IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA.No.966/Hyd/2013
Assessment Year 2005-2006

M/s. Andhra Networks Limited, Hyderabad. PAN AAECA0302L (Appellant)	vs.	The DCIT, Circle 1(1) Hyderabad. (Respondent)

For Assessee : Mr. S. Ananthan
For Revenue : Mr. YVST Sai

Date of Hearing : 25.09.2014
Date of Pronouncement : 26.11.2014

ORDER

PER B. RAMAKOTAIAH, A.M.

This appeal by assessee is against the order of Ld. CIT(A)-V, Hyderabad dated 27.02.2013. Assessee in the course of present appeal filed concise revised grounds which are as under :

1. *"The order of the learned Commissioner (Appeals) is bad in law and against the facts of the case.*

2. *The learned Commissioner (Appeals) erred in confirming the addition of Rs.7,98,69,745/- under the head short term capital gains.*

3. *The learned Commissioner (Appeals) failed to appreciate the fact that there was no transfer of a capital asset u/s 2(47) or u/s 45(3) of the Income Tax Act, 1961.*

    3.1. *The learned Commissioner (Appeals) erred in holding that there was a transfer of capital asset within the meaning of Sec 45(3), when*

there was no transfer u/ 2(47) of the Income Tax Act, 1961.

3.2. The learned Commissioner (Appeals) failed to appreciate the fact that the assessee did not possess any capital asset which it was capable of transferring.

3.3. The learned Commissioner (Appeals) erred in relying on the general covenants in the agreement which do not determine the transfer.

4. The learned Commissioner (Appeals) failed to appreciate the fact that the books of accounts and the Balance Sheet relied on by him are not the approved books of accounts of M/s. Embassy-ANL Consortium.

4.1. The learned Commissioner (Appeals) failed to appreciate the fact that the balance sheet relied on by the learned assessing officer was. only a provisional balance sheet and not an audited balance sheet.

4.2. The learned Commissioner (Appeals) failed .to appreciate the fact that there was no credit in the capital account of the assessee.

4.3. Without prejudice to the above the learned assessing officer failed in relying on the accounts and Balance Sheet pertaining to the financial year 2005-06 for completing the assessment for the financial year 2004-05 and as such no capital gains can be taxed for the A Y 2005-06.

5. The learned Commissioner (Appeals) failed to appreciate the fact that the learned assessing officer violated the principle of natural justice in as much as not giving the copies of the balance sheet relied on by him to the assessee and not providing an opportunity of cross examining the persons on whose statement the reliance has been placed by him.

6. Without prejudice, the learned assessing officer failed to appreciate the fact that if at all there was any capital gains, then the same should have been

treated as long term and the date of acquisition should have been treated as 8th Jan 2001.

7. *The assessment order and demand notice are not sustainable since the assessment year mentioned in the order is 2007-08 whereas the demand notice pertains to the assessment year 2005-06.*

For the above grounds or any other grounds that may be submitted at the time of hearing, the assessee prays that the appeal allowed and the addition of capital gains made by the learned assessing officer and confirmed by the learned Commissioner (Appeals) be deleted with consequential relief."

2. Briefly stated, assessee is engaged in the business of providing telecom net work services. Assessee filed its return of income for A.Y. 2005-06 on 25.10.2005 declaring total income of Rs.2,06,27,320. Notice under section 148 of the I.T. Act was issued in pursuance of material gathered at the time of survey under section 133A conducted in the case of M/s. Embassy Builders on 23.09.2008. One of the documents impounded was a consortium agreement dated 10.12.2004 entered into by assessee with M/s. Dynasty Developers P. Ltd., and the new entity was called Embassy-ANL Consortium. Based on the documents, assessment was reopened. The issue in appeal is with reference to development agreement entered by assessee with the said M/s. Dynasty Developers P. Ltd., ("DDPL"). Assessee has been allotted ac.6.00 of land on lease – cum- sale basis by Karnataka Industrial Area Development Board (in short "KIADB") vide letter of allotment dated 10.01.2001. Subsequently, assessee entered into lease –cum-sale deed on 02.09.2003 with KIADB. On 10.1202004, Assessee entered into the consortium agreement referred above. As per the consortium agreement, assessee agreed to

transfer the rights in the property. Since, there are differences among the parties, assessee did not acknowledge the receipts in its audited accounts and continued to show the lease hold rights on the land as fixed assets in the books of accounts. AO initiated proceedings as Capital gains on transfer of property was not declared. Pursuant to notice under section 148, assessee submitted to the A.O. that it was not liable to capital gains as there was no 'capital asset' and also the fact that there is no 'transfer' as contemplated under section 2(47) of the I.T. Act. Assessing Officer, however, relying on the terms of consortium agreement, set aside the objections of assessee to hold that the transaction entered into by assessee comes within the purview of section 2(47) and in support discussed at length the definition of capital asset, property, lease rights, transfer of property etc., Assessing Officer also specifically discussed the provisions of section 2(47) (vi) inserted by Finance Act, 1987 with effect from 01.04.1988 as per which 'transfer in relation to a capital asset includes a transaction which has the effect of transferring or enabling the enjoyment of any immovable property'. Assessing Officer also brought out the intention of bringing out this particular clause (vi) to section 2(47) to hold that in the instant case assessee by entering into Consortium Agreement has transferred its rights over the land to M/s. DDPL and accordingly, there is transfer of capital asset within the meaning of section 45(3) of the I.T. Act. Holding so, he brought the value of consideration recorded in the books of consortium at Rs.10,76,61,044 as 'full value of consideration' and considering the fact that assessee entered into the agreement immediately on getting the ownership held that the period of holding is less than 12 months and accordingly, considered the gains as short term

capital gain. He brought an amount of Rs.7,98,69,745 to tax as short term capital gain.

