

आयकर अपीलीय अधिकरण “F” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI

**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER &
SHRI VIVEK VARMA, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.1588/Mum/2013
(निर्धारण वर्ष / Assessment Year : 2008-2009)

Mr. Fardeen Khan, (legal Heir of Late Mr. Feroz Khan), C-7, R.N.A. Complex, Road No. 3, Samrath Nagar, Lokhandwala Complex, Andheri West, Mumbai - 400 058.	बनाम/ Vs.	Asstt. Commissioner of Income Tax - 11(1), 4 th floor, Aayakar Bhavan, M.K. Road, Mumbai.
स्थायी लेखा सं./PAN : AABPK8193M		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.1589/Mum/2013
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(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Appellant by	Shri Vijay Mehta & Shri Govind Jhaveri
Respondent by :	Shri Rajesh Ranjan Prasad

सुनवाई की तारीख /**Date of Hearing** : 15-1-2015
घोषणा की तारीख /**Date of Pronouncement** : 25-2-2015

आदेश / ORDER**PER R.C. SHARMA, A.M.**

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These are the appeals filed by the assessee against the order of Id. CIT(A) -3, Mumbai dated 27-12-2012 for the A.Y. 2008-09 in the matter of order passed u/s 143(3) of the Income Tax Act, 1961.

2. Common grounds have been taken in both the appeals.

3. Rival contentions have been heard and record perused. In the assessment order A.O. observed that the assessee along with his father (Late Feroz Khan) had during the relevant financial year entered into property development agreement with M/s. Godrej Properties Ltd (Hereinafter referred to as 'GPL') vide agreement dated 20.04.2007 for development of about 13 acres of land at Tumkur Road, Bangalore and construction of 287 villas therein. The said land is owned by the Mr. Fardeen Khan and his late father, Mr. Feroz Khan in the ratio of 75% and 25% respectively. The A.O. further observed that as per the said development agreement, an amount of Rs.13.75 crores has been paid by the GPL to the land owners as non-refundable advance/deposit by the developer. In turn, an irrevocable power of attorney dated 19.04.2007 was given by the assessee to GPL giving all the powers of obtaining various permissions, commencement of construction, and construction of all infrastructures, leveling of property to construct villas and to sell the villas. The AO stated that the assessee has not offered any capital gains on the above transfer of land to GPL. Therefore, the assessee was asked to explain as to why the above transaction should not be considered as a transfer as per section 2(47) (v)/(vi) of the Act and why the principles laid down in the decision in the case of Chaturbhaj Dwarkadas Kapadia Vs. CIT 260 ITR 491 (Bom) should not be made applicable to the facts of the present case. The assessee made written submissions which are reproduced by the AO at para 3.2 of the assessment order. In sum up, it was stated that late

Feroz Khan and Mr. Fardeen Khan (collectively referred to as "FK" hereinafter) owned certain parcels of land at Bangalore which was agricultural land till about 31.03.2005, and thereafter the said land was converted into non-agricultural land for which FK has executed an agreement with GPL for construction of villas on the land in April, 2007. As per the agreement, FK has received deposit of Rs.13.75 crores on the signing of agreement in April, 2007. Further, 30% of the proceeds was to be received by the developer from sale of villas till total amount received including deposit of Rs.13.75 crores reached the figure of Rs.55 crores. The GPL has not assured that FK shall definitely be entitled to Rs.55 crores or definite timing of payment of money to FK. If by virtue of the formula prescribed the revenue to FK falls short of Rs.55 crores or project does not take off, FK does not have a legal right of recovery of shortfall. The market price of the land at the time of signing of agreement was in the range of Rs.67 crores only. The property was treated as stock in trade w.e.f. 01.04.2007 by FKs with an intention to develop the property. Even though the GPL paid an advance, the agreement was in the nature of MOU which was void ab initio or non-concluded agreement. The agreement was not registered u/s.17(1A) of Indian Registration Act, 1908. Therefore, there was no transfer of any immovable property for the purpose of section 53A of Transfer of Property Act, 1882 ('in short TPA').

4. Without prejudice, it was further stated that the provisions of section 2(47) (v) apply only for the determination of capital gains whereas in this case, transaction was in the nature of stock in trade, hence, the provisions of section 2(47) were not applicable. Provisions of section 2(47)(v) provides that transfer includes any transaction involving the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of TPA. However, these conditions are not satisfied in the case of assessee. As the agreement was not a concluded contract, the provisions of section 53A of TPA are not applicable. Even after

