आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ"ए",मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री राजेन्द्र, लेखा सदस्य, के समक्ष ।

Before Shri Joginder Singh, Judicial Member and
Shri Rajendra, Accountant Member

ITA NO.6062/MUM/2011
Assessment Year-2007-08

DCIT-24(3), R. No.701, C-11, 7th Floor, B.K.C. Bandra (East), Mumbai-400051	**बनाम**/ Vs.	Shri Avadh Narayan Singh, 204, Awadh House, Thakur Laxmi Singh Estate, S.V. Road, Goregaon (W), Mumbai-400062
		PAN No.AAZPS6963P
(राजस्व /Revenue)		(निर्धारिती /Assessee)

राजस्व **की ओर से** / Revenue by	Shri M. Murli-DR
निर्धारिती **की ओर से** / Assessee by	Shri Vimal Punamiya

सुनवाई की तारीख / **Date of Hearing :**	**29/03/2016**
आदेश की तारीख /**Date of Order:**	**29/03/2016**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 23/06/2011 of the ld. First Appellate Authority, Mumbai. The only ground raised in this appeal pertains to deleting the penalty of Rs.1,30,23,590/-, imposed u/s 271(1)(c) of the Act, without appreciating the facts.

2. During hearing, the ld. counsel for the assessee, Shri Vimal Punamiya, contended that the penalty is not maintainable as quantum addition has been deleted by the Tribunal vide order dated 02/03/2016, in the case of assessee (ITA No.7363/Mum/2010) and ITA No.7982/Mum/2010. This factual matrix was consented to be correct by the ld. DR, Shri M. Murli.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the aforesaid order dated 02/03/2016 for ready reference and analysis:-

"These cross appeals relate to assessment year 2007-08 and they are directed against the orders passed by Ld CIT(A). All these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. Even though both the parties have urged grounds relating to computation of capital gains in the original grounds of appeal, they have

filed an additional ground contesting therein the capital gains is not assessable in AY 2007-08, since the transfer has taken place in the year relevant to the assessment year 2003-04 in terms of sec. 2(47) of the Act. Since this additional ground goes to the root of the matter, we admit the same and proceed to dispose of the same.

3. The facts relating to the case are discussed in brief. Both the assessees have inherited a land from their father named Shri Laxmi Singh Udit Singh. After the death of Shri Laxmi Singh Udit Singh in the year 1986, the land was inherited by his five sons. The daughters of Shri Laxmi Singh Udit Singh relinquished their respective rights in favour of their brothers. Thus each son inherited 1/5th share in the land. They entered into an agreement on 10-10-2002 with M/s Brickworks Trading Pvt. Ltd. for development of the land and accordingly executed a power of attorney on 10-10-2002. According to the assessees the possession of the land was handed over to the developers at that point of time itself.

4. The assessees herein had declared long term capital gain in the return of income filed for assessment year 2007-08. The department noticed during the course of assessment proceedings of Shri Harinaryan L Singh (one of the co-owners) that the assessees herein along with other co-owners have executed a development agreement on 09-10-2002 with M/s Brickswork Trading Pvt. Ltd. (developer). As per the development agreement, the developer shall get 60% share and the co-owners shall get 40%. It was noticed that M/s Brickwork Trading Pvt. Ltd. has distributed the profit to all the co-owners during the F.Y 2006-07 relevant to the assessment year 2007-08. Hence the assessing officer reopened the assessment of the assessees herein for AY 2007-08 to assess the capital gain arising therefrom. In the reopened assessment, he varied the capital gains declared by these assessees. In the appeals filed by them before Ld CIT(A), they got partial relief. Hence the revenue as well as assessees are in appeal before us assailing the decision rendered by Ld CIT(A) against each of them.

5. The main contention urged in the additional ground filed by these assessees is that the "transfer" of property took place in the year relevant to the assessment year 2003-04 and hence the capital gains assessed in AY 2007-08 was not in accordance with the law. It was further submitted that there is no estoppel against the law and hence, even if the assessee has erroneously offered the capital gains in AY 2007-08, the same cannot be assessed in that year.

6. On the contrary, the Ld D.R placed strong reliance on the orders passed by tax authorities. He further submitted that the assessees have got their respective share only in the year relevant to the AY 2007-08 and they have also declared the same in their respective returns of income. Accordingly he submitted that the assessees are precluded from taking a different stand at this point of time.

7. We have heard the rival contentions and perused the record. It is a well settled proposition of law that there is no estoppel against law and hence we are of the view that the assessees herein are entitled to contend that the income offered by them is not liable to tax during the year under consideration, if the said income is not liable to tax at all in that year. In the instant cases, the undisputed fact remains that the assessees have entered into a development agreement with M/s Brickwork Trading Pvt. Ltd. on 09-10-2002. The very fact that the development project was completed in the FY 2006-07 itself shows that the agreement should have been entered much earlier. The power of attorney executed in favour of the developer has been registered in Oct., 2002. Hence there is merit in the submissions of the assessees that the possession was handed over to the developer at that point of time itself.

8. In this regard, we may refer to the provisions of sec. 2(47), which defines the word "transfer". For the sake of convenience, we extract below the provisions of clause (v) and (vi) of sec. 2(47) of the Act:-

"2(47) "transfer", in relation to a capital asset, includes,

......

(v) 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 sec. 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 agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

In the instant case, by virtue of development agreement, the assessee has handed over the possession of the impugned land during the FY 2002-03. Hence, in terms of sec.2(47)(v) and 2(47)(vi) of the Act, the taxability of Capital gain has to be considered in AY 2003-04. Our view gets support from the decision rendered by Hon'ble Bombay High Court in the case of Chaturbhu Dwarkadas Kapadia Vs. CIT (260 ITR 491).