3. Being aggrieved, assessee contested before the Ld. CIT(A) that assessee did not possess any 'capital asset' and the land allotted by KIADB as per lease –cum- sale agreement does not give ownership rights and it can not be considered as immovable property and therefore, a capital asset. Without prejudice to the above, assessee also contended that it did not obtain any transferable lease hold rights over the land and as per clause-8 of the allotment any failure to fulfill any of the standard terms and conditions shall result in cancellation of the allotment. It was submitted that clause-12 of the terms and conditions stipulates that no permission will be granted to lease out any portion of the building or any portion of the land in favour of other entrepreneurs during the existence of lease period. Referring to the other clauses of the allotment letter, it contended that assessee did not possess any transferrable lease hold rights and therefore, the land in question is not a capital asset. Further, it also contended that provision of section 2(47) are not applicable as the property is not an immovable property, as was given in clause (d) of section 269UA of the I.T. Act. It was contended that assessee has only lease hold rights and it did not fall into the definition of 'immovable property'. It further contended that there was no transfer under section 45(3) of the Act as it was only a legal fiction. It was submitted that as there is no assignment of rights executed, there is no transfer, consequently, no capital gains can be assessed in the hands of assessee by invoking the provisions of section 45(3). Ld. CIT(A) did not agree and

confirmed the capital gains in the hands of assessee. The relevant observations of Ld. CIT(A) are as under :

> *"7. I have gone through the assessment order, submissions of the assessee, evidences filed by the assessee and case laws relied upon by both the parties. The basic contention of the assessee is that they do not possess transferable right over the land allotted to them by KIADB and therefore the land in question is not a capital asset and consequently there is no capital gain. This submission of the assessee is contrary to what it has disclosed on its own in the para Q of notes to account in Annual Report for Financial Year 2005-06. The assessee discloses that it had entered into a consortium agreement and that it had contributed all its rights in the property (acquired through lease-cum-sale agreement) to the Consortium as its contribution towards capital. Relevant portion of the Annual Report is as follows:*
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> *"Q : The company has entered into a consortium agreement dated 10th Dec 2004 with M/s. Dynasty Developers P Ltd to promote and development of Land appearing in the books of account at RS.2,77,91,299/- at No.5 EPIP Area, Phase-I, White Field, Bangalore. As per the terms of the agreement the company is fifty percent associate / members of consortium created thereby and has contributed all its rights with regards to scheduled property as its contribution towards the capital of the consortium, Further a charge has been created on the landed property by way of equitable mortgage in favour of ING-Vsya Bank Ltd to the extent of 36 crores plus interest and other charges, for advances made to Dynasty Developers P Ltd."*
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> *7.1 Going by the above notes to the accounts, the company is admitting that it has some rights over the property which it had acquired through lease-cum-sale agreement. On the contrary, during the course of appeal proceedings, the assessee claims that the lease-cum-sale agreement can only be treated as a right to obtain an immovable property and cannot be treated as capital asset. Of these two - the admission made by the assessee in the notes to*

accounts and the claim made during appeal proceedings - to me, the notes to accounts carry much credence since the same was a result of consensus in the Board meetings of the company and finally approved by the Board of Directors. Therefore, the first argument put forth by the assessee is rejected. When the facts of the case prove otherwise. the case laws relied upon by the assessee become distinguishable and the assessee cannot take any strength from these decisions.

7.2. The next argument of the assessee is that there is no transfer within the meaning of section 2(47) of the Act. Referring clause (vi) of section 2(47), the assessee insisted on the term immovable property and its definition, its application to their own case. Here, it is the argument of the assessee that since they do not hold any right over the property and they have only a right to purchase the property (by virtue of lease-cum- sale agreement entered into with KIADB), the land in question cannot be treated as an immovable property in the hands of the assessee. In this regard, it is pertinent to refer: to para 8 of the Consortium agreement between the assessee company and M/s. DDPL. Relevant portion of the Consortium agreement is as under :

"8.1 ANL assures the undertaking and the Dynasty as under:

8.1.1 The scheduled property has been allotted to ANL and the possession of the scheduled property has also been given to ANL and ANL is entitled to develop the scheduled. property as an infrastructure/commercial development within the existing rules of KIADB.

8.1.2 ANL has further assured that there is no and there would be no impediment under any law, order, decree or contract for the development of the scheduled property and subsequent thereto for the development of the scheduled property and subsequent thereto for the sale or lease of such development subject to conformity to KIADB rules and Regulations.

8.1.3 ANL assures and confirms that the title of the scheduled property is good, marketable and subsisting and not subject to any encumbrances, attachments, Court Orders, minor claims or any requisition or: acquisition proceedings or mortgage, charges, lien of any kind and that the same will be kept leaseable and marketable save and except the borrowing taken by the project based on the terms herein subject to KIADB NOC

8.1.4 ANL assures and confirms that they shall secure the sale deed from KIADB as per the prevailing norms within 180 days of execution of this agreement and obtain permission for development of the property based on- minimum FAR of 1.75 within 30 days of execution of this agreement. "

7.3 In para 8.1.1 above, the assessee states that the property has been allotted to ANL, possession has been given to ANL and they are entitled to develop the schedule property as an infrastructure / commercial development within the existing rules of KIADB. Adding strength to this claim, the assessee further assures that there would be no impediment under any law, order, decree or contract for the development of scheduled property. It is hard to go by the argument of the assessee that on one hand it claims that they have no right over the property since they possess only a right to purchase the property and not a right over the property, and on the other hand, going by the assurances given in the Consortium agreement the assessee assures that there is no impediment under any law, order, decree or contract for the development of schedule property. Here again the inconsistencies between the contents of the Consortium agreement and the arguments made during the course of assessment and present appeal proceedings leads to a justifiable conclusion that the assessee is making contrary claims to suit its needs. In the course of assuring M/s. DDPL, the assessee goes to show that there will not be any impediment under any law in developing the land in question. When it comes to the question of immovable property, it says that it has limited right to purchase the property and not a right over the property. If the claim of the assessee that it had no right over the property is to be accepted, then the question that arises is in what capacity the

assessee had assured its Consortium constituent over the property ? Certainly the assessee had seen a right over the land allotted' to it by KIADB and accordingly they entered into an agreement for development of property with M/s. DDPL.

