

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "डी" मुंबई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**

**BEFORE S/SHRI B.R.BASKARAN (AM) AND VIVEK VARMA, (JM)**  
**सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं विवेक वर्मा, न्यायिक सदस्य के समक्ष**

आयकर अपील सं./I.T.A. No.3096/Mum/2012  
(निर्धारण वर्ष / Assessment Year : 2001-02)

Dilip Anand Vazirani 66/1512, Adarsh Nagar, MIG Colony, Bengal Chemicals, Worli, Mumbai-400030	<b>बनाम/</b> <b>Vs.</b>	Income Tax Officer-18(1(3), Mumbai.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :ABCPV2159A

अपीलार्थी ओर से / Appellant by	Shri Vimal Punamiya
प्रत्यर्थी की ओर से/Respondent by	Shri Jeetendra Kumar

सुनवाई की तारीख / Date of Hearing : 5.11.2014

घोषणा की तारीख /Date of Pronouncement : 14.11.2014

**आदेश / ORDER**

**Per B.R.BASKARAN, Accountant Member:**

The appeal filed by the assessee is directed against the order dated 29-03-2012 passed by Ld CIT(A)-29, Mumbai and it relates to the assessment year 2001-02.

2. The issues urged before us is whether the Ld CIT(A) was justified in law in confirming that the capital gain is assessable in the assessment year 2001-02 and if the answer to the above question is Yes, then, whether the computation of capital gain approved by Ld CIT(A) is correct in law.

3. The facts relating to the case are stated in brief. We shall first narrate the events as to how the assessee acquired the property. The father of the assessee named Shri Anand Vazirani was originally habitant of Pakistan and he

owned certain land there. Pursuant to Indo-Pakistan partition, Shri Anand Vazirani migrated to India along with his family members during 1947 and left his property in Pakistan. In 1954, he applied for compensation and allotment of any evacuee's property under the "The Displaced Persons (Claim and Rehabilitation) Act, 1954. The said application was not processed till 1989 and hence he wrote two letters to Settlement Commission. Thereafter, he filed a writ petition before Hon'ble High Court of Bombay and the High Court, vide its order dated 22.11.1989, directed the Settlement Commission to allot property at 21 Bund Garden Road, Pune to set off the value payable to Mr. Anand Vazirani. On 30-5-1990, the Central Government also directed the Maharashtra Government to allot property. Pending allotment, Shri Anand Vazirani passed away on 30-03-1992. There after, the assessee herein pursued the matter by making several applications, petition etc to the Settlement Commission and the Government of Maharashtra. On 08-9-994 & 01.7.1995, the Settlement Commission passed orders against the assessee on the reasoning that the land value was higher than the compensation amount. Upon the writ petition filed by the assessee, Hon'ble High Court quashed the order of the Settlement Commission on 24.4.1996. Again, the Settlement Commission dismissed the case. Again the assessee filed Writ petition before Hon'ble High Court in 1997 and the High Court, vide its order dated 13.8.1998, directed the Settlement Commission to allot property to the legal heirs of Shri Anand Vazirani on payment of differential amount as compensation. The Settlement Commission filed SLP before Hon'ble Supreme Court and on 19.4.1999, the said SLP was dismissed by the Apex Court. The review petition filed by the Settlement Commission was dismissed by the Hon'ble Supreme Court on 18.8.1999. The assessee paid the differential amount on 1.4.2000 & 4.4.2000. Finally, the Settlement Commission passed final order in favour of the legal heirs on 24.4.2000 and the possession letter was given on 15.5.2000.

