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

BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER
AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No. 212/Hyd/2014
Assessment Year : 2008-09

Asst. Commissioner of Income-tax, Central Circle – 5, Hyderabad.	Sri B. Rajamallu (Indl.), Hyderabad PAN – ADUPR 1057 R
(Appellant)	(Respondent)

ITA No. 368/Hyd/2014
Assessment Year : 2008-09

Sri B. Rajamallu (Indl.), Hyderabad PAN – ADUPR 1057 R	Asst. Commissioner of Income-tax, Central Circle – 5, Hyderabad.
(Appellant)	(Respondent)

Revenue by	Shri D. Sudhakar Rao
Assessee by	Shri A. Srinivas
Date of hearing	05-11-2014
Date of pronouncement	26-11-2014

O R D E R

PER SAKTIJIT DEY, J.M.:

These two appeals one by assessee and other by the department are directed against two separate orders of learned CIT(A)-VII, Hyderabad both dated 30/12/2013 pertaining to assessment years 2007-08 and 2008-09.

ITA No. 368/H/2014 by assessee

2. The only issue in the aforesaid appeal of assessee is confined to assessing to tax an amount of Rs. 2,89,95,000 being the profit on

sale of land as income of assessee under the head 'business and profession.

3. Briefly the facts are, Assessee is an individual. Pursuant to the search and seizure operation conducted in case of Sri Venigella Anand Prasad and others within the group including assessee, a notice u/s 153A was issued to assessee. In response to the said notice, assessee filed return of income declaring total income of Rs. 1,22,350 as was returned in the original return of income filed for the impugned AY on 17/10/2009. During the assessment proceeding, AO noticed that assessee had purchased five acres of land at Bowrampet, Dundigal, R.R. District. Vide document No. 6522/05 dated 25/05/05. Out of the said five acres of land, assessee had sold three acres of land to M/s Varun Constructions through sale-cum-GPA executed on 12/03/2007 vide document No. 2794/08 for an amount of Rs. 3 crores. AO noted that land purchased and transacted by assessee was contiguous to the land purchased and similarly transacted by M/s Bhavya Constructions Pvt. Ltd.(BCPL) Shri V. Anand Prasad, MD of BCPL and other individuals who like assessee were investors in M/s Bhavya Cements Pvt. Ltd. company set up by Shri V. Anand Prasad. He further noted that all these persons had shown the sources of investment in share capital of M/s Bhavya Cements Pvt. Ltd. the sale proceeds of these lands. As noted by AO in the assessment order, on detailed investigation and from the evidences found, AO noted that no agricultural activity was undertaken on the land. The bills and vouchers towards purchase of fertilizers, etc. are only made to create façade of agricultural activity when in reality there is no such activity. In this context, AO also relied upon the statements recorded from Sri R. Srinivasa Rao and B. Raghunanda Prasad. On going through the statements, AO noted that except for occasional grazing in monsoon for cattle/vegetables, these lands were neither used nor arable for cultivation. It was observed that except some grass for the cattle in this land, no agricultural

activities were performed. AO relying on the decision of Hon'ble Supreme Court in case of Sarifabibi 204 ITR 631 and ITAT Hyderabad Bench decision in case of M/s G.K. Properties Pvt. Ltd. in ITA No. 773/H/07 dated 27/06/08, concluded that lands are not in the nature of agriculture, hence, assessee's claim that lands sold by him do not come within the purview of capital asset as defined u/s 2(14), cannot be accepted. While coming to such conclusion, AO relied upon the discussion made in the assessment order passed in case of M/s BCPL. AO observed that activity undertaken by BCPL, its MD and other investors/shareholders in dealing with the land in such manner revealed that M/s BCPL and its associates have performed an adventure in the course of normal professional activity which is buying and selling of land. AO observed that land bought by all associates of BCPL in the same period at Bowrampet, was adjacent to the urban agglomeration sprawling around Hyderabad. AO observed that all the parties invested in this land keeping in view rising real estate market. He also noted that rise in price of land was around 100 times in less than three years, which confirmed the intention of assessee and others in making investment in land.

4. In course of assessment proceeding, though, assessee claimed that agricultural activity was carried out in these lands and also the fact that lands are not falling under GHMC limit, for which a certificate of Town Planning Officer of GHMC, Qutubullapur Mandal dated 04/10/08 was filed. AO, however, did not accept the claim of assessee by stating that by merely claiming the lands as agricultural as per old record without giving credence to the visible physical appearance and all round urban development cannot be accepted. He observed that traces of agricultural activity has to be physically seen, physically felt as per geographical terrain and soil conditions and more so with verifiable evidences of agricultural produce and sale bills/vouchers, etc., which assessee was not able to produce. AO also observed that GHMC was formed on 16/04/07 by merger of

Qutubullapur Municipality amongst 12 other municipalities and 8 Gram Panchayats. He, therefore, negated assessee's contention that agricultural lands are situated beyond 8 km from the limits of notified municipality. AO finally concluded that the gain derived from the sale of land has to be treated as business income of assessee. Being aggrieved of the assessment order, so passed, assessee preferred appeal before the first appellate authority by raising similar argument as advanced before the AO.

5. The learned CIT(A) after considering the submissions of assessee ultimately concluded that the land cannot be considered to be agricultural land by observing as under:

> "*15. Thus, on summation of facts and circumstances both favourable and against the assessee/appellant, as per the above table, it is clear that other than its assertion, the appellant really does not have anything real and substantive to claim that the land was really agricultural. The Hon'ble Supreme Court had already stated that the revenue record, though, important is not conclusive evidence. The photographic evidence gathered by the investigation wing may be in the year 2009. But the pictures clearly show that the land was left idle and there is really no attempt to bring it under cultivation in whatsoever manner. More importantly, the purchase and sale deeds also have photographs pasted as part of sale deed. These are contemporaneous. They too do not differ from the picture that the investigation wing took. The environment of the entire chunk of land not only appellant's but the other related investors of Bhavya Cements is identical. Further, the proximity to city, the merger within GHMC within a month of sale (when the proposal for such merger and the drafting of such bill must have been in news much before) clearly show the development activity taking place around and which is a key factor in assessing the general environment around the land and its use.*
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> *To conclude in the facts and circumstances of the case, it is held that the lands were not agricultural. They were merely fallow, vacant lands lying idle. This conclusion is also fortified by the statements recorded at the time of search and as extracted at para 5.2 (e) and 5.2 (f) of this order."*

6. So far as the appropriate head under which the gain derived from sale of land is to be taxed, learned CIT(A) also upheld the view

of AO by holding that it is to be taxed as income from business. Being aggrieved of such aforesaid order of learned CIT(A), assessee is in appeal before us.