more than 3.5 years of signing MOU, there has been no ground breaking been happened and the agreement and power of attorney are neither stamped nor registered and fresh terms are getting negotiated. Therefore, it was claimed that ratio of decision in the case of Chaturbhaj Dwarkadas Kapadia 260 ITR 491 (Bom) is not applicable, because this is a case of sale of stock-in-trade while the said decision was in the context of transfer of capital assets. Further, the provisions of section 2(47)(v) cannot be applied as the conditions enumerated therein are not satisfied. However, the A.O. did not agree with the assessee's contention and held that this alleged conversion of land into stock-in-trade is an afterthought to escape chargeability of capital gains. Thus assessee's contention that the land has been converted into stock-in-trade was not accepted. The A.O. also held that the transaction is covered by provisions of section 2(47)(v) of the Act and accordingly the assessee was liable for capital gains. While completing the assessment, the major addition made by Assessing Officer is on account of capital gain earned by FK pursuant to DA entered with GPL. In the opinion of the Assessing Officer, pursuant to the DA and power of attorney, FK transferred land to GPL and hence, provisions of section 2(47)(v) and section 2(47)(vi) were attracted. The Assessing Officer considered Rs.55 crores stated in DA as full value of consideration for transfer of the land to GPL. The Assessing Officer noted that date of conversion of land into stock in trade was 01.04.2007 as claimed by FK and held that if the conversion and sale or transfer is in the same financial year, the tax liability will arise in that year. By the impugned order, the ld. CIT(A) upheld the addition made by Assessing Officer on account of capital gains arising from alleged transfer of the said land. However, the Ld. CIT(A) allowed deduction on account of cost of acquisition and cost of improvement from the alleged sale consideration of Rs. 55 crores. The ld. CIT(A) observed that FK had shown the land in Wealth Tax returns u/s.2(ea) (v) of Wealth Tax Act, 1957. This establishes that land was not converted into 'stock-in-trade' initially and this contention of conversion is an afterthought.

The ld. CIT(A) also confirmed the action of A.O. holding that there was transfer of right within the meaning of section 2(47) of the Act. Aggrieved by the order of the ld. CIT(A) the assessee has preferred these appeals before the Tribunal, wherein following grounds have been taken :-

5. The grounds taken in the appeal filed by Mr. Fardeen Khan in ITA No. 1589/Mum/2013 read as under:-

“On the facts and circumstances of the case and in law:

1. a) The Ld Commissioner of Income Tax'(Appeals) erred in assessing capital gains on account of alleged 'transfer' of capital asset and failed to take into consideration that on the date of agreement, the impugned property at Bangalore was not a capital asset within the meaning of section 2(14) of the Income Tax Act ["Act"], as the same had been converted into stock-in-trade.

b) The Ld Commissioner of Income-Tax' (Appeals) erred in ignoring the voluminous evidence filed before him in this regard.

2. Without prejudice, the Ld Commissioner of Income-Tax (Appeals) erred in not holding that Capital Gains are not chargeable because in this case consideration received or accruing in respect of the said asset is not ascertainable or cannot be determined and hence machinery provisions fail and the gains arising from the transfer of asset are not liable to tax.

3. Without prejudice the Ld Commissioner of Income-Tax (Appeals) erred in not giving a finding that capital gain has not accrued during the year under appeal and that capital gain shall arise only when Godrej Properties Ltd["GPL"] enters into specific agreements with prospective buyers.

4. a. Without prejudice the Ld Commissioner of Income-Tax (Appeals) erred in holding that by virtue of signing a development agreement with GPL in respect of Bangalore property, there has been a 'transfer' of property u/s. 2(47)(v)j(vi) of the I. Tax Act, 1961, although there was no concluded agreement, there was no contract for transfer of property and further that the said agreement has been annulled.

b. Without prejudice all the conditions specified in Sec. 53A of Transfer of Property Act, have not been satisfied and therefore no 'transfer ix] s. 2(47) (more specifically conditions of "Transferee not being read and willing to perform his part of contract and the contract has not been registered).

5. Without prejudice the Ld Commissioner of Income Tax (Appeals) erred in computing the capital gains, by adopting Rs. 41.25 crores (i.e. 75% of Rs. 55 crores) as the full value of consideration. He erred in presuming that the value of the property at Rs. 55 crores as full value of consideration although

i.. the Appellant , as self and legal heir, has only received a Deposit of 13.75 crores, arising from a non-stamped, non-registered and annulled agreement;

ii. for the purposes of computing the Sale Consideration, the Fair market value of the property proposed to be developed, should not exceed either of the following :-

- 75% of Rs. 4,86,37,508/- (FMV as per the valuation report) or

- 75% of 13.75 crores (total Deposit received)

6. Without prejudice the Learned Commissioner of Income Tax (Appeals) erred in holding that no reference was required to be made to the DVO u/s 55 when although the Appellant had taken an alternative ground of adopting the sale consideration at a value which is lower than the alleged fair market value of Rs. 55 crores as is adopted by the Ld AO, which is without any basis.”