7.4. It is also pertinent to mention here that the assessee got the land registered in its name on 27.08.2007 by KIADB. Here, one may bring out a logic that since the assessee got a full right over the property by virtue of sale agreement registered in its name only in the year 2007 and therefore, the treatment given by the Assessing Officer in his assessment order basing on the facts as stood for the FY 2004-05 do not hold good. In this context. it is pertinent to refer to the books of account of the Consortium JV. In the books of account of Consortium JV as on 3l.03.2006, fixed assets (land) is debited with Rs.10,76,61,044/- and M/s. Andhra Networks Ltd capital account is credited with Rs.10,76,61,044/- . These books of the JV were audited by a statutory auditor and this credit recorded in. the books of JV is in tune with para 9 of the consortium agreement dealing with capital. Under para 9 of Consortium agreement, it was mentioned as under :

"9) CAPITAL

9.1) ANL would contribute, as its share to the Consortium, all its rights with regard to the scheduled property to the projects.

9.2) DYNASTY as its capital will in the first instance pay towards the cost of construction on the scheduled property to the extent of Rs.10,76,61,044/-."

7.5 . Going by the entries in the books of JV, it can be seen that the account of assessee was credited with the value of land it contributed towards capital. Though during the course of assessment proceedings. the assessee contended that the books of JV are not under its control and M/s. DDPL had unilaterally passed entries in the books of JV, it is pertinent to note that while entering into Consortium agreement, the assessee on its own contributed the value of the land as its capital to JV. For this act of contribution, the assessee cannot throw the burden on anybody

else and this clearly proves the assessee had a right over the land to develop the property unless it is contrary to the terms and conditions set forth by KIADB. Since this JV is not contrary to its terms, the KIADB had accordingly registered the land in the name of the assessee in the year 2007.

Therefore. going by the above factual matrix. the assessee is changing its stances over the land in question to suit its needs and the argument of the assessee that it has only a right to purchase the land and not a right over the land fails miserably.

7.6 The third and final argument taken by the assessee is that there is no transfer under section 45(3) of the Act. In this regard. the assessee contended that the 'consortium agreement cannot be treated as an AOP since clause 18 of the agreement clearly stipulates that each party shall pay their respective taxes on the income distributed. The next aspect the assessee brought out is that they do not possess any capital asset and there was no transfer of the same. It was also brought out that there is no assignment agreement other than the Consortium agreement and clause 9.1 under which the assessee agreed to transfer the right cannot be treated as transfer of rights.

Though the assessee claimed that the contents of clause 9.1, wherein the assessee agreed to transfer the rights cannot be treated as transfer, no .reasons were adduced for such claim. However, the said clause has already been discussed above and it was held that the assessee by virtue of the !ease-cum-sale agreement entered into with KIADB contributed the value of this land as its capital. Therefore, the land in question is treated as capital asset and the same was agreed to be transferred to M/s. DDPL, the developer.

7.7. Since all the arguments put forth by the assessee were proved to be factually incorrect, the land in question is treated capital asset in the hands. of the assessee and there is transfer of such asset within the meaning of section 2(47)(vi) of the Act. Accordingly, I see no reason to deviate from the treatment given by the Assessing Officer to this

> *transaction and I uphold the action of the Assessing Officer in taxing the consideration contributed as capital to the JV, as capital gains in the hands of the assessee".*

4. Ld. Counsel made elaborate arguments and also filed written arguments which can be summarized as under :

4.1. The first contention was that there was no transfer u/s. 2(47) and no capital gain accrued to assessee u/s. 45(3) of the Act. Relying on the provisions of section 2(47)(vi) of the Income Tax Act, 1961, A.O. was of the view that there was a transfer of capital asset by assessee. The relevant portion of the section reads as follows:

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

The above sub clause covers any transaction which has the effect of transferring or enabling the enjoyment of any immovable property. Therefore, the pre-requisite is that the asset transferred should be an immovable property. If the asset transferred is not an immovable property, then the transaction does not fall within the sub clause.

4.1.1. The explanation to the above sub clause states that the term immovable property shall have the meaning as in clause (d) of section 269UA, the same reads as follows :

"immovable property" means –

(i) any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also.

Explanation.-For the purposes of this sub-clause, "land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein ;

(il) any rights in or with respect to any land or any building or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising from 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 of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building ;"

From the above definition it can be seen that the term immovable property means any land or building or any rights in it. Therefore, it has to be seen whether the leasehold rights of assessee falls within the definition of the immovable property.

4.1.2. The leasehold rights is certainly not land or building and as such, is not covered by item (i) of the definition. The item (ii) of the definition refers to rights in a land or a building accruing or arising other than by way of lease. Therefore, the right arising from the lease transaction is not included in this item. Since the right of assessee is not an immovable property as per the section 269UA of the IT Act, there is no transfer.

4.1.3. It was further submitted that leasehold right cannot be treated as a right in the property. Relying on the decision of the Supreme Court, in *Swami Motor Transports (P) Ltd.* v. *Sri Sankaraswamigal Mutt* AIR 1963 SC 864, it is submitted that the right of assessee under the contract for sale of immovable property was not in the nature of property in that assessee was having no interest in or right of property. The Supreme Court was concerned with the question of right to purchase property by a tenant under the Madras City Tenants Protection Act, 1922, with reference to article 19(1)(f) of the Constitution of India. Reliance is placed on the following passage of the judgment:

> *" ... The law of India does not recognise equitable estates. No authority has been cited in support of the contention that a statutory right to purchase land is, or confers, an interest or a right in property. The fact that the right is created not by contract but by a statute cannot make a difference in the content or the incidents of the right: that depends upon the nature and the scope of the right conferred. The right conferred is a right to purchase land. If such a right conferred under a contract is not a right of property *, the fact that such a right stems from a statute cannot obviously expand its content or make it any the less a non-proprietary right. In our view, a statutory right to apply for the purchase of land is not a right of property. It is settled law that a contract to purchase a property does not create an interest in immovable property .... " (p. 874) (* emphasis supplied)*

Based on the above decision of Hon'ble Supreme Court it can be said that the right acquired by assessee in this case was only a restrictive non transferable right to purchase the property and is not a right in the property. Therefore, this is not covered by the definition u/s. 269UA of IT Act.

4.1.4. It is submitted that there was no immovable property held by assessee and as such, the transaction is not

covered by section 2(47)(vi) of the Income Tax Act, 1961.

