

NOTE ON TAXATION OF REAL ESTATE DEVELOPMENT AGREEMENTS VIS A VIS SECTION 2(47)(v)- DEEMED TRANSFER- OF THE INCOME TAX ACT, 1961

This relates to **first SC ruling** in context of section 2(47)(v) of the Income Tax Act dealing with 'deemed transfer' in case of Part Performance of contract as stipulated under section 53A of Transfer of Property Act. It assumes importance in view of jump in real estate activities *as experienced* in the recent past and larger property development deals taking place between builders and owners.

In the case of Ajay Kumar Shah Jagati decided on 24 January 2008 215 CTR 396 (*Coram Hon'ble Justice S.H.Kapadia and Justice B.S.Reddy*), it has been inter alia held that handing over of possession over underlying property is *sine qua non* to trigger the same. Relevant observations of SC ruling are:

Quote

“In these civil appeals we are concerned with the scope of Sec.2 (47) (v) read with Sec.53A of the T.P. Act....

....Briefly, it may be stated that in order that the case would fall under the extended meaning of the word 'Transfer', possession is essential element to be considered. That is the crux of the matter...”

Unquote

Further, SC while accepting revenue's appeal and remanding the matter back to ITAT, reasoned that "....In the present case, no finding qua possession has been recorded by Tribunal...." **With great respect for their lordships, aforesaid finding/reasoning of SC may require reconsideration, as apparent from underlying Delhi Bench of ITAT ruling reported at 55 ITD 348** (speaking through Sh. Vimal Gandhi, argued from assessee's side by Sh. C.S.Aggarwal). Relevant extract from Delhi ITAT ruling is given below:

".....11. The learned lower authorities in this case held the transaction to be covered under section 53A of the Transfer of Property Act as assessee transferred 3700 sq. meters out of 7000 sq. meters agreed to be sold under the agreement. As contract was performed in respect of 3700 sq. meters, they took that it was partly performed and therefore provisions of section 53A were applicable. They took the agreement as a transfer and substituted consideration of Rs. 25,00,000 in place of Rs. 15,20,900 received by the assessee.

...The part performance of a contract has been taken in the little sense to mean performance of any part to contract i.e. sale of a part of property agreed to be sold, has been taken as part performance. This with respect has been in total disregard of express language of statutory provisions and the well-settled law. Any and every type of performance is no relevant to attract application of provision of section 53A of the Transfer of Property Act and/or section 2(47) of the Income-tax Act.....

...13. It is more than clear from the order of the Assessing Officer that he recorded no finding that possession of property other than 3700 sq. meters admittedly transferred was delivered by the assessee. His reasoning for holding that provisions of section 2(47) (v) were applicable, has already been noted and discussed.."

In aforesaid connection, BHC in its landmark ruling in the case of Chaturbhuj Dwarkadas Kapadia 260 ITR 491 on the subject (*speaking through Justice S.H.Kapadia as his lordship then was*) has concluded that neither handing over of actual possession nor giving of irrevocable licence over the property is *sine qua non* to trigger extended transfer under section 2(47) of the Act. In this ruling, it has been interalia held that mere signing of 'development' agreement giving limited power of attorney to builder coupled with substantial payment discharged by builder to owner, is enough to give rise to Capital Gains under subject provision. Relevant observations of BHC which are often pressed by revenue in majority of land development deals (against taxpayers) are:

"If the Contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability"

Further, Mumbai Bench of ITAT in 104 TTJ 375 speaking through Sh. Pramod Kumar has distinguished aforesaid BHC ruling in 260 ITR 491, on the score that, when only *paltry* consideration has been discharged by builder, transfer cannot be invoked under subject provision on strength of said BHC ruling.

Further, recently, AAR in J.S.Sararia 294 ITR 196, speaking through Hon'ble Chairman Justice P.V.Reddy while reinforcing the BHC ruling in 260 ITR 491 has inter alia held that:

"...What is contemplated by section 2(47)(v) is a transaction which has direct and immediate bearing on allowing the possession to be taken in part performance of the contract of transfer. It is at that point of time that the deemed transfer takes place. ..."

Further, DHC in the case of Ashok Kapur HUF 213 CTR 241 for assessment year 1980-1981 (section 2(47)(v) inserted by Finance Act, 1987 w.e.f AY 1988-89) in fact situation where relevant development/construction agreement in terms of DHC language indicated that *"The other clauses, namely the preamble clauses, as well as cls. 22 and 23 are unequivocal that the assessee has allocated to the builder 50 per cent of the building to be constructed and has also given the builder the right to sell the builder's allocation to third parties. These clauses have all the elements of transfer. For the purposes of capital gains what was critical to be examined was whether pursuant to the agreement there was a transfer of an asset from one party to the other. Even if one were to accept the argument that there was no joint venture between the assessee and M/s Ansal Properties, still the inescapable conclusion is that there was a transfer of property from one entity to the other. In that view of the matter, this Court is unable to agree with the Tribunal that there has been no transfer by the assessee of its right in the property in question."* On basis of this language, DHC reversed the underlying ITAT ruling and concluded that

transfer took place at the time of entering into said agreement, for purposes of capital gains.

Precedent	Ratio
Mum ITAT in 99 ITD 368	<p>Assessee having recd consideration and handed over possession of assets on 31 March 1998, transfer for section 2(47)(v) r/w sec 53A TP Act took place in AY 1998-1999 and cap. gains become chargeable under said year, notwithstanding sale deed got registered on 31 Oct 1998</p> <p>Similar Ratio in 91 ITD 429 – Mum ITAT TM</p>
Hyd ITAT in 106 ITD 388	<p>Assessee having delivered possession of the property to the developer under irrevocable development agreement with a right to developer for disposing its share in the built up property and taking advances against it etc – transfer took place at the time of agreement u/s 2(47)(v) r/w section 53A of the Transfer of Property Act</p> <p>Similar Ratio in 98 TTJ 179- Pune ITAT</p>