, the Registration Act, etc., in the context section 22 of the Income-tax Act, 1961, having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, to tax the income, "owner" is a person who is entitled to receive income from the property in his own right. The requirement of registration of the sale deed in the context of section 22 is not warranted."*

Thus, from the above, it is clear that it is not necessary to get the instrument of transfer registered for the purpose of Income-tax Act when a person has got a valid legally conveyed after complying with the requirements of the law.

9. Similarly, in the case of Mysore Minerals Ltd. v. CIT [1999] 239 ITR 775/106 Taxman 166 (SC), the assessee had purchased for the use of its staff seven low income group houses from a Housing Board. The payment had been made and in turn possession of the houses was taken over by the assessee. The actual conveyance deed was not executed. The assessee claimed depreciation which was denied by the department. After great discussion, it was observed that for all practicable purposes and for the purpose of Income-tax Act, the assessee shall be construed as owner of the property. In fact, it was held as under:

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> *"Held, reversing the judgment of the High Court, that the finding of fact arrived at in the case at hand was that though a document of title was not executed by the Housing Board in favour of the assessee, the houses were allotted to the assessee by the Housing Board, part payment received and possession delivered so as to confer dominion over*

the property on the assessee whereafter the assessee had in its own right allotted the quarters to the staff and they were being actually used by the staff of the assessee. The assessee was entitled to depreciation in respect of the seven houses in respect of which the assessee had not obtained a deed of conveyance from the vendor although it had taken possession and made part payment of the consideration".

Thus, from the above two decisions, it becomes absolutely clear that for the purpose of the Income-tax Act the ground reality has to be recognized and if all the ingredients of transfer have been completed, then such transfer has to be recognized. Merely because the particular instrument of transfer has not been registered will not alter the situation. This position is further strengthened by the fact that legislature itself has inserted clause (v) to section 2(47) and while referring to the provisions of section 53A, reference has been made by stating that contracts in the nature of section 53A should also be covered by the definition of "transfer". Therefore, in our humble view, the amendment to sec. 53A of the Transfer of Property Act, whereby the requirement of the documents not being registered has been omitted, will not alter the situation for holding the transaction to be a transfer u/s.2(47)(v) if all other ingredients have been satisfied."

74 Thus, it is clear that non registration of agreement cannot lead to the conclusion that provision of section 2(47) (v) is not applicable. Similar view has been taken by ITAT Cochin Bench of the Tribunal in case of G.Sreenivasan Vs DCIT 28 Txmann.com 200 (Coch.) and ITAT Pune Bench in the case of Mahesh Nemichandra Ganeshwade v ITO 21 Taxmann.com 136 (Pune). In view of this legal position, this contention is rejected.

75 The next contention was that the decision of Hon'ble Bombay High Court in case of Chaturbhuj Dwarkadas Kapadia (supra) is not applicable particularly because ultimately in that case it was held that capital gain tax should be charged in Assessment year 1999-2000 whereas agreement was executed in August, 1994.

76 We have already discussed the implications of the decision in case of Chaturbhuj Dwarkadas Kapadia (supra) in para 33 to 38.

We had also examined why in that case capital gain was not held to be chargeable in Assessment year 1995-96.There is no need to repeat the same and in view of the said observations, we reject this contention.

77 The next contention is that it is necessary for invoking of section 2(47)(v) of the Act to comply with the provisions of section 53A of the Transfer of Property Act to the extent that there should be willingness on the part of the transferee to perform his part of the contract.

78 In this aspect we have no quarrel with the proposition that for invoking section 53A pf T.P. Act read with clause (v) of section 2(47), the transferee has to perform or is willing to perform his part of the contract. In this respect as referred to by Ld. Counsel for the assessee, the comments of the Ld. Author in the commentary by Mulla – Dinshan Frederick Mulla vide para 16 are clear and shows that this requirement has to be absolute and unconditional. Some observations have been made in the case of General Glass Company Pvt Ltd Vs DCIT (supra). In that case it was held that willingness to perform for the purpose of section 53A is something more than a statement of intent and it is unqualified and unconditional willingness on the part of the transferee to perform his obligation. In that case the transferee has agreed to make certain payments in installments in consideration of the development agreement but such payments were not made. Later on, the agreement was modified and more time was given to the transferee for payment of such installments. However, the installments were not paid even under the modified terms and that is why it was ultimately held that such agreement cannot be construed as transfer.

79 The second decision referred to by Ld. Counsel for the assessee is K. Radika v DCIT (supra). In this case, similar observations were made, though it is not pointed out in what respect the transferee has failed to perform his part but it has

been observed that the facts of the case shows that transferee has not performed his part of the contract.

80 The third judgment relied upon by the Ld. Counsel for the assessee is in the case of DCIT v Tej Singh (supra). In that case land was acquired by the government and the matter went for litigation. During the pendency of litigation, the assessee entered into a Development agreement with a Developer for the purpose of development of the property, however, it was clarified in the agreement that there is litigation in respect of acquisition of property and the developer has to take clearance from the government in the matter of denotification of the land. It was held that since the land was under compulsory acquisition and no compensation has been received, therefore, there could not be any capital gain tax u/s 2(47) (iii) which deals with the compulsory acquisition. It was further observed that assessee could not have given possession unless and until the land was denotified. Since facts of the case are different than the case in hand and therefore, same are not relevant for our purpose.

81 Now coming to the facts, firstly it was contended that Developer i.e transferee has not obtained various permissions which were required to be taken by the Developer as per clauses 3.1, 7.9, 8.4 and 8.6 of the JDA. This is not correct as pointed out by the Ld. CIT DR that assessee had already got the municipal plan sanctioned but in the meantime PIL was filed before the Hon'ble Punjab & Haryana High Court against the implementation of the project. Initially, the construction was banned by the Hon'ble High Court. However, later on it was observed in the CWP No. 20425 of 2010 and as clarified by the order of the Hon'ble Supreme Court that refusal of sanction under the Environment (Protection) Act, the society have sought a review of the order because the findings arrived were ex.parte. No order in the matter has been passed by the competent authority perhaps because of the order of High Court. In the interim order passed in the PIL it has been clarified by the Hon'ble Supreme Court vide order dated

31.1.2012 permitting the concerned authority under the different statutes governing the matter to their respective jurisdiction to be decided in accordance with law. Thus, it becomes clear that developer i.e. THDC has applied for various permissions before the relevant authorities and in some cases permission were declined on ex.parte basis and in some cases the same were declined in view of the High Court order banning the construction. After the clarification of the order of the High Court by Hon'ble Supreme Court by order dated 31.1.2012, the authorities have already been permitted to examine the issue on merits under various laws. Further in the JDA there is a clause 26 which deals with the Force Majeure clauses. The clause 26 (i) to (v) reads as under:-

FORCE MAJEURE

i) None of the parties shall be liable to the other Party or be deemed to be in breach of this Agreement by reasons of any delay in performing or any failure to perform, any of its own obligations in relation to the Agreement, if the delay or failure is due to any Event of Force Mejeure. Event of Force Majeure is any event caused beyond the parties reasonable control. The following shall be regarded as issues beyond the Parties reasonable control.

ii) For the purposes of this Clause, an Event of Force Majeure shall mean events of war, war like conditions, blockades, embargoes, insurrection, Governmental directions, riots, strikes, acts of terrorism, civil commotion, lock-outs, sabotage, plagues or other epidemics, acts of God including fire, floods, volcanic eruptions, typhoons, hurricanes, storms, tidal waves, earthquake, landslides, lightning, explosions and other natural calamities, prolonged failure of energy, court orders / injunctions, charge of laws, action and / or order by statutory and / or government authority, third party actions affecting the development of the Project, acquisition / requisition of the Property or any part thereof by the government or any other statutory authority and such circumstances affecting the development of the project (Event of Force Majeure).

iii) Any Party claiming restriction on the performance of any of its obligations under this agreement due to the happening or arising of an Event of Force Majeure hereof shall notify the other Party of the happening or arising and the ending of ceasing of such event or

circumstance with three (3) days of determining that an Event of Force Majeure has occurred. In the event any Party anticipates the happening of an Event of Force Majeure, such Party shall promptly notify the other party.

iv) The Party claiming Event of Force Majeure conditions shall, in all instances and to the extent it is capable of doing so, use its best efforts to remove or remedy the cause thereof and minimize the economic damage arising thereof.

v) Either Party may terminate this Agreement after giving the other Party a prior notice of fifteen (15) days in writing of the Event of Force Majeure continues for period of ninety (90) days. In the event of termination of this Agreement all obligations of the Parties until such date shall be fulfilled.

82 The combined reading of these clauses show that if any of the party could not perform its part of the obligation because of the unforeseen circumstances which included government directions, court orders, injunctions etc. such party would not be liable to other party. In view of Force Majeure clause which included Court Injunction it can not be said that THDC is not willing to perform its obligation. In fact Develpers i.e. THDC/HASH were perusing the issue of permissions/sanctions vigorously. These aspects become further clear if the judgment of the Hon'ble Punjab & Haryana High Court in CWP No. 20425 of 2010 vide order dated March 26, 2012 is perused. Paras 3, 4, 22, 25 & 26 of the judgment read as under:-

> 3. The broad contours of the present proceeding having been outlined, we may now proceed to take note of the specific contentions of the contesting parties as made before us. However, before we do so, it may be appropriate to mention the somewhat conflicting stand of the parties with regard to the present stage of the applications filed under the provisions of the Environment (Protection) Act as well as the Wild Life (Protection) Act. While the petitioner, who is supported by the respondent No.6-Chandigarh Administration, asserts that necessary sanction/permission under both the Acts have been refused by orders passed by the competent authorities, the promoters of the project contend to the contrary. The facts, as unfolded before us, indicate that against the refusal of sanction under the Environment (Protection) Act, the respondents have sought a review of the order on the ground that

the findings arrived at, which have formed the basis of the refusal, are ex-parte. No order in the review matter has been passed by the competent authority, perhaps, because of the interim order passed in the PIL which has been clarified by the Hon'ble Supreme Court by order dated 31.1.2012 permitting the concerned authority under the different statutes governing the matter to exercise their respective jurisdictions in accordance with law. Insofar as the Wild Life (Protection) Act is concerned, it appears that the rejection has been made by the Chief Wild Life Warden who, the respondents claim, is merely a recommending authority and is required to forward his recommendation to the Central Government. As the rejection under the Wild Life (Protection) Act has been made by an authority not competent to do, the promoters of the project have sought a review of the order which is still pending for the same reason(s) as noticed above.

4. On these facts we are of the view that it would be prudent on our part to take the view that the issue with regard to clearance/sanction under the two enactments i.e. Environment (Protection) Act and Wild Life (Protection) Act is presently pending and as the promoters of the project have submitted themselves to the jurisdiction of the authorities under the said enactments we should refrain from addressing ourselves on any of the issues connected with either of the two statutory enactments as any such exercise, even though may be unintended, may have the effect of fettering the jurisdiction of statutory authorities functioning under the two relevant statutes.

22. Insofar as the provisions of the Environment (Protection) Act and the Wild Life (Protection) Act are concerned, it need not be emphasised that every project attracting the provisions of the Periphery Control Act and/or the provisions of the 1995 Act must satisfy the ecological concerns of the area in the light of the provisions of the two statues in question. As already held by us, a public trust has been bestowed on the authorities by provisions of the said Acts which cast on such authorities a duty to interdict any project or activity which even remotely seems to create an imbalance in the pristine ecology and environment of the area on which the city of Chandigarh is situated or for that matter in the immediate vicinity thereof. As already observed, necessary clearances under the aforesaid two enactments, insofar as the respondents are concerned, are presently pending before the concerned authorities and, therefore, it would be highly incorrect on our part to enter into any further discussion on the aforesaid aspect of the case.

> 25. We also hasten to emphasise that a more rigorous regulated development in what are now the remnants of the periphery and the areas adjoining to it is the need of the hour for which the stakeholders i.e. the Administration of Chandigarh, the States of Punjab and Haryana as also the authorities under the Environment (Protection) Act and the Wild Life Protection Act have to demonstrate the need to engage themselves intensively and not acquire a placid approach indicating an eloquent acquiescence to the violation of the 1995 Act, Periphery Control Act and the Periphery Policy.
>
> 26. We thus conclude on the aforesaid note by holding and observing that the provisions of the Periphery Control Act and the 1995 Act are complementary to each other and the provisions of the two statutes would apply to the housing project in question. The respondents, therefore, will have to comply with all the requirements spelt out by both the aforesaid statutes. As the requirement of clearances under the Wild Life (Protection) Act and Environment (Protection) Act is not a contentious issue, and as we have already held that the process of grant of such clearances is pending before the appropriate authorities under the respective Acts, the same will now have to be brought to its logical conclusion keeping in mind our observations and directions contained hereinabove.

83 The combined reading of the above paras in the order of Hon'ble High Court clearly shows that Developer THDC/ HASH i.e. transferee have made their sincere efforts for obtaining the necessary permissions / sanctions which were required under the JDA. However, some of the sanctions could not be taken in time because of the litigation by way of PIL but since none of the party was liable to the other party in view of the clause 26 dealing with FORCE MAJEURE it cannot be said that Developer was not willing to perform his part of contract. In any case no specific evidence has been shown us to prove that THDC / HASH were declining to perform particular obligation provided in JDA. In view of this discussion, it cannot be said that transferee i.e. Developer THDC/HASH is not willing to perform his part of contract.

84 Secondly, it was contended that payments have not been made as per the JDA. However, again this is not correct. As per clause 4(iv) of the JDA, the installment for Rs.

31,92,75,000/- was required to be paid. The clause 4(iv) read as under:-

> *"iv) Payment being Rs. 31,92,75,000/- (Rupees One Crore ninety two lacs seventy five thousand only) calculated @ Rs. 24,75,000/- (Rs. Twenty Four lacs seventy five thousand only) per plot holder of 500 Sq. yards and (Rs. 49,50,000/- (Rs. Forty nine lacs fifty thousand only) as per plot holder of 1000 square yards to be made to the Owner and / or the respective members of the Owner (as the case may be) within six(6) months from the date of execution of this agreement or within two (2) months from the date of approval of the plans / Design and Drawings and grant of the final licence to develop where upon the construction can commence, whichever is later, against which the Owner shall execute a registered sale deed for land of equivalent value being 6.36 acres out of the Property as demarcated in green colour (also hatched in green colour) in the Demarcation Plan annexed hereto as Annexure V and bearing Khasra nos. 123/15, 123/6, 123/7 (balance part), 123/3 (part), 123//4//1, 123///4//1/2, 123//4/2, 123/5/1, 123//5/2, 123//5/3, 112/24/24 (part)"*

85 The careful reading of the said clause of the JDA would show this payment was required to be made within a period of six months from the date of execution of this agreement or within two months from the date of approval of plan / sanction and drawing grant of final license to develop where upon the construction can commence, whichever is later. Thus, this installment was dependent on two contingencies first the expiration of a period of six months from the date of agreement or alternatively on the expiration of a period of two months from the date of approval of plans / designs drawing etc. leading to grant of final licenses which can lead to commencement of construction, whichever is later. The matter was taken up by way of PIL by certain citizens and Administration of the Union Territory before the Hon'ble High Court which initially stayed the sanction of such plan etc. This led to situation where construction could not be commenced and hence payment was not required to be made in view of the pending litigation. The clauses of force majeure came into operation and therefore, it cannot be said that the developer is not willing to perform its part of the contract. In any case there

is no default on the part of the developer as payment was not yet due as per clause 4(i)(iv) of JDA.