7. The learned AR submitted before us that there cannot be any doubt with regard to nature of land sold by assessee as assessment order itself makes it clear that it is contiguous to the land to the extent of 30 acres sold to M/s Varun Constructions by BPCL and others including assessee, which are situated at the very same place i.e. Bowrampet Village, Dundigal Mandal. Learned AR submitted that considering identical facts and issues while deciding the appeal filed by the department in case of BCPL and others in ITA No. 1751/Hyd/12 and others dated 28/08/14, the Tribunal has upheld the claim of assessee that land situated at Bowrampet Village, Dundigal Mandal RR Dt. being in the nature of agricultural land and outside the prescribed limit of a place notified municipality, neither it can be treated as capital asset nor the transaction as an adventure in the nature of trade. Thus, AR submitted that since the issue in dispute is squarely covered by the decision of the Tribunal, the order passed by learned CIT(A) deserves to be set aside.

8. The learned DR, on the other hand, though agreed that facts and issues involved in the present appeal are identical to the facts and issues considered by ITAT in case of ACIT Vs. BCPL and others vide ITA No. 1751/Hyd/12 and others dated 28/08/14, he nevertheless submitted that both the AO and CIT(A) were justified in rejecting assessee's claim of exemption of gain derived on sale of land.

9. We have considered the submissions of the parties and perused the orders of the revenue authorities as well as other materials on record. On perusal of impugned assessment order as well as other materials on record, it is very much clear that the land, in question, gain from sale of which was subject matter of taxation is situated at

Bowrampet Village, Dundigal Mandal, RR Dt. It is also evident from the assessment order that it is contiguous to the land sold by M/s BCPL and others to M/s Varun Constructions. It is also very much clear that while coming to conclusion that the land cannot be treated as agricultural land, AO has heavily relied upon observations made in the assessment order passed in case of M/s BCPL and others in the group. From the aforesaid facts, the picture which emerges is nature of land sold by assessee is similar to the land sold by BCPL and others within the group to M/s Varun Constructions. While dealing identical issue in the appeal filed by the department in case of BCPL and others in ITA No. 1751/Hyd/12 and others (supra), the coordinate bench of this Tribunal after considering the submissions of assessee and keeping in view the factual aspects of the issue and relying upon the other decisions of coordinate bench in case of Smt. Vijay and others Vs. DCIT in ITA Nos. 306, 307, 309 and 311/H/13 dated 06/06/14, held as under (for better clarity finding of ITAT is extracted in its entirety).

> *"13. We have heard the parties and perused the materials on record as well as the orders of the revenue authorities. We have also applied our mind to the decisions placed before us. On going through the order of the learned CIT(A) we do not find any infirmity either with regard to his conclusion in respect of the nature of land sold by the assessee or with regard to the issue as to whether the transaction is to be treated as an adventure in the nature of trade. As can be seen from the facts and materials placed on record, the nature of land at the time of purchase by the assessee from M/s Deccan Properties Ltd. and also at the time of sale to M/s Varun Constructions, remained the same i.e. agricultural not only in the revenue records but also in the pahanis. It is also a fact on record the assessee has shown income from agricultural operations carried on over the said land in the return of income filed for the impugned assessment year as well as the preceding assessment year which has been accepted by AO. In fact the AO has not totally ruled out agricultural operation, though according to him it is not substantial. In these circumstances, when the nature of land sold by the assessee still remains to be agricultural in the revenue records and the assessee has not applied for conversion of the land to non-agricultural it cannot be treated*

as non-agricultural land only because the AO was of the view that agricultural operation on the said land is not possible to the extent shown by the assessee. In this context it is to be noted that the certificate issued by the Dy. Collector and Mandal Revenue Officer, Qutubullapur Mandal (at page 99 of assessee's paper book) clearly indicate that the land under the same survey nos. situated at Bowrampet Village are under cultivation by raising crops of paddy, cattle feed, maize, jowar etc. Further the pahanis also indicate the crops grown over the said land. When certificate has been issued by govt. authorities certifying cultivation of agricultural produce the AO was not correct in rejecting them without proper evidence. Moreover, certificate dt. 04/02/2009 issued by Dy. Collector and Tahsildar Qutubullapur Mandal (at page 100 of assessee's paper book) and certificate dt. 04/10/2008 of Town Planning Officer, GHMC (at page 101 of paper book) clearly indicate that Bowrampet village where assessee's land is situated is beyond the limit of GHMC. It is a fact on record, in the original assessment order passed u/s 143(3) of the Act, the AO has examined the nature of transaction by conducting necessary enquiry and after proper application of mind had accepted the claim of the assessee that the asset being sold being agricultural land will not attract capital gain tax. The department has not brought any cogent evidence or material on record to disprove assessee's claim either in respect of agricultural income earned through agricultural operation conducted on the said land or the fact that the land is situated beyond the prescribed limit of the nearest municipality notified by the Central Government. In the aforesaid circumstances, the finding of the CIT(A) remains uncontroverted. Therefore, it has to be held that as the land sold by the assessee is in the nature of agricultural land and is situated beyond the prescribed limit of any municipality notified by the central govt. it cannot come within the definition of capital asset as envisaged u/s 2(14) of the Act. So far as the finding of the AO that the transaction entered into by the assessee is an adventure in the nature of trade, the same is also without merit for the strong and valid reasons recorded by the CIT(A). On a perusal of the assessment order, it appears, that the AO has treated the transaction as an adventure in the nature of trade only to overcome assessee's claim of exemption from capital gain on the ground that the asset sold is not a capital asset within the meaning of section 2(14) of the Act. As rightly observed by the learned CIT(A), the facts clearly indicate that the assessee has held the asset for more than two years and only because of compelling circumstances sold it to M/s Varun Constructions in the year under consideration. Therefore, none of the attributes of an adventure in the nature of trade is present in the transaction. It will be pertinent to mention here that earlier a bench of this Tribunal had an occasion to examine

similar nature of dispute arising out of similar nature of transaction relating to sale of agricultural land located in the same area in case of some other assessees, namely, Smt. M. Vijaya and others Vs. DCIT (ITA Nos. 306, 307, 309 & 311/Hyd/13 order dated 06/06/2014) who also sold their land to M/s Varun constructions. The Tribunal after examining the contentions of the parties and referring to a number of judgments held as under:

> *23. Adverting to the facts of the present case, the land in question is classified in the Revenue records as agricultural land and there is no dispute regarding this issue and actual cultivation has been carried on this land and income was declared from this land in the return of income filed by the assessee for the AY as agricultural income. It is also an admitted fact that the assessee has not applied for conversion of this agricultural land for non-agricultural purposes before sale of this property and the assessee has not put the land to any purposes other than agricultural purposes. It is also an admitted fact that neither the impugned property nor the surrounding areas were subject to any developmental activities at the relevant point of time of sale of the land as per the evidence brought on record.*
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> *24. The provisions of Andhra Pradesh Agricultural Land (conversion for non-agricultural purposes) Act, 2006 also prescribed the procedure for conversion of agricultural land into non-agricultural land. Being so, whenever the agricultural land to be treated as non-agricultural land, the same has to be converted in accordance with the provisions of Andhra Pradesh Agricultural Land (conversion for non-agricultural purposes) Act, 2006. If by a Government Notification, the nature and character of land changes from agriculture into non-agriculture then there is no question of conversion of this land for non-agricultural purposes by the Revenue authorities concerned. To our understanding nature of land cannot be changed by any State Government notification and the land owners are required to apply to the concerned Revenue authorities for the purpose of conversion of the agricultural land into non-agricultural land and there is no automatic conversion per se by State Government notification.*
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> *25. In the instant case, at the relevant point of sale of the land in question, the surrounding area was totally undeveloped and except mere future possibility to put the*

land into use for non-agricultural purposes would not change the character of the agricultural land into non-agricultural land at the relevant point of time when the land was sold by the assessee. It is also an admitted position that the assessee had not applied for conversion of the land in question into non-agricultural purposes and no such permissions were obtained from the concerned authority. In the Revenue records, the land is classified as agricultural land and has not been changed from agricultural land to non-agricultural land at the relevant point of time when the land was sold by the assessee. It is also not in dispute that there was no activity undertaken by the assessee of developing the land by plotting and providing roads and other facilities and there was no intention also on the part of the assessees herein to put the same for non-agricultural purposes at time of their ownership that land. No such finding has been given by the Department. No material or evidence in support of the fact that the assessees have put the land in use for non-agricultural purposes has been brought on record. The nature of the crop and the person who cultivated the land are duly mentioned in the revenue records shows that at the relevant point of time the land was used for agricultural purposes only and nothing is brought on record to show that the land was put in use for non-agricultural purposes by the assessees. In view of the decision of the Hon'ble High Court in the case of Gopal C. Sharma vs. CIT (209 ITR 946) (Bom), it is also clear that the profit motive of the assessee in selling the land without anything more by itself can never be decisive to say that the assessee used the land for non-agricultural purposes. We may also refer to a decision of the Hon'ble Supreme Court in the case of N. Srinivasa Rao vs. Special Court (2006) 4 SCC 214 where it was observed that the fact that agricultural land in question is included in urban area without more, held not enough to conclude that the user of the same had been altered with passage of time. Thus, the fact that the land in question in the instant case is bought by Developer cannot be a determining factor by itself to say that the land was converted into use for non-agricultural purposes.

26. Recently the Karnataka High Court in the case of CIT vs. Madhukumar N. (HUF) (2012) 78 DTR (Kar) 391 held as follows:

"9. An agricultural land in India is not a capital asset but becomes a capital asset if it is the land

located under Section 2(14)(iii)(a) & (b) of the Act, Section 2(14) (iii) (a) of the Act covers a situation where the subject agricultural land is located within the limits of municipal corporation, notified area committee, town area committee, town committee, or cantonment committee and which has a population of not less than 10,000.

10. Section 2(14)(m)(b) of the Act covers the situation where the subject land is not only located within the distance of 8 kms from the local limits, which is covered by Clause (a) to section 2(14)(iii) of the Act, but also requires the fulfilment of the condition that the Central Government has issued a notification under this Clause for the purpose of including the area up to 8 kms, from the municipal limits, to render the land as a "Capital Asset.

11. In the present case, it is not in dispute that the subject land is not located within the limits of Dasarahalli City Municipal Council therefore, Clause (a) to section 2(14][iii] of the Act is not attracted.

12. However, though it is contended that it is located within 8 knits,, within the municipal limits of Dasarahalli City Municipal Council in the absence of any notification issued under Clause (b) to section 2(14)(iii) of the Act, it cannot be looked in as a capital asset within the meaning of Section 2(14)(iii)(b) of the Act also and therefore though the Tribunal may not have spelt out the reason as to why the subject land cannot be considered as a 'capital asset' be giving this very reason, we find the conclusion arrived at by the Tribunal is nevertheless the correct conclusion."

27. Further the Kolkata Bench of the Tribunal in the case of DCIT vs. Arijit Mitra (48 SOT 544) (Kol) held as follows:

"7. From the above, it is clear that agricultural land situated in areas lying within a distance not exceeding 8 km from the local limits of such Municipalities or Cantonment Boards are covered by the amended definitions of 'capital asset', if such areas are, having regard to the extent of and scope for their urbanization and other relevant considerations, is notified by the Central Government in this behalf. Central Government in exercise of such powers has issued the above

notification, as amended latest by Notification No. 11186 dated 28.12.1999 clearly clarifies that agricultural land situation in rural areas, areas outside the Municipality or cantonment board etc., having a population of not less than 10,000 and also beyond the distance notified by Central Government from local limits i.e. the outer limits of any such municipality or cantonment board etc., still continues to be excluded from the definition of 'capital asset'. Accordingly, in view of sub-clause (b) of section 2(14)(iii) of the Act even under the amended definition of expression 'capital asset', the agricultural land situated in rural areas continues to be excluded from that definition. And as in the present case, admittedly, the agricultural land of the assessee is outside the Municipal Limits of Rajarhat Municipality and that also 2.5 KM away from the outer limits of the said Municipality, assessee's land does not come within the purview of section 2(14)(iii) either under sub clause (a) or (b) of the Act, hence the same cannot be considered as capital asset within the meaning of this section. Hence, no capital gain tax can be charged on the sale transaction of this land entered by the assessee. Accordingly, we quash the assessment order qua charging of capital gains on very jurisdiction of the issue is quashed. The cross objection of the assessee is allowed."

28. It was held in the case of CIT vs. Manilal Somnath (106 ITR 917) as follows:

"Under the Income-tax Act of 1961, agricultural lend situated in India was excluded from the definition of " capital asset" and any gain from the sale thereof was not to be included in the total income of an assessee tinder the head "capital gains". In order to determine whether a particular land is agricultural land or not one has to first find out if it is being put to any use. If it is used for agricultural purposes there is a presumption that it is agricultural land. If it is used for non-agricultural purposes the presumption is that it is non-agricultural land. This presumption arising from actual use can be rebutted by the presence of other factors. There may be cases where land which is admittedly non-agricultural is used temporarily for agricultural purposes. The determination of the question would, therefore, depend on the facts of each case.