4.2. The main contention of assessee was that it did not hold 'any capital asset' which was capable of being transferred. It was contended that assessee had only lease hold rights. The lease hold rights are not transferable. Assessee was allotted the land by KIADB under various standard terms and conditions. Para 8 of the letter of allotment clearly stipulates that failure to fulfil the standard terms and conditions shall result in cancellation of the agreement. Para 12 of the standard terms and conditions attached to the letter of allotment clearly stipulates that no permission will be granted to lease out any portion of the building or any portion of the land in favour of other entrepreneurs during the existence of the lease period. Para 2(q) of the Lease agreement clearly stipulates that lessee shall not alienate the demised premises or any part thereof or the building that may be constructed there on during the period of lease. Para 2(p)(3) of the Lease agreement states that the lessor always reserves the right to resume the whole of the demised premises for the breach of any of the covenants stipulated in the lease deed. Para 2(r)(i) stipulates that the original applicant/partners/ directors/shareholders shall continue to hold minimum of 51% of interest in the shareholding of the lessee company. Para 2(r)(i) stipulates that the lessee shall not change constitution or its status without the previous written consent of the lessor. It further states even if such consent is given, the original applicant shall continue to hold 51% interest in the newly constituted entity. Para 6 of the lease agreement stipulates that the lessor may at its discretion, consider the request of the lessee to transfer the lease hold rights in favour of the new entrepreneur by imposing certain terms and conditions.

4.2.1. Relying on the various conditions stipulated in the letter of allotment and the lease agreement, it was submitted that it was a non-transferable lease agreement, the enjoyment of the same was restricted to assessee. Since the lease deed was not a transferable one, there was no capital asset capable of being transferred by assessee.

4.2.2. It was submitted, the decisions relied on by the Learned Assessing Officer are totally distinguishable from the facts of assessee's case. In all the decisions relied on, assessee had transferable leasehold rights. In this case, there was no transferable leasehold rights available to assessee. Therefore, those decisions cannot be relied on. Further, in those decisions, the leasehold rights were relating to mines which were business assets of the assessee. In this case, it is only a right to buy the land and as such, the facts of this case is different from the cases relating to lease rights

4.3. It was submitted that it is not a Transferable right under Transfer of Property Act. 1882 (T.P. Act). It was submitted that the covenants of the lease deed and the terms and conditions of the letter of allotment, clearly demonstrate that the property has to be enjoyed by the allottees. Even assuming but not admitting that the lease deed has created an interest in the property in favour of assessee, this is restricted in enjoyment to assessee. Therefore, this cannot be transferred as per section 6(d) of the TP Act. Though for the purpose of transfer a registered deed is not required under the deeming provisions of the IT Act, still a transfer which is not legally permitted cannot be a valid transfer. Since the TP Act specifically prohibits this kind of right from being transferred, the contemplated transfer in violation of the TP Act, cannot be

considered as transfer and as such, no capital gains would arise. Reliance in this regard is placed on the decisions of Hon'ble Delhi High Court in the case of CIT vs. J. Dalmia (1984) 149 1TR 215 (Del).

4.4. Another argument raised was that there is no Transfer without a registered document. In this case, it was submitted that there was no registered document other than the consortium agreement. Since there is no registered document, there cannot be any transfer. In this regard, reliance is placed on the decision of the Hon'ble Uttarakhand High Court in the case Rajesh Kumar Agarwal vs ITO reported in 213-TIOL-532-HC-UKHAND-IT. The facts of that case and assessee's case are similar. Therefore, based on the same, it is submitted that there is no transfer.

4.5. Further, it was contended that there is no transfer even based on the terms of consortium agreement. Without prejudice to the various other arguments, it is submitted that there was no transfer of any capital asset based on the provisions of Consortium Agreement dated 10.12.2004. It was submitted that the entire assessment has been made on the basis of the Consortium Agreement dated 10.12.2004 entered into by assessee. Therefore, it is necessary to see, is there a transfer as per the agreement.

> *"In para 9 of the agreement, assessee agreed to contribute all rights with regard to the landed property to the consortium. It is based on this clause, the lower authorities have come to the conclusion that there was a transfer of capital asset. Para 9.1 of the agreement reads as follows;*
>
> > *"9.1 ANL <u>would contribute</u> *, as its share to the Consortium, all its rights with regards to the schedule*

property to the project." (emphasis supplied)*

From the reading of the above clause it can be seen that there was no transfer per se, but it was only an agreement to transfer the rights. Based on this itself, it can be said that there was no transfer of any rights by assessee.

It is also pertinent to note that as per clause 8 of the agreement, assessee undertook to obtain sale deed from KIADB within 180 days of the execution of the agreement and obtain permission for development of the property. Therefore, without fulfilling these conditions, it was only an agreement to transfer the rights and not an absolute transfer of rights. Since it was only an agreement to transfer the rights, there was no actual transfer of rights.

Further, as per clause 16(d) of the consortium agreement, assessee should within 60 days of the agreement secure permission from KIADB to effect lease/sub-lease of the property. This itself would indicate that till the permission is granted, there was no transfer.

As per clause 20.6 of the agreement (refer page 43 of the paper book), if any term, condition or provision of the agreement is held to be a violation of any applicable Law, Statute or Regulation, the same shall be deemed to be deleted from the agreement and shall be of no force and effect".

4.5.2. It was submitted that the leasehold rights obtained by assessee are not transferable without the approval of the lessor. Further, they are also not transferable as per section 6(d) of the TP Act. Therefore, if clause 9 of the Consortium Agreement is read in such a manner that there is a transfer on entering into an agreement, then, the same is violating the provisions of the TP Act and also the terms and conditions of the Lease cum Sale Agreement. In view of the same, clause 9 of the Consortium Agreement has to be treated as non-existent and having no force based on the provisions of clause 20.6 of the Consortium Agreement. Therefore, it was submitted that there is no transfer even based on the

provisions of the Consortium Agreement. Since the agreement does not give effect to any transfer, there can never be a transfer even as per the provisions of section 2(47) of the Income Tax Act, 1961.