86 This position was informed to the Society by letter dated 4.2.2011 by HASH Builder, copy of which has been filed at pages 23 & 24 of the paper book dealing with the additional evidence. Through this letter it has been clearly stated that since permission is pending from the Ministry of Environment and Forest Department and therefore constructions could not commence. These permissions were pending because of the PIL filed by Shri Aalok Jagga before the Hon'ble Punjab & Haryana High Court. All these facts clearly shows that in view of clause 4.1(iv) read with clause 26(v) of the JDA, HASH Builder were not required to make the payment and it cannot be said that they were not willing to perform their part of the contract on this aspect. Therefore, this contention is rejected.

87 Seventh contention is that revenue wrongly held that even clause (vi) of Section 2(47) is applicable. We find no force in this contention. Clause (vi) to Section 2(47) reads as under:

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

88 The plain reading of the provision shows that any transaction by way of becoming a Member or acquiring shares in the Cooperative Society or shares in the company which has the effect of transferring or enabling the enjoyment of any immoveable property would be covered by the definition of transfer. In the case before us, initially the Members of the Society were holding shares in the Society for ownership of plot of 500 sqyd or 1000 sqyd. This membership was surrendered to the Society vide resolution of the Society passed in the Executive Committee on 4.1.2007 which was later ratified in the General Body Meeting of the Society on 25.1.2007, so that the society could enter into JDA. In the JDA the Society has agreed to transfer the land. Therefore, technically it can be said that the developer i.e. THDC/HASH has purchased the

membership of the Members in the society which would lead to enjoyment of the property and in that technical sense, clause (vi) of Section 2(47) is applicable.

89 Eighth contention is that since the Society has transferred the land through JDA on a pro-rata basis, therefore, only whatever money is received against which sale deeds have also been executed, can be taxed and notional income i.e. the money to be received later, can not be taxed. In this regard reliance was placed on certain Supreme Court decisions and other cases for the proposition that notional income cannot be taxed. There is no need to discuss the cases relied on by the ld. counsel of the assessee because it is settled position of law that no notional income can be taxed. Though there is no quarrel that it is a settled principle of law that notional income can not be taxed but in case of capital gain, Section 45 which is charging Section and Section 48 which is computation section, makes it absolutely clear that rigor of tax in case of capital gain would come into play on the transfer of capital asset and total consideration which is arising on such transfer, has to be taxed. Section 48 clearly talks about full consideration received or accruing as result of transfer. This aspect we have already discussed in detail at paras 64 to 68.

90 Second aspect of this contention was that if consideration which has not been received was to be taxed then the assessee would be deprived for claiming exemption u/s 54 and 54EC. As observed above as per Section 45 r.w.s 48 whole of the consideration, received or accrued has to be taxed. Every person is supposed to know the law and if the transaction is structured in such a way for the transfer of capital asset that some of the consideration would be received later then such person is supposed to know the consequences of the denial of such benefits. However, if the section is interpreted in the manner suggested by the ld. counsel of the assessee then no person would pay capital gain tax on transfer of a property. This will be clear from a simple example. Let us assume if “A” sells the property to “B” for a consideration of Rs. 100 crores and receive only a consideration of 1.00 crore and it is

mentioned in the transfer instrument that balance of consideration would be paid after 20 years then no tax can be levied on such balance consideration of Rs. 99.00 crores which has not been received as per the contention of the ld. counsel of the assessee . But in that case no taxes can be levied even after 20 years because no transfer can be said to have taken place after 20 years and Revenue cannot do any thing because capital gain can be charged u/s 45 only on transfer of capital asset. We do not think that this kind of interpretation can be made while interpreting Section 45 r.w.s. 48 by invoking the rule that there can not be any tax on notional receipt. Generally speaking it is only the real income which can be taxed but this has to be understood subject to limitations. Commenting on these limitations, the Ld. Author Shri S. Rajaratnam in the Commentary of Law of Income Tax by Sampat Iyengar's Volume 1, (11th Edition) has observed at page 343 as under:-

> "5. Reservations on real income theory. - Whether accrual of income has taken place or not, must be judged on the principle of the real income theory. After accrual, non-charging of tax on the same because of certain conduct based on the ipse dixit of a particular assessee cannot be accepted. In determining the question whether it is hypothetical income or whether real income has materialized or not, various factors will have to be taken into account. **It would be difficult and improper to extend the concept of real income to all cases depending upon the self-serving statement of the assessee. What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view or real income taking the probability or improbability of realization in a realistic manner, but once accrual takes place, on the conduct of the parties subsequent to the year of closing, an income which has been accrued cannot be made "no income'."**

91 The above position can be understood by examining some of the provisions of the Act which would show that concept of notional income can not be extended if specific provision is available in the Act. For example in case of income from house property, the income has to be determined as per section 23. Section 22 of the Income Tax Act provides that it is the annual value of the property which can be taxed under the head "income from house property". Sector 23 prescribes the

method for determining the annual value. Section 23(1)(a) reads as under:-

> ***23.*** *(1) For the purposes of section 22, the annual value of any property shall be deemed to be —*
>
> *(a) the sum for which the property might reasonably be expected to let from year to year; or*
>
> (b) *where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or…….*

92 On this aspect the settled position of the law is that the annual value has to be determined even if the property is not let out. This position has been discussed by the Ld. author Chaturvedi & Pithisaria's in Commentary of Income Tax Law (fifth edition) Volume 1 in this respect at pages 1275 & 1276 observed as under:

> *"Annual value- determination of – Section 23(1)(a) provides that for the purposes of section 22, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year. The word used is 'might' and not 'can' or 'is'. It is thus a notional income to be gathered from what a hypothetical tenant would pay which is to be objectively ascertained on a reasonable basis irrespective of the fact whether the property is let out or not [Sultan Bros. Pr. Ltd. v. CIT, (1964) 51 ITR 353 (SC); Jamnadas Prabhudas v. CIT, (1951)20 ITR 160(Bom); D.M. Vakil v. CIT, (1946) 14 ITR 298, 302(Bom); CIT v. Biman Behari Shaw, Shebait, (1968) 68 ITR 815 (Cal); Sri Sri Radha Govinda Jew v. CIT, (1972) 84 ITR 150, 156 (Cal); CIT v. Ganga Properties Ltd., (1970) 77 ITR 637, 647 (Cal); Liquidator, Mahmudabad Properties Ltd. v. CIT, (1972) 83 ITR 470 (Cal), affirmed, (1980) 124 ITR 31 (SC); CIT v. Zorostrian Building Society Ltd., (1976) 102 ITR 499 (Bom); C.J. George V. CIT, (1973) 92 ITR 137 (Ker); D.C. Anand & Sons v. CIT, (1981) 131 ITR 77 (Del). Also see, CIT v. Parbutty Churn Law, (1965) 57 ITR 609, 619 (Cal); In the matter of Krishna Lal Seal, AIR 1932 Cal 836; Lalla Mal Samgham Lal v. CIT, (1936) 4 ITR 250 (Lah); New Delhi Municipal Committee v. Nand Kumar Bussi, (1977) Tax LR 2130 (Del)]"*

93 Similar view has been expressed by Shri N.A. Palkhivala in his commentary on the Law land Practice of Income Tax, Volume 2 (Eighth edition) by Kanga and Palkhivala's observation at pages 22 & 23. Again even Shri S. Rajaratnam in the Commentary of Law of

Income Tax by Sampat Iyengar's Volume 2, (11th edition) expressed identical views in his commentary at page 2738.

94 In all the leading commentaries cited above, it has been observed that annual value is to be computed whether property has been let out or not. This means that notional value of the property has to be charged to the Income Tax under the head "income from house property". From the above, it becomes clear that though there is no real income from letting out of the property, still the notional annual value is subjected to tax under the head "income from house property". However, we may mention that u/s 23(1)(c) of the Act if the property is let out and then remained vacant for some part of the year or for whole of the year then vacancy allowance can be claimed. Here, it is important to note that if property is not let out, then notional income becomes chargeable to the tax because of provisions of sections 22 and 23 (1)(a) of the Act. Similarly, under the Mat provisions, it is basically the notional income which is being subjected to charge under the head "income from business and profession". A businessman may have income of Rs. 100/- but because of higher depreciation allowable under the Income-tax Act or some other weighted deductions say for example in case of expenditure on scientific research, the taxable income as per the provisions of the Act may be zero but still because of the Mat provisions, tax has to be charged on book profits. Similarly in the case of presumptive tax provisions e.g. u/s 44AD if a person is civil contractor and does not maintain books of account and his turnover is less than Rs. 60 lakhs then the profit would be presumed to be 8% of turnover even if he has suffered a loss. Another example of Section 2(22)(e) can be taken. Under this provision a loan or advance given by certain companies to a substantial share holder is to be treated as deemed dividend. Such loan under the normal accounting principle or on commercial principles cannot be regarded as income but because of this specific provision regarding deemed dividend such amount has to be treated as income of the person receiving such loans.

95 The above position of law makes it absolutely clear that theory of real income is subject to the provisions of the Act and whenever any specific provisions of the Act is there for charging of a particular item of income, then the same has to be charged accordingly. It may be sometimes hard to the assessee's but again it has been held in numerous decisions that Fiscal statues have to be interpreted on the basis of language used and there is no scope for equity or intent. Ld. Author Shri S. Rajaratnam in the Commentary of Law of Income Tax by Sampat Iyengar's Volume 1, page 236 in this regard has observed as under:-

> *"Once it is shown that the case of the assessee comes within the letter of the law, he must be taxed, however, great the hardship may appear to the judicial mind. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity. Thus, any benevolent construction in favour of the assessee has been held to be uncalled for.*

96 Therefore, it can be said that generally speaking notional income could not be subjected to tax but whenever there is a specific provision, the same has to be taxed. Now, in case of capital gain, section 45 read with section 48 very clearly provides that it is the profit "arising" from the transfer of a capital asset which would be subjected to charge of capital gain tax and section 48 clearly provides for taking the total consideration into account while computing the capital gains. This aspect we have already discussed in detail at para No. 64 to 68 from which it becomes clear that it is the whole consideration whether received or accrued, which has to be taxed under the capital gain once transfer of the capital asset takes place. Accordingly, there is no force in this part of the contention.

97 Now let us examine the issue of taxability of flat on the basis of above principles. Relevant portion of clause 4 of the JDA which deals with consideration are as under:

"4. CONSIDERATION

4.1 It is specifically understood and agreed amongst the Parties that THDC shall use its expertise and its Brand name and / or any other brand name at its discretion to develop the Property into the Premises as per applicable building bye-laws of the Competent Authority and the Owner shall have no objection to the same in whatsoever manner. In consideration of the Owner granting and assigning, its Development Rights in the Property, irrevocably and in perpetuity, to THDC to develop the Property and for transfer of the Property upon the surrender of allotment rights of 500 sq. yards and/or 1000 sq. yards (as the case may be) by its members to the Owner, vide resolution dated 04.01.2007 and 25.02.2007 (copy attached as per Annexure I & II), HASH is committed to pay to the Owner and / or the respective members of the Owner (as the case may be) a total amount of Rs. 106,42,50,000/- (Rupees One Hundred Six Crores Forty Two Lacs Fifty Thousands Only) calculated @ Rs. 82,50,000/- (Rupees Eighty Two Lacs Fifty Thousands Only) payable to 65 members having plot of 500 sq. yards each, Rs. 1,65,00,000/- (Rupees One Crore Sixty Five Lacs Only) payable to 30 members having plot of 1000 sq. yards each and Rs. 3,30,00,000/- (Rupees Three Crores Thirty Lacs Only) payable to the Owner for the 4 plots of 500 sq. yards each, which shall tantamount to the full and final payment to the Owner and / or the respective members of the Owner (as the case may be) in a manner set out herein below ('Payment'). Further, the transfer, sale and conveyance of 21.2 acres of land of the Property shall be made by the Owner in favour of THDC pro rata to the Payment received by the Owner and/or the respective members of the Owner (as the case may be) from HASH by executing sale deeds and registering the same. It is expressly provided that as resolved by the Owner, the total amount payable by HASH to the Owner and / or the respective members of the Owner (as the case may be) for assignment of the Development Rights and for transfer and sale of 21.2 acres of land of the Property shall be Rs. 106,42,50,000/- (Rupees One Hundred Six Crores Forty Two Lacs Fifty Thousand only) and one hundred and twenty nine (129) flats consisting of Super Area of 2250 Sq. feet ('Flats'); one flat each for sixty five members having a plot of 500 sq. yards, two flats for the (thirty) 30 members having a plot of 1000 sq. yards and 4 flats to the Owner for the 4 plots of 500 sq. yards each as per list annexed with this Agreement as Schedule B ('Sale Transaction')

It is expressly agreed between the Developers that HASH shall be responsible for making all payments to the Owner and/or the respective members of the Owner (as the case may be) as per the negotiated and agreed terms between the Owner and HASH, HASH expressly undertakes to make timely payments of the Payment to the Owner and / or the respective members of the Owner (as the case may be) as under:

4.2 As resolved by the Owner, THDC either by itself or along with HASH shall allot the Flats in the name of members of the Owner as per list annexed with this Agreement as Schedule B attached herein (hereinafter referred to as the 'Allottees'). The specifications of the flats would be provided by the Developers to the Owner and more particularly described in the Schedule C attached herein (hereinafter referred to as the 'Specifications'). The Allotment letters shall be issued to the Allottees (members of the Owner) within forty-five (45) days from the date of sanction of the building plans / Design and Drawing and on obtaining final license/permission for the development of the Project from the Competent Authority. Thereafter, the possession of the flats shall be handed over to the Allottees within thirty(30) months form the date of issuance of the Allotment Letter.

It is expressly provided that the Payment to be made by HASH to the Owner and/or to the respective members of the Owner (as the case may be) and the Flats to be allotted to the Allottees as set out in this Clause 4.2 shall hereinafter be collectively referred to as the 'Entire Consideration'

98 From this clause it becomes absolutely clear that each Member having 500 sqyd of plot was entitled to receive one furnished flat measuring 2250sqft and Members having 1000sqyd flat were entitled to receive two furnished flats. Thus upon execution of the JDA vested right came to such Members to receive such flats. Once this vested right arises out of the above contract it can easily be said that this right has also accrued to the assessee. Clause 4.2 makes it absolutely clear that developer i.e. THDC/HASH was to allot the letters of allotment within 45 days from final sanction from the competent authority and such flats were part of entire consideration. Merely because such allotment letter has not been given because of sanctions / permissions could not be obtained because of Public Interest Litigation before the Hon'ble Punjab & Haryana High Court, it cannot be said that such right has not accrued. Though it may be hard on the assessee but it is well settled that taxation and equity are

strangers. Further commenting on this aspect Shri Rajarathnam in his commentary has observed at page 5164 as under:

> *"It is hard on the owners when required to pay tax, when handing over the possession for purposes of construction without being able to enjoy the construction, which is yet to commerce or in the process of construction being put up by the developer, but the solution lies in statutory clarification in such cases. In view of the increasing scale of such development agreements to solve the housing problem in the cities, a statutory clarification or circular is overdue."*

99 These comments and the other detailed discussion on this aspect clearly show that capital gain tax has to be paid on the total consideration arising on transfer which would include the consideration which has been received as well as the consideration which has arosen and become due and may be received later on. In view of this discussion this contention is rejected.

100 Ninth contention is that the assessee has already terminated the agreement and has revoked the Power of Attorney. We find no force in this submissions.