4. In the mean time, the assessee also took steps to sell the property and the events relating thereto are narrated here under. The assessee entered into a Memorandum of Understanding (MOU) on 05-08-1994 with M/s Radiant Builder for development of property. According to the assessee a right was created in the favour of him and other legal heirs in respect of the impugned property, by the order passed by Hon'ble High Court in 1989 and hence he entered into a

MOU to develop the property. Subsequently, the assessee entered into another MOU with M/s Murali Realtors on 26.12.1995 & 17.5.1996 and a Deed of Confirmation was also executed on 13.11.1997. Thereafter the assessee also applied to the Income tax department seeking clearance u/s 269UL and the Income tax department also issued a certificate on 15.9.1998. There after, the assessee executed supplementary MOU on 29.3.2000 and the development agreement was executed on 25.9.2000 with M/s Murali Realtors. Thereafter, on 10.2.2001 the assessee cancelled the MOU entered with M/s Radiant Builder earlier in 1994. Between 2000 to 2005, the assessee purchased the tenancy rights of various tenants. In 2005, the assessee received substantial payments from M/s Murli Realtors and the possession was handed over. Finally the assessee executed sale deed on 19.5.2007 in favour of M/s Murali Realtors. According to the assessee, since the substantial amount was received and the possession was also handed over by March 2005, the Capital gain was offered in the assessment year 2005-06. The legal heirs of Mr. Anand Vazirani were the assessee herein, his mother and his sister. The assessee's mother died in between and his sister executed release deed in favour of the assessee. Accordingly the assessee herein became the full owner of the property.

5. The department carried out a survey operation in the hands of M/s Murli Realtors, wherein they noticed the development agreement dated 25-09-2000 entered between the assessee herein and M/s Murli Realtors. In that agreement, the consideration was shown at Rs.8,60,00,000/-. Upon receipt of the said information, the assessing officer of the assessee reopened the assessment relating to the assessment year 2001-02, i.e., the year under consideration, by issuing notice u/s 148 of the Act. The assessing officer noticed that the Settlement Commission had given the letter of possession to the assessee on 15.5.2000 and the development agreement was entered into between the assessee and M/s Murli Realtor on 25.9.2000. The assessing officer took the view that the assessee has transferred the property within the meaning of sec. 2(47)(v) and 2(47)(vi) of the Act on 25.9.2000 and accordingly held that the capital gain arising on such transfer is assessable as Short term Capital gain in the assessment year 2001-02. The assessee submitted that he had offered the capital gain in the assessment year 2005-06, as the possession of the property was actually given in that year and major consideration was received in that year.

Further the sale deed was executed subsequently on 19.6.2007 confirming the said transfer. However, the said contentions did not find favour with the assessing officer. Accordingly, the assessing officer computed the Short term Capital gain as under and assessed the same in AY 2001-02.

Total Consideration		8,60,00,000
Less:- Amount paid to RBI	1,35,34,380*	
Cash payment to tenants	1,14,50,000	
Cheque payment to tenants	84,00,000	
Paid to Radiant Builders	65,43,899	
	-----	3,99,28,279
		-----
Short term capital gain		4,60,71,721
		=====

(\* to the Settlement Commission towards differential price)

The assessee met the above said expenses out of the advance of Rs.4,56,67,167/- received from M/s Murli Realtors from time to time.

6. The Ld CIT(A) also confirmed the view taken by the assessing officer. Paragraph 5.3 of his order reads as under:-

“5.3 The sale of property has been effected by a development agreement dated 25.9.2000. The sale has to be concluded as complete on this date for the following reasons:-

- (1) Development agreement has been signed on this date, consideration is quantified and possession has been given to the buyer.
- (2) Part of the consideration amount has been received or deemed to have been received.
- (3) There is part performance of the contract and as per provisions of section 2(47) r.w.s. 53A the transfer of property is regarded as complete once the possession is given and transferee is ready and willing to perform his part of the contract.”

Apparently, the tax authorities have applied the ratio laid down by Hon'ble jurisdictional Bombay High Court in the case of Chaturbhuj Dwarakadas Kapadia of Bombay Vs. CIT (2003)(260 ITR 491). Aggrieved, the assessee has filed this appeal before us.