4.6. Another argument made was that there is no Capital Gains u/s 45(3) of the IT Act. The capital gains in this case has been assessed by invoking the provisions of section 45(3) of the Income Tax Act, 1961. It is an accepted fact that section 45(3) creates a legal fiction where by in certain cases of transfers, the capital gains are deemed to accrue without receipt of actual consideration. Since it is a legal fiction, the section has to be interpreted strictly and not liberally. The Consortium Agreement dated 10.12.2004, cannot be treated as an AOP. Clause 18 of the Agreement clearly stipulates that each parties shall pay their respective taxes on the Income distributed. There is nothing in the agreement to suggest that the parties intended to treat the arrangement as an AOP as per the provisions of Income Tax Act, 1961. Therefore, no capital gains can be assessed by invoking the provisions of section 45(3) of the Income Tax Act, 1961. Further, from the Balance Sheet and the schedules of the Consortium agreement attached to the Assessment order, it can be seen that assessee was only shown as a Sundry Creditors as on 31.03.2006.

4.7. Without prejudice to the above, it is submitted that as explained in the preceding paragraphs, assessee did not possess any capital asset and there was no transfer of the same. Therefore, there cannot be any capital gains u/s 45(3) of the Income Tax Act, 1961.

4.8. Without prejudice to the above arguments, it is submitted that the right to acquire an immovable property cannot be transferred without an assignment agreement. In this case, there is no assignment agreement other than the consortium agreement. In the consortium agreement, there is no clause assigning the rights. Clause 9.1 of the Consortium Agreement under which assessee agreed to transfer the rights cannot be treated as transfer of rights. Since there are no documents assigning the rights executed by assessee, there is no transfer. Therefore, no capital gains can be assessed in the hands of assessee invoking the provisions of section 45(3) of the Income Tax Act, 1961.

4.9. It was further contended that the assessment is for the assessment year 2005-06. The assessment has been made based on the entries in the books and the alleged Balance Sheet of the consortium. All the documents are annexed to the assessment order. From the copy of the Day book of the consortium attached to the assessment order, it can be seen that the entry relating to the land was passed on 31-03-2006. Further, assessee has been shown as a sundry creditor as on 31-03-2006. This would indicate the fact that even if there was a transfer, it took place only during the financial year 2005-06 relevant to the assessment year 2006-07 and as such, no capital gains can be taxed for the assessment year 2005-06.

5. In reply, learned D.R. also made elaborate arguments and refuted the objections of assessee by stating as under :

5.1. It was submitted that at clause VI at page 2 of the consortium agreement, it is clearly mentioned that "ANL has represented that the schedule property has good clear and marketable title free from all encumbrances, attachments, liens, lis pendens, charges, mortgages, lien or any other claims whatsoever and the proposed development being the development of the scheduled property into software/business park within the framework of rules defined by KIADB". At clause 8.1.1 to 8.1.4 of the consortium agreement, it was clearly declared that there is no impediment under any law, order or decree or contract for development of the property and also the assessee would secure the sale deed from KIADB. At clause 3 of the agreement, it was clearly specified that the project came into effect on 10-12-04. It is therefore submitted that the argument of the assessee that there was no transfer of the land in F.Y 2004-05 is incorrect and contrary to the facts on record. It is also submitted that clearances, if any required from KIADB to lease out space in the completed software park would not in any way be relevant for transfer of land by the assessee to the consortium in which it is a 50% member.

5.2. Attention was drawn to the fact that at clause 17(d) of the consortium agreement, the responsibility of maintenance of accounts of the consortium was assigned to M/s. Dynasty Developers Pvt Ltd and hence, it is incorrect on the part of the assessee to argue that unilateral entries were passed by the other member of the consortium. These

accounts are also duly audited by a qualified chartered accountant. A supplemental agreement was also entered into by the consortium members on 01.03.2005. Through this supplemental agreement no changes to the original agreement are made except for the fact that the first of purchase of share of a member, in case he wants to dispose off his constructed area shall vest with the other member upon payment of market value.

5.3. It was further submitted that the assessee not only transferred the land owned by it on 10-12-04 to the consortium but also actively participated in the execution of the project by securing loans for M/s. Dynasty Developers Ltd, the other member of the consortium from ING Vysya Bank Ltd by permitting mortgage of the land of the consortium.

5.4. It was submitted that the assessee did not disclose the transfer of land during A.Y 2005-06 (F.Y 2004-05) in its return of income. Even in the annual report the fact that consortium agreement was entered into during F.Y 04-05 was not disclosed. The transaction was discovered by the Department on 23-09-08, during a survey u/s 133A conducted by ITO, Ward-8(1) on the Embassy-ANL consortium. Inspection during the survey proceedings revealed that the project on the land consisted of two multi-storied towers and one of the towers was 95% complete and the bare shell was complete on the other. The total carpet area of the project was about 3.5 lakh sft. The transaction was brought to tax only

after initiation of reopening of the assessment proceedings.

5.6. It was submitted even if the arguments of the assessee that the project was under dispute were to be accepted for a moment as true, such a dispute would not in any way affect the fact that the land was already transferred by the assessee to the consortium. Any subsequent relinquishment of rights by one member of the consortium in favour of the other member would not affect the transfer of land from the assessee to the consortium.

5.7. In light of the above facts, it was submitted that the present case is a clear case of transfer of land from one of the members to the AOP on 10-12-04. The consortium-AOP obtained necessary approvals and constructed the "software park" also immediately thereafter. Therefore, capital gains on transfer of the land arose (on the value of consideration recorded in the books of the AOP) for A.Y 2005-06 in the present case u/s 45(3).

5.8. It was also submitted that for transfer of a property, there is no need that the transferor must have full and absolute title. It is settled law that property is a bundle of rights and whatever rights are with the assessee, they were transferred to the consortium-AOP on 10.12.2004. In this regard reliance is placed on the decision of Hon'ble Supreme Court in the case of Ahmed G Ariff (76 ITR 471), wherein it was held that the term property is of

"widest import".

5.9. Reliance is also placed on the decision of the Jurisdiction High Court in the case of Potla Nageswara Rao (365 ITR 249), wherein it was held that "agreement for sale has to be taken into consideration for the purpose of assessment of income for the assessment year when the agreement was entered into and possession was given". In the present case, both these actions occurred on 10-12-04. Reliance is also placed on the decision of Karnataka High Court in the case of Dr T K Oayalu (202 Taxmann 531), decision of this Hon'ble Bench in case of Durdana Khatoon (2013-TIOL-523- ITAT-HYD). Attention of the Hon'ble Bench is also drawn to the decision of AAR in the case of Jasbir Singh Sarkaria (164 Taxmann 108 (AAR - New Delhi)).