6. It was argued by the ld. A.R. that the A.O. has wrongly assessed capital gains for alleged transfer of land pursuant to Development Agreement dated 20-04-2007 entered with GPL. The assessee was having agricultural land and the same was held as “agricultural land” till 31-3-2005 and thereafter converted into “non-agricultural land” with an intention to develop the land and exploit it commercially. As per the ld. A.R., in order to exploit the said land commercially, the assessee took further several steps such as construction of compounding wall, appointment of architects to formulate plans, development of logo, approaching financial institution for financial assistance, submission of plans to Bangalore Development Authority etc. For this purpose, he invited our attention to the following documents:-

Documents evidencing conversion of land to stock-in-trade

- a) Conversion order from Karnataka Revenue Department for conversion of land to Non-Agriculture dated 23-09-2005.
- b) Acknowledgment of submission of layout plans to Bangalore Development Authority (BDA) dated 16-11-2005.
- c) Application to Karnataka State Pollution Control Board for granting No Objection Certificate for the project dated 25-11-2005.
- d) Letter addressed to Bangalore Electricity Supply Co. Ltd for granting NOC for the project.
- e) Letter addressed to Bangalore Water Supply & Sewerage Board for granting NOC for the project.
- f) NOC issued by Bangalore Electricity Supply Co. Ltd. dtd. 12-12-2005.
- g) NOC issued by Karnataka State Pollution Control Board for development of new residential property dtd. 23-02-2006.
- h) Reminder letter to BDA for approval of residential layout dtd. 3-3-2006.
- (i) Letter addressed to Hong Kong & Shanghai Banking Corporation for credit facility for the housing project dtd. 18-4-2006.
- (j) Relevant extract of project report forming part of letter to HSBC dtd.18.4.2006
- (k) Contract documents by Siraj & Renu.
- (l) Details of tender negotiation meeting with Siraj & Renu (Architects and Interior Designers) dated 10.05.2006.
- (m) Tender Form issued by Manjunatha Enterprises to Siraj & Renu for civil works for the project
- (n) Letter from Siraj & Renu dated 15-5-06 defining scope of services for architectural consultancy for the project.
- (o) Invoice issued by Siraj & Renu and acknowledged receipt of payment of 3,50,000/- dated 17-7-2006 for professional consultancy.

- (p) Letter of Anup S. Shah, Senior Advocate dtd. 20.7.2006 confirming the land in Survey No. 52 to 68 presently vests with Mr. Feroz Khan and Mr. Fardeen Khan.
- (q) Letter addressed to Hong Kong & Shanghai Banking Corporation for credit facility for the housing project dtd. 8-8-2006.
- (r) Letter dated 10-09-2006 addressed to Bangalore Development Authority informing that all charges in respect of the approval have been made.
- (s) Letter dated 16-2-2007 addressed to Bangalore Development Authority for approval of additional residential layout.
- (t) Letter addressed by Bangalore Development Authority in respect of approval of residential layout plan dtd. 8-3-2007.

7. Our attention was also invited to various clauses of Development Agreement entered into between the assessee and Godrej Properties Limited, Development Agreement between Fardeen Khan and Laila Khan and Godrej Properties Limited, general Power of Attorney, supplemental agreement between Fardeen Khan and Laila Khan and Godrej Properties Ltd. to demonstrate that there was no transfer of land within the meaning of section 2(47) v/vi of the I.T. Act. All these documents are placed on record. The ld. A.R. also invited our attention to the remand report given by the A.O. and the rejoinder filed by the assessee. The ld. A.R. contended that although the conversion of "Agricultural land" into "non-agricultural land" took place in the year 2005, the said land was not shown in the balance sheet as 'stock-in-trade' till year ended 31-3-2007. Subsequently, in the books of account the assessee treated the land as 'stock-in-trade' i.e w.e.f. 1-4-2007. As per the ld. A.R., later on the assessee realized that developing the land require experienced association and with a view to develop the land more profitably, the assessee entered into agreement with Godrej Properties Ltd. and granted licence to the GPL to enter upon the property and do the necessary things to

execute the project. Our attention was also invited to the relevant clause in Development Agreement evidencing that possession of the land was retained and continued with the assessee even though assessee had executed "Power of Attorney" in favour of GPL. Our attention was further invited to the fact that rate of the land that prevailed at the time of signing of development agreement was about Rs. 4.86 crores. As per the ld. A.R., on the basis of market report the GPL found that the size of the villas proposed to be constructed over the land as planned by the assessee had very few buyers and also that such villas were not easily saleable and accordingly no construction was undertaken on the said land by GPL pursuant to the Development Agreement. Our attention was also invited to the fact that subsequently the plan to construct villas was shelved and Development Agreement dtd. 20-4-2007 was annulled. However, fresh Development Agreement was entered into on 26-3-2011 with revised plans and with a new Power of Attorney. Thus the construction activity as per second Development Agreement was started by GPL in the year 2012.