101 In this regard ld. counsel of the assessee has relied on the decision of Mumbai Bench of the Tribunal in case of Chemosyn Ltd. V ACIT (supra). In that case the assessee-Company was owner of two plots bearing 256 & 257 in Gundabali Andheri Mumbai. The assessee-company entered into a development agreement with Dipiti Builders for the development rights for a consideration of Rs. 16.11 crores. Dipiti Builders had also agreed to construct 18000 sqft carpet area for the benefit of assessee on plot No. 256. In the return of income total consideration was shown only at Rs. 16.11 crores. It was explained that before Dipiti Builders could start the development /construction work, entire property comprising of plot no. 256 & 257 was sold to a third party M/s Financial Technology Ltd. by a tripartite conveyance deed executed on 5.7.2007 for Rs. 29.11 crores and therefore, additional consideration of Rs. 13 crores has been offered to tax in Assessment year 2008-09. This explanation was rejected by the Assessing Officer because

according to him it was a case of transfer u/s 2(47)(v) and total consideration has to be charged in the year of transfer. The Tribunal after considering the provisions of section 45 & 48 posed a question to itself that what should be the consideration in the case before the Bench. The case law relied on by the Department was rejected because same was relevant to accrual of interest. The Bench followed the decision of Kalptaru Construction Oversees Pvt Ltd. 13 SOT 194. In that case the assessee had agreed to sell to its subsidiary equity shares for a consideration of Rs. 1.25 crores which was finally settled at Rs. 1.00 crore and the Tribunal held that the consideration of Rs. 1.00 crore has to be accepted.

102. From the above decision it is not clear whether in case of Kalaptaru Construction Oversees Pvt Ltd. (supra) which has been followed in above case, was concerning capital gain or not? Secondly it is not clear that whether the amended consideration i.e. settlement for Rs. 1.00 crore was made in the same year or not? As observed earlier while discussing the issue of notional income that provisions of section 45 r.w.s. 48, are absolutely clear and there is no ambiguity that once a capital asset is transferred then whole of the consideration received or accruing has to be considered for the purpose of taxation in the year in which the transfer has taken place. We further find that in the JDA there is a clause for termination of the agreement. Relevant clause 14 reads as under:

> "Termination
>
> "14(i) Save and except the provision of clause 26, THDC shall at all times have the right to terminate this Agreement in the event there is any material breach of the representations, warranties, undertakings, declarations, covenants and/or obligations given by the Owner under this Agreement after giving thirty (30) days written notice for rectification of such breach. In the event the Agreement is termination by THDC, all the lands registered in the name of THDC as per the terms of this Agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this Agreement shall not be transferred by the Owner in favour of THDC. Upon the termination, the Owner shall refund to THDC the Adjustable Advance/Earnest Money mentioned in clause 4.1(i) above within one month of such termination. In the event of failure of the Owner to refund the said amount, the Owner hereby agrees to execute a

registered sale deed for land of equivalent value in favour of THDC.

(ii) In the event all the requisite government and statutory approvals, authorizations, consents, licenses, approvals of all the plans/designs and Drawings as may be required for the development of this Property in relation to the Project and to undertake the Project are not granted within nine (9) months of the submission of the final plans/Designs and Drawings to the Competent Authority for approval then THDC may as its sole discretion either decide that it does not desire to undertake and complete the Project and hence terminate this Agreement after giving thirty (30) days written notice in this regard or decide to wait for any further times deemed fit by THDC for the grant of the aforesaid approvals and licenses. In the event the Agreement is terminated by THDC, all the lands registered in the name of THDC as per the terms of this Agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this Agreement shall not be transferred by the Owner in favour of THDC. Upon the termination, the Owner shall refund to THDC the Adjustable Advance/Earnest Money mentioned in clause 4.1(i) above within one month of such termination. In the event of failure of the Owner to refund the said amount, the Owner hereby agrees to execute a registered sale deed for land of equivalent value in favour of THDC.

(iii) In the event THDC is unable to develop the Property due to refusal/non grant of approvals, consents, permission, licenses or revocation of the same by the appropriate statutory authority, then THDC may at its sale discretion terminate this Agreement. In the event the Agreement is terminated by THDC, all the lands registered in the name of THDC as per the terms of this Agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this Agreement shall not be transferred by the Owner in favour of THDC. Upon the termination, the Owner shall refund to THDC the Adjustable Advance/Earnest Money mentioned in clause 4.1(i) above within one month of such termination. In the event of failure of the Owner to refund the said amount, the Owner hereby agrees to execute a registered sale deed for land of equivalent value in favour of THDC.

(iv) The owner shall have the right to terminate the Agreement only in the event of default by the Developers for making the Payment in accordance with the terms of this Agreement and the allotment of Flats within the time period as mentioned in this Agreement after giving Thirty (30) days

written notice for rectification of such breach or any further time as may be desired by the Owner. In the event the Agreement is terminated by Owner, all the lands registered in the name of THDC as per the terms of this Agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this Agreement shall not be transferred by the Owner in favour of THDC. Upon the termination, the Owner shall forfeit the Adjustable Advance/Earnest Money mentioned in clause 4(i)."

103 The reading of the above clause would show that power of termination has been given in many circumstances to THDC vide clause 14(i), (ii) and (iii). The power for termination by the owner has been mentioned in clause 14(iv) only. Reading of this clause would show that right to terminate with the owner i.e. the Society was available only in case of default in making the payment. The issue regarding default for making payment has already been discussed by us in Paras 84 to 86 above while discussing the issue of willingness on the part of the transferee to perform its part of the contract We have already held that there was no default on the part of developer i.e. THDC/HASH in making the payment, therefore, the assessee had no right to terminate the contract. In any case we further find that clause 20 of the JDA refers to Arbitration and it is clearly provided that all the disputes under it should be referred to the arbitration. Therefore, if the Society had some grievance it was duty bound to give a notice for appointment of an Arbitrator to the developer. In the absence of such notice the termination will not stand scrutiny of law. Here it is also pertinent to note that though it was stated that irrevocable Power of Attorney has been revoked and some documents have been filed before us for revocation but clause 6.7 of the JDA which we have reproduced earlier clearly provides that such Power of Attorney cannot be revoked. We reproduce clause 6.7 again which is as under:

"6.7 The Owner shall execute an irrevocable special Power of Attorney granting its complete Development Rights in the Property in favour of THDC interalia including the right to raise finance by mortgaging the property and register the charge with the Competent Authority and execute registered sale deeds) as set out in ***Clause 4.1 (ii), (iii), (iv) and (v) and the Owner confirms, undertakes, declares and binds itself not to***

revoke the same for any reason whatsoever out of its own will and discretion without obtaining a specific prior written consent of THDC or any of its duly constituted attorneys."

104 The above clearly shows that this Power of Attorney could not be revoked for any reason without obtaining specific prior written consent of THDC/HASH. No document showing the consent of THDC for revocation of this irrevocable Power of Attorney has been produced before us. We fail to understand that in the absence of such document how the assessee can claim that this Power of Attorney has been revoked. As discussed earlier while considering the legal position, we would again recall the words of Hon'ble Authority for Advance Ruling in case of Jasbir Singh Sarkaria (supra) wherein at para 33 of the decision while discussing the issue in respect of Power of Attorney, it was highlighted that execution of irrevocable Power of Attorney is of significant nature and the words "irrevocable" are very important. The expression "irrevocable" itself shows that normally such attorney cannot be revoked. Therefore, no cognizance can be taken in respect of revocation of the irrevocable Power of Attorney. In the absence of specific consent as provided in clause 6.7 of the JDA from THDC.

105 We may also note that CIT D.R has pointed out that total consideration was to be determined as under:

(i)	*Consideration in cash (Rs. 82,50,000 x 129 plots)*	*Rs. 106,42,50,000/-*
(ii)	*Consideration in kind (Rs. 101,25,000/- x 129 plots)*	*Rs. 130,61,25,000/-*
	Total	*Rs. 237,03,75,000/-*

Average cost of consideration Rs. 11.18 crores per acre
(Total consideration of Rs. 237.03 crores divided by 21.2 acres of land)

It is claimed on behalf of the assessee that JDA has been cancelled and the developer has been allowed to retain the property which has also been conveyed to developer through two sale deeds. If that is so then what would happen to the balance consideration because in such situation the assessee has received consideration of only about Rs. 5 croress per acre because the assessee has registered land measuring 3.08 acres for Rs. 15.48 crores through first conveyance deed, whereas consideration as per original agreement was Rs. 11.18 crores per acre as shown above. The difference is because of non receipt of consideration in kind and the assessee has not shown any evidence that it has made the claim for receipt of balance consideration. This leads to the conclusion that there was no cancellation of the JDA.

106 Some arguments were made by both the parties that if the contract is finally stand abandoned then what would happen. The contention on behalf of the assessee is that if the contract is abandoned then the assessee would have paid tax in the year of transfer and would be left with no recourse for relief. The contention on behalf of the Department was that the assessee could always file revised return or make a petition u/s 264 and some relief was possible in case of the assessee. However, if revenue fails to tax the total consideration in the year of transfer then same cannot be subjected to tax in any other year. We find that this question was seriously considered by the Ld. Authority for Advance Ruling in case of Jasbir Singh Kataria (supra) which has been relied on by both the parties for various aspects. In that case it was observed at para 39 as under:

> "We have to advert to one aspect which has caused some concern to us. What will happen if during the year following the one in which the deemed transfer took place, the proposed venture collapses for reasons such as refusal of permissions, the developer facing financial crunch etc. By that time, the owner would have received only a part of the agreed consideration, but he is obliged to file the return showing the entire capital gain based on the full sale price whether or not received during the year of deemed transfer. In such an eventuality, hardship may be caused to the owner who would have paid full tax. No doubt, such a situation could be avoided if the contention of the applicant is accepted. On

> deep consideration, however, we find that the construction of the relevant provision should not be controlled by giving undue importance to such hypothetical situations. Normally, the owner executes a Power of Attorney or does similar act to left the transferee take possession only after the basic permissions are granted and he is satisfied about the ability of transferee/developer to fulfil the contract. In spite of that, if such rate situations take place, the owner/transferor will not be without remedy. He can file a revised return and make out a case for exclusion or reduction of income. However, if the time-limit for filing a revised return expires, the difficulty will arise. It is for Parliament or the Central Government to provide a remedy to the assessee in such cases. Moreover, the other side of the picture as depicted in paragraph 27 (supra) should also be kept in view."

Here the comments of Shri Rajaratnam quoted at para 5164 above are also relevant again:

> "*"It is hard on the owners when required to pay tax, when handing over the possession for purposes of construction without being able to enjoy the construction, which is yet to commerce or in the process of construction being put up by the developer, but the solution lies in statutory clarification in such cases. In view of the increasing scale of such development agreements to solve the housing problem in the cities, a statutory clarification or circular is overdue."*

We may mention here that no doubt sometimes an assessee may be put in a difficult situation and as mentioned by Hon'ble Authority in case of Jasbir Singh Sarkaria (supra) as well as Ld. Author Shri Rajaratnam it is for the legislature to take corrective steps. However, it may not be out of place that if considering the difficulty the interpretation given by the ld. counsel of the assessee is accepted then the Revenue may not be able to tax such assessees when these difficulties are removed. For example in the present case if tomorrow when all permissions are obtained and construction is completed and if no taxes are held to be payable then later on also the assessee may not be subjected to any tax under the head "capital gain" because then it can be easily contended on behalf of the assessee that the transfer has already taken place on the date when irrevocable Power of Attorney was executed. In that situation the Revenue will have no remedy.

107 The above clearly shows that such hypothetical consideration cannot be considered for giving true meaning to a particular provision. It has also been observed that in some genuine cases the difficulties may arise but it was for the Parliament or the Government to provide remedy in such cases and judicial forums cannot do anything. Therefore, in view of the provisions of Section 45 r.w.s. 48 we are of the opinion that subsequent events, if at all any will not make any difference because total consideration received or accrued has to be assessed in the year of transfer. We may also note that it was stated that irrevocable Power of Attorney has been revoked but the word “irrevocable” itself shows that in the eyes of law special Power of Attorney could not have been revoked. In view of this analysis, we are of the opinion that either the JDA has not been cancelled or in any case the same cannot be considered for determining the taxation of capital gain. Accordingly this contention is rejected.

108 The next contention of the assessee is that even if the whole consideration has to be taxed then value of the flats cannot be taken at Rs. 4,500/- per sq. feet. It is also pointed out that in view of the agreement between the HASH & THDC consideration has been shown at Rs. 2,000/- per sq. feet for 126 flats whereas it is Rs. 4,500/- per sq. feet for three flats. We find no force in these submissions. The assessee has filed along with the written submissions copy of the addendum of agreement between THDC and HASH by Joint Developer (at page 265 & 266) and this issue is discussed in clause 5 which is as under:-

> “5. Clauses 4.1, 4.2, 4.3 and 4.4 on the page nos. 18 and 19 of the Agreement shall stand amended, modified and substituted by the following:-
>
> 4.1 It is expressly agreed and understood by and between the Parties hereto
>
> (a) in the ratio of 72,28 between THDC and HASH in case Gross Sales Proceeds does not exceed Rs. 1272 crores;
>
> (b) in the ratio of 70: 30 between THDC and HASH in

case Gross Sales Proceeds is equal to Rs. 1272 crores;

(c) in addition (b), in the ratio of 60: 40 between THDC and HASH in respect of gross sales Proceeds in excess of Rs. 1272 crores.

"It is agreed that the minimum guaranteed amount from the Gross Sales Proceeds for THDC and HASH is Rs. 890.40 crores and Rs. 225.76 crores respectively. The minimum guaranteed amount of Rs. 225.76 crores to HASH includes Rs. 58.88 crores that shall be expended by THDC towards construction of 126 flats equivalent to 2,83,500 sq. ft,, which flats are to be allotted in the names of the members of the Society or otherwise, as the case may be, calculated as Rs. 2000 per sq. ft. for the area 2,83,500 sq. ft. and the 72% share of 3 flats of 2250 Sq. ft. to be purchased by HASH @ Rs, 4500/- per sq. ft. Should the application of the ratio stipulated in (a) above result in HASH being entitled to a sum greater than the minimum guaranteed amount and THDC being entitled to a sum less than the minimum guaranteed amount, THDC shall-be entitled to the entitlement of HASH which is in excess of its minimum, guaranteed amount until THDC achieves its minimum guaranteed amount.-The same is illustrated in Annexure I hereto."

109 The above clearly shows that HASH was entitled to total proceeds of Rs. 225.76 crores out of total proceeds of the project which were agreed to be shared by THDC and HASH but the portion of HASH includes a sum of Rs. 58.88 crores which was required to be spent towards construction of 126 flats equivalent to 283500 square feet area which were to be allotted to the members of the society. Thus, it is clear that figure of Rs. 2,000/- per sq. feet represents only the cost of constructions to be incurred by THDC which was debited to the account of HASH. Further, HASH has agreed to purchase three Flats @ 4,500/- per square feet. Some news reports were quoted before us in one of the cases to show that various brokers had issued various advertisements for sale of these flats and these flats were ultimately to be sold at Rs. 7,000/- to Rs. 10,000/- per square feet. This also becomes clear from the addendum of agreement in terms of total proceeds of 1272 crores. In any case if the cost of construction is Rs. 2,000/-, then cost of land which has been paid to the society is also to be added to the cost of the flat because this portion of

consideration in any case was received or to be received later by the society in cash. Considering the present market value of the flats in and around Chandigarh area which is Rs. 4,000/- to 12,000/- per square feet we are of the opinion that value of the flat at Rs. 4,500/- per square feet is absolutely fair. In any case M/s HASH has agreed to purchase the flats at this rate from M/s THDC. It may be noted as pointed out by the ld. DR for the revenue some of the News report clippings filed by various assessees clearly shows that flats were booked in the "Tata Camleot" (this was the name which was given to the Project which was to be developed on the land of two societies) in the Pre Launch offer in the range of Rs. 7500 to 8000 per sqft. It is a common knowledge that rates in Pre Launch offer are lower than the rates when bookings open for the Public. Considering these facts we are of the opinion that Assessing Officer has estimated the value of the flats on most reasonable basis. In view of these observations this contention is rejected.

