

Tri Nagar Keshav Puram CPE Study Circle of NIRC of ICAI

CAPITAL GAINS AND REAL ESTATE TRANSACTIONS

Presentation by :

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OBJECT/SCOPE

To deliberate and discuss the issues relating to capital gains vis a vis real estate transactions

Relevant Provisions in the Act

- Section 2(47)- definition of transfer specially extended definition in sub-clause (v) stating:

“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 Transfer of Property Act, 1882”

From Asst Year 1988-89 onwards.....

Section 53A T.P.Act

- **Relevant conditions:**
 - There should be a contract for consideration;
 - It should be in writing
 - It should be signed by the transferor
 - It should pertain to transfer of immovable property
 - The transferee should have taken **possession** of property
 - **Lastly transferee should be ready and willing to perform his part of the contract**

(Refer BHC in Chaturbhuj Kapadia 260 ITR 491 etc)

Case Study Practical- Clause in Agreement

- "The owners shall execute a POA in favor of the developer or their nominee for registration and transfer of the title rights and interest with proportionate share in land in favor of the prospective buyers. However, such POA shall be executed on completion of the project and on receipt of the entire consideration/area allocated to the owners. In the eventuality sale deed is to be registered in favour of the prospective buyer then the owners on the requests of developer and on the basis of payments recd against the share of area shall execute such transfer document in favour of prospective buyer"

Case Study Practical- Clause in Agreement

- "The owners shall authorise the developer to sell allot book lease etc the built up spaces in the complex and receive the booking amount, advances, sale consideration from prospective buyer and tenant respectively. **Owners shall execute such POA in favour of developer on handing over possession of the plot to the developer**"
- **The owners shall also execute and register a POA authorizing the developer to sell and transfer the built up areas and handover possession to intending buyers...This POA shall be given in manner stated above..."**

Dr Maya Shenoy 23 DTR 140 Hyd Bench ITAT

HELD:

“though several decisions have been cited by both the sides, none of them considered a binding precedent for the reason that no document would be Identically worded and the conduct of the parties also would differ from case to case which certainly Will have bearing in drawing inferences and Conclusions...”

Judicial Precedents Snap Shot

Precedent	Ratio
SC Ajay Jagati 215 CTR 396	Possession is the crux of the matter
Advance Ruling in J.S.Sarkaria 294 ITR 196 (Irrevocable POA executed)	A transaction which has <u>direct and immediate bearing on allowing the possession to be taken in part performance of the contract</u> . It is that point of time when deemed transfer takes place
DHC Ashok Kapur HUF 213 CTR 241 (AY 1980-81)	Transfer when assessee entered into development agreement

Judicial Precedents Snap Shot

Precedent	Ratio
Mad HC in G Saroja 301 ITR 124	Saroja assessee permitted son in laws to promote a housing project – no written agreement – <u>not shown that saroja parted possession for part/full consideration</u> – held no transfer
Mumbai Bench of ITAT in Asian Distributors 70 TTJ 88	IF RIGHT TO REVOKE THERE-POSSESSION NOT COMPLETE- NO TRANSFER – MERE LICENSE

Judicial Precedents Snap Shot

Precedent	Ratio
Delhi Bench of ITAT in Satyawati Verma 123 TTJ 97	For 2(47)(v): must that transferee has no part left to perform in contract and transferor has performed/is willing to perform contract
Mumbai Bench of ITAT in Gandhi & Co 13 SOT 82	Contract terms should be ascertainable – <u>consideration not final</u> - distinguished kapadia's case 260 itr- where total consideration recd by assessee

Judicial Precedents Snap Shot

Precedent	Ratio
Chennai Bench of ITAT ruling in 122 TTJ 405 Kalanidhi	<u>Total consideration agreed and possession handed over</u> – held 2(47)(v) attracted
Pune Bench of ITAT Mulik 98 TTJ 179	<u>GPA given to developer-transfer</u> attracted – 2(47)(v)
Mumbai Bench of ITAT ruling in General Glass 108 TTJ 854	Payment schedule agreed- <u>transferee not stuck to his promise of payment schedule-</u> 2(47)(v) not attracted

Judicial Precedents Snap Shot

Precedent	Ratio
Mumbai Bench of ITAT ruling in Gripwell 102 TTJ 441	Where <u>transferee paid Rs 1 crore (sale consideration)</u> to owner & thereby took possession – 2(47)(v) attracted
Bang Bench of ITAT in Vemmanna Reddy 114 TTJ 246	Transfer u/s 2(47)(v) when possession of vacant land given and not when constructed flats were given
Hyd Bench of ITAT in 106 ITD 388 Dr t.Rao	Transfer u/s 2(47)(v) when possession of vacant land given and not when constructed flats were given ¹²

Latest Hyd Bench of ITAT in Dr Maya Shenoy 23 DTR 140

Issue for Consideration	Ratio
<p>Effect of development agreement: Held : constituted transfer u/s 2(47)(v)</p>	<p>Assessee's arguments that co-extensive possession and Joint Venture between owner and builder rejected in light of:</p> <ul style="list-style-type: none">a) Agreement clause which gave absolute rights to builder for its 55% share of landb) No material brought on record to prove stated intent to share the fruits

Latest Hyd Bench of ITAT in Dr Maya Shenoy 23 DTR 140

Issue for Consideration	Ratio
Effect of development agreement: Held	<p>Assessee's arguments that no consideration flowing from giving of possession of land and future receipt of constructed flats cannot be stated to be consideration: rejected for:</p> <p>Consideration may be futuristic and hence valid (refer SC AIR 1955 SC 376)</p>

Latest Hyd Bench of ITAT in Dr Maya Shenoy 23 DTR 140

Issue for Consideration	Ratio
Effective date of transfer	Held: on december 1999 when possession handed over (ay 2000-2001)
Capital Gains Charge u/s 45 held consideration to be computed by estimation	"it is well established that even if assessee has recd right to receive consideration, though it may be quantified later/it may be recd later, but these factors do not retrard/stall capital gains accrual.."

Latest Hyd Bench of ITAT in Dr Maya Shenoy 23 DTR 140

Issue for Consideration	Ratio
Whether single transaction or two transactions	Held: Accordingly we hold that transfer of land in consideration of flats constitute one transaction giving rise to capital gains and sale of constructed flats by assessee owner – another transaction giving rise to capital gains

Conclusion on Case Study: Own Views

- a) For total consideration not agreed/final and right to revoke there - uncertainty in performance of contract is there (terms of contract not ascertainable with reasonable certainty)
- b) For POA not given and limited right of entrance given (license) for right to make applications to authorities etc
- c) Transferee part- not complete in full

Transfer apparently not complete u.s 2(47)(v)

Other real estate sector- issues – developer/business hands

SC in Realest Builders 216 CTR 345 followed in Dhir COLonisers by SC to reverse P&H HC 288 ITR 561 TO Conclude

Income from sale of plots in hands of builder/business head accrued only on date of conveyance and not time of execution of tripartite Agreement, when assessee recd advance consideration

(ADVANCE OF PLOT NOT TAXABLE TILL FINAL CONVEYEANCE)

Other real estate sector- issues – developer/business hands

- WHETHER NEW SECTION 56 AS AMENDED BY FINANCE NO 2 ACT 2009 APPLIES TO REAL ESTATE DEALERS ETC FOR SALE/PURCHASE OF PROPERTIES (STOCK) BELOW FMV ETC?
- DEBATABLE
- BUT CONTEXT AND HARMONISED WITH SECTION 28/145 AND SC REALIST BUILDERS ETC

Capital Gains TDR/Right to construct additional floor

- Issue of capital gains on transferable development right TDR(has inbuilt cost) and right to construct additional floor (has no cost) : Mumbai Bench of 121 TTJ 641 Maheshwar & 2 SOT 422 Jethalal: HELD since additional floor construction right flowing from development regulations has no computable cost – charge fails SC B.C.Shetty applied
- For TDR Cap Gains also see : Mum ITAT 87 ITD 56 Shakti Insulated

Capital Gains TDR/Right to construct additional floor

- Conversion of Stock to Capital Asset Refer
 - Mum ITAT Bright Star 24 SOT 288 (for cap gains computaion – holding prd from beginning of acquisition to be reckoned)
 - Pune ITAT in Kalyani 78 ITD 95 – same as above
 - Delhi ITAT Spledour 27 SOT 39 (contra-adverse- without considering above)

Section 50C Not applicable to builder business head

- Mumbai Bench in Inderlok Hotels ITA 4376/M/2008
- Section 50C precedents
 - Delhi ITAT Ravi Kant 110 TTJ 297 – DVO report cannot be ignored by AO
 - Luck ITAT in 117 TTJ 974: Where DVO exceeds stamp valuation, Stamp valuation to be adopted....
 - Chd ITAT in Optec: 11 DTR 264: fiction of 50C taxation in seller hands cannot be adopted for 69 taxation purchaser hands

Thank You

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