

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी', अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ B ” BENCH, AHMEDABAD

समक्ष श्री एन.एस.सैनी, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य ।
BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER And
SHRI KUL BHARAT, JUDICIAL MEMBER

1. आयकर अपील सं./I.T.A. No.1281/Ahd/2013 – A.Y. 2009-10
2. आयकर अपील सं./I.T.A. No.1283/Ahd/2013 – A.Y. 2009-10

1. Shri Amitkumar Ambalal Shah Kavi Nanalal Marg Ellisbridge,Ahmedabad	बनाम/ Vs.	1.The ITO Ward-10(2) Ahmedabad
2. The ITO Ward-10(2) Ahmedabad		2.Shri Amitkumar Ambalal Shah Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AFAPS 3095 N		
(अपीलार्थी /Appellants)	..	(प्रत्यर्थी / Respondents)

Assessee by :	Shri S.N.Soparkar with Ms.Urvashi Shodhan, A.R.
Revenue by :	Shri Dinesh Singh Sr.D.R.

सुनवाई की तारीख / Date of Hearing	18/09/2014
घोषणा की तारीख/ Date of Pronouncement	30/10/2014

आदेश / ORDER

PER SHRI KUL BHARAT, JUDICIAL MEMBER :

These cross-appeals by the Assessee and the Revenue are directed against the order of the Ld.Commissioner of Income Tax(Appeals)-XVI, Ahmedabad ('CIT(A)' in short) dated 13/02/2013 pertaining to Assessment Year (AY) 2009-10. These appeals were heard together and are being disposed of by way of this consolidated order for the sake of convenience.

2. First, we take up the Assessee's appeal in ITA No.1281/Ahd/2013 for AY 2009-10. The Assessee has raised the following grounds of appeal:-

- 1) *Order u/s.250 Dt.13.02.2013 being erroneous, unlawful and without considering facts on record properly be cancelled and set aside.*
- 2) *Long Term Capital Gain considered at Rs.2,49,78,280/- revised to Rs.2,19,40,693/- after giving effect to Commissioner of Income Tax (Appeal) VI Order being improper and unwarranted be deleted.*
- 3) *The learned Commissioner of Income Tax (Appeals) VI, Ahmedabad has erred and not considered properly and judiciously that*
 - (i) *Long Term capital gain on sale of land at Shahwadi etc. pertains to A.Y. 2008-09, 31.03.2008 being deed of sale executed on 31.03.2008.*
 - (ii) *While computing long term capital gain, benefit of substitution of cost as at 01.04.1981 is allowed on adhoc basis at Rs.8,00,000/- as against claimed Rs.13,72,000/- on the basis of valuation report of Government approved valuer on record.*
 - (iii) *Non concrete supporting evidences deduced for adopting value as at 01.04.1981 at Rs.8,00,000/-.*
 - (iv) *Income from long term capital gain referred above duly considered in A.Y. 2008-09 by the appellant. Hence considering long term capital gain I the year amounts to duplication.*
 - (v) *Claim of exemption u/s.54F is allowed partially and no valid reason given.*
 - (vi) *Additional compensation received Rs.10,00,000/- in the year does not change legal and correct situation as to arising of capital gain.*
 - (vii) *Even decision relied upon by the appellant have not been considered/appreciated judiciously.*
 - (viii) *Even no plausible reasons given for non-applicability of the decision cited.*

2.1. Briefly stated facts are that the case of the assessee was picked up for scrutiny assessment and the assessment u/s.143(3) of the Income Tax Act,1961 (hereinafter referred to as “the Act”) was framed vide order dated 29/12/2011, thereby the Assessing Officer (AO in short) made addition on account of Long Term Capital Gain (LTCG) amounting to Rs.2,49,78,280/-. Against this, the assessee filed an appeal before the Id.CIT(A), who after considering the submissions, partly allowed the appeal; thereby the Id.CIT(A) directed the AO to recalculate the LTCG taking the value of property as on 01/04/1981 of Rs.8 lacs. The other grounds of appeal of the assessee were rejected.

3. Aggrieved by the order of the Id.CIT(A), now the assessee is in appeal before us.

4. Ground Nos.1 to 3(i), (ii) & (iv) are inter-related. The same are being disposed of together. The Id.counsel for the assessee vehemently argued that the AO and the Id.CIT(A) were not justified in holding that the LTGC is pertaining to AY 2009-10 without considering the facts that the sale-deed was executed on 30/03/2008 and the possession was handed over on the same date and also the assessee had received this almost entire sale consideration. He submitted that the judgement of Hon’ble Apex Court rendered in the case of Suraj Lamp and Industries Pvt.Ltd. vs. State of Haryana and Another reported at (2012) 340 ITR 1 (SC) is misconstrued as the judgement was rendered with regard to the title of property and was given under different Act,i.e. under the Property

Act. He further drew our attention towards para-27 of the judgement wherein it has specifically held that the Hon'ble Apex Court that the observation does not intend to apply on bona fide genuine transactions. He submitted that the decision of the Coordinate Bench (ITAT Ahmedabad Bench 'C') rendered in the case of Smt.Sandhyaben A.Purohit vs. ITO reported at (2013) 35 taxmann.com 472 squarely applies on the facts of the present case. He also relied on the judgement of the Hon'ble Gujarat High Court(Full Bench) rendered in the case of CIT vs. Hormasji Mancharji Vaid reported at (2001) 118 Taxman 276 (Guj.) :: (2001) 250 ITR 542 (Guj.).

4.1. On the contrary, ld.Sr.DR supported the orders of the authorities below. He submitted that there is a specific observation by the AO that the assessee has devised a colorful device to avoid tax liability.

5. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below as well as the judgements relied upon by the ld.counsel for the assessee. We find that the ld.CIT(A) in para-4.4 of his order has observed and decided as under:-

“4.4 I have carefully considered the facts of the case and the submissions made by the appellant. As pointed out earlier, perusal of the assessment order and the grounds of appeal No 3 raised indicate that there are three actions of the A O which deserve adjudication. Accordingly, the same are discussed in the succeeding paras.

1) Ground of appeal No. 3(i), (iii), (v) & (vi) on the issue of taxation of capital gains during the year under consideration

i) It is the case of the appellant that the entire LTCG of Rs. 2,49,78,280/- is not available for taxation during A Y 2009-10 but is available for taxation in A Y 2008-09, the year in which it already stands disclosed. In support of his contentions, the appellant has submitted that the sale deed for Shahwadi land was executed on 31-3-2008, payment were received and stamp duties paid and that the registration of the said deed thereafter was a mere formality. And hence its liability to tax falls in A Y 2008-09. In the opinion of the Id A O, since on the said date i.e. 31-3-2008, a conveyance deed was not signed and that the said sale deed was actually transformed into a registered conveyance deed only on 29-5-2008 and hence the taxability would lye in A Y 2009-10. The question which thus arises is as to whether for the purpose of section 2(47) read with section 45 and other connected sections a transfer of property is to be taken as date on which a sell deed in registered as conveyance deed before Registering Authority or any other date.

ii) It will be seen from the definition of the transfer in relation to a capital asset that the capital gain will be chargeable to tax only on account of sale or any transaction involving of the possession of any immovable property to be taken or in part performance of a contract of the a nature referred to in section 54(a) of the Transfer of Property Act. Since the registered deed was not executed on 31-3-2008 but on 29-05-2008 therefore, it cannot be treated as the sale of land. The assessee's case cannot be covered by clause (v) of section 2(47) of the Act. It cannot be said that the assessee has sold his property under the provisions of the Act. The sale was affected only with the vendee with whom the registered deed was executed on 29-5-2008 and therefore, the actual sale of property was made on 29-5-2008 by the registered deed. The issue regarding legal and lawful transfer of immovable property has been now settled by the Hon'ble Supreme Court in the case of Suraj Lamp & Industries (P) Ltd. Vs. State of Haryana, 340 ITR 1, wherein Hon'ble Courts has held as under:

"Section 5 of the Transfer of Property Act, 1882 ('TP Act' for short) defines 'transfer of property as under:

"5. Transfer of Property defined : In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself [or to himself] and one or more other living persons; and "to transfer property" is to perform such act."

Section 54 of the TP Act defines 'sales' thus:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made. Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.-A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

*It does not, of itself, create any interest in or charge on such property.”
Section 53A of the TP Act defines ‘part performance’ thus :*

"Part Performance. - Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

8. We may next refer to the relevant provisions of the Indian Stamp Act, 1999 (Note : Stamp Laws may vary from state to state, though generally the provisions may be similar). Section 27 of the Indian Stamp Act, 1899 casts upon the party, liable to pay stamp duty, an obligation to set forth in the instrument all facts and circumstances which affect the chargeability of duty on that instrument. Article 23 prescribes stamp duty on 'Conveyance'. In many States appropriate amendments have been made whereby agreements of sale acknowledging delivery of possession or power of Attorney authorizes the attorney to 'sell any immovable property are charged with the same duty as leviable on conveyance.

9. Section 17 of the Registration Act, 1908 which makes a deed of conveyance compulsorily registrable. We extract below the relevant portions of section 17.

"Section 17 - Documents of which registration is compulsory.(1) The following documents shall be registered, namely:

*** ** **

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

*** ** **

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) 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 on or after such commencement, then, they shall have no effect for the purposes of the said section 53 A".

Advantages of Registration

10. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference :

"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people

who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

Registration of documents makes the process of verification and certification of title easier and simpler. It reduces disputes and litigations to a large extent.

Scope of an Agreement of sale

11. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam [1977] 3 SCC 247, observed:

"A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act See Rambaran Prosad v. Ram Mohit Hazra [1967] 1 SCR 293. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not to an interest or easement therein."

In India, the word 'transfer' is defined with reference to the word 'convey'. The word 'conveys' in section 5 of Transfer of Property Act is used in the wider sense of conveying ownership that only on execution of conveyance ownership passes from one party to another."

In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [2004 (8) SCC 614] this Court held:

"Protection provided under Section 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."

It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of TP Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan v. Basant Nehata - 2005 (12) SCC 77, this Court held :

"A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee In exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked, (see sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

Conclusion

15. Therefore, a SA/GPAA/VILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in Asha M. Jain v. Canara Bank - 94 [2001] DLT 841, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPAA/VILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPAA/VILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPAA/VILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPAA/VILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPAA/VILL transactions known as GPA sales.

17. It has been submitted that making declaration that GPA sales and SA/GPAA/VILL transfers are not legally valid modes of transfer is likely to create hardship to a large

number of persons who have entered into such transactions and they should be given sufficient time to regularize the transactions by obtaining deeds of conveyance. It is also submitted that this decision should be made applicable prospectively to avoid hardship.

18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.

19. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bona fide/genuine transactions...."

iii) A perusal of the above cited judgement of Hon'ble Apex Court indicates that transfer of a property under the I T Act happens only when the conveyance deed is registered before the appropriate authority. Mere signing of an agreement on a stamp paper and payment of requisite stamp duty, on a particular date without submitting the said documents to the registration authority for his approval does not tantamount to a valid transfer under the Act. This act can at best be described as an intention between buyer and seller towards sale / purchase of a property against stated consideration. There is no ' transfer' of the property at this stage. Provisions of IT Act pertaining to capital gain come to force only when a transfer has taken place. Applying the ratio laid down by Hon'ble Apex Court in the case of Suraj Lamps supra, since in the instant case the conveyance deed was registered only on 29-5-2008, it can be safely concluded that the transfer of property for the purposes of capital gains took place on 29-5-2008 and the consequent conclusion that the gain or

loss therefrom shall only be available for taxation in FY 2008-09 relevant to AY 2009-10. The argument of the appellant regarding reliance upon the decision of Hon'ble Apex Court in the case of BV Reddy & Sons & Other decisions have been considered. It is seen that the decision of Hon'ble Apex Court on the matter is the latest judgement on the issue of transfer of immovable properties as well as taxation thereof. In the light of this discussions, it is held that the action of the AO in taxing the impugned capital gains of Rs.2,490,78,280/- in AY 2009-10 was a legally correct decision which also finds strength from the decision of Hon'ble Apex Court in the case of Suraj Lamps supra. The action of the A O is therefore confirmed and grounds of appeal No. 3, (i), (iii), (v) & (vi) challenging taxation of capital gains during the year under consideration stands dismissed.

II) Ground of appeal 3(ii) is on the issue of adoption of cost of acquisition of Shahwadi Property at Rs. 13,72,000/-

i) The appellant argues that u/s 55 (2) (b), in respect of properties acquired prior to 1-4-81. he has option of taking either the cost of acquisition of assets or the FMV of the asset as on 1-4-81. It has been argued that the property was acquired by way of gift from father long back. The value of 41,741/- was taken as per the gift deed wherein the value of the property was indicated at some Rs. 50,000/-. The appellant has submitted that u/s. 55(2)(b) it has the option of taking the FMV and that with a view to ascertain the FMV, the appellant got the property valued from the registered valuer, who estimated the price at Rs. 13,72,000/-. The AO adopted the value of Rs 47741 which was hitherto disclosed by the appellant in his books. He further pointed out that the valuation report cannot be relied upon as it was hurriedly made and that the estimations of registered valuer are not based upon reliable comparables.

ii) Before proceeding further, it is pertinent to examine the relevant provision of section 55(2)(b) which are reproduced hereunder :-

(b) in relation to any other capital asset,]

(i) where the capital asset became the property of the assessee⁶⁴ before the 65[1st day of April, 66[1981]], means the cost of acquisition of the asset to the assessee or the fair⁶⁷ market value of the asset on the 68 [1st day of April, 69[1981]], at the opt/on of the assessee ;

(ii) where the capital asset became the property of the assessee⁷⁰ by any of the modes specified in 71 [sub-section (1) of] section 49, and the capital asset became the property of the previous owner before the 72[1st day of April, 73[1981]]. means the cost of the capital asset to the previous owner or the fair⁷⁴ market value of the asset on the 72[1st day of April, 73[1981]], at the option of the assessee :

(iii) where the capital asset became the property of the assessee⁷⁰ on the distribution of the capital assets of a company on its liquidation and the assessee has been

assessed to income-tax under the head "Capital gains" in respect of that asset under section 46, means the fair 74 market value of the asset on the date of distribution ;

There is no dispute on records that the property under consideration was not acquired by gift prior to 1-4-81. A perusal of the above statutory stipulation indicate that a tax payer has liberty u/s. 55(2)(b) to adopt the value at which the property was acquired or its FMV Since, the property was acquired by gift , the cost of acquisition would be Nil leaving the only alternative of adopting its FMV for the purposes of determination of capital gains tax. Thus to the extent, the argument of the A O in adopting the value in the books as against estimation of the registered valuer are not supported by law.

iii) The issue however remains as to whether the adoption of FMV by the registered valuer of the impugned property at Rs. 13,72,000/- is a correct value or not. Facts on records, indicate that physical inspection of the property was done by the valuer on 26-9-2008 and the report was submitted by him on 29-9-2008 i.e. within a short period of three days. The valuation report further indicates that the comparable sale instances adopted by the valuer are in respect of properties which are not located in the immediate vicinity. Thus, the valuation report, prepared by the registered value M/s/ K C Engineers, cannot be accepted as a true and correct estimation of the FMV of the property as on 1-4-1981. The impugned property has not been disclosed in any wealth tax returns by the appellant which could have been helpful to estimate its FMV. Considering the peculiar aspect and the infirmities and deficiencies in the valuation of the registered valuer, it is considered reasonable, if the FMV of the property as on 1-4-1981 is restricted to Rs.8,00,000/- as against Rs. 13,72,000/-. **The A O is accordingly directed to recalculate LTCG taking the value of property as on 1-4-81 at Rs. 8,00,000/-. The addition made by the A O is therefore partly confirmed and ground of appeal 3(ii) is partly allowed.**

Ill) **Ground of appeal 3(iv) is on the issue of part allowance of claimed deduction u/s. 54F of the Act.**

The appellant had claimed deduction u/s. 54F of Rs. 4,39,50,000/- whereas the A O allowed deduction of only Rs.1,12,40,000/-. The argument of the A O regarding the shortcomings entire purchase transaction of property by appellant from his own HUF & mother have been examined and have been found to be having sufficient force. There is no denying the fact that the law permits exemption from capital gains provided sale proceeds of an asset are deployed/utilised for the acquisition of another asset within the mandatory time limits. The A O has brought on record adequate evidences which indicate that unregistered agreement to sale of 2007 were primarily made with a view to claim the deduction u/s, 54F. The A O has further pointed out that the property per se reportedly sold by appellants HUF and his mother is one composite property which actually cannot be bifurcated and sold in two parts. Without prejudice to the fact of correctness of the argument of the A O, during the current proceedings also, the appellant has not been able to give any

*evidence which can indicate that the properties purchased by him are two distinct and separate properties in the municipal records and records of other authorities like electricity department, water department, revenue department etc. In case, the appellant has bought two distinct properties then they should appear separately in municipal records as two different property numbers. The documents concerning payment of stamp duty etc by the appellant which have also been annexed by A O as page-6 & page-7 of the assessment order also indicate that entire transaction was in respect of only one property. It is a highly improbable that one single composite property can be sold by two persons without any description of any descriptive details of the separate component of the property. It is accordingly held that the addition made by the Id A O is based upon correct understanding of inherent facts of the case. **Accordingly, the action of the A O in restricting claim of deduction u/s. 54F to Rs. 1,12,40,000/- is confirmed and the ground of appeal No 3(iv) is dismissed.***

5.1. From the above finding of the Id.CIT(A) it is evident that the Id.CIT(A) has applied the judgement of Hon'ble Apex Court. Under the identical facts, the Coordinate Bench of this Tribunal (ITAT Ahmedabad Bench 'C') in ITA No.1536/Ahd/2011 for AY 2004-05 rendered in the case of Smt.Sandhyaben A.Purohi vs. ITO vide order dated 08/02/2013 in para-8 has held as under:-

“8. Next is the question of the correct year of assessment of the capital gain. On the basis of the documents available on record, it is evident that a sale deed was executed on 9th July, 2001, a copy of which is placed by the Revenue Department on record, by Smt. Sandhyaben Amrishbhai Purohit as a vendor in favour of Smt. Meenaben Markandbhai Parikh, proprietor of M/s Siddhi Corporation, as a purchaser, for a sale consideration of Rs. 12 lacs. As per cl. 5 of the deed, it is evident that on the date of execution of the said deed the possession has also been handed over to the purchaser. As far as the passing of consideration from one hand to another hand, our attention has been drawn on the bank statement of the assessee to demonstrate that the amount of consideration was deposited on two dates, i.e. Rs. 31,000 on 30th April, 2001 and Rs. 11,69,000 on 23rd May, 2001. It has also been informed that on the said date, i.e. on 21st May, 2001,

adhesive stamps of Rs.1,24,800 have also been purchased and duly affixed on the said deed. However, that deed could not be presented before the Sub-Registrar Dwarkadas Kapadia v. CIT [2003] 260 ITR 491/129 Taxman 497 (Bom) is worth mentioning. In the said decision, it was explicitly held that in a situation where consideration has been paid and the possession has been handed over, then in view of the provisions of s. 2(47)(v) transfer took place and that date of transfer is thus required to be taken for the purpose of computation of capital gain. We therefore hold that the capital gain was required to be assessed in asst. yr. 2002-03 and not in asst. yr. 2004-05. Although, from the side of the Revenue the decision of Suraj Lamp & Industries (P.) Ltd. (supra) has been cited but that decision is not in respect of the provisions of the IT Act, but the said decision was pronounced in respect of the provisions of the Transfer of Property Act, 1882. In that context, while dealing with s. 54 of TP Act, 1882, the Hon'ble Court has pronounced that an immovable property can be legally and lawfully transferred or conveyed only by a registered deed of conveyance. Since this decision of the Hon'ble Court has been decided in different context and the income-tax provisions were not adjudicated upon, therefore, we hereby hold that the reliance placed by the Revenue on the said precedent was misplaced.”

5.2. The judgement of Hon’ble High Court of Gujarat (Full Bench), relied upon by the ld.counsel for the assessee, rendered in the case of CIT vs. Hormasji Mancharji Vaid (supra), wherein the Hon’ble Gujarat High Court after examining and considering the various provisions of law as well as the judgements of the Hon’ble Apex Court and the High Courts has held as under:-

“19. Another case with regard to section 22 which has created charge on the income was considered by the Rajasthan High Court in the case of Maharani Yogeshwari Kuniariv. CIT[1995] 213 ITR 541 . The Court posed a question "the question, therefore, arises is as to whether words 'that the assessee is the owner' can be applicable only to a registered owner so also to such person in whose favour, registered sale deed has not been executed but sale agreement has been executed, possession of the property has been given and consideration for sale has been paid.

Section 53A of the Transfer of Property Act contemplates as under :

"Part Performance.—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

.....

and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract...."

If the view that without there being registration, the transferor continues to be the owner is taken, still the question which arises is that the income has not been received by the owner and, therefore, whether the assessment of the transferee can be made by considering that there was diversion of income or the transferor has ceased to have any right to have income received? This section debars the transferor from enforcing his right to property. In the case of Rajputana Hotels (P.) Ltd. v. State of Rajasthan [CWP No. 511 of 1989, dated 27-5-1992] while interpreting the provisions of Rajasthan Land & Building Act, 1964, it was held that the person who is entitled to receive rent is assessable in respect of property even if it is not registered in his name.

20. In our view, considering the aforesaid decisions and the object of the Act, definition given in the Act is required to be taken into consideration. When the document is executed, the property passes and merely because there is no registration certificate, the State coffers should not suffer. If the view propounded that only on registration, act of transfer will be complete, then in that case, if the document is not registered, though the assessee will be enjoying the property, he will say that he is not liable to pay the tax. But that is not the intention of the Legislature. In our opinion, the word 'transfer' as indicated in the Income-tax Act is required to be considered and not 'sale' as indicated in the Transfer of Property Act. If the intention of the Legislature was different, then there would have been specific reference. Relevant provision of clause (47) of section 2 is as under :

"Unless context otherwise requires, transfer, is to be understood in the simple meaning as it is indicated which includes sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law ."

If the words are defined in the Act itself, then it is not proper to read the meaning of the similar words given in another statute unless otherwise expressly provided. In the Income-tax Act, wherever Legislature has thought fit to have the meaning of the word provided in different statute, specific provision has been made. In our opinion, therefore, 'transfer' as defined in the Act is to be given simple meaning as indicated.

There are various methods by which there can be avoidance of tax. The tax evaders always keep faith in their counterparts. Even property is being transferred by merely executing special power of attorney on the stamp paper of Rs. 20 and the transfer deed is not executed as contemplated under the law. The transferor puts transferee in possession but in view of the document, namely, power of attorney executed by the transferor, it is said that the transferee is not the owner of the property though for all practical purposes transferee acts as the owner, in view of irrevocable

power of attorney. By this method tax evaders are securing double benefits, i.e., avoidance of income-tax and stamp duty. It seems that considering various devices which the tax evaders are applying, the Legislature, therefore, amended by inserting clauses in the definition of 'transfer' by clause (47) of section 2 which is as under :

- "(47) 'transfer', in relation to a capital asset, includes,—*
- (i) the sale, exchange or relinquishment of the asset; or*
 - (ii) the extinguishment of any rights therein; or*
 - (iii) the compulsory acquisition thereof under any law; or*
 - (iv) a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or*
 - (v) any transaction involving the following of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or*
 - (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.*

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

21. In case of ownership, there is a transfer of capital assets. This is a case of lease. The transferee was put in possession and was enjoying the property as a lease holder. There cannot be different criteria for transfer of capital asset. For the purpose of tax even if document, i.e., conveyance is not executed but the transferee exercises all the rights of the true owner, one cannot emphasize for the taxation purpose that unless and until the deed of conveyance transferring the rights in property is executed, the transferee is not liable though did everything which is required for acquiring a property. As pointed out, vendor is not permitted in law to dispossess or question the title of the vendee.

22. Under the circumstances, our answer would be that transfer of immovable property of the value exceeding Rs. 100 can be said to have been effected on the date of execution of the document. In view of this answer, it is not necessary to answer further questions."

5.3. In view of the above binding precedent, we are of the considered view that the transaction would relate to the date when the sale-deed was executed, sale consideration was paid and the possession was handed over but not on the date when the document was presented before the Registrar for registration of the sale-deed. Moreover, the issue whether the transaction would relate to the date when the assessee has received

sale consideration, handed over the possession and executed sale agreement or the date when the sale agreement is presented before the concerned Registrar for registration of the document was not before the Hon'ble Apex Court. There is also another aspect of the matter, which the Id.CIT(A) had lost sight of the fact that the judgement of the Hon'ble Apex Court (in the case of Suraj Lamp and Industries Pvt.Ltd. vs. State of Haryana and Another-supra) was delivered on 11/10/2011, but the sale agreement in the present case was executed on 31/03/2008. The Hon'ble Apex Court has observed that *"It is also submitted that this decision should be made applicable prospectively to avoid hardship. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not "transfers" or "sales" and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered deeds of conveyance to complete their title. The said "SA/GPA/WILL transactions" may also be used to obtain specific performance or to defend possession under section 53A of the Transfer of Property Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by development authorities. We make it clear that if the documents relating to "SA/GPA/WILL transactions" has been accepted acted upon by the DDA or other developmental authorities or by the Municipal or Revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision."*

5.4. In the case in hand, the agreement to sell dated 31/03/2008 had already been acted upon the parties by delivery possession and registering sale-deed. Therefore, for this reason also, the judgement of the Hon'ble Apex Court rendered in the case of Suraj Lamp and Industries Pvt.Ltd. vs. State of Haryana and Another (supra), would not help the Revenue.

5.5. Therefore, Ground Nos.1, 2, 3 (i) (ii) & (iv) are allowed.

5.6. With regard to Ground Nos.3 (iii), (v), (vi)(vii) & (viii) since we have held that the Id.AO was not justified in computing the LTGC in the AY 2009-10 for the transaction which have effected on 30/03/2008, therefore would not fall in the AY 2009-10. Thus, these grounds have become infructuous.

6. As a result, the appeal of the assessee is partly allowed.

7. Now, we take up the Revenue's appeal in ITA No.1283/Ahd/2013 for AY 2009-10. The Revenue has taken the following grounds of appeal:-

- (1) The Ld.CIT(A) has erred in law and on facts in estimating the fair market value of the land to be adopted as on 01/04/1981 at Rs.8,00,000/- as against Rs.41,741/- being the cost of acquisition, without considering the finding of the AO.*
- (2) The Ld.CIT(A) has erred in law and on facts in estimating and adopting the fair market value of the land at Rs.8,00,000/-, which are not based upon reliable comparables and without bringing any substantiating material.*
- (3) On the facts and circumstances of the case, the Ld.CIT(A) ought to have upheld the order of the Assessing Officer.*

(4) It is therefore prayed that the order of the Ld.CIT(A) may be set aside and that of the order of the Assessing Officer be restored to the above extent.

7.1 Parties have adopted the same arguments as were advanced in assessee's appeal, i.e. ITA No.1281/Ahd/2013 for AY 2009-10(supra). Since we have held that the authorities below were not justified in treating the Long Term Capital Gain in AY 2009-10, the grounds raised in Revenue's appeal are dismissed.

8. In the combined result, Assessee's appeal is partly allowed, whereas Revenue's appeal is dismissed.

Order pronounced in Court on the date mentioned hereinabove at caption page

Sd/-
(एन.एस.सैनी)
लेखा सदस्य
(N.S. SAINI)
ACCOUNTANT MEMBER
Ahmedabad; Dated 30/ 10 /2014

Sd/-
(कुल भारत)
न्यायिक सदस्य
(KUL BHARAT)
JUDICIAL MEMBER

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-XVI, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad