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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.139 OF 2015

The Commissioner of Income Tax-111
Pune.

.. Appellant

Vs.

Dr. Arvind S. Phake

.. Respondent

Mr. Tejveer Singh for the appellant.

Mr. Mihir C. Naniwadekar for the respondent.

**CORAM : A. S. OKA &
A. K. MENON, JJ.**

DATED : 20TH NOVEMBER, 2017

ORAL JUDGMENT (PER A. S. OKA, J.)

1. Heard the learned counsel appearing for the appellant. The challenge is to the judgment and order passed by the Income Tax Appellate Tribunal, Pune Bench A at Pune (for short "Appellate Tribunal") on 30th April, 2014. The substantial questions of law which are placed into service are the questions which reads thus:-

" (i) Whether on the facts and in the circumstances of the case and in law, the ITAT is correct in holding, the date of transfer as the date of handing over of physical possession of the property i.e. 01.03.2008 by the assessee, as against the date of Execution of Development Agreement alongwith irrevocable General Power of Attorney i.e. 13.09.2007?

(ii) Whether on the facts and in the circumstances of the case and in law, the ITAT is correct in ignoring the provisions of

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Section 2(47)(v) of the Income Tax Act, which indicates that the year of chargeability is the year in which the contract is executed even if the transfer of immovable property is not effective or complete under the general law?

(iii) Whether on the facts and in the circumstances of the case and in law, the ITAT has erred in ignoring the judgment of this Court in the case of Chaturbhuj Dwarkadas Kapadia v/s. CIT (2003) reported in 260 ITR 491 (Bom) wherein it is held that if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of contract would be relevant to decide the year of chargeability?”

2. In this Appeal, we are concerned with the Assessment Year 2008-09. A return was filed by the respondent-assessee declaring his income on account of Long Term Capital Gain on sale of immovable property, income from business and profession of medical practitioner and other sources. The dispute before the Appellate Tribunal was in respect of part disallowance of exemption claimed by the assessee under Section 54EC of the Income Tax Act, 1961 while computing the Long Term Capital Gain on the sale of immovable property. The respondent-assessee was holding immovable property at Pune. He entered into a registered Development Agreement dated 13th September, 2007 in respect of the said property. The total consideration was agreed to be

₹.5,32,00,000/- out of which a sum of ₹.20,00,000/- was to be adjusted against the cost of construction of the area in the reconstructed building which was to be retained by the respondent-assessee. The construction of the said area was to be made by the developer. The Long Term Capital Gain was accordingly claimed at ₹.5,32,00,000/-. The deduction under Section 54 of the said Act amounting to ₹.20,00,000/- was claimed by way of investment in new residential property. The exemption under Section 54EC of the Act to the tune of ₹.50,00,000/- was claimed on account of investment in National Highway Authority of India (NHAI) Bonds. Initially net taxable Capital Gain was claimed at ₹.2,74,88,690/-. A revised return filed on 31st March, 2008 was filed as a result of a supplementary deed entered into on 30th March, 2010. As per the revised return, the Long Term Capital Gain was quantified at ₹.1,87,28,690/-.

3. As indicated earlier, the real dispute before the Appellate Tribunal was in relation to the claim of deduction under section 54EC. The investment of ₹.50,00,000/- was made in the Bonds of NHAI on 28th March, 2008 and ₹.50,00,000/- in the Bonds of REC Ltd. on 22nd August, 2008. The Assessing Officer held that investment in the bonds of NHAI was within the period specified under Section 54EC

of the Act and the investment of ₹.50,00,000/- made in the bonds of REC Ltd. was beyond the period provided in the said provision inasmuch as the investment made on 22nd August, 2008 was not within six months from the date of the transfer of assets. The finding recorded by the Appellate Tribunal in the impugned judgment and order is that the physical possession of the property was given by the respondent-assessee to the developer on 1st March, 2008. The Appellate Tribunal observed that on the date of execution of the development agreement, full consideration was admittedly not paid, and therefore, the contention of the department that the transfer was effected on 13th September, 2007 cannot be accepted. Therefore, taking the date of transfer as 1st March, 2008 on which day the possession was delivered, it was held that investment made on 22nd March, 2008 was well within the time specified under Section 54EC.

4. The learned counsel appearing for the appellant-Revenue relied upon a decision of High Court of Andhra Pradesh in the case of ***Potla Nageswara Rao v/s. Commissioner of Income Tax in Income***¹ He submitted that in the said decision, the law laid down by a Division Bench of this Court in the case of *Chaturbhuj Dwarkadas Kapadia v/s. Commissioner of Income Tax* has been distinguished.

1 *Tax Appeal No.245 of 2014.*

He also relied upon a decision of the Tribunal in the case of *Jasbir Singh Sarkaria, In Re.*² He pointed out that the said decision relies upon the decision of this Court in *Chaturbhuj Dwarkadas Kapadia v/s. Commissioner of Income Tax*³. He would, therefore, submit that considering the terms and conditions incorporated in the development agreement, the date of transfer for the purposes of Income Tax Act ought to be taken as 13th September, 2017 when the agreement was executed.

5. The learned counsel for the respondent on a query made by the Court pointed out that when the possession was handed over by the respondent-assessee to the developer on 1st March, 2008 the entire consideration under the development agreement was received by the respondent-assessee.
6. We have carefully considered the submissions. What binds this Court is that the judgment of the Division Bench in the case of *Chaturbhuj Dwarkadas Kapadia v/s. Commissioner of Income Tax (supra)*. The Division Bench held that the date of contract is relevant provided the terms of the contract indicate passing off or transferring of complete control over the property in favour of the developer. The Division

2 (2007) 294 ITR 0196

3 (2003) 260 ITR 491 (Bom.)

Bench laid down the test for determining the date which should be taken into account for determining the relevant accounting year in which the liability accrues. In the present case, the Appellate Tribunal has taken into consideration various clauses in the development agreement. Sub-clause (d) of clause (3) of the agreement provides that after full payment of consideration, the construction shall be undertaken by the developer. Admittedly, on the date of execution of the development agreement, the entire consideration was not received by the respondent-assessee. The physical possession of the property subject matter of development agreement was parted with by the respondent-assessee on 1st March, 2008. It was held that on that day, complete control over the property was passed on to the developer. After having perused the various clauses in the agreement and the aforesaid factual aspects, the Tribunal has taken 1st March, 2008 as the date of transfer. This finding is fully consistent with the law laid down by the Division Bench in the case of Chaturbhuj Dwarkadas Kapadia (supra). Therefore, no fault can be found with the impugned judgment of the Tribunal when it was held that the investment made in the sum of ₹.50,00,000/- by the respondent-assessee on 22nd August, 2008 was within the period specified under Section 54EC of the said Act.

7. In the circumstances, no substantial question of law arises. Hence, there is no merit in the appeal and the same is accordingly disposed of.

(A. K. MENON, J.)

(A.S.OKA, J.)