5.10. Regarding the period of holding, it was submitted that the assessee acquired rights of ownership in the property only on 02-09-03, when the lease cum sale agreement was executed by KIADB. The argument that date of allotment shall be taken as the date of acquisition of the property is incorrect. In this regard, it was submitted that on 08-01-2001, the assessee only acquired the right of allotment to the exclusion of others. However, the allotment is contingent and the acquisition of the property fructified only on payment of the cost of the land and on execution of the sale cum lease agreement. Once the sale cum lease agreement was executed, the right for allotment automatically ceased

to exist. If the right of allotment were transferred by the assessee, the date of acquisition would have been 08-01-2001, which is not the present case. What was transferred by the assessee to the consortium was the "ownership" in the land and in fact the possession itself was handed over. Such a right was acquired by the assessee only on 02-09-03 and hence the transaction is in the nature of short term capital gains.

5.11. It was also submitted that reliance of the assessee on the decision of Hon'ble Supreme Court in the case of Suraj Lamp & Industries Pvt. Ltd is misplaced because the said decision is delivered in a different context of "sale" through GPAs/Sale Agreements under section 54 of the Transfer of Property Act with reference to conveyance of title. It may be submitted that in the said judgment itself, the Hon'ble Court observed that rights granted under section 53A of Transfer of Property Act are excluded. It is settled law that "transfer" under the Income Tax Act operates on the principle of "beneficial ownership" and not on "legal ownership". Similarly, reliance on the decision of Delhi High Court in the case of J. Dalmia is not correct because the facts are different and the issue was related to assessability of damages received in a suit for specific performance. Reliance on the decision of Uttarakhand High Court in the case of Rajesh Kumar Agarwal is also incorrect because in the said case, there was no evidence of transfer to AOP nor there was an agreement with the AOP. In the present case, there is a consortium

agreement for constitution of the AOP and land was transferred on 10-12-04 as per the agreement. In the case of decision of the jurisdiction Bench in the case of Fibras Infratech Pvt Ltd also, the facts are totally different. In the said case, the transferee was not willing to perform its obligations. In the present case also, in light of the decision of jurisdictional High Court in the case of Potla Nagaeswara Rao (cited above), the decision of ITAT and decisions of other High Courts get overruled in case of identical issue.

6. We have considered the rival contentions and perused the documents placed on record and the orders of the authorities. There is no dispute with reference to the fact that assessee was allotted property by KIADB way back vide letter of allotment dated 10.01.2001. It is also not disputed that subsequently, assessee has paid amounts and lease cum sale deed was also registered on 02.09.2003. It is also not disputed with reference to consortium agreement entered with M/s. Dynasty Developers P. Ltd., on 10.12.2004 and the consortium was styled as Embassy – ANL consortium. It is also a fact that consortium is filing returns and at the time of survey, property was already constructed to a large extent. It is also a fact that assessee has not represented this transaction in the books of accounts in the relevant year and consequent to the survey operations conducted under section 133A of the Act in the case of consortium on 23.09.2008 in the transaction entered by assessee has come into picture. There is no need to reproduce the terms of consortium agreement and various clauses of allotment relied on by both the parties as they are already part of orders of A.O. and Ld. CIT(A) and also extracted in the earlier part of this order. As can be seen from the

consortium agreement it is also not in dispute that assessee has introduced the said property as a capital in the consortium and the price so arrived at as capital consideration was at Rs.10,76,61,044, being 50% of the share in consortium.

6.1. It was the A.O's contention that there is transfer of assessee's rights in the property to the said consortium and therefore, capital gain arises. He has discussed at length various provisions in the order to arrive at the conclusion that the transaction is one of transfer giving rise to capital gains. He has also considered the date of registration, lease –cum-sale deed by KIDAB and arrived at short term capital gains stating that the holding period is less than 3 years.

6.2. It was assessee's contention that first of all, there is no capital asset, there is no transfer, there is no capital gains to be taxed under section 45(3). In the alternate, assessee submits that even if capital gain is to be taxed, it will not be long term capital gains and not short term capital gains.

6.3. After considering the issue, we are of the opinion that the orders of Ld. CIT(A) on the issue of taxing capital gains are to be upheld. As rightly pointed out by the Ld. CIT(A), the property under consideration need not be immovable property. Assessee is having certain rights and the bundle of rights are transferred. Even though assessee relied on provisions of section 2(47)(vi) of the I.T. Act, the provision is very clear that any transaction which has the effect of transferring or enabling the enjoyment of any immovable property is covered by the definition of 'transfer' even though assessee has argued that there is no immovable property, what the provision entitles is that of a transaction which has the effect of transferring or

enabling the enjoyment of any immovable property. Therefore, the contention that assessee has not transferred immovable property does not hold good, as assessee has entered into consortium agreement which is the effect of transferring the rights in an immovable property. The argument that assessee has no transferable right and the agreement with KIADB does not give rise to any transferable rights is not correct in the sense that assessee is enjoying the property by virtue of allotment letter granted by the Industrial Area Development Board on 10.01.2001 and assessee by way of consortium agreement passed on the bundle of rights to the consortium. In fact, as rightly pointed out by Ld. CIT(A) and also by A.O. assessee has in fact permitted mortgage of the said property by way of equitable mortgage in favour of ING Vysya Bank Ltd., to an extent of Rs.36 crores for advance made to Dynasty Developers P. Ltd., Considering these facts, it cannot be sated that assessee has no right on the property when it admits and enters into agreement and even permits the Bank for an equitable mortgage of the said property. Therefore, all the contentions raised by assessee that it does not hold any capital asset, there are no transferable rights under the Transfer of Property Act and not transferred without registered document cannot be accepted. In fact, assessee has relied on the judgment of Hon'ble High Court of Karnataka in the case of CIT vs. A. Suresh Rao ITA.No.417 of 2013 dated 28th October, 2013 with reference to consideration of period of holding of long term capital gains. As briefly stated above, A.O. has treated the property as one of the short term capital asset and levied short term capital gain, whereas, assessee is contending that it is a long term capital asset. This issue will be discussed at a later point of time but what we are relying is, on the

interpretation of the provisions of the Act by the Hon'ble Karnataka High Court on the capital assets transferred and computation of capital gains which are as under :