8. In view of all these documentary evidences, ld. A.R. contended that A.O. was not justified in treating the Development Agreement as sale of land and thereby taxing the capital gains in financial year 2007-08 relevant to A.Y. 2008-09 under consideration. Reliance was placed by the ld. A.R. on the decision of Hyderabad Bench of ITAT in the case of Fibars Infratech (P.) Ltd. vs. ITO, [2014] 46 Taxmann.com 313 (Hyderabad – Trib). Further reliance was placed in the decision of Mumbai Bench of ITAT in the case of Ramesh Abaji Walavalkar vs. Addl. CIT, [2012] 150 TTJ (Mum) 725 in which it was held that there was a conversion of land by the assessee into stock-in-trade on 15th May, 2002 within the meaning of section 45(2) and hence the profits or gains arising from the transfer by way of such conversion were chargeable to tax as the income of the assessee under the head "capital gains" in the year when such stock-in-trade was sold by the assessee. In this case also, on the basis

of various steps taken by the assessee prior to entering into Development Agreement, in the matter of development of the said land which were sufficient to show that the business of real estate development had not only been commenced by the assessee but the same was prior to the date of development agreement.

9. Reliance was also placed on the decision of the Mumbai Bench of the Tribunal in the case of DCIT vs. Crest Hotels Ltd. [2001] 78 ITD 213 wherein the capital asset comprising the hotel business was converted by the assessee into stock-in-trade of the construction business. The said stock-in-trade was held to be liable to capital gain on conversion, was offered to tax by the assessee in the year in which stock-in-trade was sold. It was held by the Tribunal that the tax on capital gains would be leviable in the same year in which the business profit on sale accrued to the assessee as per the provisions of section 45(2) of the Act.

10. Further reliance was also placed on the decision of Chennai Bench of ITAT in the case of R. Gopinath (HUF) vs. ACIT (2010) 133 TTJ (Chennai) 595.

11. On the other hand, the ld. CIT -DR contended that agricultural land was acquired in the year 1981 and 1991 by father and son. The land was converted into non-agricultural land in the year 2005 and the land was shown by the assessee and his father in their balance sheet with return of income for A.Y. 2008-09 as capital asset. As per the ld. D.R., in the Wealth tax return filed by the assessee for A.Y. 2008-09, the land was shown as urban land which means the assessee himself at the time of filing Wealth Tax return also treated this land as capital asset and not as 'stock-in-trade'. The ld. D.R. also invited our attention to the fact that assessee had shown this land u/s 2(ea) of the Wealth Tax Act, 1957. The ld. D.R. vehemently argued that as per the development agreement dated 20-4-2007 entered into between the assessee and GPL, the right for 13 acres of land with regard to its

development absolutely was transferred to GPL in lieu of Rs. 13.75 crores as deposit and revenue up to Rs. 55 crores was to be treated as land value. As per the ld. D.R., in terms of Power of Attorney 19-4-2007, GPL was given the powers of obtaining various permissions, commencement of construction, and construction of all infrastructures, leveling of property and sale of villas. Therefore there was transfer of right within the meaning of section 2(47)(vi) of the Act. He accordingly argued that vide development agreement dated 20-4-2007 there was transfer of property within the meaning of section 2(47)(v)/(vi) of the Act. The ld. D.R. also relied on the observations made by the lower authorities and contended that assessee has transferred land to GPL and earned capital gain in the year of entering into agreement for development of property.

12. We have considered the rival contentions and carefully gone through the orders of authorities below and deliberated on the judicial pronouncements referred by lower authorities in their respective order as well as cited by ld. A.R. and ld. D.R. during the course of hearing before us. The main issue for consideration is whether the land owned by FK is a 'capital asset' or was converted into stock-in-trade, whether there was transfer of land within the meaning of provisions of section 2(47)(v) and section 2(47)(vi) of the Act and whether any income can be said to have accrued to FK when the amount of sale consideration could not be determined as per the terms of DA. Before reaching to the conclusion that capital asset was converted into "stock-in-trade" or not several steps taken by the assessee for conversion of land is to be taken into account. After perusal of various documents placed on record as narrated at para 5 hereinabove, we found that land was initially acquired in 1981 by late Firoz Khan jointly with Ms. Sonia Sahani. Subsequently the land owned by Ms. Sonia Sahani was transferred to Mr. Fardeen Khan in 1991 and consequently the assessee Mr. Fardeen Khan became owner of the agricultural land. As per the documents placed on