110 The Ld. Counsel for the assessee had made some submissions on the issue of deduction u/s 54F. He has pointed out that this issue has been rejected wrongly by CIT(A). However, carefully perusal of the grounds of appeal show that no ground in respect of deduction u/s 54F has been raised before us and, therefore, we decline to adjudicate this issue and all the arguments made in this behalf are rejected. Though reference was made to ground No. 2.3 in this regard. The perusal of grounds No. 2.3 would show that reference has been made only to Section 54 and Section 54EC. Section 54 deals with deduction in case the assessee being an individual or HUF, transfers the residential house and in case before us, the assessee has transferred the plot. Therefore, it cannot be said that deduction u/s 54F and 54 is same. Since no ground has been raised for deduction u/s 54F, we reject this contention.

111 Ground No. 3 - The ld. counsel of the assessee submitted that without prejudice to the issues raised in grounds No. 2, 5 & 6, capital gain should have been taxed in the hands of the Society which is legal owner of the land.

112 On the other hand, the ld. DR for the revenue submitted that the Society was acting on behalf of the Members and the Members have surrendered their rights in favour of the Society so as to enable the Society to enter into JDA for transfer of property in favour of the developer i.e. THDC/HASH. Therefore, capital asset has been sold by the Members. Further the consideration was to be received from Hash by the individual plot owners.

113 We have heard the rival submissions carefully and find that the Society was formed by various Members for the purpose of purchase of land and to develop the same and they allotted the plots to the Members. The Society purchased 21.2 acres of land and ultimately plots in the sizes of 500sqyd and 1000sqyd were allotted to various Members. When the proposal for development of property came it was resolved in the General Body Meeting of the Society that the Members would surrender their rights in favour of the Society so that the Society can enter into the JDA. Thus it is clear that the Society has entered into JDA on behalf of the Members. It is the members who are owning the plots and the Society was only a facilitator. It becomes clear from the JDA that payment for consideration was to be made to an individual plot holder and in fact consideration was mentioned in terms of per Member. Each Member holding 500sqyd plot was to receive a sum of Rs. 82,50,000/- and one fully furnished flat measuring 2250 sqft and the Members holding 1000sqyd plot were to receive monetary consideration of Rs. 1.65 crores plus two flats measuring 2250 sqft. In fact the payment of cheques is made by Hash by issuing cheques in the name of individual Member and not the Society. This fact stands admitted because assessee has filed a return declaring capital gain against part money received against his plot. Thus it becomes

clear that it is the individual member who are liable to tax in respect of transfer to plots and the Society being only a facilitator or Post office. Some more details have been discussed in this respect while adjudicating the appeal of Punjabi Coop House Building Society Ltd. in ITA No. 310/Chd/2012 and 556/Chd/2012 which have been adjudicated little later in this order itself. Accordingly we find no force in the submissions and this ground is rejected.

114 Ground No. 7 – The issue regarding levy of interest u/s 234B and withdrawal u/s 244A (3) is of consequential nature and the Assessing Officer is directed to charge interest u/s 234B of the Act in accordance with law. Withdrawal of interest u/s 244A (3) should also be done in accordance with law.

115 In the result, appeal of the assessee is partly allowed.

` **ITA No. 276/Chd/2012 in case of ACIT V. Satpal Gosain**

116 This appeal is directed against the order passed by the ld. CIT(A)-I, Ludhiana dated 21.12.2011.

117. In this appeal the Revenue has raised the following grounds:

> *"1 That the ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 3,55,21,070/- made on account of capital gains ignoring the principle laid down in the case of Chaturbhuj Dwarikadas Kapadia V. CIT reported at 260 ITR 491 (Bom).*
>
> *2 That the ld. CIT(A) has erred in law and on facts innot passing an order in w2riting and therefore, not complying with the Sub Rule (2) of Rule 46A while admitting the additional evidence ignoring the decision of the Jurisdictional Bench of the Hon'ble ITAT, Chandigarh in the case of Smt. Surinder Kaur dated 29.7.2011 passed in ITA No. 596/Chd/2011.*
>
> *3 That the order of the ld. CIT(A) be set aside and that of Assessing Officer be restored."*

118 The ld. DR for the revenue submitted that since the issue involved is same as in the case of lead case of Shri Charanjit Singh Atwal and therefore same arguments may be adopted in this case.

119 On the other hand, the ld. counsel of the assessee, Shri Ajay Vohra also submitted that the arguments made by him in case of Shri Charanjit Singh Atwal may be adopted in this case also.

120 Ground No. 1 - In this case the assessee is the owner of 1000 sqy plot in Punjabi Coop Housing Building Society which has been transferred by the Society through a JDA to the developer i.e. THDC/HASH. All the facts of the case are identical with the facts of the case of Shri Charanjit Singh Atwal in ITA No. 448/Chd/2011. Therefore, following our decision in Para No. 27 to 110, we decide this issue against the assessee.

121 Ground No. 2 – After hearing both the parties we find that during assessment proceedings certain documents were filed by way of additional evidence which have been admitted by the ld. CIT(A) and relied on for reaching his conclusion. However, there is no finding in the order why such evidence has been admitted. The objection of the revenue is that as per Rule 46A(2) such additional evidence could not be admitted without recording the reason. The ld. counsel of the assessee had submitted that all the evidences were generated after the assessment was over and therefore, it was necessary to bring the same to the notice of first appellate authority and therefore, there should not be any objection if the same have been admitted.

122 After considering the rival submissions we find that Rule 46A(2) reads as under:

> *"46A(2) No evidence shall be admitted under sub-rule (1) unless the (DC(A)) (or as the case may be the Ld. Commissioner (Appeals) records in writing the reasons for its admission.*

The above clearly shows that additional evidence could not be admitted unless and until the reasons for admission of the same are recorded in writing. However, impugned order shows that no reasons have been recorded by the ld. CIT(A) in his order for admission of additional evidence. In the absence of such an order, admission of additional evidence is against Rule 46A(2) of the Act and therefore, this ground is decided in favour of the Revenue.

123 We may note that we have admitted this additional evidence in case of Shri Charanjit Singh Atwal vide Para No. 8 & 9 because it was found that additional evidence came into existence after the completion of assessment proceedings, therefore, in this case ground of revenue against the admission of additional evidence, has been allowed on technical basis but additional evidence stands considered in case of Shri Charanjit Singh Atwal and that decision has been followed in the case of this assessee. Therefore, no harm has been caused to the assessee despite the fact that admission of additional evidence has been held to be not valid.

124 Appeal of the Revenue in ITA No. 276/Chd/2012 is allowed.

ITA No. 986/Chd/2011 – Avtar Singh Brar V. ITO

125 This is an appeal filed by the assessee against the order dated 18/08/2011 of CIT (Appeals) Chandigarh.

131 In this appeal various grounds have been raised but disputes raised can be summarized as under:

(i) That despite the issue of notice u/s 148, the assessment order has been framed u/s 143(3) of the Act.

(ii) Confirmation of action of the Assessing Officer to charge capital gain tax on full value of consideration against the sale of plot through JDA.

(iii) The ld. CIT(A) erred in conforming the action of the Assessing Officer in rejecting the revised return.

126 Since the issues raised in this appeal were covered by other group of cases and particularly the lead case in case of Shri Charanjit Singh Atwal in ITA No. 448/Chd/2011 and therefore, we proceeded to hear this appeal on ex-parte basis because in this group of cases it was clarified that there appeals will be heard on 1st /2nd May, 2013 but despite that none appeared on behalf of the assessee.

127 The ld. DR for the revenue was heard.

128 After considering the submissions of the ld. DR for the revenue and relevant material on record, we find that in this case assessment order clearly mentions that originally the return was processed u/s 143(1) and later on a notice u/s 148 was issued.

129 Notice u/s 148 was issued because the Assessing Officer got the information from the enquiries conducted by the Department in the case of Group Housing Societies that the Society consisting of 95 members of present and Ex.MLAs of Punajb State Legislative Assembly who had formed a Society known as Punjabi Coop House Building Society Ltd. and that Society has transferred 21.2 acres of land to developers i.e. THDC/HASH.

130 Regarding first issue since original return was processed u/s 143(1) the Assessing Officer could have issued a notice u/s 148 in view of the fresh material/information received in view of the decision of Hon'ble Apex Court in case of ACIT V. Rajesh Jhaveri Stock Broker Pvt Ltd., 291 ITR 500. As far as the issue regarding passing of order u/s 143(3) of the Act is concerned, the same has been adjudicated by the ld. CIT(A) vide para 8.1 of impugned order which is as under:

> *"The contention of the appellant that if notice u/s 148 has been issued, assessment could not be made u/s 143(3) is not correct, since assessments under Income Tax Act, 1961 are made only u/s 143(3) or u/s 144. Further, wrong mentioning of the assessment year in the assessment order is an inadvertent mistake and assessment cannot be held invalid merely for this reason in view of provisions of section 292B of the Income Tax Act, 1961. Moreover, the Assessing Officer has already*

corrected the assessment year in his records, a copy of which has been sent to the appellant also."

131 The ld. CIT(A) has already given the reasons for rejecting this issue and we find nothing wrong with the same and accordingly this issue is decided against the assessee.

132 Second issue has been adjudicated in detail in the case of Shri Charanjit Singh Atwal, ITA No. 448/Chd/2011 in Para No. 27 to 110 and following the same we decide the issue against the assessee.

133 Third issue has been adjudicated by the ld. CIT(A) vide Para 7.1 which is as under:

"During the course of appellate proceedings, the Ld. Counsel for the appellant has filed a copy of revised return of income for A.Y. 2008-09 and not A.Y. 2007-08, the year for which notice u/s 148 was issued. As the return had been revised for A.Y. 2008-09 and not A.Y. 2007-08, the Assessing Officer was right in not considering the revised return filed by the appellant for A.Y. 2008-09. Ground of appeal No. 5 is dismissed."

134 We find no reason to deviate from the reasoning given by the ld. CIT(A) because there is no evidence to show that return for Assessment year 2007-08 was revised. Therefore, this issue is also decided against the assessee.

135 In the result, the appeal of the assessee is dismissed.

ITA No. 993/Chd/2011 – Smt. Surjit Kaur V. ITO

136 This appeal is directed against the order of ld. CIT(A),Chandigarh dated 1.8.2011.

137 In this appeal the assessee has raised various grounds but the ld. counsel of the assessee submitted that in this case the assessee was a Member of "The Defence Services Coop House Building Society Ltd. which was the owner of 27.3 acres of land. This land was transferred to developer i.e.

THDC/HASH as in case of Punjabi coop House Building Society. In this case the consideration for individual plot holder of 500sqy was Rs. 80 lakhs plus one furnished flat measuring 2250sqft. Other facts of the case are identical to the case of Shri Charanjit Singh Atwal, ITA No. 448/Chd/2011. The ld. counsel of the assessee submitted that all the arguments made in case of Shri Charanjit Singh Atwal (supra) may be considered except that in this case the notice for cancellation of the JDA was issued by The Defence Services Coop House Building Society Ltd. (copy of which is placed at page 34 to 38 of the paper book).

138 On the other hand, the ld. DR for the revenue adopted his arguments as in case of Shri Charanjit Singh Atwal (supra).

139 After considering the rival submissions we find that since the issue regarding taxability of capital gain against the transfer of plots to developer, is identical to the issues in case of Shri Charanjit Singh Atwal (supra) and only difference is that here the assessee is a Member of The Defence Services Coop House Building Society Ltd.. However, we further find that similar Joint Development Agreement has been entered into by The Defence Services Coop House Building Society Ltd. with the same developer i.e. THDC/HASH. The issue regarding cancellation of JDA has been dealt in detail in case of Shri Charanjit Singh Atwal and therefore, there is no need to further examine this issue. Therefore, following the decision in case of Shri Charanjit Singh Atwal (supra), we decide the issue against the assessee.

140 In the result, appeal of the assessee is dismissed.

ITA No. 1064/Chd/2011 – Shri Sucha Singh Langah V DCIT

141 This appeal is directed against the order of ld. CIT(A),Chandigarh dated 30.8.2011.

142 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

143 Grounds No. 4 to 11 contain the issue regarding transfer of 1000 sqyd plot through the Society to the developer.

144 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

145 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

146 Ground No. 12 regarding deduction u/s 54 & 54F was not pressed and therefore, same is dismissed.

147 Ground No. 13 is regarding charging of interest u/s 234A, 234B and 234C of the Act. Charging of interest u/s 234A, 234B and 234C is consequential nature and the Assessing Officer is directed to charge interest as per provisions of the Act.

148 In the result, appeal of the assessee is dismissed.

ITA No. 1070/Chd/2011 – Shri Madan Mohan Mittal V ACIT

149 This appeal is directed against the order of ld. CIT(A), Chandigarh dated 23.8.2011.

150 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

151 Grounds No. 4 to 12 contain the issue regarding transfer of 500sqyd plot through the Society to the developer. Both the parties adopted identical arguments which were given in case of Shri Charanjit Singh Atwal (supra).

152 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

153 Ground No. 13 reads as under:

> *"That the ld. CIT(A) has further erred in upholding the non allowance of benefit provided u/s 54/54F of the Act and claimed on the amount received which is arbitrary and unjustified."*

154 The ld. counsel of the assessee adopted the arguments made in case of Shri Charanjit Singh Atwal (supra) in respect of deduction u/s 54F of the Act.

155 On the other hand, the ld. DR for the revenue supported the order of the ld. CIT(A).

156 After considering the rival submissions and on verification of record we find that this issue was raised before the ld. CIT(A) through ground No. 11 which reads as under:

> *"That the Assessing Officer has further erred in not giving the benefit provided u/s 54 of the Act and claimed on the amount received which is arbitrary and unjustified."*

From above it becomes clear that before the ld. CIT(A) only issue regarding deduction u/s 54 was taken which has been adjudicated by the ld. CIT(A) vide Para 7.1 which reads as under:

> *"7.1 The appellant has also argued that he was entitled for deduction u/s 54. This argument of the appellant is not correct because deduction u/s54 is available only if capital gain arises from transfer of a residential house. As the appellant has not sold/transferred any residential*

house, the appellant is not entitled to deduction u/s 54 of the Act. Ground of appeal No. 11 is dismissed."

157 From the above ground No. 11 raised before the ld. CIT(A) it becomes clear that the issue regarding deduction u/s 54F was not raised before the ld. CIT(A) and therefore, the same has not been rightly adjudicated by the ld. CIT(A). Since this issue was not raised before the ld. CIT(A), therefore, the same is not emanating from the impugned order and cannot be adjudicated by us.

158 Section 54 of the Act clearly provides for deduction in a case where the assessee being an individual or HUF, transfers long term capital asset in the nature of residential house. Since in the case before us, the asset transferred is a plot, therefore, deduction u/s 54 cannot be allowed to be entertained. In view of this ground No. 13 is rejected.