> *"12. The definition as contained in Section 2(42A) of the Act, though uses the words, "a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer", for the purpose of holding an asset, it is not necessary that, he should be the owner of the asset, with a registered deed of conveyance conferring title on him.* ***In the light of the expanded definition as contained in Section 2(47), even when a sale, exchange, or relinquishment or extinguishment of any right, under a transaction the assessee is put in possession of an immovable property or he retained the same in part performance of the contract under Section 53-A of the Transfer of Property Act, it amounts to transfer. No registered deed of sale is required to constitute a transfer. Similarly, 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, also constitutes transfer and the assessee is said to hold the said property for the purpose of the definition of "short-term capital gain. In fact, the Circular No.495 makes it clear that 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 common mode of acquiring flats particularly in multistoried constructions in big cities. The aforesaid new sub-clauses (v) and (vi) have been inserted in Section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above. A person holding the Power of Attorney is authorized the powers of owner, including that of making construction though the legal ownership in such cases continues to be with the transferor. The intention of legislature is to treat even such transactions as transfers and the capital gain arising out of such transactions are brought to tax.*** *Further, the Circular No.471 goes to the extent of clarifying*

that for the purpose of Income Tax Act, the allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. In case of construction agreements, the tentative cost of construction is already determined and the agreement provides for payment of cost of construction in instalments subject to the condition that the allottee has to bear the increase, if any, in the cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position. Therefore, in construing such taxation provisions, what should be the approach of the courts and the interpretation to be placed is clearly set out by the Apex Court in the case of Smt.Saroj Aggarwal -vs- Commissioner of Income-Tax reported in (1985) 156 ITR 497 (SC) wherein it is held as under:

> *"Facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Too hyper technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered..... Courts should, whenever possible unless prevented by the express language of any section or compelling circumstances of any particular case, make a benevolent and justice oriented inference. Facts must be viewed in the social milieu of a country."*

Therefore, keeping the aforesaid principles in mind, when we look at Section 48, the language employed is unambiguous. The intention is very clear. When a capital asset is transferred, in order to determine the capital gain from such transfer, what is to be seen is, out of full value of the consideration received or accruing, the cost of acquisition of the asset, the cost of improvement and any expenditure wholly or exclusively incurred in connection with such transfer is to be deducted. What remains thereafter is the capital gain. It is not necessary that after payment of cost of acquisition, a title deed is to be executed in favour of the assessee. Even in the absence of a title deed, the assessee holds that property and therefore, it is the point of time at

which he holds the property, which is to be taken into consideration in determining the period between the date of acquisition and date of transfer of such capital gain in order to decide whether it is a short-term capital gain or a long-term capital gain.

6.4. In the light of the above, the extended definition as contained in section 2(47) even when a sale exchange or relinquishment or extinguishment of any right under a transaction, assessee is to be in possession of any immovable property or retained the same in part, performance of contract under section 53A of the Transfer of Property Act, it amounts to transfer. Therefore, in the given transaction, since assessee has given all rights in immovable property of which, consortium has taken approvals and constructed buildings, the contention that there is no capital asset no transfer cannot be accepted. We endorse the views expressed by A.O. and Ld. CIT(A) on this issue.

7. Since, we have upheld the contention of the Revenue that assessee owns the capital asset in the form of property which it has transferred to the consortium, the other contentions of assessee does not survive. Accordingly, they are rejected.

8. One of the arguments raised by assessee is that entries have been passed as on 31.03.2006 and therefore, the transaction cannot be brought to tax in the given assessment year. This argument cannot be accepted as the consortium agreement is entered into on 10.12.2004 and supplemental agreement also was entered into by consortium members on 01.03.2005. Therefore, the possession of the property is also stated to have been granted at that point of time. As can be

seen from the facts, assessee also subsequently gave permission for equitable mortgage of property and licenses from the authorities and also obtained no objection certificate from KIDAB since agreement entered into on 10.12.2004 was implemented by assessee without any failure, the principles laid down by the Hon'ble A.P. High Court in the case of Potla Nageswara Rao 365 ITR 249 the capital gains is liable to be taxed in the year when the development agreement was entered into applies. There may be disputes between the consortium members which does not affect the year of taxability of capital gains. In view of this, we are of the opinion that capital gains is rightly assessed in the impugned assessment year. Other cases relied on by Ld. D.R. in his submissions also support the above, which we do not intend to extract here. Suffice to say, that the agreement for development has to be taken into consideration for the purpose of assessment of income, in the year in which the agreement was entered into and possession was given. Since, there is no dispute about the entering into the agreement and possession being given capital gains was rightly taxed in the impugned assessment year correctly. Therefore, the arguments of assessee on this are rejected.

9. Coming to the issue whether the capital gains arising in the transaction is that of short capital gain or long term capital gain, we are of the opinion that the gain has to be considered as long term capital gain. There is no dispute with reference to the fact that assessee was allotted the property on 10.01.2001. Even though the lease deed was registered on 02.09.2003, assessee has held it for more than three years by the time he has entered into an agreement on 10.12.2004. The

Hon'ble Karnataka High Court in the case of CIT vs. A. Suresh Rao (supra) has considered the issue and held as follows :