7. The Ld Counsel appearing for the assessee Mr. Vimal Punmiya submitted that the view taken by the tax authorities to assess the capital gain in assessment year 2001-02 is against the peculiar facts prevailing in the instant case and they have reached such a conclusion without properly appreciating the facts. He submitted that the tax authorities are under the impression that the possession of the property was given to the developer on the date of execution of development agreement and further the developer has also immediately started the activities. However, the fact remains that the assessee had given only the licence to the developer to enter the property. He further submitted that the advance received from the developer was fully used to pay the differential price to the Settlement commission, to purchase tenancy rights from the tenants, to relieve from the earlier MOU entered with M/s Radiant Builders etc. Further, the developer also did not start the development work in terms of the Development agreement. Further, there was delay in getting approval from municipal authorities and there was further delay, since the claims of the tenants need to be settled. Accordingly, the Ld A.R submitted that the developer could not start the work in the year relevant to the assessment year 2001-02. Once all the hurdles were cleared, the assessee received major part of the consideration on his own account, only in the year relevant to the assessment year 2005-06 and accordingly the possession was also given to the developer during that year. Accordingly, the assessee offered the Capital gain in that year only. Subsequently, the conveyance deed was executed on 19.5.2007 in favour of the Developer M/s Murli Realtor. The Ld A.R submitted that the decision rendered by the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarakadas Kapadia (supra) is not applicable to the facts prevailing in the instant case. He submitted that one of the conditions prescribed in the above said case was that the developer should be "willing to perform as per the contract". However, the developer did not perform as per the contract and hence the said condition was not satisfied. The Ld A.R submitted that, in the absence of any positive action from the side of developer to perform in terms of the contract during the financial year relevant to the assessment year 2001-02, the assessee was not sure that the developer would comply with the terms of the development agreement. Further, the assessee has not given possession to the developer, but gave only licence to enter into the property. Accordingly, he

submitted that the tax authorities are not correct in law in assessing the capital gain in AY 2001-02. The Ld A.R also invited our attention to various clauses of the Development Agreement and also drew support from various Case laws to support his contentions.

8. On the contrary, the Ld D.R, Shri Jeetendra Kumar submitted that the assessee had received substantial amount by virtue of the development agreement, where as in the case laws relied upon by the assessee, the consideration paid to the owners of the property was not substantial. Further, by giving licence to enter the property, the assessee has given possession to the developer. Accordingly, the Ld D.R submitted that the provisions of sec. 2(47)(v) and 2(47)(vi) shall square apply to the impugned transaction and hence the Ld CIT(A) was justified in confirming the assessment of Capital gain in AY 2001-02.

9. We have heard the rival contentions and carefully perused the record. We feel it pertinent to highlight certain facts, which were reiterated by Ld A.R during the course of his arguments. There is no dispute with regard to the fact that the impugned property was occupied by many tenants and they held tenancy rights. The payments made by the assessee to the tenants to purchase the said tenancy right were allowed as deduction by the assessing officer himself while computing the Short term Capital gain. The assessee has placed copies of agreements entered with various tenants for vacating the property at pages 177 to 220 of the paper book filed by him. A perusal of the said agreements shows that the assessee has started entering into the agreements with the tenants from 2002 onwards. We notice that the assessee has purchased tenancy rights in January, 2005 also. These facts show that the tenants were occupying the property till that date. In the mean time, the developer was approaching the Pune Municipal Corporation for the joint development of the impugned property. It is stated that the building permission was given vide commencement certificate bearing no.4679 dated 19.9.2001, but it was revised, vide revision certificate No.0131 dated 3.10.2003 and there were subsequent revisions also. It is further stated that the developer obtained plinth completion from Pune Municipal Corporation on 26.3.2002 and part completion was issued on 5.1.2004. All these facts show that the developer did not commence the work of development in the year relevant to the assessment year 2001-02.

10. We have already noticed that the assessee had entered into MOU with M/s Murli realtors in the year 1995 and has started receiving advance amounts from it. We have further notice that the advance amount of about Rs.4.56 crores was fully utilized to meet the expenses, meaning thereby the consideration of Rs.8.60 crores included the expenditure to be met by the assessee. According to the assessee, he had received the advance on his own account only in 2005, i.e., the advances received earlier were used to meet the expenses. The assessee has placed ledger account copy relating to the advance payments from the books of M/s Murli Realtors at pages 221 to 227 of the paper book. A perusal of the same shows that the assessee had received advance amount of Rs.2.90 crores prior to 1.4.2000. It is pertinent to note that the development agreement itself was entered on 25.9.2000 only. During the financial year 1.4.2000 to 31.3.2001, the assessee has received a sum of Rs.1.57 crores. In FY 2001-02, he received a sum of Rs.30 lakhs only. In FY 2002-03, no advance was received. In FY 2003-04, he received a sum of Rs.25.00 lakhs only. Final payment of Rs.3.07 crores was made to the assessee only in FY 2004-05. Hence, the assessee claims that the development agreement was really given effect to, only in the financial year 2004-05 relevant to the assessment year 2005-06.

10. Further, our attention was invited to the following clauses of the development agreement dated 25.9.2000, which is placed at pages 102 to 117 of the paper book:-

- (a) As per clause 5, the owners (assessee herein) has agreed to execute a Power of Attorney in favour of the developer.
- (b) As per clause 6, the owner has to get the Deed of Transfer executed by the Government of Maharashtra in his favour. The expenses to be incurred in connection there with shall be borne by the owner.
- (c) As per clause 15, the owners have executed licence in favour of the Developer to carry out construction activities. However, the possession of the property shall be delivered by the owners upon execution of Conveyance Deed in favour of the Developer or their nominees.

Accordingly, it was contended that the legal possession (complete control over the property) was not given to the developer and he was given only the licence to carry out the work.

11. The Ld A.R also placed reliance on few case laws to support his contention that the capital gain need not be assessed in the year in which the development agreement was entered, i.e., the year of assessment should be decided on the basis of facts prevailing in each case. We shall briefly discuss about those case laws:-

(a) ACIT Vs.Mrs. Geetadevi Pasari (2007)(14 SOT 63)(Mum)(URO)- In this case, the assessee executed an agreement of sale cum development with a builder on 29.3.1994 to develop the property. The developer, after obtaining the commencement certificate from the municipal corporation, paid the balance consideration. The assessee handed over the possession of the premises to the developer on 10.4.1998. On analysis of the facts prevailing in this case, the Tribunal came to the conclusion that the possession was given only on 10.4.1998. Accordingly, the Tribunal held as under:-

“... In these circumstances, when only a small portion of sale consideration was received as earnest/deposit money and when the developer could not have, therefore, exercised his rights under the contract which were to crystallize on making the payments after the receipt of no objection certificate from the authorities, it cannot be said that there is anything to indicate, leave aside establish, “passing of or transferring of complete control over the property in favour of the developer” which is sine qua non for taking the date of contract as relevant for the purpose of deciding the year of chargeability of capital gains. Therefore, on the facts of the present case, the date of development agreement would not really be relevant to decide the year of chargeability.”

According to Ld A.R, the above said order of Tribunal has since been approved by the Hon'ble Bombay High Court in Income tax Appeal No.861 of 2007, vide its order dated 10.7.2008, after considering its earlier decision rendered in the case of Chaturbhuji Dwarakadas Kapadia. However, the copy of the order of the High Court was not furnished.

(b) Dr. Arvind S Phadke Vs. Addl. CIT (2014)(46 taxmann.com 335)(Pune) - In this case, the development agreement was entered on 13.9.2007 and the physical possession was given on 1.3.2008. The Tribunal held that the date of transfer should be taken as the date on which physical possession was given.

(c) Binjusaria Properties (P) Ltd Vs. ACIT (2014)(45 taxmann.com 115)(Hyd) - In this case, the assessee entered into a development agreement cum General Power of Attorney with a developer on 2<sup>nd</sup> February, 2006. However, the builder did not start the works as per the agreement. The AO assessed the capital gains in AY 2006-07 observing that the transfer had taken place in AY 2006-07. The Tribunal noticed that the assessee has given only 'permissive possession' to the developer, vide the development agreement. Further, the developer did not carry on any development activity on the property as per the development agreement. Accordingly, the Tribunal held that there was no transfer of property by virtue of development agreement giving rise to Capital gain in AY 2006-07. It is pertinent to note that the Tribunal had placed reliance on the Third member decision rendered in the case of Vijaya Productions (P) Ltd Vs. Addl. CIT (2012)(134 ITD 19).

(d) S. Ranjitha Redddy Vs. DCIT (2013)(35 taxmann.com 415)(Hyd) - In this case, the assessee had given licence to the developer to carry on development activities. However, the developer did not commence construction activities. The Tribunal held that the 'willingness to perform' contemplated in sec. 53A of the Act is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of Section 53A of the Transfer of Property Act will come into play on the facts of tht case. Since the developer did not commence the construction activities, the Tribunal held that there was no transfer of property on the date of execution of development agreement. Identical views have been expressed in the following cases also by the Hyderabad bench of Tribunal:-

- (i) Smt. P Prathima Reddy Vs. ITO (25 taxmann.com 264)(Hyd)
- (ii) Fibars Infratech (P) Ltd Vs. ITO (46 taxmann.com 313)(Hyd)
- (iii) Suresh Kumar D Shah Vs. DCIT (16 taxmann.com 324)(Hyd)
- (iv) Ravinder Singh Arora Vs. ACIT (24 taxmann.com 346)(Hyd)

(e) JCIT Vs. M/s Gokhale & Gadre Enterprises (ITA No.2335 & 2336/mum/2000 dated 23-08-2005)(Mum ITAT) - In this case, the assessee entered into an agreement on 30.12.1992 for sale of development rights. The

Tribunal noticed that the possession was given on 6.5.1994. Accordingly, it was held that the Capital gain would arise in AY 1995-96 and not in AY 1993-94 as opined by the assessing officer.

12. Thus, we notice that the assessee had received advance amounts much earlier to the execution of development agreement, probably on the strength of the MOU. The property was encumbered with tenancy rights of many persons and the release of tenancy right was completed only in January, 2005. Further, the approval from municipal corporation was also got delayed and the plans were revised subsequent to AY 2000-01. The surrounding circumstances show that the developer did not start the work of development in the year relevant to AY 2001-02. As per the terms of development agreement, the assessee has given only licence to enter into the property, meaning thereby the possession was not given in the year relevant to AY 2001-02. In view of the peculiar facts narrated above, the assessee has contended that the tax authorities are not correct in holding that the transfer of property took place in the year relevant to AY 2001-02. The various case laws discussed above also support the view taken by the assessee. Hence, we agree with the contentions of the assessee in this regard. Accordingly, we hold that the transfer of property did not take place on the date of execution of development agreement and accordingly the tax authorities are not justified in assessing the capital gain in AY 2001-02. Accordingly we set aside the orders of tax authorities on this issue.

13. Since we have held that the transfer of property did not take place in the financial year relevant to AY 2001-02, we do not find it necessary to address other issues relating to computation of capital gains.

14. In the result, the appeal filed by the assessee is allowed.

The above order was pronounced in the open court on 14th Nov, 2014.

घोषणा खुले न्यायालय में दिनांक: 14th Nov, 2014 को की गई ।

Sd

(विवेक वर्मा / VIVEK VARMA)  
न्यायिक सदस्य / JUDICIAL MEMBER  
मुंबई Mumbai: 14th Nov, 2014.

sd

(बी.आर.बास्करन / B.R. BASKARAN)  
लेखा सदस्य / ACCOUNTANT MEMBER

व.नि.स./ SRL , 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)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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