'The assessee, Hindu, undivided family, had obtained some land on a partition in 1939. From that time, up to

the time of its sale, agricultural operations were carried on in the land. There was no regular road to the land and it was with the aid of a tractor that agricultural operations were being carried on. The land was included within a draft town planning scheme. The assessee got permission of the Collector to sell the land for residential purposes and sold it. On the question whether the land was agricultural land:

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

29. Further the word "Capital Asset" is defined in Section 2(14) to mean property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-

(iii) agricultural land in India, not being land situate-

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanization of that

area and other relevant considerations, specify in this behalf by notification in the Official Gazette;

30. It is very clear from the above that the gain on sale of an agricultural land would be exigible to tax only when the land transferred is located within the jurisdiction of a municipality. The fact that all the expressions enlisted after the word municipality are placed within the brackets starting with the words 'whether known as' clearly indicates that such expressions are used to denote a municipality only, irrespective of the name by which such municipality is called. This fact is further substantiated by the provisions contained under clause (b) wherein it has been clearly provided that the authority referred to in clause (a) was only municipality.

31. We also perused the meaning of the term local authority as referred in section 10(20) of the Act.

(20) the income of a local authority which is chargeable under the head "Income from house property", "Capital gains" or "Income from other sources" or from a trade or business carried on by it which accrues or arises from the supply of a commodity or service [(not being water or electricity) within its own jurisdictional area or from the supply of water or electricity within or outside its own jurisdictional area].

[Explanation. - For the purposes of this clause, the expression "local authority" means -

(i) Panchayat as referred to in clause (d) of article 243 of the Constitution; or

(ii) Municipality as referred to in clause (e) of article 243P of the Constitution; or

(iii) Municipal Committee and District Board,

legally entitled to, or entrusted by the Government with, the control or management of a Municipal or local fund; or

(iv) Cantonment Board as defined in section 3 of the Cantonments Act, 1924 (2 of 1924);

32. It is also evident from the Memorandum explaining the provisions of Finance Act, 1970, whereby s. 2(14) was amended so as to include the agricultural lands located within the jurisdiction of a municipality in the definition of the expression

'Capital Asset'. The relevant portion of the said memorandum is reproduced hereunder:

"30. ... The Finance Act, 1970 has, accordingly, amended the relevant provisions of the Income-tax Act so as to bring within the scope of taxation capital gains arising from the transfer of agricultural land situated in certain areas. For this purpose, the definition of the term "capital asset" in section 2(14) has been amended so as to exclude from its scope only agricultural land in India which is not situate in any area comprised within the jurisdiction of a municipality or cantonment board and which has a population of not less than ten thousand persons according to the last preceding census for which the relevant figures have been published before the first day of the previous year. The Central Government has been authorised to notify in the Official Gazette any area outside the limits of any municipality or cantonment board having a population of not less than ten thousand up to a maximum distance of 8 kilometres from such limits, for the purposes of this provision. Such notification will be issued by the Central Government, having regard to the extent of, and scope for, urbanisation of such area, and, when any such area is notified by the Central Government, agricultural land situated within such area will stand included within the term "capital asset". Agricultural land situated in rural areas, i.e., areas outside any municipality or cantonment board having a population of not less than ten thousand and also beyond the distance notified by the Central Government from the limits of any such municipality or cantonment board, will continue to be excluded from the term "capital asset".

33. Further it is nobody's case that the property falls within any area which is comprised within the jurisdiction of a municipality or cantonment board or which has a population of not less than 10,000 according to the last preceding Census of which the relevant figures have been published before the first day of the previous year. In other words, the land does not fall in sub-clause (a) of section 2(14)(iii) of the Act as the land is outside of any municipality including GHMC. Further we have to see whether the land falls in clause (b) of section 2(14)(iii). This section prescribes that any area within such distance, not being more than 8 km from the local limit of any municipality or cantonment board as referred to in sub-clause (a) of section 2(14)(iii) of the Act, as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area

and other relevant considerations, specify in this behalf by notification in the Official Gazette.

34. We have carefully gone through the notification issued by the Central Government u/s. 2(1A)(c) proviso (ii)(B) and 2(14)(3b) vide No. 9447 (F. No. 164/(3)/87/ITA-I) dated 6th January, 1994 as amended by notification No. 11186 dated 28th December, 1999. In the schedule annexed to the notification dated 6.1.1994, Entry No. 17 is relating to Hyderabad wherein mentioned that the areas up to a distance of 8 km from the municipal limits in all directions. In the notification 11186 dated 28.12.1999 there is no entry relating to Hyderabad. It is clear from these notifications that agricultural land situated in areas lying within a distance not exceeding 8 km from the local limits of Hyderabad Municipality (GHMC) is covered by the amended definitions of 'capital asset'. Central Government in exercise of such powers has issued the above notification, as amended latest by Notification No. 11186 dated 28.12.1999 clearly clarifies that agricultural land situation in rural areas, areas outside the Municipality or cantonment board etc., having a population of not less than 10,000 and also beyond the distance notified by Central Government from local limits i.e. the outer limits of any such municipality or cantonment board etc., still continues to be excluded from the definition of 'capital asset'. Accordingly, in view of sub-clause (b) of section 2(14)(iii) of the Act even under the amended definition of expression 'capital asset', the agricultural land situated in rural areas continues to be excluded from that definition. And as in the present case, admittedly, the agricultural land of the assessee is outside the Municipal Limits of Hyderabad Municipality and that also 8 km away from the outer limits of this Municipality, assessee's land does not come within the purview of section 2(14)(iii) either under sub clause (a) or (b) of the Act, hence the same cannot be considered as capital asset within the meaning of this section. Hence, no capital gain tax can be charged on the sale transaction of this land entered by the assessee. This is supported by the order of Kolkata Bench of this Tribunal in the case of Arijit Mitra (cited supra), Harish V. Milani (supra) and M.S. Srinivas Naicker vs. ITO (292 ITR 481) (Mad). By borrowing the meaning from the above section, we are not able to appreciate that the land falls within the territorial limit of any municipality without notification of Central Government as held by the Karnataka High Court in the case of Madhukumar N. (HUF) (cited supra).

35. From the facts and circumstances of the case, as narrated before us, it is important to note that what was the intention of the assessees at the time of acquiring the land or

interval action by the assessee between the period from purchase and sale of the land and the relevant improvement/development taken place during this time is relevant for deciding the issue whether transaction was in the nature of trade. Though intention subsequently formed may be different, it is the intention at the inception is crucial. One of the essential elements in an adventure of the trade is the intention to trade; that intention must be present at the time of purchase. The mere circumstances that a property is purchased in the hope that when sold later on it would leave a margin of profit, would not be sufficient to show, an intention to trade at the inception. In a case where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor and unless it is offset by the presence of other factors it would raise as strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. The presumption may be rebutted. In the present case, considering the facts and circumstances of the case it cannot be considered as an adventure in the nature of trade. The intention of the assessee from the inception was to carry on agricultural operations. Merely because of the fact that the land was sold in a short period of holding, it cannot be held that income arising from the sale of land was taxable as profit arising from the adventure in the nature of trade or capital gain. The period of holding should not suggest that the activity was an adventure in the nature of trade.

36. In view of our above discussion, in our opinion, the land is not situated within the Qutubullapur municipality, but, the same situated in the Dundigal village and the evidence brought on record suggest that the land is an agricultural land, hence, it is not liable for taxation. Accordingly, the addition made on this count is deleted in all the appeals under consideration. No evidence suggests that Dundigal village falls within Qutubullapur Municipality and also this Qutubullapur Municipality has not notified in the year under section 2(14)(iii) of the I.T. Act and Qutubullapur Municipality abolished and merged with Municipal Corporation of Hyderabad with effect from 16/04/2007. We have also gone through the record placed in the paper book at pages 76 & 77. At page 76, a copy of the intimation is placed issued by the Town Planning Officer, Quthbullapur , Circle – 15, GHMC vide Ref. No. G/1240/2008,

dated 04/10/2008 informing that the land is not falling in the GHMC limits. At page 77, a copy of the agricultural land certificate is placed, issued by the Deputy Collector & Mandal Revenue Officer, Qutubullapur Mandal vide Ref. No. A/13607/2005, dated 20/08/2005 stating that the lands are under cultivation by raising crops i.e. paddy, cattle feed, maize, jowar, vegeteables etc.

37. Further, we make it clear that when the land which does not fall under the provisions of section 2(14)(iii) of the IT Act and an assessee who is engaged in agricultural operations in such agricultural land and also being specified as agricultural land in Revenue records, the land is not subjected to any conversion as non-agricultural land by the assessee or any other concerned person, transfers such agricultural land as it is and where it is basis, in such circumstances, in our opinion, such transfer like the case before us cannot be considered as a transfer of capital asset or the transaction relating to sale of land was not an adventure in the nature of trade so as to tax the income arising out of this transaction as business income.

14. On going through the aforesaid order of the coordinate bench, we find the facts dealt upon by the tribunal is identical to the facts in the present case. Therefore, ratio laid down therein also equally applies to the facts of the present case as the land sold is not only agricultural in nature but is also situated beyond 12 kms from the limit of a municipality notified by the central govt. Hence, land sold by assessee not being a capital asset, the gain derived there from is not taxable at the hands of the assessee. Accordingly, we uphold the order of the CIT(A) by dismissing the ground raised."

10. On going through the facts considered by the coordinate bench in case of ACIT Vs. BCPL and others (supra), we find that the facts involved in the present case are identical to that case. Learned DR has not brought any new facts or materials before us to take a view contrary to the aforesaid decision of the coordinate bench. Hence, respectfully following the same, we hold that the asset sold by assessee being in the nature of agricultural land cannot be considered as capital asset within the meaning of section 2(14) of the Act. Accordingly, we direct the AO to delete the addition made.

11. So far as the issue whether the transaction can be considered to be an adventure in the nature of trade, we are also not in agreement with the view of the AO and learned CIT(A) as there is nothing brought on record to suggest that assessee is involved in trading activity. As can be seen from the facts on record, assessee had purchased the land in the assessment year 2005-06 and has sold part of land in the impugned assessment year for making investment in Bhavya Cements Ltd., therefore, it cannot be considered as a trading activity because sale of land is for a particular purpose. In the aforesaid view of the matter, we allow the grounds raised by assessee.

12. In the result, assessee's appeal is allowed.

ITA No. 212/Hyd/14 by department

13. The only issue arising in the aforesaid appeal of the department is whether the CIT(A) was justified in deleting the addition made by AO on account of capital gain.

14. Briefly the facts are, assessee is an individual deriving income from salary. A search and seizure operation was conducted in case of Venigalla Anand Prasad and others on 07/10/09. During search and seizure operation as alleged by the department, certain documents, books of account and other related information belonging to assessee were found and seized. On the basis of these incriminating materials notice u/s 153A was issued to assessee. During assessment proceeding, AO noticed that assessee had purchased 7.9 acres of land in Survey Nos. 667, 668, 669, 670 and 671 at Dundigal and 2 acres in Sy.No. 166 at Bowrampet, RR Dist. In 2005 vide sale deed No. 8807/2005 and 6522/2005 respectively. Out of the aforesaid land he has sold 1 acre land to M/s Varun Constructions for a consideration of Rs. 1 crore through agreement of sale-cum-GPA

dated 12/03/07. As far as balance land is concerned, assessee along with 33 others entered into an agreement with M/s Amsri Developers vide Document No. 7110 dated 04/05/07 giving the land for development. AO noticed that the land purchased and sold by assessee was contiguous to the land purchased and similarly transacted by Bhavya Constructions Pvt. Ltd., Shri Anand Prasad and other individuals, who all like assessee were the investors in M/s Bhavya Constructions a company set up by Shri V. Anand Prasad. He noticed that all these persons had jointly entered into a development agreement with M/s Amsri Developers for development of their land totaling to 123 acres and 05 guntas. He noted that M/s Amsri Developers has paid refundable security deposit in furtherance of the development agreement. As per the registered document, the entire value of the project was Rs. 720 crores with a sharing ratio of 35% to the land owners on the built up area and undivided land. AO on the basis of statement recorded from V. Anand Prasad, M.D. of Bhavya Constructions Pvt. Ld. and referring to decisions noted in the order held that there is a transfer of capital asset u/s 2(47)(v) of the Act and proceeded to compute short term capital gain at Rs. 21,84,10,621. Being aggrieved of the assessment order so passed assessee preferred appeal before the CIT(A).

15. Before the CIT(A), assessee took a specific plea that there cannot be any transfer u/s 2(47)(v) of the Act as the development of the project has not taken place due to failure on the part of the developer to perform his part of the contract. It was submitted that assessee had only received refundable security @ Rs. 13 lakh per acre. Assessee also contended that as no steps were taken by the developer to start development activity there was a complete breach and breakdown of the development agreement, which led to assessee and others filing a civil suit for cancellation of the development agreement, which is pending before Additional District Judge, RR District as OS No. 903/12. Thus, it was submitted by assessee that as

development agreement has not been acted upon, the conditions of section 53A of the TP Act, has not been fulfilled and as such there cannot be any transfer as envisaged u/s 2(47)(v) of the Act. In this context, assessee relied upon a number of decisions of different Courts and Tribunal. CIT(A) after considering the submissions of assessee in the context of facts and materials on record as well as the ratio laid down in judicial precedents came to the conclusion that there being no steps taken by developer to perform his part of contract under the development agreement, it cannot be said that the conditions of section 53A of TP Act read with section 2(47)(v) of the IT Act has been fulfilled. The observations of learned CIT(A) in this regard are extracted below for the sake of convenience:

> ***"12.0.*** *In the instant case, it is evident that the development agreement cum GPA was signed and the developer was allowed possession to do his part of the deal/contract. However, the developer did not take any action and finally, the appellant along with the other land owners filed a petition in court seeking cancellation of the development agreement. (O.S.No 903 of 2012).*
>
> ***13.0.*** *The issue for the question now is, whether the development agreement, which is clearly not operational, should be still insisted and considered as being valid enough to fasten the capital gains liability on the appellant? As on the date of assessment order, the appellant had drawn attention to the non performance of contract by the developer and the contemplation of filing of suit. The suit was subsequently filed in 2012. This only reinforced and provided evidence to the argument of the appellant that there is no progress on the development agreement and the agreement is itself in limbo and is being repudiated.*
>
> ***14.0.*** *The basic works in any development project are (a) Clearing of land and survey of land (b) Formation of roads and drainage (c) demarcation of villa plots (d) Application for land usage conversion (e) Preparation of plans and drawings (f) Filing of such drawings for approval of municipal authorities (g) Filing of application for environment clearance since it is a project of more than 100 acres (h) grant of such approvals and (h) construction work.*
>
> ***15.0*** *Not a single work of the above was done even till 2011 or even to date according to the appellant. This lack of progress and unwillingness of developer led to the appellants and other land owners seeking judicial remedy of cancellation of development agreement so that they would be free of the developer and can proceed to deal with someone else or to deal*

with the land in whatsoever manner they deem fit.

16.0 *The Civil Suit filed in the Court of District Judge, Ranga Reddy in OS No.903/2012 is seen. The relevant extract from the suit are given below:*

Clause (2) *The names of Plaintiffs (appellant and the other 33) were mutated in the revenue records as per pattadars and possessors. The possession and enjoyment of the plaintiff is evident from the pahanis and other revenue records.*

Clause (3) *The developer made the plaintiffs believe that the entire project would be completed within a period of 36 months from the date of obtaining construction permission from concerned authorities.*

The Development Agreement cum GPA empowers the developer to take appropriate decision with regard to the demarcation of area and take necessary action for application/approval of plan.

Clause (4) *The developer failed to make an application for permission and approval - he thereby committed default in discharge of his obligation under development agreement.*

Clause (5) *It is submitted that more than 5 years have elapsed since the date of the development agreement, but absolutely there is no initiation of any work by the defendant NO.1 (developer) relating to submission of plans, leave about progress.*

Clause (5) *A legal notice was sent to defendant on 12.02.2012 and the notice or cancellation of development agreement cum GPA was sent on 23.06.2012*

Clause (6) *In the reply to notice dated 12.02.2012, the defendant no.1 (developer), came up with a lame excuse that survey and demarcation is to be done, to cover up its inexcusable lapses. The defendant also made alleged claims of protected tenant but failed to give any details with regard to alleged claim by these 'protected tenants' and the extent of land involved in such proceedings. The plaintiffs are not aware of any such proceedings initiated by any such tenants.*

The defendant (developer) in its anxiety to show some kind of performance obtained land use certificate of HUDA and tried to project the same as requisite permission.

The defendant did not invest any amount over the project.

The defendant ought to have completed entire project by end of December,

201l.

Defendant miserably failed to commence the project within 5 years of date of development agreement.

Clause (7) *The defendant nO.1 (developer) is liable to pay damages for breach of contract. An amount of Rs.13 lakhs per acre was furnished as l security for performance guarantee of the development l agreement. It is submitted that as the developer failed to perform its obligations, the deposit is forfeited.*

17.0 *The website of M/s AMSRI Developers was seen in course of appeal proceedings. Even as on 28th December, 2013, The website had two distinct classes of projects (a) Ongoing-under which 3 projects were listed and (b) Proposed projects-under which 9 projects were listed with the present project under discussion, being listed at SI.No.8 as AMSRI GLOBAL VILLAGE. The classification by the developer itself as "proposed", as distinct from "ongoing" is significant.*

18.0 *On further clicking the project on this website, the only description available is - "The project is being implemented at Bowrampet, Hyderabad, adjacent to Outer ring road as an integrated township spread over an area of 260 acres. This is proposed as a modern township complete with residential, commercial, retail, entertainment and schooling facilities for the residents." The copies of website pages (2 nos.) are overleaf.*

The built up area details are mentioned as : - "to be announced" The approximate SFT price is also given as "to be announced".

19.0 *The above lends credibility to the stand of appellant that there was no willingness or part-performance on part of the developer during the relevant previous year or even for next 4 years finally leading to collapse of the agreement when a Suit seeking its cancellation is filed and is presently in court.*

20.0 *It is also seen that apart from the Rs 13 lakh per acre that the appellants and others received as refundable security deposit, there was no further payment. Since 2007 May, there was no further movement and no willingness of the developer to do his part of the deal could be seen. I am therefore constrained to hold that no capital gains arise to the appellant in the year 2008-09 based on this development agreement which turned out to be a non-starter.* ***Consequently, there is no income to be taxed as capital gains on account of the development agreement.*** *This ground of appeal is thus allowed."*

16. The learned AR, at the outset, submitted that the issue is squarely covered by the decision of ITAT, Hyderabad in case of ACIT Vs. R. Srinivasa Rao in ITA No. 1786/Hyd/12 and others dated 28/08/14 as while deciding identical issue, the ITAT has upheld assessee's claim that there was no transfer of property under the development agreement.

17. The learned DR, though accepted the fact that ITAT upon considering similar facts and identical issue has accepted the claim of assessee, but, he nevertheless submitted before us that CIT(A) was not justified in deleting the addition made on account of capital gain since there is clearly a transfer as per section 2(47) as assessee in terms of the development agreement has delivered the possession of the property to the developer.

18. We have considered the submissions of the parties and perused the orders of revenue authorities as well as other materials on record. It is quite evident from the assessment order that AO has assessed capital gain in the impugned assessment year for the reason that assessee as per the terms of the development agreement entered with the developer has handed over possession of the property. However, as can be seen from the order of learned CIT(A) as well as other facts and materials on record, there is no evidence that the developer has taken any steps for development towards performance of his part of contract under the development agreement by undertaking any steps for development of the property. On the other hand, facts and materials clearly show that there is complete lack of willingness on the part of the developer in undertaking the development activity. In fact for that reason, assessee and other land holders instituted a suit against the developer seeking cancellation of development agreement. Further, on a perusal of the order passed by the coordinate bench in case of Sri R. Srinivasa Rao in ITA No. 1786/Hyd/12 and others (supra), we find that on considering identical

facts and circumstances arising out of same development agreement with M/s Amsri Developers, the coordinate bench has given categorical finding while upholding the order of learned CIT(A) that there is no transfer as envisaged u/s 2(47)(v) since there is no willingness on the part of the developer to undertake the development activity. The observations of the coordinate bench in this regard are extracted hereunder in its entirety for the sake of clarity.

> *"11. We have considered the submissions of the parties and perused the materials on record along with the orders passed by the revenue authorities. We have also carefully applied our mind to the decisions placed before us. It is clear from the assessment order that the AO has computed capital gain in the impugned assessment year solely on the basis of the fact that assessee has entered into the development agreement with the developer 04/05/2007 and handed over possession of the property. He has also put stress on the fact that the assessee has received refundable security deposit from the developer @ Rs. 13 lakhs per acre. However, as rightly held by the learned CIT(A) neither entering into the development agreement or handing over of the possession of property are the sole and exclusive criteria to construe transfer of capital asset as envisaged u/s 2(47)(v) of the Act. On plain reading of section 2(47)(v) would make it clear that it refers to handing over possession of the property under a development agreement towards part performance of contract as envisaged u/s 53A of the TP Act. However, the handing over of possession by the assessee towards part performance of contract will not amount to transfer unless the transferee is also willing and ready to perform his part of the contract under the development agreement. As can be seen from the facts and materials on record, the developer apart from making payment of the refundable security deposit of Rs. 13 lakhs per acre has not taken any step towards development of the property. In fact the most important act of converting the nature of land from agriculture to non agriculture has not been put into motion. The nature and character of land remains as it is even today. The Developer has not taken any steps to get sanction/approval of plan, building construction, etc. from the competent authorities. Even not a single development activity like leveling of land, sales promotion, has been initiated by the developer. These facts, which have not been controverted by the department, clearly demonstrate unwillingness on the part of the developer to perform his part of the contract. It is also a matter requiring consideration that the assessee along with other land owners*

have filed a civil suit for cancellation of the development agreement, which clearly brings out the dispute between the land owners and developer and also the fact that developer has not only failed to perform but is also unwilling to perform his part of the contract. Therefore, when the developer has not performed or there is unwillingness to perform his part of the contract, it cannot be concluded that there is transfer of capital asset in terms with section 2(47(v) read with section 53A of the TP Act only because the assessee has entered into a development agreement or even handed over possession of the land to the developer during the previous year relevant to AY under dispute. As rightly held by the ld. CIT(A), handing over possession of the property is not the sole ctriteria but one of the criteria to construe 'transfer' u/s 53A of the T.P. Act. The ITAT Hyderabad Bench in case of Smt. K. Radhika Vs. DCIT (supra) has held as under:

> *"48. We are in considered agreement with the views so expressed in this commentary on the provisions of the Transfer of Property Act. It is thus clear that 'willingness to perform' for the purposes of Section 53A is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of Section 53A of the Transfer of Property Act will come into play on the facts of that case. It is only elementary that, unless provisions of Section 53A of the Transfer of Property Act are satisfied on the facts of a case, the transaction in question cannot fall within the scope of deemed transfer under Section 2(47)(v) of the IT Act. Let us therefore consider whether the transferee, on the facts of the present case, can be said to have 'performed or is willing to perform' its obligations under the agreement.*
>
> *49. Even a cursory look at the admitted facts of the case would show that the transferee had neither performed nor was it willing to perform its obligation under the agreement in the assessment year under consideration. The agreement based on which capital gains are sought to be taxed in the present case is agreement dated 11.05.2005 but this agreement was not adhered to by the transferee. The transferee originally made a payment of Rs.10 lakhs on 11.5.2005 and another payment of Rs.90 lakhs on the same day as refundable security deposit. However, out of this a sum of Rs.50 lakhs was said to be refunded by the landlord to the developer on 5.3.2009. As such, the assessee has received only a meager amount*

as refundable security deposit which cannot be construed as receipt of part of sale consideration. Admittedly, there is no progress in the development agreement in the assessment year under consideration. The Municipal sanction for development was obtained not in this assessment year and it was obtained only on 17.09.2006 from the Hyderabad Urban Development Authority. The sanction of the building plan is utmost important for the implementation of the agreement entered between the parties. Without sanction of the building plan, the very genesis of the agreement fails. To enable the execution of the agreement, firstly, plan is to be approved by the competent authority. In fact, the building plan was not got approved by the builder in the assessment year under consideration. Until permission is granted, a developer cannot undertake construction. As a result of this lapse by the transferee, the construction was not taken place in the assessment year under consideration. There is a breach and break down of development agreement in the assessment year under consideration. Nothing is brought on record by authorities to show that there was development activity in the project during the assessment year under consideration and cost of construction was incurred by the builder/developer. Hence it is to be inferred that no amount of investment by the developer in the construction activity during the assessment year in this project and it would amount to non-incurring of required cost of acquisition by the developer. In the assessment year under consideration, it is not possible to say whether the developer prepared to carry out those parts of the agreement to their logical end. The developer in this assessment year had not shown its readiness or having made preparation for the compliance of the agreement. The developer has not taken steps to make it eligible to undertake the performance of the agreement which are the primary ingredient that make a person eligible and entitled to make the construction. The act and conduct of the developer in this assessment year shows that it had violated essential terms of the agreement which tend to subvert the relationship established by the development agreement. Being so, it was clear that in the year under consideration, there was no transfer of not only the flats as superstructure but also the proportionate land by the assessee under the joint development agreement. As per clause no. 12.11 and 19.1 of Development Agreement-cum Power of Attorney, time is the essence of the contract and as per clause No.12.11 the said property is to be developed and hand over the possession of the owners' allocation to the owners' and or

their nominees within 24 months from the date of receiving the sanction of the plan from HUDA and Municipality/Gram Panchayat with a further grace period of 3 months. But the fact remains that the transferee was not only failed to perform its obligations under the agreement, but also unwilling to perform its obligations in the assessment year under consideration. Even otherwise, the assessing authorities has not brought on record the actual position of the project even as on the date of assessment or he has not recorded the findings whether the developer started the construction work at any time during the assessment year under consideration or any development has taken place in the project in the relevant period. He went on to proceed on the sole issue with regard to handing over the possession of the property to the developer in part performance of the Development Agreement-cum-General power of Attorney. In our opinion, the handing over of the possession of the property is only one of the condition u/s 53A of the Transfer of Property Act but it is not the sole and isolated condition. It is necessary to go into whether or not the transferee was 'willing to perform' its obligation under these consent terms. When transferee, by its conduct and by its deeds, demonstrates that it is unwilling to perform its obligations under the agreement in this assessment year, the date of agreement ceases to be relevant. In such a situation, it is only the actual performance of transferee's obligations which can give rise to the situation envisaged in Section 53A of the Transfer of Property Act. On these facts, it is not possible to hold that the transferee was willing to perform its obligations in the financial year in which the capital gains are sought to be taxed by the Revenue. We hold that this condition laid down under Section 53A of the Transfer of Property Act was not satisfied in this assessment year. Once we come to the conclusion that the transferee was not 'willing to perform', as stipulated by and within meanings assigned to this expression under Section 53A of the Transfer of Property Act, its contractual obligations in this previous year relevant to the present assessment year, it is only a corollary to this finding that the development agreement dt. 11.5.2005 based on which the impugned taxability of capital gain is imposed by the AO and upheld by the CIT(A), cannot be said to be a "contract of the nature referred to in Section 53A of the Transfer of Property Act" and, accordingly, provisions of Section 2(47)(v) cannot be invoked on the facts of this case Chaturbhuj Dwarkadas Kapadia v. CIT's case (supra) undoubtedly lays down a proposition which, more often than not, favours the

Revenue, but, on the facts of this case, the said judgment supports the case of the assessee inasmuch as 'willingness to perform' has been specifically recognized as one of the essential ingredients to cover a transaction by the scope of Section 53A of the Transfer of Property Act. Revenue does not get any assistance from this judicial precedent. The very foundation of Revenue's case is thus devoid of legally sustainable basis.