> *"15. All the aforesaid judgments relied on by the Revenue are cases arising prior to the amendment to Section 2(47) of the Act. The very same judgments show, in particular the judgment of the Full Bench of the Gujarat High Court, the reasons for amendment i.e., even in the absence of a registered deed of transfer, if the transaction in question demonstrates the intention of the parties and after paying the entire consideration agreed upon, the purchaser enjoys the property. The fact that the transaction is not completed by execution of the registered sale deed makes no difference in the eye of law for the purpose of taxes. If the Revenue is entitled to collect tax on such capital gains, even in the absence of a registered document, on the same analogy, the assessee, who is liable to pay the capital gains, is also entitled to the exemption granted under the very Act on such capital gains. That is precisely what the Apex Court has said in Smt.Saroj Aggarwal's case (supra) that facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Too hyper technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered. The Courts should place an interpretation making a benevolent and justice oriented inference and the facts must be viewed in the social milieu of a country. Now in this background, let us see the facts of this case.*
>
> *16. The assessee was allotted a site on 21.9.1988 in R.M.V. Extension, Bangalore. The assessee paid a sum of Rs.1,11,480/- on such allotment. He was also put in possession of the property and possession certificate was issued. On compliance with other legal requirement, a registered sale deed came to be executed on 6.10.2005 in his name. However, the said site was the subject matter of litigation and therefore, when the assessee was not allowed to enjoy the said property in obedience of the orders passed by the courts, the BDA cancelled the sale deed dated 6.10.2005 by executing a deed of cancellation dated 18.9.2007. Thereafter in lieu of the site, which was cancelled, a fresh allotment was made in Hennur-Banaswadi road. When the assessee after the site being allotted, went to the spot, he found that there was a*

construction, which was also involved in a legal dispute. Inspite of the orders of the court to demolish the structure, it has not been done. When he reported the matter to the authorities, the allotment of site in Hennur-Banaswadi road was cancelled on 9.1.2008 and in lieu of the same, the present site was allotted on 15.2.2008. A registered sale deed came to be executed on 27.2.2008. No consideration was paid under the said sale deed. The consideration paid on 21.9.1988, which was acknowledged in the sale deed dated 6.10.2005, was treated as a consideration for the same on 27.2.2008. It is thereafter the assessee transferr

ed the site by way of a registered sale deed in favour of a purchaser on 29.5.2008 and received a consideration of Rs.1 crore 13 lakhs. This site, which was transferred, he was holding it from 21.9.1988, when he paid the consideration on intimation of allotment. Merely because the original site which was allotted was cancelled, yet another site was allotted and the said site was also cancelled and thereafter the present site was allotted, in law would make no difference. Admittedly, the consideration paid on 21.9.1988 is treated as the consideration for the sale dated 27.2.2008. In other words, the cost of acquisition of the asset was paid on 21.9.1988 and no cost was paid either on the date of allotment i.e., on 15.2.2008 or on the date of registered sale deed on 27.2.2008. For the purpose of computing the capital gains under Section 48 of the Act, it is the date of acquisition of the asset, which is to be taken into consideration and the said cost of acquisition is to be converted as the indexed cost of acquisition as defined in the Explanation to Section 48 of the Act and, the said amount is to be deducted out of the sale consideration to arrive at the capital gain. Accordingly, after deducting the cost of acquisition and the registration fee, the capital gain after the transfer of the said asset was Rs.1,08,73,892/- as it was a long-term capital gain. He invested an amount of Rs.28 lakhs in Rural Electrification Corporation Limited and an amount of Rs.22 lakhs in the National Highways Authority of India in terms of Section 54EC of the Act. Similarly he purchased an apartment at Hebbal, Bangalore, for a sum of Rs.56,03,590/- in terms of Section 54F of the Act and sought an exemption. For the balance of Rs.2,70,296/-, he has paid the long-term capital gain. Therefore, the assessee has rightly claimed the benefit of exemption under Section 54EC and 54F of the Act.

17. In that view of the matter, if we look at the facts in a natural perspective, there is no dishonest or improper motive on the part of the assessee in claiming said exemption. The facts seen from the social milieu of our society, it is in natural course of conduct of any law abiding citizen. When capital gain is accrued in him instead of paying tax to the Government, he has invested the money in the aforesaid manner, which gives him the benefit of exemption from payment of capital gains. He satisfies the requirement of the law. By hypertechnical or legalistic approach, such benefit conferred on an assessee cannot be denied. Very fact that the law encourages an assessee to make such investments to avoid payment of tax, such benevolent provision which is meant for such assesses has to be equitably interpreted and justly administered.

18. In that view of the matter, we do not see any infirmity committed by the Tribunal in passing the impugned order extending the benefit which the law has extended to an assessee. Therefore, there is no merit in this appeal. The substantial question of law is answered in favour of the assessee and against the Revenue."

10. In view of the above, respectfully following the principles laid down in the above said case and also considering the Board Circular issued in this regard particularly, Circular No. 471 and 474 of CBDT, we are of the opinion that the capital asset has to be considered as long term asset and capital gains thereon has to be assessed only under the head "Long Term Capital Gains" and A.O. is directed to modify the computation accordingly. Ground Nos. 3 to 9 on the issue of taxability of capital gains are rejected and Ground No.10 pertaining to taxability as long term capital gain is allowed.

11. Ground No.11 pertains to issue in which assessee is contesting that the assessment year in the order and demand notice are wrongly mentioned. On the first page of the order indicate that assessment was made for A.Y. 2007-08

whereas the demand was raised for A.Y. 2005-06. Even though there was an error on the body of the order mentioning A.Y. as 2007-08, the proceedings under section 148 are incidentally initiated for A.Y. 2005-06 only and the every page of order (on the top of it), the A.Y. is mentioned as 2005-06. In fact, assessee preferred appeal before the Ld. CIT(A) for A.Y. 2005-06 only and the demand notice was also issued for A.Y. 2005-06. If the error in first page of the assessment order is not corrected by A.O. by this time, since, it is a curable defect, the A.O. is directed to modify the A.Y. from 2007-08 to A.Y. 2005-06. However, there is no need to consider assessee's objections on this as the assessment order was passed for A.Y. 2005-06 and demand notice was also issued for A.Y. 2005-06 and assessee also preferred appeals mentioning the A.Y. 2005-06 only. In view of this, ground No.11 of the assessee is rejected.

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

Order pronounced in the open Court on 26.11.2014.

Sd/-	**Sd/-**
(SAKTIJIT DEY)	**(B.RAMAKOTAIAH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated 26th November, 2014

VBP/-

Copy to

1.	Andhra Networks Limited, 6-3-652, Dhruva Tara Complex, Somajiguda, Hyderabad.
2.	The DCIT, Circle 1(1), Hyderabad.
3.	CIT(A)-V, Hyderabad.
4.	CIT-I, Hyderabad
5.	D.R. ITAT "B" Bench, Hyderabad.