9 The legal position of development agreement vis-à-vis section 2(47(v) of the Act was considered by the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia, cited supra. The relevant observations of the High Court, in that case, are extracted below:

"It was argued on behalf of the assessee that there was no effective transfer till grant of irrevocable licence. In this connection, the judgments of the Supreme Court were cited on behalf of the assessee, but all those judgments were prior to introduction of the concept of deemed transfer under section 2(47)(v). In this matter, the agreement in question is a development agreement. Such development agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a development agreement is to enable a professional builder/contractor to make profits by completing the building and

selling the flats at a profit. That the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements, That such agreements are only a mode of remunerating the builder for his services of constructing the building (see Gurudev Developers V Kurla Konkan Niwas Cooperative Housing Society (2000) 3 Mah LJ 131). It is precisely for this reason that the legislature has introduced section 2(47(v) read with section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In this case that test has not been applied by the department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a development agreement. There is a difference between the contract on one hand and the performance on the other hand. In this case, the Tribunal as well as the department have come to the conclusion that the transfer took place during the accounting year ending 31.3.1996, as substantial payments were effected during that year and substantial permissions were obtained. In such cases of development agreement, one cannot go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of section 2(47(v) of the Act. ……

…….. In this case, the agreement is a development agreement and in our view, the test to be applied to decide the year of chargeability is the year in which the transaction was entered into. We have taken this view for the reason that the development agreement does not transfer the interest in the property to the developer in general law and, therefore, section 2(47)(v) has been

enacted and in such cases, even entering into such a contract could amount to transfer from the date of agreement itself. …. Therefore, if on a bare reading of a contract in its entirety an assessing officer comes to the conclusion that in the guise of agreement for sale, a development agreement is contemplated, under which the developer applies for permissions from various authorities, either under power of attorney or otherwise and in the name of the assessee, then the assessing officer is entitled to take the date of contract as the date of transfer in view of section 2(47(v)….. We do not find merit in the argument of the assessee that the court should go only by the date of actual possession and that in this particular case, the court should go by the date on which irrevocable licence was given." 10. We feel it necessary to discuss about the facts of the case of Charubhuj Dwarkadas Kapadia, referred supra, in order to understand the legal proposition laid down by the Hon'ble Bombay High Court. In that case, the assessee entered into an agreement on 18.8.1994 to sell the property to a builder for a consideration of Rs.1.85 crores with a right to the builder to develop the property in accordance with the relevant rules. The assessee shall grant an irrevocable license to enter upon the assessee's share of the property upon receipt of necessary permissions and approvals and also the NOC under Chapter XXC of the Income tax Act. By 31.3.1996, the builder obtained most of the approvals and also paid major portion of the consideration. The power of attorney was executed in favour of the builder on 12.3.1999. The assessee offered the capital gains in the assessment year 1999-2000, since the licence and power of attorney were given in the financial year 1998-99. The AO and ITAT held that the capital gains is assessable in the assessment year 1996-97 since substantial compliance of terms of agreement has taken place before 31.3.1996. However the High Court held that the impugned sale agreement is only a "Development agreement" and hence the

> *capital gain is assessable in the year in which the said agreement was entered into. Thus the contentions of both the assessee as well as that of the revenue with regard to the year of chargeability were rejected.”*

11. Thus, as per the legal proposition laid down by the Hon’ble Bombay High Court in the above cited case, the factors such as “date of possession, substantial compliance of the contract etc.” are not relevant in the case of development agreements. The High Court has observed that the aim of the builder under the development agreement was to make profits by completing the building and therefore, no interest in the land stands created in their favour under such agreements. Thus the said agreements are only a mode of remunerating the builder for his services of constructing the building. The High Court has noticed that the assessees were entering into development agreements with the builders by conferring privileges of ownership to them and were claiming that the capital gains would arise only after registering the conveyance deed. Accordingly the High Court held that the section 2(47)(v) was brought into the statute to plug this kind of loop hole. Thus by considering the object of the Development Agreements and also the purpose of introduction of section 2(47)(v) of the Act, the Hon’ble High Court has finally held that the year of chargeability in the case of Development Agreements is the year in which the contract was executed.

12. In view of the foregoing discussions, we are of the view that the assessees herein succeed in the additional ground urged by them. Accordingly we hold that the capital gain arising on entering of development agreement is not taxable in the assessment year 2007-08, but taxable in AY 2003-04.

13. In view of the above, we set aside the assessment of capital gains made in AY 2007-08 and hence all the grounds urged by both the parties before us become infructuous.

14. In the result, the appeals filed by the assessees are treated as allowed and the appeals of the revenue are dismissed."

2.2. It is noted that in the aforesaid order, the Tribunal has given a categorical finding that the capital gain arising on entering on development agreement is not taxable in assessment year 2007-08 but is taxable in assessment year 2003-04. Considering the finding of the Tribunal, the penalty u/s 271(1)(c) will not survive for A.Y. 2007-08. We hold so. Thus, for the impugned assessment year i.e. 2007-08, penalty is directed to be deleted. Appeal of the Revenue is, therefore, dismissed.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced in the open in the presence of ld. representatives from both sides at the conclusion of the hearing on 29/03/2016.

Sd/-	Sd/-
(Rajendra)	**(Joginder Singh)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 29/03/2016

*Shekhar, P.S./*नि.स.

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

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.

3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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