record we found that in order to exploit the land commercially, the assessee filed an application to Bangalore Development Authority on 12-4-2005 to convert 'agricultural land' into 'non-agricultural land' so that it can be used for residential purposes. Thus it was the first step taken by the assessee to convert his agricultural land into stock-in-trade. The assessee has also incurred an amount of Rs. 13,66,991/- on construction of compound wall on the said land. The Bangalore Development Authority (BDA) converted the agricultural land into non-agricultural land on terms contained in official memorandum dated 23-09-2005. After receipt of conversion order, the assessee has submitted lay out plan for proposed Villas to the BDA on 16-11-2005. The assessee has also filed Application before the Karnataka State Pollution Control Board for treatment of domestic effluent, etc. Application was also filed before Bangalore Electricity Supply Company Ltd. [BESCOM] for approval of residential layout and proposed electrical load estimate for proposed 28 residences, borewell and club house. After receipt of these documents, BESCOM issued NOC to the assessee in December, 2005 pursuant to the proposed lay out submitted by the assessee. NOC was also issued to the assessee by Karnataka State Pollution Control Board in February and March 2006. Thereafter assessee made application to Hongkong and Shanghai Banking Corporation in April 2006 to procure finance for the residential project namely 'Gold County' wherein cost of proposed construction of 29 villas, infrastructure with project report was explained to the financial institution i.e. bank from whom assessee want to take loan for the proposed project. Changes in projects were also duly intimated to bank in August 2006. For looking after the project the assessee has also appointed Architects M/s Siraj & Renu in May 2006 to handle the project, tender documents for contractor was also prepared. The assessee had paid architects' fees in July 2006. To confirm the correctness of assessee's claim of Title of the property for the purpose of creating equitable mortgage in favour of financial institution, the assessee obtained Title Certificate from Anup S

Shah Law firm in July 2006. The assessee has also made payments to BDA for execution of layout plans to the tune of Rs. 20.60 lakhs in September 2006. After detailed discussion with BDA, lay out plan was also approved in March, 2007. All these steps taken by assessee to convert its agricultural land into stock-in-trade were brushed aside by lower authorities and by ignoring other documentary evidences mostly issued by Government Agencies like Bangalore Development Authority, Karnataka State Pollution Control Board, Bangalore Electricity Supply Co., Bangalore Water Supply and Sewerage Board, Hong Kong and Shanghai Banking Corporation etc. etc., the A.O. jumped into the conclusion that assessee had sold its land to Godrej Properties Ltd. by entering into DA with GPL

13. The above voluminous documents evidencing various acts undertaken by the assessee clearly shows that the assessee had taken various definitive steps for exploitation of land by preparing project for construction of various villas for which land was converted into stock-in-trade in April 2005 by converting the same into 'non-agricultural land'. Thus, the act of the assessee like actual conversion of land to 'non-agricultural' use i.e. residential purpose, appointment of architect, incurring related expenditure, appointment of contractor, submission of plan to Bangalore Development Authority and seeking its approval etc. all collectively establish that assessee had already ventured into business of development of property. The fact that the land was converted by Bangalore Development Authority in year 2006 itself establishes that the assessee no longer held land as 'investment' but treated it as 'stock-in-trade'. The allegation of the A.O. that no proper entry has been passed in the books of account so as to treat the converted land as 'stock-in-trade', we are of the view that mere entries in the books of account are not conclusive for deciding the nature of transaction and its impact under Income Tax Act, however true nature of transaction has to be ascertained from the total facts and circumstances of the case. Thus, when various acts undertaken by

assessee as stated hereinabove are cumulatively considered, it establishes beyond any doubt that the assessee had converted land into 'stock in trade' and it no longer remained 'capital asset'. The intent of the assessee to treat the land as 'stock in trade' is apparent from series of activities undertaken by assessee as discussed above. Coming to the observation of the lower authorities to the effect that assessee has paid Wealth Tax on the land by showing the same in Wealth Tax return, as per our considered view mere payment of Wealth tax on the land cannot be considered as evidence contrary to the intent of the assessee insofar as the payment of tax by the assessee was based on his limited understanding of law on the subject that exemption for agricultural land held as stock-in-trade is available only for first 10 years from the date of acquisition of land and the period of 10 years from the date of acquisition had already expired. However, assuming that there was such a mistake it cannot debar the assessee from making rightful claim under the Act, more particularly when glaring contemporary evidences from several Government offices such as BDA, Karnataka Revenue Department, etc. support the claim of the assessee as discussed above.