159 Ground No. 14 is regarding charging of interest u/s 234B of the Act which is consequential nature. The Assessing Officer is directed to decide the issue in accordance with law.

160 In the result, appeal of the assessee is dismissed.

ITA No. 1071/Chd/2011 – Shri Surinder Singh V DCIT

161 This appeal is directed against the order of ld. CIT(A), Chandigarh dated 5.8.2011.

162 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

163 Grounds No. 4 to 12 contain the issue regarding levy of capital gain tax for transfer of plot through the Society in terms of JDA and only difference is that the assessee is a Member of

Defence Services Coop House Building Society Ltd. to the developer.

164 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

165 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

166 Ground No. 13 reads as under:

> *" That the Ld. Commissioner of Income Tax (Appeals) has further erred in upholding the non allowance of benefit provided under section 54/54 F of the Act and claimed on the amount received which is arbitrary and unjustified."*

167 After hearing both parties we find this issue has been adjudicated by Ld. CIT (Appeals) vide para 6.13 to 6.14, which are as under:-

> *"6.13 The Ld. Counsel for the appellant has also argued that the appellant is entitled to deduction u/s 54F to the extent of investment in the new asset, as reinvestment in flat. For the sake of convenience, provisions of section 54 F of the Act are reproduced below:*
>
> ***" 54F. Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.***
>
> *(1) Subject to the provisions of sub-section (4), where, in the case of an appellant being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the appellant has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter*

in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-

(a) if the cost of the asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45;

Provided that nothing contained in this sub-section shall apply where-

a) the appellant-

i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

ii) purchase any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".

Explanation – For the purposes of this section,

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

6.14 Sub section (1) of section 54 F allows exemption of long term capital gains from tax, if the net consideration on transfer of long term capital asset is invested in the purchase of a new residential house within a period of one year before or two years after or in construction of a new residential house within a period of 3 years from the date of the transfer of the long term capital asset. In the instant case, the construction of the flat, which the appellant is to be given, has not yet started and so it cannot be said that the amount has been invested in a new residential house for allowing benefit u/s 54 F of the Act. Hence, the appellant is not eligible for deduction u/s 54 F "

168 Both parties adopted similar arguments before us as in case of Shri Charanjit Singh Atwal.

169 After considering the rival submissions, we find Ld. CIT(A) has adjudicated the issue correctly and has given the reason for rejection of deduction under section 54 / 54 F. Therefore, we find nothing wrong with the order of Ld. CIT(A) and confirm the same. Hence this ground is rejected.

170 Ground No. 14 is regarding charging of interest u/s 234B of the Act.

171 The Assessing Officer is directed to decide the issue of charging of interest u/s 234B of the Act, in accordance with law.

172 In the result, appeal of the assessee is dismissed.

ITA No. 1072/Chd/2011 – Mrs. Gurdev Kaur V ITO

173 This appeal is directed against the order of ld. CIT(A), Chandigarh dated 1.8.2011.

174 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

175 Grounds No. 4 to 12 contain the issue regarding levy of capital gain tax for transfer of plot through the Society in terms of JDA and only difference is that the assessee is a Member of Defence Services Coop House Building Society Ltd. to the developer.

176 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

177 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

178 Ground No. 13 reads as under:

> *"That the ld. CIT(A) has further erred in upholding the non allowance of benefit provided u/s 54/54F of the Act and claimed on the amount received which is arbitrary and unjustified."*

179 Both the parties were heard. The Issue has been adjudicated by us in ITA No. 1071/Chd/2011 which we have dealt above. In this case also similar findings have been given by ld. CIT(A). Following our earlier order in ITA No. 1071/Chd/2011, we dismiss this ground.

180 Ground No. 14 is regarding charging of interest u/s 234B of the Act. The Assessing Officer is directed to decide the issue of charging of interest u/s 234B of the Act, in accordance with law.

181 In the result, appeal of the assessee is dismissed.

ITA No. 1073/Chd/2011 – Shri Tara Singh Ladal V ACIT

182 This appeal is directed against the order of ld. CIT(A), Chandigarh dated 1.8.2011.

183 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

184 Grounds No. 4 to 11 contain the issue regarding levy of capital gain tax for transfer of plot through the Society in terms of JDA.

185 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

186 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

187 Ground No. 12 is regarding charging of interest u/s 234B of the Act.

188 The Assessing Officer is directed to decide the issue of charging of interest u/s 234B of the Act, in accordance with law.

189 In the result, appeal of the assessee is dismissed.

ITA No. 1074/Chd/2011 – Mrs. Satwinder Kaur Dhaliwal V ITO

190 This appeal is directed against the order of ld. CIT(A), Chandigarh dated 12.8.2011.

191 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

192 Grounds No. 4 to 13 contain the issue regarding levy of capital gain tax for transfer of plot through the Society in terms of JDA.

193 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

194 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

195 Ground No. 14 reads as under:

> *"That the ld. CIT(A) has further erred in upholding the non allowance of benefit provided u/s 54/54F of the Act and claimed on the amount received which is arbitrary and unjustified."*

196 The ld. counsel of the assessee adopted the arguments made in case of Shri Charanjit Singh Atwal (supra) in respect of deduction u/s 54F of the Act.

197 On the other hand, the ld. DR for the revenue supported the order of the ld. CIT(A).

198 After considering the rival submissions and on verification of record we find that this issue was raised before the ld. CIT(A) through ground No. 11 which reads as under:

> *"That the ld. CIT(A) has further erred in not giving the benefit provided u/s 54 of the Act and claimed on the amount received which is arbitrary and unjustified."*

199 This issue has been adjudicated by the ld. CIT(A) vide para 5.14 and we have dealt with similar issue in ITA No. 1070/Chd/2011 above in para No. 153 to 158. Following that decision we decide this issue against the assessee.

200 Ground No. 15 – This ground is regarding charging of interest u/s 234B of the Act which is of consequential nature.

The Assessing Officer is directed to charge the interest as per provisions of law.

201 In the result, appeal of the assessee is dismissed.

ITA No. 1088/Chd/2011 – Smt. Neena Chaudhary V ITO

ITA No. 1089/Chd/2011 – Smt. Krishna Raghu V ITO

ITA No. 1090/Chd/2011 – Sh. Gaurav Raghu V ITO

202 These appeals are directed against the order of ld. CIT(A), Chandigarh dated 1.8.2011 and 26.8.2011.

203 In all these three appeals common issues have been raised. The issues raised are summarized as under:

(i) Reopening of the assessment

(ii) Taxability of capital gain

(iii) Denial of deduction u/s 54F of the Act.

204 The first issue regarding reopening of the assessment raised through ground No. 1 & 2 was not pressed before us and therefore, the same is decided against the three assessees.

205 Second issue: In all these cases the assessees are Members of Defence Services Coop House Building Society Ltd. Smt. Neena Chaudhary was owner of a plot measuing 300sqyd and Smt. Krishna Raghu and Shri Gaurav Raghu are owner of the plot measuring 250 sqyd each. In this case also the plots were surrendered by the individual members in favour of the Society so as the development agreement can be entered into with the developer i.e. THDC/HASH. The members who were having 300sqyd were to receive cash consideration of Rs. 48 lakhs and furnished flat measuring 1350 sqft whereas the members having 250 sqyd plot were to receive 34 lakhs in cash and a flat measuring 1350 sqft. The whole of cash

consideration as well as the value of flat has been subjected to capital gain tax.

206 Both the parties submitted that the arguments given in case of Shri Charanjit Singh Awal (supra) should be adopted in this case also.

207 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

208 Third issue is regarding deduction u/s 54F. Both the parties made similar arguments as in the case of Shri Charanjit Singh Atwal (supra).

209 After considering the rival submissions we find that a careful perusal of the grounds raised before the ld. CIT(A) shows that this issue was not raised before the first appellate authority and the same has therefore, been not adjudicated by the ld. CIT(A). Thus this issue is not emanating from the impugned order and accordingly we refuse to entertain this issue and this ground is dismissed.

210 In the result, ITAs No. 1088, 1089 and 1090/Chd/2011 are dismissed.

ITA No. 1092/Chd/2011 – Sh. Balwinder Singh Bhunder V. DCIT

211 This appeal is directed against the order of ld. CIT(A), Chandigarh dated 1.8.2011.

212 In this appeal the assessee has raised various grounds of appeal but at the time of hearing the ld. counsel of the assessee submitted that grounds No. 1 to 3 deals with reopening of the assessment which are not pressed, therefore, these grounds are dismissed as not pressed.

213 Grounds No. 4 to 12 contain the issue regarding levy of capital gain tax for transfer of plot through the Society in terms of JDA.

214 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

215 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

216 Ground No. 13 is regarding charging of interest u/s 234B of the Act.

217 The Assessing Officer is directed to decide the issue of charging of interest u/s 234B of the Act, in accordance with law.

218 In the result, appeal of the assessee is dismissed.

ITA No. 1099/Chd/2011 – Sh. Rajesh Singhal V. ITO

ITA No. 1100/Chd/2011 – Smt. Neeraj V. ITO

219 These appeals are directed against the order of ld. CIT(A), Chandigarh dated 1.8.2011.

220 In both these appeals various grounds have been raised but at the time of hearing the ld. counsel of the assessee submitted that only two issues are involved which are as under:

(i) Taxability of capital gain

(ii) Denial of deduction u/s 54F of the Act

221 First issue – In these cases both the assessees are members of Defence Services Coop House Building Society

Ltd. and has entered into a development agreement with the developer i.e. THDC/HASH. The assessee is owner of 250 sqyd plot each and were entitled to cash consideration of Rs. 40 lakhs and furnished flat of 1150 sqft. The whole cash consideration and value of the flat has been subjected to be capital gain tax by the Assessing Officer and confirmed by the ld. CIT(A).

222 Both the parties adopted similar arguments given in the case of Shri Charanjit Singh Atwal (supra).

223 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

224 Second issue is regard denial of deduction u/s 54F of the Act. Both the parties were heard. The Issue has been adjudicated by us in ITA No. 1071/Chd/2011 which we have dealt above. In this case also similar findings have been given by ld. CIT(A). Following our earlier order in ITA No. 1071/Chd/2011, we dismiss this ground.

225 In the result, both the appeals are dismissed.

ITA No. 1156/CHD/2011 – Smt. Surjit Kaur Vs. ITO, Mohali

226 This appeal is directed against the order of CIT (Appeals) Chandigarh dated.23.08.2011.

227 This appeal is late by 22 days. The ld. counsel of the assessee submitted that delay is because the assessee is an illiterate lady and was staying in a village where she fell sick and could not consult a Lawyer and an affidavit to this effect has been filed.

228 The CIT-DR left the matter of condonation of delay to the discretion of the Bench.

229 After considering the rival submissions we are satisfied that the assessee had sufficient reason for not filing the appeal within the limitation period. Considering the fact that the appeal is late for 22 days only we condone the delay.

230 In this appeal various grounds have been raised but the ld. counsel of the assessee submitted that only three disputes are involved in this appeal which are as under:

(i) Reopening of assessment

(ii) Taxability of capital gain

(iii) Denial of deduction u/s 54F of the Act

231 First issue regarding reopening of assessment was not pressed before us, therefore, the same is dismissed as not pressed.

232 Regarding second issue the assessee is a member of Punjabi Coop Housing Building Society Ltd. and was owner of 500 sqyd plot. The Society had entered into an agreement for development with THDC/HASH and was entitled for cash consideration of Rs. 82,50,000/- and furnish a flat of 2250 sqft. Whole of cash consideration and value of furnish flat was subjected to capital gain tax by the Assessing Officer and confirmed by the ld. CIT(A).

233 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

234 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

235 Third issue is regarding denial of deduction u/s 54F - Both the parties were heard. The Issue has been adjudicated by us in ITA No. 1071/Chd/2011 which we have dealt above. In this case also similar findings have been given by ld. CIT(A).

Following our earlier order in ITA No. 1071/Chd/2011, we dismiss this ground.

236 In the result, appeal of the assessee is dismissed.

ITA No. 1178/CHD/2011 – Mrs. Bibi Jagir Kaur Vs. ITO, Mohali

237 This appeal is directed against the order of CIT (Appeals) Chandigarh dated.23.08.2011.

238 In this appeal various grounds have been raised but at the time of hearing the ld. counsel of the assessee submitted that mainly two disputes are involved in this appeal which are as under:

(i) Reopening of assessment

(ii) Taxability of capital gain

239 First issue - The ld. counsel of the assessee submitted with reference to reasons for reopening that perusal of the reasons would show that the Assessing Officer has issued notice u/s 148 to bring to tax Rs. 15 lakhs received during Financial Year 2006-07. In the re-assessment he has accepted capital gain of Rs. 15 lakhs but at the same time has taxed total capital gain at Rs. 1,62,33,044/-. From this it becomes clear that the Assessing Officer has not assessed the income for which the reasons were recorded u/s 147 which would mean that there were no reason to believe to show any income had escaped the assessment. This clearly shows that the Assessing Officer has no reason to believe that income has escaped the assessment. In this regard he relied on the following decisions:

CIT V. Atlas Cycle Industries (1989) 180 ITR 319 (PH)

CIT V. Gardhara Singh (2008) 173 Taxman 46 (PH)

Ranbaxy Laboratories V CIT (2011) 336 ITR 136 (Delhi)

CIT V. Jet Airways (I) Ltd. (2011) 331 ITR 236 (Bom)

CIT V. Shri Ram Singh (2008) 306 ITR 243 (Raj)

240 On the other hand, the ld. DR for the revenue submitted that first of all original return was processed u/s 143(1), therefore, in view of the decision of Hon'ble Supreme Court in case of ACIT V. Rajesh Jhaveri Stock Broker Pvt Ltd. 291 ITR 500 (S.C), notice u/s 148 can be issued particularly because the department has made enquiries in respect of Group Housing Societies and information was available that Punjabi Coop Housing Building Society Ltd. has transferred land, therefore, issuance of notice u/s 148 is justified. In any case at the time of recording the reasons, it is not necessary to reach a fool proof conclusion that particular item of income has escaped. What is required under the Act is only prima facie reasons. He also supported the order of the ld. CIT(A).

241 We have heard the rival submissions carefully. We do not find any force in the submissions of the ld. counsel of the assessee. The ld. CIT(A) has adjudicated this issue vide para 5.2 to 5.4 which are as under:

5.2 "I have considered the facts of the case. It is seen that there was information available with the Assessing Officer that the appellant, being a member of M/s Punjabi Co-Operative House Building Society Ltd. Mohali (who had 21.2 acres of land in village Kansal and had entered into an agreement with TATA and HASH for sale of land), had received Rs. 15 Lacs as consideration in this year and was liable to pay capital gain tax on sale of land. The appellant had declared Rs. 15 Lacs only as the sale consideration for the purposes of calculation of capital gain on sale of land in the return of income filed on 11.01.2010 and the correct value of capital gain had not been declared. As the full value of consideration was at least Rs. 1,83,75,000/- (82,50,000/- as monetary consideration and Rs. 1,01,25,000/- as cost of furnished flat of 2250 sq. feet), the Assessing Officer formed his reasons to believe that some income had escaped assessment and so issued notice u/s 148 of the Act.

5.3 The appellant has also contended that the reasons recorded do not disclose the date on which these were recorded. This issue was raised before the Assessing Officer also and has been duly dealt with in para 25 (page 17) of the assessment order. I have gone through the assessment records and find that notice u/s 148 was issued in this case on 07.12.2009. A notice u/s 148 cannot be issued without recording reasons and the reasons recorded are on file and so it cannot be said that the reasons were recorded after issuing the notice. The fact that no date is mentioned on the reasons recorded does not mean that reasons recorded are pre-dated. Moreover, the appellant has not come out with any evidence that the reasons were, in fact, recorded after issue of notice u/s 148. In may also be mentioned that in view of provisions of section 292 B

of the Act, the notice issued u/s 148 cannot be held invalid merely on the ground that no date was mentioned on the reasons recorded. Hence, the arguments taken by the appellant in this regard are rejected.

5.4It has been held by Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500) that at the stage of issue of notice u/s 148, the only question to be seen is whether there was relevant material, on the basis of which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at the stage of issue of notice u/s 148. It is so because the formation of belief is within the realm of the subjective satisfaction of the Assessing Officer. In view of this judgment of Hon'ble Supreme Court and by respectfully following the same, the action of the Assessing Officer of reopening the assessment is upheld. Grounds of appeal No. 2 & 3 are dismissed."

242 First of all admittedly the original return was processed u/s 143(1) and further from the enquiries made by the Department information was available that Punjabi Coop Housing Building Society Ltd. has transferred 21.2 acres of land through JDA to the developers i.e. THDC/HASH which means that the Assessing Officer had reasons to the believe that income has escaped. As observed by the ld. CIT(A) once the preliminary information is available then in view of the decision of Hon'ble Supreme Court in case of ACIT V. Rajesh Jhaveri Stock Broker Pvt Ltd. (supra), notice u/s 148 can be issued because no assessment u/s 143(3)has been framed originally.

243 Perusal of the reasons recorded by the Assessing Officer show that Assessing Officer has referred to the agreement entered into by the Society which shows that certain consideration has been received. He has referred to a sum of Rs. 15 Lakhs received in Financial Year 2006-07. But basically what he is referring is to the escapement of capital gains. It is settled position of law that at the time of reopening what is required is prima facie reasons and not conclusive proof for reopening the assessment. In this regard the recent observations of the Hon'ble Punjab & Haryana High Court in case of Arun Kumar Goyal V CIT, ITA No. 54/2012 vide order dated 21.11.2012, is important and relevant paras No. 12 to 14 reads as under:

"12 There is, however, a sea-change after the amendment in Section 147 for determining jurisdictional scope for re-assessment of the escaped income. The Hon'ble Supreme Court in Rajesh Jhaveri's case (supra) has explained and laid down that under the substituted Section 147 "existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment". It was further held that "so long as the ingredients of Section 147 are fulfilled, the Assessing Officer is free to initiate proceedings u/s 147 and failure to take steps u/s 143(3) will not render the Assessing Officer powerless to initiate re-assessment proceedings even when intimation u/s 143(1) had been issued.".

13 The expression "reason to believe" thus cannot be restrictively construed to say as if the Assessing Officer is obligated firstly to finally ascertain the factum of escaped income on the basis of admissible evidence and then only to issue shown cause to the assessee. The Hon'ble Supreme Court held that the final outcome of the proceedings initiated u/s 147 is not relevant and what is of relevance is the existence of reasons to make the Assessing Officer believe that there has been under-assessment of the assessee's income for a particular year.

14 It is explicit from the post-amendment decisions cited above that once there are reasons for the Assessing Officer to believe, whether such reasons originate out of the record already scrutinized for otherwise, he shall be within his competence to initiate the re-assessment proceedings. The formation of belief by the Assessing Officer must always be tentative and not a firm or final conclusion as the latter will negate the very object of giving an opportunity of hearing to the assessee as it will amount to post-decisional hearing."

10 From the above it emerges that only requirement for reopening the assessment is that there should be a reason to believe that income has escaped assessment and such reasons should be prima facie reason and there is no requirement that the Assessing Officer should finally ascertain the factum of the escapement of income at the stage of issuing of notice itself. Even Hon'ble Supreme Court in case of Raymond Woolen Mills V ITO, 236 ITR 34 has clearly held that at the stage of reopening of

assessment what is required is that there should be some prima facie material on the basis of which the Department would reopen the case. Head note of the decision reads as under:

> *"In determining whether commencement of re-assessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.*
>
> *Held, that the case of the Revenue was that the assessee was charging to its profit and loss account, fiscal duties paid during the year as well as labour charges, power, fuel, wages, chemicals etc. However, while valuing its closing stock the elements of fiscal duty and the other direct manufacturing costs were not included. This resulted in undervaluation of inventories and understatement of profits. This information was obtained by the Revenue in a subsequent year's assessment proceedings. The commencement of reassessment proceedings was valid."*

244 In view of the above legal position and the facts that original return was processed u/s 143(1) and no assessment was made u/s 143(3) of the Act the Assessing Officer was justified in issuing the notice u/s 148. The case law relied on by the ld. counsel of the assessee is not relevant because even if assessment has not been completed on capital gain of Rs. 15 lakhs but on larger amount of capital gain because of full value of consideration, the addition still remains under the head "capital gain" for which reasons were recorded. Thus it can not be said that the Assessing Officer has not assessed the income for which the reasons have been recorded. Further once an item of income was found to have escaped assessment during recording of the reasons then other items of income can also be examined. In any case in the case before us only larger amount of capital gain has been charged to tax in the reassessment proceedings. In view of this we confirm the action of the ld. CIT(A) for upholding the reopening of the assessment.

245 Second issue is regarding taxability of capital gain for transfer of plot to the Society in terms of JDA.

246 In respect of second issue both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

247 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

248 In the result, appeal of the assessee is dismissed.

ITA No. 1204/CHD/2011 – Mr. Balramji Dass Tandon Vs. ACIT

249 This appeal is directed against the order of CIT(Appeals) Chandigarh dated.02.09.2011.

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250 In this appeal various grounds have been raised but at the time of hearing the ld. counsel of the assessee submitted that in this case there are five disputes which are as under:

(i) Reopening of the assessment

(ii) Taxability of capital gain

(iii) Adjustment of taxes which has been paid in future years

(iv) Capital gain should have been levied in the hands of the Society and not in the hands of the assessee.

(v) Index cost of acquisition

251 Regarding First issue the ld. counsel of the assessee referred to page 12 to 14 of paper book which is copy of notice and copy of the reasons recorded and pointed out that copy of the reasons would clearly show that no date has been mentioned in the reasons, therefore, same cannot be said to have been recorded before issuance of notice. It was also pointed out by him that these reasons were supplied by the Department when the same were asked by the assessee.

252 On the other hand, the ld. DR for the revenue strongly relied on the order of ld. CIT(A) and submitted that even if the date was not put on the reasons same should be construed as a mistake which has to be ignored in view of Section 292B of the Act.

253 In the rejoinder, the ld. counsel of the assessee submitted that fatal mistake of not putting the date cannot be ignored in view of Section 292B particularly in the light of the decision of Hon'ble Punjab & Haryana High Court in case of CIT V. Norton Motors, 275 ITR 595.

254 We have heard the rival submissions carefully and do not find any force in the submissions of the ld. counsel of the assessee. First of all if the assessee had objection against the reasons recorded by the Assessing Officer same should have been pointed out to the Assessing Officer in the light of the decision of Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd. V ITO and Others, 259 ITR 19. This is particularly so because in the case before us, the reasons were supplied to the assessee by the Assessing Officer when the same were asked for. The Hon'ble Supreme Court has clearly held that when a notice u/s 148 is issued the assessee has the right to ask for the reasons for reopening the assessment. Once such reasons are supplied the assessee is required to file return as well as objections if any before the Assessing Officer and the Assessing Officer is duty bound to deal such objections. Despite of this clarification and the law no objections have been filed before the Assessing Officer. Further the issue regarding reopening has been adjudicated by the ld. CIT(A) vide para 5.1 to 5.2.3 which are as under:

> "5.1 *During the course of appellate proceedings, the Ld. Counsel for the appellant has filed a written submission, mainly submitting therein that the return of income was voluntarily revised by the appellant before issuance of notice u/s 148. The Ld. Counsel for the appellant has also submitted that no date is mentioned on the reasons recorded by the Assessing Officer and so the provisions of section 148(2) have been violated. The Ld. Counsel has relied upon the judgment of Hon'ble ITAT, Chandigarh in the case of Sh. Karanvir Singh Ghosal in ITA No. 377/Chd/2002 and of Hon'ble Punjab & Haryana High Court in the case of Sh. Baldev Singh Giani (248 ITR 266).*

5.2 I have considered the facts of the case. It is seen that there was information available with the Assessing Officer that the appellant, being a member of M/s Punjabi Co-operative House Building Society Ltd. Mohali (who had 21.2 acres of land in village Kansal and had entered into an agreement with TATA and HASH for sale of land), had received Rs. 15 Lacs as consideration in this year and was liable to pay capital gain tax on sale of land. The appellant had declared Rs. 15 Lacs only as the sale consideration for the purposes of calculation of capital gain on sale of land in the return of income filed on 30.10.2009. This return is non-est in the eyes of law, as it is not a revised return u/s 139 (5) of the Act and so the contention of the appellant that the return of income was revised before issuance of notice u/s 148 of the Act is not relevant. The correct value of capital gain had not been declared in the return of income filed by the appellant and since the full value of consideration was at least Rs. 1,83,75,000/- (82,50,000/- as monetary consideration and Rs. 1,01,25,000/- as value of furnished flat of 2250 sq. feet), the Assessing Officer formed her reasons to believe that some income had escaped assessment and so issued notice u/s 148 of the Act.

5.2.1 The appellant has also contended that the reasons recorded do not disclose the date on which these were recorded. This issue was never raised before the Assessing Officer; though the appellant had requested the Assessing Officer to intimate the reasons for issuing notice u/s 148 vide his letter dated 6.08.2010 and the Assessing Officer had provided the same vide letter dated 25th August 2010. I called for the assessment records from the office of the Assessing officer and perused the same. I find that the reasons for initiating action for reassessment are duly recorded by the assessing officer and these are available on records. In fact, a copy of the reasons recorded was supplied to the appellant on his request. Therefore it is clear that the reasons for initiating reassessment proceedings were recorded by the assessing officer. Of course, the note wherein such reasons are contained does not bear any date. It is mandatory that the reasons for reopening the assessment must be recorded by the assessing officer before the issue of notice under section 148. Therefore, the issue is – whether one can infer from the absence of the date on the note that the note was actually recorded after and not before the issue of notice under section 148? If the assessing office had not recorded this note before the issue of notice under section 148 and fudged the records and put this note in the file later on, what would have prevented her from putting a date on this note prior to the date of issue of the notice. In fact, such a safeguard would have certainly been taken by a person who had a dishonest intention. The very fact that this was not done shows the absence of mala fide on the part of the assessing officer. In a routine manner, she omitted to put a date on the note recorded. Many persons do not put date below their signatures. The fact that no date is mentioned on the reasons recorded does not mean that reasons were recorded after the issue of notice under section 148. Moreover, the appellant has

not come out with any evidence that the reasons were, in fact, recorded after issue of notice u/s 148. It may also be mentioned that in view of provisions of section 292B of the Act, the notice issued u/s 148 cannot be held invalid merely on the ground that no date was mentioned on the reasons recorded. The facts of the case of Hon'ble Punjab & Haryana High Court relied upon by the Ld. Counsel for the appellant are distinguishable, since in that case, the records of the department did not contain the reasons recorded by the Assessing Officer. Therefore that was a case of non-recording of reasons and not a case where the reasons are duly recorded but while signing the note, the assessing officer has not dated it. Hence, the arguments taken by the appellant in this regard are rejected.

5.2.2 The appellant has also relied upon the decision of Hon'ble ITAT, Chandigarh Bench in the case of Shri Karanvir Singh Gosal in ITA No. 377/Chd/2002. In that case, the Hon'ble ITAT has merely set aside the matter to the file of CIT (A) to give a finding on the validity of initiation of proceedings u/s 148. The Hon'ble ITAT had not given any finding in that case. Hence, the ratio of this judgment also does not apply to the facts of the instant case.

5.2.3 It has been held by Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500) that at the stage of issue of notice u/s 148, the only question to be seen is whether there was relevant material, on the basis of which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at the stage of issue of notice u/s 148. It is so because the formation of belief is within the realm of the subjective satisfaction of the Assessing Officer. The various judgments quoted by the Ld. Counsel for the appellant are distinguishable on facts. In view of this judgment of Hon'ble Supreme Court (291 ITR 500) and by respectfully following the same, the action of the Assessing Officer of reopening the assessment is upheld. Grounds of appeal No. 2,3 & 13 are dismissed."

255 From above it becomes clear that the reasons were recorded prior to date of issuing the notice. We have also perused the judgment of Hon'ble Punjab & Haryana High Court in case of Norton Motors (Supra). In that case the assessee was a partnership firm consisting of many partners. The Constitution of the firm was changed many times and lastly it was changed on March 15, 1978 whereby the profit was to be divided into the ratio of one third among three partners. However, as per the return the profit was divided equally among five partners. Accordingly notice was issued by the Ld. Commissioner to the assessee requiring it to show as to why Registration may not be withdrawn. Ultimately the Ld.

Commissioner directed the Assessing Officer to distribute the profits among three partners. The assessee filed an appeal before the Tribunal. The Tribunal noted that the Ld. Commissioner has proposed the cancellation of the registration granted to the firm on the ground of violation of conditions of the partnership deed in the matter of allocation of shares but ultimately did not cancel the Registration and therefore, the Ld. Commissioner could not have directed the ITO to change share allocation among the partners. Against this order the Revenue filed an appeal before the Hon'ble High Court and defended the order in view of Section 292B. Hon'ble High Court after referring Section 292B observed as under:

> *"A reading of the above reproduced provision makes it clear that a mistake, defect or omission in the return of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an action taken by the competent authority, provided that such return of income, assessment, notice summons or other proceeding is in substance and effect in conformity with or according to the provisions of the Act. To put it differently, section 292 B can be relied upon for resisting a challenge to the notice, etc., only if there is a technical defect or omission in it. However, there is nothing in the plain language of that section from which it can be inferred that the same can be relied upon for curing a jurisdictional defect in the assessment notice, summons or other proceeding. In other words, if the notice, summons or other proceeding taken by an authority suffers from an inherent lacuna affecting his/its jurisdiction, the same cannot be cured by having resort to section 292B."*

256 From above it becomes clear that what can be saved in view of Section 292B, is a mistake or defect or omission in an assessment, notice, summons or other proceedings. But the same could not be invoked to validate for curing jurisdictional defect. In our view the fact of not mentioning the date is not a jurisdictional defect and it can be treated as a simple case of mistake or typographical mistake of omission. Therefore, the ld. CIT(A) has correctly adjudicated the issue and accordingly we confirm his order.

257 In respect of second issue of chargeability of capital gain - After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

258 Third issue – After going through the record, we find that this issue has not been adjudicated by the ld. CIT(A), therefore, in the interest of justice, we remand this matter to the file of ld. CIT(A) for adjudication of the issue regarding adjustment of taxed paid in future years.

259 Fourth issue – Both the parties were heard.

260 After considering the rival submissions we find that this issue has also been adjudicated by us while adjudicating Ground No. 3 in case of Shri Charanjit Singh Atwal (supra) and following that order, we reject this ground.

261 5th issue – The ld. counsel of the assessee submitted that the Assessing Officer has not allowed full cost of acquisition and benefit of indexation before calculating capital gain.

262 On the other hand, the ld. DR for the revenue supported the order of the Assessing Officer.

263 After considering the rival submissions we find that we have already confirmed the charging of capital gain tax on whole of the consideration, therefore, whole cost of acquisition has to be considered. Since the details are not available therefore, we set aside the issue to the file of Assessing Officer with a direction to compute the capital gain tax after allowing full cost of acquisition after applying inflation index on the same.

264 In the result, appeal of the assessee is allowed for statistical purposes.

ITA No. 1205/CHD/2011 - Mrs. Satwant Kaur Sandhu Vs. DCIT

265 This appeal is directed against the order of CIT(Appeals) Chandigarh dated.23.09.2011.

266 In this appeal various grounds have been raised but at the time of hearing the ld. counsel of the assessee submitted that there are four disputes involved in this appeal which are as under:

(i) Chargeability of capital gain

(ii) Mistake in calculating the cost of acquisition

(iii) Interest u/s 234B

(iv) Deduction u/s 54F

267 In respect of first issue - Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

268 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

269 Second issue – The ld. counsel of the assessee submitted that the Assessing Officer has not allowed full cost of acquisition and benefit of indexation before calculating capital gain.

270 On the other hand, the ld. DR for the revenue supported the order of the Assessing Officer.

271 After considering the rival submissions we find that we have already confirmed the charging of capital gain tax on whole of the consideration, therefore, whole cost of acquisition has to be considered. Since the details are not available therefore, we set aside the issue to the file of Assessing Officer with a direction to compute the capital gain tax after allowing full cost of acquisition after applying inflation index on the same.

272 Third issue is regarding denial of deduction u/s 54F of the Act. Both the parties were heard. The Issue has been adjudicated by us in ITA No. 1071/Chd/2011 which we have dealt above. In this case also similar findings have been given by ld. CIT(A). Following our earlier order in ITA No. 1071/Chd/2011, we dismiss this ground.

273 Fourth issue is regarding chargeability of interest u/s 234B which is of consequential in nature and the Assessing Officer is directed to decide this issue in accordance with law.

274 In the result, appeal of the assessee is dismissed.

ITA No. 1219/CHD/2011 – Mr. Santosh Chaudhary Vs. DCIT,

275 This appeal is directed against the order of CIT (Appeals)-Chandigarh dated.20.09.2011

276 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only three disputes are involved in this appeal which are as under:

(I) Reopening of assessment

(ii) Chargeability of capital gain

(iii) Deduction u/s 54F

277 Since the issues raised in this appeal were covered by other group of cases and particularly the lead case in case of Shri Charanjit Singh Atwal in ITA No. 448/Chd/2011 and therefore, we proceeded to hear this appeal on ex-parte basis because in this group of cases it was clarified that there appeals will be heard on 1st /2nd May, 2013 but despite that none appeared on behalf of the assessee.

278 The ld. DR for the revenue was heard.

279 In this case original return was processed u/s 143(1) and information came from the Department that the assessee is a Member of Punjabi Coop Housing Building Society Ltd. which has transferred the land to the developer i.e. THDC/HASH. Since the original return was processed u/s 143(1) and notice u/s 148 was issued, the issue regarding reopening of the assessment has been adjudicated by the ld. CIT(A) vide para 4.2 to 4.2.3 of impugned order which are as under:

> *"4.2 I have considered the facts of the case. The contention of the appellant that the preliminary objections against issue*

of notice u/s 148 were not disposed off by the Assessing Officer is not correct. The objection raised by the appellant has been reproduced in para 4.1 of the assessment order and the Assessing Officer has duly disposed off the objection in para 5 of the assessment order as under:

> *"As regards the objection of the assessee mentioned above that the income has not been quantified which had escaped assessment, it is stated that the total income escaped from the assessment has duly been quantified in para 2 & para 3 of the reasons for reopening the case under section 147/148 of I.T. Act. The complete details of the total consideration to be received and the manner in which to be received have been mentioned in the reasons for reopening the case u/s 147/148 of the I.T. Act. Therefore the objections raised in this regard are not sustainable.*

4.2.1 As per the decision of the Apex Court in the case of GKN Driveshafts (India) Ltd. (supra), the preliminary objection against issue of notice u/s 148 of the Act has to be disposed off by passing a speaking order and this has been done by the Assessing Officer even before discussing about the disallowance / additions in the assessment order. Further, as per the reasons recorded, the appellant's income exceeded the maximum amount chargeable to tax.

4.2.2 It is seen that there was information available with the Assessing Officer that the appellant, being a member of M/s Punjabi Co-operative House Building Society Ltd. Mohali (who had 21.2 acres of land in village Kansal and had entered into an agreement with TATA and HASH for sale of land), had received Rs. 15 lakhs as consideration in this year and was liable to pay capital gain tax on sale of land. The appellant had declared Rs. 15 Lacs only as the sale consideration for the purposes of calculation of capital gain on sale of land in the return of income filed and the correct value of capital gain had not been declared. As the full value of consideration was at least Rs. 1,83,75,000/- (82,50,000/- as monetary consideration and Rs. 1,01,25,000/- as cost of furnished flat of 2250 sq. feet), the Assessing Officer formed his reasons to believe that some income had escaped assessment and so issued notice u/s 148 of the Act.

4.2.3 *It has been held by Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500) that at the stage of issue of notice u/s 148, the only question to be seen is whether there was relevant material, on the basis of which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at the stage of issue of notice u/s 148. It is so because the formation of belief is within the realm of the subjective satisfaction of the Assessing Officer. In view of this judgment of Hon'ble Supreme Court and by respectfully following the same, the action of the Assessing Officer of reopening the assessment is upheld. Ground of appeal No. 1 is dismissed. "*

280 After considering the submissions of the ld. DR for the revenue and the material on record, we find nothing wrong in the order of ld. CIT(A) because original return was processed u/s 143(1) and therefore, issuance of notice u/s 148 is justified particularly in view of the decision of Hon'ble Supreme Court in case of ACIT V. Rajesh Jhavery Stock Broker (supra). Further the issue regarding objections raised has been dealt by the ld. CIT(A) and we decline to interfere in his order.

281 Second issue - After considering the submissions of the ld. DR for the revenue and the material on record, we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

282 Third issue - Both the parties were heard. The Issue has been adjudicated by us in ITA No. 1071/Chd/2011 which we have dealt above. In this case also similar findings have been given by ld. CIT(A). Following our earlier order in ITA No. 1071/Chd/2011, we dismiss this ground.

283 In the result, appeal of the assessee is dismissed.

ITA No. 1223/CHD/2011– Mr. Tej Prakash Singh Vs. DCIT

284 This appeal is directed against the order of CIT (Appeals)-, Chandigarh dated.28.09.2011

285 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only three disputes are involved in this appeal which are as under:

(I) Chargeability of capital gain

(ii) Deduction u/s 54F

(iii) Reopening of assessment

286 The issue regarding reopening of the assessment was not pressed before us and the same is dismissed as not pressed.

287 In respect second issue regarding chargeability of capital gain – both the parties submitted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

288 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

289 Regarding third issue the ld. counsel of the assessee made identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

290 On the other hand, the ld. DR for the revenue strongly relied on the order of the ld. CIT(A).

291 After considering the rival submissions we find that this issue has been adjudicated by the ld. CIT(A) vide para 6.1 and 6.2 which are as under:

> "*6.1 Brief facts on the issue are that the appellant had claimed before the Assessing Officer that he had invested the amount of Rs. 51 Lacs for purchase of residential house and so deduction of this amount should be allowed out of long term capital gain u/s 54 F of the Act. The Assessing Officer noticed that only Rs. 14 Lacs had been invested before due date of filing of return and so he restricted deduction u/s 54 F to Rs. 14 Lacs.*
>
> *6.2 As per the provisions of section 54F(4), the deduction u/s 54 F is to be allowed only of the amount which has been deposited in the capital gain scheme or invested in purchase of residential property before the due date of filing of return of income. It is seen that only Rs. 14 Lacs has been invested before the due date of filing of return and so deduction u/s 54 F is to be restricted Rs. 14 Lacs. The Assessing Officer has rightly calculated the deduction u/s 54 F at Rs. 14 Lacs and his action in this regard is upheld. Grounds of appeal No. 4 & 5 are dismissed."*

292 The above clearly shows that benefit of Section 54F has been denied because the assessee had invested only a sum of Rs. 14 lakhs before due date of filing of return. Section 54F clearly provides that if a residential house is purchased within two years from the date on which transfer took place then deduction has to be allowed. In the case before us, we have held that whole of the consideration to be taxable therefore, if the assessee has invested any further sum within a period of two years from the date of transfer then the same has to be allowed u/s 54F of the Act. Therefore, we set aside the order of the Ld. CIT(A) and remit the matter to the file of Assessing Officer with a direction to verify whether any further payments have been made by the assessee and if so then deduction has to be allowed accordingly .

293 In the result, appeal of the assessee is dismissed.

ITA No. 1238/CHD/2011– Sh. Ranjit Singh Vs. The ITO,

294 This appeal is directed against the order of CIT (Appeals), Chandigarh dated 11.11.2011.

295 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only three disputes are involved in this appeal which are as under:

(I) Reopening of assessment

(ii) Chargeability of capital gain in respect of flat to be received by the assessee on hypothetical basis @ Rs. 4500 sqft

(iii) Deduction u/s 54F

296 First issue regarding reopening of assessment was not pressed by the ld. counsel of the assessee and the same is dismissed as not pressed.

297 In addition to above an application dated 1.5.2013 has been made for admission of addition ground which are as under:

> "1 That the ld. CIT(A) has further erred in upholding the addition of Rs. 80,00,000/- as the alleged consideration

received in cash which in fact has not been received till date except Rs. 32,00,000/- and as such the addition upheld is illegal, arbitrary and unjustified.
2 That the ld. CIT(A) has erred in holding hat the transaction was squarely covered by the provisions of section 2(47) r.w.s. 45 and 48 which is arbitrary and unjustified.

4 That in any case, Section 53A of the Transfer of Property Act is not applicable to unregistered documents as in the instant case and as such the addition made and sustained on the basis of an unregistered agreement is illegal, arbitrary and unjustified."

298 The ld. counsel of the assessee submitted that in above two grounds assessee has challenged the levy of capital gain and various aspect of such capital gain. However, he admitted that arguments in respect of these additional grounds and the ground No. 1 of the assessee's appeal in respect of considering Rs. 4500/- as cost of flat on hypothetical basis, are identical as given in the case of Shri Charanjit Singh Atwal (supra).

299 On the other hand, the ld. DR for the revenue left it to the discretion of the Bench.

300 After considering the rival submissions we find that two additional grounds in respect of charging of capital gain, have been raised which has been argued in detail in case of Shri Chranjit Singh Atwal (supra) and therefore, the same are admitted therefore, these additions were deleted.

301 Since both the parties adopted identical arguments as in the case of Shri Chranjit Singh Atwal (supra). In this case also we following the decision of Shri Charanjit Singh Atwal, decide the issue raised in grounds No. 1,2 & 3 and additional grounds i.e. issue of chargeability of capital gain against the transfer of plot of 500 sqyd, held by the assessee in Defence Services Coop House Building Society Ltd., against the assessee.

302 In respect of third issue, the ld. counsel of the assessee referred to the submissions made before the ld. CIT(A) and relied on the same.

303 On the other hand, the ld. DR for the revenue also relied on the order of the ld. CIT(A).

304 After considering the rival submissions we find that the ld. CIT(A) has summarized the submissions of the ld. counsel of the assessee in respect of deduction u/s 54F as under:

> "During the year under consideration and out of part consideration received, the appellant constructed residential house and invested an amount of Rs. 32 Lacs on its construction. In the course of assessment proceeding, necessary evidence was produced before the Ld. A.O. vide our letter dated 13.12.2010. Photo copy of the said letter is enclosed marked as Annexure "A". In the computation chart filed with the return of income on 17/12/2009, the long term capital gain of Rs. 26,36,402/- was worked out as per return filed and the assessee claimed exemption u/s 54 F for Rs. 26,36,402/- i.e. to the extent of Long Term capital gain as shown in the return and the same was allowed. Copy of Computation chart is enclosed marked as Annexure "B"
>
> *However, while computing the long term capital gain in the assessment order passed u/s 143(3)/147, the Ld. A.O. has wrongly restricted the claim of exemption u/s 54F at Rs. 26,36,402/- instead allowing to the extent of Rs. 32 Lacs i.e. the amount which was invested in the construction of residential house and evidence for which was provided by the appellant and examined by the Ld. A.O. As such the exemption u/s 54 F is wrongly allowed at Rs. 26,36,402/- instead of Rs. 32 Lacs on this account for which necessary evidence was provided in the course of assessment proceedings.*
>
> *Even the assessee had filed an application for rectification u/s 154 for this purpose vide letter dated 27.01.2011 duly acknowledged by the Ld. A.O. on 31.01.2011 and till date no rectification order either making the amendment or refusing to allow the claim has been passed. Whereas, as per provisions of sub Section 8 of Section 154, the Ld. A.O. was duly bound to passed the order within a period of six months from the end of month in which the application was received by him. In this case the period of six month has already been expired on 31.07.2011 and no order has been passed, as such the contention of assessee stands accepted and the appellant is entitled to further exemption to the extent of Rs. 563,598/-. Copy of application of rectification filed u/s 154 dated 27.01.2011 is enclosed marked as annexure 'C'.*
>
> *In view of above submission the order of the Ld. Income Tax Officer VI(2) Ludhiana is against law and facts of the case as such is liable to be quashed and humbly preyed that the returned income of the appellant be accepted and appeal be allowed."*

305 We further find that the ld. CIT(A) adjudicated the issue vide para 6 which is as under:

> *"5. After going through the facts of the issue and submissions of the appellant reproduced as above. The AO is directed to verify the same from the relevant record and dispose of appellant's pending application u/s 154 as per law. "*

306 We find nothing wrong in the above finding of the ld. CIT(A) and therefore, we direct the Assessing Officer to verify the claim and allow the same accordingly .

307 In the result, appeal of the assessee is partly allowed for statistical purposes.

ITA No. 3/CHD/2012 – Mr. Bhag Singh Sidhu Vs. The DCIT, Punjab

308 This appeal is directed against the order of CIT (Appeals)- II, Ludhiana dated.24.10.2011.

309 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only three disputes are involved in this appeal which are as under:

(I) Reopening of assessment

(ii) Chargeability of capital gain

(iii) Deduction u/s 54F

310 First issue of reopening the assessment was not pressed before us and the same is dismissed as not pressed.

311 In respect of second issue regarding chargeability of capital gain both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

312 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

313 Third issue regarding deduction u/s 54F, ld. counsel of the assessee adopted identical arguments as in the case of Shri Chranjit Singh Atwal (supra).

314 On the other hand, the ld. DR for the revenue supported the order of the ld. CIT(A).

315 After considering the rival submissions we find that the issue regarding Section 54F has been adjudicated by the ld. CIT(A) vide para 5.7p which is as under:

> *"As regards applicability of Section 54F, there are certain conditions which are attached with Section 54F also which have to be fulfilled before which exemption under that section is available to the assessee. The assessee has not even tried to make any claim by showing that he has fulfilled the said conditions to be eligible for exemption u/s 54F. So exemption cannot be given in such a situation u/s 54F."*

Relevant portion of Section 54F reads as under:

"54F. (1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereinafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two year after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say-,

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45;

***Provided** that nothing contained in this sub-section shall apply where –*

(a)the assessee,-

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

(iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

(b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".

The above clearly shows that certain conditions are required to be fulfilled particularly the condition that the assessee is required to purchase the house within a period of two years from the date of transfer. No material has been furnished before us to show that the assessee has purchased such a new house or even constructed a new house and accordingly we find no merit in the claim for deduction u/s 54F of the Act. Therefore, we find nothing wrong with the order of the ld. CIT(A) and confirm the same.

316 In the result, appeal of the assessee is allowed for statistical purposes.

ITA No. 765/CHD/2012– Ms. Manmohan Kaur Vs. The ACIT,

317 This appeal is directed against the order of CIT (Appeals), Chandigarh dated.08.05.2012

318 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only three disputes are involved in this appeal which are as under:

(i) Chargeability of capital gain

(ii) Deduction u/s 54F

(iii) Levy of interest u/s 234B/234C

319 In respect of issue No. 1 regarding chargeability of capital gain – both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

320 After considering the rival submissions we find that the assessee is a Member of Defence Services Coop House Building Society Ltd. and was holding a plot of 500 sqyd. The Society sold the land to the developer THDC/HASH. All the facts are identical with the facts in case of Shri Charanjit Singh Atwal (supra) except that in this case the value of 2250 sqft to be received by the assessee has been adopted at the rate of Rs. 5000 per sqft. Following the decision of Shri Charanjit Singh Atwal (supra) we decide the issue against the assessee. However, we see no reason for adoption of Rs.5000/- per sqft rate for the flat in this case whereas in other cases the value of the flat has been taken at Rs. 4500 per sqft, therefore, we set aside the order of the ld. CIT(A) and remit the matter back to the file of Assessing Officer with a direction to adopt the value of 4500 per sqft in respect of 2250 sqft flat which is to be received by the assessee.

321 Third issue is regarding denial of deduction u/s 54F of the Act. Both the parties were heard. The issue has been adjudicated by us in ITA no. 1071/Chd/2011 which we have dealt above. In this case also similar findings have been given by the ld. CIT(A). Following our earlier order in ITA No. 1071/Chd/2011, we dismiss this ground.

322 Third issue regarding chargeability of interest u/s 234B and 234C is of consequential nature and the Assessing Officer is directed to decide the issue in accordance with law.

323 In the result, appeal of the assessee is allowed for statistical purposes.

ITA No. 858/CHD/2011– Mr. Shri Parminder Singh Mavi Vs. ITO

324 This appeal is directed against the order of CIT (Appeals), Chandigarh dated.30.07.2012

325 In this appeal following grounds are raised:

> *"1 That the learned CIT(A) has erred in law and on facts in upholding reopening of proceedings U/s 144/147 which were*

not valid as no copy of the reasons recorded were furnished to the appellant.
2 That the learned CIT(A) has taxed capital gain on notation consideration not received by the appellant which is erroneous in law. Handing over of possession of property was conditional in order to enable the builder to obtain necessary permission from the Govt. Agencies. There is no transfer of property as envisaged u/s 2(47) (vi) of the Income Tax Act 1961.
3 That the Learned CIT(A) has fallen in error in including the cost of flats on estimation basis which could not be ascertained as no construction or other activity has been commenced by the Developer and hence no capital gains could be levied on the cost of flats on the date of the agreement i.e.27.04.2007. That, the Assessing Officer has fallen in error and has misconstrued the terms of the agreement dated 27.04.2007.
4 That the learned CIT(A) has also not allowed deduction u/s 54 F which was eligible to the applicant since, he has included the cost of proposed flat in the sale consideration."

326 Out of above, grounds No. 1& 4 were not pressed before us and same are dismissed as not pressed.

327 Grounds No. 2 & 3 - Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

328 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

329 In the result, appeal of the assessee is dismissed.

ITA No. 196/CHD/2013– Mr. Amrik Singh Vs. The ITO

330 This appeal is directed against the order of CIT (Appeals)-II,Ludhiana dated.21.12.2012

331 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only dispute is regarding chargeability of capital gain.

332 Both the parties adopted identical arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

333 After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

334 In the result, appeal of the assessee is dismissed.

ITA No. 1301/CHD/2012– Mr. Devinder Singh Cheema Vs.ITO

335 This appeal is directed against the order of CIT (Appeals)- II, Ludhiana dated.15.11.2012

336 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only two disputes are involved in this appeal which are as under:

(i) Chargeability of capital gain

(ii) Deduction u/s 54 F

337 Regarding issue No. 1 in respect of chargeability of capital gain - After considering the rival submissions we find that identical issue has been dealt in case of Shri Charanjit Singh Atwal (supra) and following the decision in that case we decide this issue against the assessee.

338 Regarding deduction u/s 54F the ld. counsel of the assessee pointed out that the issue regarding deduction u/s 54F was raised before the ld. CIT(A) by way of additional ground but the same has not been adjudicated.

339 On the other hand, the ld. DR for the revenue relied on the order of the ld. CIT(A).

340 Regarding issue No. 2 in respect of deduction u/s 54F which was raised by way of additional ground before the ld. CIT(A) has not been adjudicated by the ld. CIT(A), therefore, we set aside the order of ld. CIT(A) and remit the matter back to his file with a direction to decide the issue after providing adequate opportunity to the assessee.

341 In the result, appeal of the assessee is partly allowed for statistical purposes.

ITA No. 556/CHD/2012– The Punjabi Coop House Building Society Ltd. V DCIT

342 This appeal is directed against the order of CIT (Appeals), Chandigarh dated.12.12.2011.

343 In this appeal various grounds have been raised but at the time of hearing, the ld. counsel of the assessee submitted that only two disputes are involved in this appeal which are as under:

(i) Reopening of assessment

(ii) Chargeability of capital gain

344 First issue regarding reopening of assessment was not pressed before us and the same is dismissed as not pressed.

345 Second issue regarding chargeability of capital gain – During the assessment proceedings the Assessing Officer noticed that the assessee society has also transferred four plots which were owned by the Society along with plots of the Members for which resolution was passed by the Society for surrender of membership rights by the Members, to the developer i.e. THDC/HASH by execution of a JDA. Firstly it was submitted that on the basis of mutuality the Society had basically purchased land and allotted the plots to the Members, therefore, on principal of mutuality in respect of transfer of four plots could not be subjected to tax. Secondly even if such income was to be taxed the same should have been taxed under the head “business and profession” The Assessing Officer did not agree with the submissions and observed that since the plots have been

transferred to the outsiders therefore, principal of mutuality will not apply and since it is a case of transfer of property same has to be subjected to tax under the head "capital gain". Other arguments that this is not a case of transfer, are similar to the arguments made in case of Shri Charanjit Singh Atwal (supra) which were also rejected.

346 On appeal the ld. CIT(A) adjudicated this issue on similar line as in the case of Shri Charanjit Singh Atwal (supra). Further it was observed by the ld. CIT(A) in paras 3.2 and 3.2.1 as under:

> "3.2 *I have considered the submission of the Ld. Counsels for the appellant. The Society entered into a joint development agreement with HASH and THDC on 25.02.2007, as per which it was agreed that the Society, owner of 21.2 Acres of land, would transfer all its land to HASH in lieu of monetary consideration and consideration in kind. As per clause 2.1 of this document, the owner, at the time of agreement, irrevocably and unequivocally granted and assigned in perpetuity all its rights to develop, construct, mortgage, lease license, sell and transfer the property i.e.21.2 Acres of land alongwith any or all the construction, premises, hereditaments, easements, trees thereon in the favour of THDC for the purpose of development, construction, mortgage, sale, lease, license and / or exploitation for full utilization of the property and to execute all the documents necessary to carry out, facilitate and enforce the rights in the property. Thus, the owner has irrevocably and unequivocally granted and assigned in perpetuity all the rights of the owner in lieu of consideration which includes monetary consideration and immovable property, termed as "entire consideration" in the agreement. The appellant society was left with four plots of 500 sq. yards, which had not been allotted to any of the members. These four plots were also transferred to HASH in lieu of monetary consideration and consideration in kind. The appellant society was to receive Rs. 3,30,00,000/- in addition to four flats of 2250 sq. ft each, worth Rs. 4,05,00,000/- .*
>
> *3.2.1 The contention of the appellant is that the amount received by the appellant from HASH was assessable as business income and not as capital gains. This contention of the appellant is not acceptable because this is not a case where plots of the land have been allotted to the members of the appellant society. Plots have been transferred to a third party and therefore the profit arising from sale / transfer of these plots is liable to be taxed as capital gains in the hands of the society."*

347 Before us, both the parties adopted similar arguments which were given in the case of Shri Charanjit Singh Atwal (supra).

348 After considering the rival submissions we find that the Society has purchased 21.2 aces of land in village Kansal. The land was developed into various plots and the plots in the size of 500sqyd and 1000sqyd were allotted to 95 members. These members through a General Body Meeting resolution dated 4.1.2007 agreed to surrender the rights of their plots so that the Society could enter into JDA with the developer i.e. THDC/HASH for development and transfer of the property. It seems that four plots were there which were not allotted. These plots obviously would become property of the Society because same remained un-allotted. It is a common practice that cooperative housing societies purchase a particular piece of land and develop the same into plots. Some plots always remain un-allotted because at that point of time some new members may join the Society to whom such plots could be allotted. If such plots have not been allotted then they would obviously be the property of the Society. In other words, the Society was owner of such plots on the date of entering the JDA. The issue regarding ownership came for consideration before the Hon'ble Supreme Court in case of CIT V. Podar Cement Pvt Ltd. and others, 226 ITR 625 wherein it was held as under:

> "*Hence, though under the common law "owner" means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, the Registration Act, etc., in the context of section 22 of the Income-tax Act, 1961, having regard to the ground realities and further having regard to the object of the Income tax Act, namely, to tax the income, "owner" is a person who is entitled to receive income from the property in his own right. The requirement of registration of the sale deed in the context of section 22 is not warranted."*

349 In the case before us when the plots remain unallotted and obviously legal ownership and beneficial ownership belonged to the Society. Had the plots been allotted to some members before entering into the JDA then it could have been said that the plots have already been allotted and therefore, the Society was not responsible for the same. Once the plots were owned by the assessee obviously the transfer of the same would lead to arising of profit which has to be taxed u/s 45. We are of the opinion that lower authorities have correctly rejected the arguments that income from such plots, if any, should be charged under the head "business

profits" because it is a settled law that if an income falls under specific head of income contained in Section 14 under Chapter IV then the same has to be taxed under that head. We have already dealt with the other arguments in case of Shri Charanjit Singh Atwal (supra) and following the same we decide the issue against the assessee.

350 In the result, appeal of the assessee is dismissed.

ITA No. 310/CHD/2012– DCIT V. Punjabi Cooperative Housing Building Society

351 This appeal is directed against the order of CIT (Appeals), Chandigarh dated.12.12.2011.

352 In this appeal following grounds have been raised:

> *"1 On the facts and in the circumstances and in law the ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.*
>
> *2 On the facts and in the circumstances and in law, the ld. CIT(A) has erred in allowing relief to the appellant society, even though the land has been registered in the name of the society in Land Records and members of the society are only shareholders.*
>
> *3 On the facts and in the circumstances, the ld. CIT(A) has erred in allowing relief to the appellant society even though the society had entered into agreement with the Developers with the due approval of the member who had surrendered their rights in their respective plots."*

353 At the time of hearing, the ld. DR for the revenue pointed out that only dispute revenue has is that the ld. CIT(A) has deleted the addition on protective basis made in respect of development sale consideration of Rs. 234 crores.

354 Before us the ld. DR for the revenue relied on the grounds of appeal.

355 On the other hand, the ld. counsel of the assessee adopted the arguments made in case of Shri Charanjit Singh Atwal (supra) in respect of ground no. 3 in that appeal.

356 After considering the rival submissions we find that in the assessment order it has been observed by the Assessing Officer that to prevent leakage of revenue entire consideration of Rs. 234 crores consisting of monetary consideration to be received by the members and consideration in the form of flats to be received by the members, was assessed on protective basis in the hands of the society.

357 We have already adjudicated this issue vide para No. 111 to 113 in relation to ground no. 3 incase of Shri Charanjit Singh Atwal (supra) where it has been held that it is individual member who is responsible for paying the taxes. We would reiterate that the plots were allotted by the society to the individual members and it was the members who surrendered their rights in the plots in favour of the Society so that the Society could enter into JDA for transfer of property in favour of the developer i.e. THDC/HASH. Consideration has been fixed in terms of per member depending upon the size of plots held by such members. Therefore, it was the individual member who was owner of the property which has been transferred to the Society through developer and accordingly it is only the individual member who has to be charged under the head “capital gain” in respect of transfer of such plots. Since we have already held that it is the individual members who are liable to pay the taxes, therefore, in our opinion, protective addition made in the hands of the society, needs to be deleted and has been rightly deleted by the ld. CIT(A). Accordingly we find nothing wrong with the order of the ld. CIT(A) in this respect and confirm the same.

358 In the result, appeal of the revenue is dismissed.

359 In the result,

ITA No.	Appeal by	Result
448/Chd/2011	Shri Charanjit Singh Atwal	Partly Allowed
276/Chd/2012	Revenue V. Shri Satpal Gosain	Allowed
986/Chd/2011	Shri Avtar Singh Brar	Dismissed
993/Chd/2011	Smt. Surjit Kaur	Dismissed
1064/Chd/2011	Shri Sucha Singh Langah	Dismissed
1070/Chd/2011	Shri Madan Mohan Mittal	Dismissed
1071/Chd/2011	Shri Surinder Singh	Dismissed
1072/Chd/211	Smt. Gurdev Kaur	Dismissed
1073/Chd/2011	Shri Tara Singh Ladal	Dismissed
1074/Chd/2011	Smt. Satwinder Kaur Dhaliwal	Dismissed
1088/Chd/2011	Smt. Neena Chaudhary	Dismissed
1089/Chd/2011	Smt. Krishna Raghu	Dismissed
1090/Chd/2011	Shri Gaurav Raghu	Dismissed
1092/Chd/2011	Shri Balwinder Singh Bhunder	Dismissed
1099/Chd/2011	Shri Rajesh Singhal	Dismissed
1100/Chd/2011	Smt. Neeraj	Dismissed
1156/Chd/2011	Smt. Surjit Kaur	Dismissed
1178/Chd/2011	Smt. Bibi Jagir Kaur	Dismissed
1204/Chd/2011	Shri Balramji Dass Tandon	Partly Allowed
1205/Chd/2011	Smt. Satwant Kaur Sandhu	Dismissed
1219/Chd/2011	Shri Santosh Chaudhary	Dismissed
1223/Chd/2011	Shri Tej Prakash Singh	Dismissed
1238/Chd/2011	Shri Ranjit Singh	Partly Allowed
3/Chd/2012	Shri Bhag Singh Sidhu	Partly Allowed
765/Chd/2012	Ms. Manmohan Kaur	Partly Allowed
858/Chd/2011	Shri Parminder Singh Mavi	Dismissed
196/Chd/2013	Shri Amrik Singh	Dismissed
1301/Chd/2012	Shri Devinder Singh Cheema	Partly Allowed
556/Chd/2012	The Punjabi Coop House Building Society Ltd.	Dismissed
310/Chd/2012	Revenue V. The Punjabi Coop House Building Society Ltd.	Dismissed

Order pronounced on 29.7.2013

Sd/-
(SUSHMA CHOWLA)
JUDICIAL MEMBER

Sd/-
(T.R. SOOD)
ACCOUNTANT MEMBER

Dated : 29.7.2013

SURESH/KASHYAP

Copy to: The Appellant/The Respondent/The CIT/The CIT(A)/The DR