50. That is clearly an erroneous assumption, and an the provisions of deemed transfer under Section 2(47)(v) could not have been invoked on the facts of the present case and for the assessment year in dispute before us. In the present case, the situation is that the assessee has received only a 'meager amount' out of total consideration, the transferee is avoiding adhering to the agreement and there is no evidence brought on record by the revenue authorities to show that there was actual construction has been taken place at the impugned property in the assessment year under consideration and also there is no evidence to show that the right to receive the sale consideration was actually accrued to the assessee. Without accrual of the consideration to the assessee, the assessee is not expected to pay capital gains on the entire agreed sales consideration. When time is essence of the contract, and the time schedule is not adhered to, it cannot be said that such a contract confers any rights on the vendor/landlord to seek redressal under Section 53A of the Transfer of Property Act. This agreement cannot, therefore, be said to be in the nature of a contract referred to in Section 53A of the Transfer of Property Act. It cannot, therefore, be said that the provisions of Section 2(47)(v) will apply in the situation before us. Considering the facts and circumstances of the present case as discussed above, we are of the considered view that the assessee deserves to succeed on reason that the capital gains could not have been taxed in the in this assessment year in appeal before us. The other grounds raised by the assessees in their appeals have become irrelevant at this point of time as we have held that provisions of section 2(47)(v) will not apply to the assessees in the assessment year under consideration. ...."

12. The coordinate bench again in case of M/s Binjusaria properties (supra) following another decision of same coordinate bench held as under:

"12. It is an undisputed fact that as on date, there was no developmental activity on the land which is subject matter of development agreement. The process of construction has not been even initiated and no approval for the construction of the building is obtained. Thus, the sale consideration in the form of developed area has not been received. Mere receipt of refundable deposit, cannot be termed as receipt of consideration. Further, as submitted the Assessing Officer calculated the capital gain on the entire land, even though the assessee has retained 38% share to itself. The valuation was also disputed. There is, therefore, no accrual of income in favour of the assessee as per S.48 of the Act. Due to lapse on the part of the transferee, the construction has not taken place in the year under consideration, and it has not commenced even now. In the facts and circumstances of the present case, wherein while the assessee has fulfilled its part of the obligation under the development agreement, the developer has not done anything to discharge the obligations cast on it under the develop agreement, the capital gains cannot be brought to tax in the year under appeal, merely on the basis of signing of the development agreement during this year. We are supported in this behalf by the decision of the Tribunal dated 3rd January, 2014 in the case of Fibars Infratech Pvt. Ltd. (supra), wherein it was held as follows-

> *59. On these facts, it is not possible to hold that the transferee was willing to perform its obligations in the financial year in which the capital gains are sought to be taxed by the Revenue. We hold that this condition laid down under Section 53A of the Transfer of Property Act was not satisfied in this assessment year. Once we come to the conclusion that the transferee's 'willing to perform' the contract is ascertainable in the assessment year, as stipulated by and within the meanings assigned to this expression under Section 53A of the Transfer of Property Act, its contractual obligations in this previous year relevant to the present assessment year, it is only a corollary to this finding that the Development Agreement dt. 15.12.2006, based on which the impugned taxability of capital gain is imposed by the AO and upheld by the CIT(A), cannot be said to be a "contract of the nature referred to in Section 53A of the Transfer of Property Act" and, accordingly, provisions of Section 2(47)(v) cannot be invoked on the facts of this case. The judgement in the case of Chaturbhuj Dwarkadas Kapadia v. CIT (supra) undoubtedly lays down a proposition which, more often that not, favours the Revenue, but, on the facts of this case, the said judgment supports the case of the assessee inasmuch as 'willingness to perform' has been specifically recognized as one of the essential ingredients to cover a transaction by the scope of Section 53A of the*

Transfer of Property Act. The Revenue does not get any assistance from this judicial precedent. The very foundation of Revenue's case is thus devoid of legally sustainable basis.

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

13. In the light of the foregoing discussion, we set aside the impugned orders of the Revenue authorities and hold that the capital gains on the property in question cannot be brought to tax in the year under appeal, and consequently delete the addition made by the Assessing Officer and sustained by the CIT(A). Assessee's grounds on this issue are allowed.

13. On going through the aforesaid decisions of the coordinate bench, the ratio which emerges is unless there is willingness on the part of the developer to perform his part of the contract, there cannot be a 'transfer' of capital asset as envisaged u/s 2(47)(v) read with section 53A of the TP Act. The ratio laid down as above squarely applies to the facts of the

present case as the department has failed to controvert the finding of the learned CIT(A) by bringing material on record to show that the developer has taken any steps towards development activity. Further, we may observe, though the AO referring to the development agreement has inferred that possession of the property was handed over to the developer, however, on going through the pleadings and prayer of the plaintiffs in the plaint filed in Civil Court, a copy of which is at page 51 of assessee's paper book, it appears assessee along with others are still having physical possession over the property. Be that as it may, after careful consideration of facts and materials on record, we are of the view, CIT(A)'s order being well founded and well reasoned needs to be upheld. Another crucial aspect which needs to be commented upon is the CIT(A) has also held that the transaction will not attract capital gain as the asset transferred being an agricultural land is not a capital asset as defined u/s 2(14) of the Act. This finding of the learned CIT(A) remains unchallenged and uncontroverted by the Department. For this reason also, short term capital gain computed by the AO cannot be sustained. In view of the aforesaid, we do not find any reason to interfere with the order of the CIT(A)."

The aforesaid decision of the coordinate bench squarely applies to the facts of the assessee's case, hence, respectfully following the same, we uphold the order of learned CIT(A) and the grounds raised by revenue are dismissed.

19. In the result department's appeal is dismissed.

20. To sum up, assessee's appeal is allowed and the department's appeal is dismissed.

Pronounced in the open court on 26th November, 2014.

Sd/-	**Sd/-**
(P.M. JAGTAP)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 26th November, 2014

kv

Copy to:-

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2) ACIT, Central Circle – 4, 8th Floor, Aayakar Bhavan, Basheerbagh, Hyderabad – 500 004
3) CIT(A)-VII, Hyderabad
4)CIT(Central), Hyderabad
5)The Departmental Representative, I.T.A.T., Hyderabad.