14. The observation of the A.O. to the effect that assessee was prominent cine celebrities therefore cannot undertake such project. Merely because assessee was a celebrity do not lead to conclude that he will not undertaken any construction activity on the land converted by him to 'non-agriculture'. Similarly not reflecting the amount as opening WIP and closing WIP is not fatal. The assessee had carried out series of activities narrated hereinabove but had not shown the land as opening WIP and closing WIP. Had the Assessing Officer have believed and accepted such conversion of land from capital asset to 'stock in trade' merely on the basis of its reflection in financial statements. As per our considered view the land ceased to be a capital asset from the date when the assessee filed application before BDA for conversion of land from 'agriculture' to 'non-agricultural'. We found that the intent of the

assessee to hold the land as 'stock in trade' is further fortified by the fact that in the records of Revenue Department land was registered as 'N.A. Land' without which no residential project could be carried thereon. The approval of plans to construct residential villas by BDA further proves the intention of the assessee to treat the land as commercial asset. Thus various steps taken by the assessee are very much part of business activities involved in real estate development. Series of activities had been undertaken by the assessee which establishes the fact that assessee has converted the 'agricultural land' to 'non-agricultural' for undertaking development project thereon. On the contrary had the assessee not carried out series of activities stated hereinabove but had merely shown the entry for opening and closing stock will not entitle him to treat mere such entry as sufficient for accepting assessee's contention regarding stock-in-trade merely on the basis of its reflection in financial statements.

15. In view of the above discussion, we can conclude that land ceased to be a capital asset from the date when assessee filed application before the Bangalore Development Authority for conversion of land from 'agriculture' to non-agriculture. The intent of the assessee to hold the land as 'stock in trade' is further established by the fact that in the records of Revenue Department land was registered as 'N.A. Land' without which no residential project could be carried thereon. The approval of plans to construct residential villas by BDA further proves the intention of the appellants to treat the land as commercial asset. Thus various steps taken by the assessee are very much part of business activities involved in real estate development.

16. If we analyse the acts undertaken by the assessee in a chronological way, we find that the process of conversion had been started in 2005-06 whereas the development agreement was entered into with GPL in the year 2007. Thus the actual conversion of land has taken place in assessment

years 2005-06 and not on 1-4-2007 i.e. the date on which the assessee had declared it as in the financial statements. Furthermore terms in the Development Agreement has assured any return to the assessee and he was entitled to share from revenue generated itself indicates that the assessee as a businessman, has borne risk of even incurring a loss in event the project failed as it is evidenced from various terms of Development Agreement.

17. The Mumbai Tribunal in the case of Ramesh Abaji Walavalkar vs. ACIT [150 TTJ 725] wherein under similar circumstances the Assessing Officer held that the assessee was not able to prove the conversion of land given for development and by placing reliance on judgment in the case of Chaturbhuj Dwarkadas Kapadia [260 ITR 461 (Born)] taxed capital gains in the hands of the assessee in the year in which Development Agreement was entered into i.e. previous year relevant to A.Y.2003-04. The CIT(A) agreed with the Assessing Officer. However, on further appeal, the Tribunal held that the assessee had converted land into stock in trade in the year 2002 when the assessee had taken several steps like entering into correspondence with CIDCO to get approval for proposed development of property, procuring commencement certificate, etc. and gains arising on conversion of land was liable to be taxed as 'capital gains' in accordance with the provisions of section 45(2) of the Act. However the instant case is on much matter footing which is evident from various permissions/approval taken by the assessee.

18. Now we deal with the contention of A.O. that there was transfer of land within the provisions of section 2(47)(v) and section 2(47)(vi) of the Act. We find that the Assessing Officer had held that land was 'capital asset' and therefore, there is transfer within the meaning of Section 2(47)(v) of the Income-tax Act, 1961 ('Act') which provides that 'any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of

the Transfer of Property Act, 1882. The Assessing Officer has mainly relied on the decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (2003) 260 ITR 491 to support his conclusion. As per our considered view for application of section 2(47)(v) of the Act, it is essential that land should be a 'capital asset'. However, in the instant case the land no longer remained 'capital asset' as the series of activities undertaken by the assessee discussed hereinabove clearly show that the land had been converted into 'stock-in-trade' in the year 2005 itself and not in the previous year relevant to A.Y.2008-09. Thus the Assessing Officer and the CIT(A) have failed to correctly and truly appreciate the series of activities undertaken by the assessee and wrongly held that the assessee have converted land in the previous year relevant to A.Y.2008-09.

19. We have carefully gone through the clauses of Development Agreement and find that [under Clause 6 dealing with 'RIGHTS AND OBLIGATIONS OF THE DEVELOPER', it has been specifically provided that the Developer (i.e. GPL) was granted mere 'licence' to enter upon the property and that by itself should not be construed as part performance of an agreement under Transfer of Property Act, 1882 or u/s 2(47)(v) of Income-tax Act, 1961. The DA also provides under Clause 14 (b) that the Owners (i.e. assessee) shall continue to be in possession of entire property to be developed. In this respect, reliance can be placed on the order of the Tribunal, Chennai Bench, in the case of R. Gopinath (HUF) v ACIT 133 TTJ 595. We also find that the A.O. has wrongly invoked provisions of section 2(47)(v) of the Act because it deals with contracts of part performance referred to in section 53A of the Transfer of Property Act.

20. Section 53A of the TOPA prescribes following cumulative conditions to be satisfied for application of doctrine of 'part performance':-

- a) there should be a written contract for consideration;
- b) the contract should be signed by the transferor;
- c) the contract should pertain to transfer of immovable property;
- d) the transferee should have taken possession of the property; - as per clause no 14(b) possession continued with Appellant
- e) the transferee should be ready and willing to perform his part of contract and
- f) the contract should be registered as per the provisions of The Registration Act, 1908 (this condition has been introduced with effect from September 2001). This part has been elaborated below.

Section 17(1A) of the Registration Act, provides as under:

"The documents containing contracts to transfer for consideration, any immovable property for the purposes of Section 53A of Transfer of Property Act, 1882 (hereinafter referred to as "TOPA") shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered they shall have no effect for the purposes of said Section 53A."

21. Amendment made in section 53A in 2001 is also relevant wherein an additional condition for registration of the written agreement was introduced as a result of which if the agreement between transferor and transferee is not registered, the transferor can dispossess the transferee from the property. Simultaneously, a consequential amendment was also been made in The Registration Act, 1908 to provide that unless the documents containing contracts to transfer any immovable property for the purpose of section 53A of the TOPA is registered, it shall not have effect for the purposes of section 53A of the TOPA. A perusal of the Section reveals that registration of document is a sine qua non for applicability of section 53A of TOPA which entitles the transferee to remain in possession of the property.

22. In the instant case, Development Agreement was executed on stamp paper of Rs. 100/- and the same was not registered, hence, provisions of section 2(47)(v) of the Act are not applicable since the conditions stipulated in section 53A of TOPA are fulfilled.

23. With respect to the decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia, we found that the said decision is not applicable because the said decision was in the context of transfer of capital asset. Although the said decision was rendered in February 2003 the assessment year under its consideration was A.Y.1996-97. Further for the purpose of assessment of capital gains in the said case, all the conditions specified in Section 53A of the TOPA were satisfied. Hence, the judgment was delivered qua the law prevailing in the year of the transaction. Accordingly, the Hon'ble Bombay High Court has discussed all the conditions required to be complied under Section 53A of the TOPA, other than the condition of registration, since the law provided only five conditions at the time. Thus the case of Chaturbhuj Dwarkadas Kapadia (supra) is of no help to Revenue to bring the transaction within the purview of section 53A of TOPA. As provisions of section 53A was amended in 2001 by which additional condition of registration of the written agreement was introduced and since in the instant case the agreement was not registered, the decision rendered by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra) with respect to relevant provisions of section 53A applicable in A.Y. 1996-97 will not be applicable to the facts of instant case. We can therefore safely conclude that the conditions stipulated in section 53A of TOPA are not satisfied in the case of assessee as discussed above, there is no transfer as per the provisions of section 2(47) of the Act.

24. In the instant case the Assessing Officer has invoked provisions of section 2(47) (vi) of the Act merely because DA is silent about its application. Impliedly, the Assessing Officer has accepted that if there is specific mention in DA on issue of applicability of provisions of the Act, then such provision of DA is acceptable. Accordingly, the Assessing Officer has accepted that section 2(47)(vi) of the Act is not applicable as it finds such specific mention in DA.

25. It is clear from the above that the Assessing Officer has overlooked the fact that DA specifically excludes application of provisions of section 2(47)(vi) of the Act in Clause 6(b) of the agreement.

26. With regard to the A.O.'s contention regarding applicability of clause (vi) of section 2(47) of the Act, we found that clause (vi) is applicable to the members of co-operative society, company or other AOP and as such, are not applicable to the assessee, being individuals.

27. In view of above discussion we hold that the A.O.'s action for computing capital gain on the basis of Development Agreement is not well founded and as such there was no transfer within the meaning of section 2(47)(v) and 2(47)(vi) of the Act. With regard to A.O.'s objection that Godrej Properties Ltd. had acted upon the Development Agreement by constructing its site office and also entered into contract agreement with the contractor, we found that GPL had merely constructed site office but not carried out any development activity on the land owned by the assessee in the previous year relevant to A.Y.2008-09. Similarly, GPL had not assigned any contract or appointed M/s Ashed Properties P. Ltd. as contractor pursuant to DA. In fact, after evaluating the market conditions, GPL found that the project as envisaged by the assessee was not viable and hence, DA was annulled. This is evident from the 2nd DA entered into between assessee and GPL which found place at PB page 194.

28 It is also a matter of record that GPL has undertaken development of revised project and the 2nd DA is also later on revised by executing Supplemental Agreement dated 27.07.2012. Thus, during the previous year relevant to A.Y.2008-09 under consideration, GPL had not undertaken any development activities pursuant to DA and as such there is no transfer within the meaning of section 2(47)(v) of the Act. In this respect we place reliance on

the order of the Tribunal, Hyderabad Bench, in the case of S. Ranjith Reddy vs. ACIT [144 ITD 461 having similar facts.

29. We have carefully gone through the Development Agreement entered into with Godrej Properties Ltd. and found that Godrej Properties Ltd. has not paid any sale consideration to the assessee and as such no sale consideration was received by the assessee against the alleged sale of land. With reference to the A.O.'s observation regarding value of Rs. 55 crores stated in the Development Agreement, we found that the value of Rs. 55 crores indicates "cost of land" which is notional and provide only benchmark to compute the consideration payable to the assessee for the purpose of adjustment of Rs. 13.75 crores paid as deposit to the assessee and probable sales that may take place during the project. Thus there was neither any sale of land nor any transfer of land as alleged by the A.O. This view is supported by the proposition laid down by of Hyderabad Bench of ITAT in the case of Binjusaria Properties P. Ltd. vs. ACIT, 164 TTJ 417.

30. Thus in the absence of any consideration flown from Godrej Properties Ltd. towards the land owned by the assessee as well as towards project to be executed, no income has accrued to assessee. Furthermore, keeping in view the fact that there is no certainty of quantum of sales, no income has accrued to the assessee. Our this inference is supported by the proposition laid down by Mumbai Bench of ITAT in the case of DCIT vs. Mrs. Hemal Raju Shete in ITA No. 2198/Mum/2010.

31. The contention of the Id. D.R. that assessee has accepted Rs. 13.75 crores from Godrej Properties Ltd. pursuant to the Development Agreement, therefore, it amounts to transfer of the land to Godrej Properties Ltd. does not find any merit. There was no transfer of land as per amended provisions of section 53A of TOPA applicable for the relevant A.Y. 2008-09 under consideration accompanied by fact that there was no transfer of possession to

GPL and the possession of land was with assessee only and the same has been expressly stated in clause 6 of Development Agreement. Furthermore the assessee has not received any consideration from Godrej Properties Ltd. but had received only “deposit” which was to be adjusted against the sale of villas on completion of the project. It is also a matter of record that Godrej Properties Ltd. has not carried out any construction/development activity as per the project envisaged in Development agreement relied on by A.O. What was mentioned in the Development Agreement was only the value of land to provide benchmark for the purpose of sharing profits and adjustment of deposit of Rs. 13.75 crores paid by Godrej Properties Ltd. It is also a matter of record that neither a single villa was constructed nor sold pursuant to the Development Agreement. It is also a matter of record that Development Agreement which is relied upon by the A.O. for the purpose of arriving at the conclusion that assessee has earned capital gains has been annulled in the year 2011. Accordingly, we do not find any merit in the action of A.O. making addition on the basis of Development Agreement.

32. Now coming to the argument of the ld. D.R. that date of conversion of land into ‘stock-in-trade’ should be taken as per the books of the assessee i.e. April, 2007. As per our considered view, the treatment given in the books of account is not a sole factor to determine the year in which land was converted into ‘stock-in-trade’ but series of events undertaken, facts and circumstances of the case which are very much relevant while considering the year in which “capital asset” is converted into “stock-in-trade”. Thus Development Agreement has to be harmoniously construed with reference to the related facts and circumstances of the case. Before reaching to the conclusion, we cannot forget the fact that the ownership and possession of land were always retained with the assessee and the same has been expressly stated so in clause 6 of the Development Agreement. The assessee has not received any consideration from Godrej Properties Ltd. nor was there any assurance about

profit given by the Godrej Properties Ltd. in the project, the project had not materialized and ultimately Development Agreement was annulled in 2011. If we analyse all these facts, we can safely conclude that there was neither any transfer of land to Godrej Properties Ltd. nor any gains arisen to the assessee during the relevant A.Y. 2008-09 under consideration.

33. The ld. D.R.'s contention that assessee had entered into sham transaction, we found that neither it is the case of A.O. nor that of ld. CIT(A) that the assessee has entered into any sham transaction to avoid any tax. Accordingly, this contention of the ld. D.R. cannot be accepted at this juncture. Even otherwise, if the Development Agreement is to be ignored, there is no transfer and no income as the A.O. as well as ld. CIT(A) have computed and taxed the assessee on the basis of Development Agreement only.

34. In view of the above discussion, the A.O. is directed to delete the capital gains computed in the hands of the assessee.

35. In the result, appeals of the assessee are allowed.

Order pronounced in the open court on 25th February, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 25-2-15 को की गई ।

Sd/-
(VIVEK VARMA)
JUDICIAL MEMBER

sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 25-02-2015

1

व.नि.स./ RK , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A) –8,, Mumbai
4. आयकर आयुक्त / CIT –4, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai