आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचन्द, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM AND SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 926/JP/2016
निर्धारण वर्ष/Assessment Year : 2012-13

<table>
<tr><td>Girish Bhutra
C/O Kalani & CO. CA, 5th floor, Mile Stone Gandhi Nagar Turn, Jaipur</td><td>बनाम
Vs.</td><td>ITO
Ward-2(1)
Jaipur</td></tr>
<tr><td colspan="3">स्थायी लेखा सं./जीआईआर सं./PAN No. AISPB9766C</td></tr>
<tr><td>अपीलार्थी/Appellant</td><td></td><td>प्रत्यर्थी/Respondent</td></tr>
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निर्धारिती की ओर से/ Assessee by : Shri P.C.Parwal (C.A.)
राजस्व की ओर से/ Revenue by: Smt. Poonam Rai (DCIT)

सुनवाई की तारीख/ Date of Hearing : 11.1.2017.
घोषणा की तारीख/ Date of Pronouncement : 28.2.2017.

आदेश/ ORDER

PER SHRI KUL BHARAT, J.M.

This appeal by the assessee is directed against the order of ld. CIT (A)-I, Jaipur dated 26.09.2016 pertaining to assessment year 2012-13. The assessee has raised the following grounds of appeal:-

1. "The Ld. Commissioner of Income Tax (Appeals) has erred on facts and in law in upholding the findings of AO that short term capital gains of Rs. 1,52,38,594/- arises on sale of Plot No. BC-26, BC-29, BC-115 & BC-105, Central Spine B-Block Yojana, Jagapura, Sanganer, Jaipur as against long term capital gain of Rs. 22,03,144/- declared by the assessee on the sale of right in these plots by:-

   (i) Not properly appreciating that assessee acquired right in the above plots in pursuance to the decision of the Government dt. 12.04.2007 for which formal reservation letter was issued on 20.08.2007.

   (ii) Holding that the assessee acquired the plots under consideration on 21.07.2011 which was sold on 02.08.2011 whereas what the assessee sold as per agreement to sale dt. 26.05.2010 is only the

right in land which is a long term asset and on 02.08.2011 only the formal title was passed on to the buyer.

(iii) Adopting the sale value of plots/right in plot as per section 50C on the basis of value assessed by sub registrar on the date off sale(i.e. 02.08.2011) as against that assessable on the date of agreement (i.e. 26.05.2010) when the sale consideration of right in the plots was determined.

(iv) Not giving the benefit of indexation for cost of improvement of Rs. 1,14,704/-

(v) Not allowing exemption u/s 54F of Rs. 99,27,487/-

2. The assessee craves to amend, alter and modify any of the grounds of appeal.

3. The appropriate cost be awarded to the assessee."

2. Briefly stated the facts are that case of the assessee was taken up for scrutiny assessment and the assessment under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was framed vide order dated 2nd March, 2015. During the course of assessment proceedings, the Assessing Officer observed that the assessee has declared long-term capital gain of Rs. 20,94,096/-. The Assessing Officer computed the short-term capital gain at Rs. 1,52,38,594/- as against the long-term capital gain claimed by the assessee. The Assessing Officer also disallowed the claim of the assessee in respect of deduction under section 54F of the Act. Aggrieved by this, the assessee preferred an appeal before Ld. CIT (Appeals), who after considering the submissions dismissed the appeal. Hence, the assessee is in further appeal before this Tribunal.

3. Ground no. 1(i) & (ii) relates to computation of short-term capital gain as against the long term capital gain claimed by the assessee. The Ld. Counsel for the assessee reiterated the submissions as made in the written brief. The submissions of the assessee are reproduced as under :-

" 1. From the facts stated above, the following three issues arises for consideration:-

(i) How the holding period of the capital asset acquired by the assessee by way of right in the additional compensation be computed?

(ii) What should be the full value of the consideration received or accrued as a result of the transfer vis-a-vis section 50C of the Act?

(iii) Whether deduction u/s 54F is allowable to the assessee on such capital gain or not?

2. In respect of the first issue i.e. for computing the holding period, we are to submit as under:-

(i) The date wise event relating to the right in additional compensation acquired by the assessee, the plots/right in the plot allotted to the assessee and the sale thereof, for a ready reference is tabulated as under:-

Date	Particulars
27-10-2005	Notification issued by Principal Secretary, Urban Development Department, Government of Rajasthan that considering the objection of the land holders and considering the substantial increase in the value of the land, the State Government has taken a decision to allot 20% of developed residential land and 5% of developed commercial land in place of 15% allotted earlier.
06-07-2006 26-10-2006 & 12-04-07	Necessary circulars were issued to allot the additional 10% of the developed land.
28-04-2007	The JDA issued reservation letter to the appellant for reserving 1997 sq. mt. of developed land, out of which 962 sq. mt. was reserved towards residential plot, 962 sq. mt. was reserved towards commercial plot and 73 sq. mt. was reserved towards shortfall in the earlier compensation. As per point no.11 of the reservation letter, the assessee can pledge the same with banks/financial institution to get loans for house construction. As per point no.15, assessee can also sale the same and the transfer formalities for which is to be carried out as per JDA rules. These conditions depict that on 28.04.2007, assessee got unconditional right of allotment of the plot.

10-12-2009	The JDA issued allotment letter on 10-12-2009 specifying the number and area of plot. In the letter it is specified that the allotment is made in pursuance to the Circular dt. 27-10-2005, 06-07-2006, 26-06-2006 & 12-04-2007 issued by the Government.
26-05-2010	Agreement for sale of Plot No.BC-26 & BC-29 entered even when there was no physical possession of the plot. This agreement is registered on which stamp duty was paid. As per the agreement it is the duty of the assessee to execute the sale deed of these plots after obtaining the possession and patta of these plots.
19-07-2011 & 26-07-2011	JDA issued letter to deposit the lease deed charges. The amount was deposited and thereafter the possession of the plots was handed over to the appellant on 21/07/2011 and lease deed issued on 26/07/2011.
02-08-2011	Sale deed was executed in favour of Gulmohar Buildhome Private Limited in respect of the above two plots.

(ii) From the above events it can be noted that on 26.05.2010, assessee entered into an agreement to sale his right in the plot which he acquired through reservation letter dated 28-04-2007. The possession of the right in the plot was given to the buyer when the sale deed was executed on 02.08.2011. Thus, it is right in the plot which is sold by the assessee and since this right is held for more than 3 years, what the assessee sold is a long term capital asset.

(iii) Section 2(14) of the Act defines capital asset to mean property of any kind held by an assessee. The term property has wide import. The AO has narrowed down its meaning in as much as he has given undue significance to the physical possession of the property. He failed to appreciate that any right of an assessee which can be lawfully exercised is also a property for the purpose of section 45 of the Act. Even a beneficial right to or a thing considered as having a money value is a property. It is an established law that the word property should be given a liberal and wide connotation. It has been held by Delhi High Court (252 ITR 491, PNB Finance Ltd. Vs. CIT) that a property is a comprehensive term indicative of every possible interest which a party can have. The definition of the property is not confined to physical property. It also means any right, title or interest in a physical property. Even a mortgage or a lessee may have certain rights and interest in a physical property. A tenant may also have certain rights in a property rented by him. License obtained for manufacturing a product is a property. A right to obtain conveyance of an immovable property is a capital asset. In the case of leasehold land, the leasehold right would be a capital asset in the hands of the lessee (CIT vs. Hindustan Hotels Ltd., 335 ITR 60, Bom). If the above definition of property is considered in light of the facts of the present case, the reservation letter received by the assesse is a property as it can be sold or pledged for loan or on the basis of which final property is to be received.

(i) Under the IT Act, short term capital asset means a capital asset held by an assessee for not more than thirty six months immediately preceding the date of its transfer. The AO has grossly erred in emphasizing upon the physical possession of the property. The AO has failed to appreciate that Calcutta High Court in the case of CIT vs. All India Tea And Trading Company Ltd.(1979) 117 ITR 525 has held that the words “held by an assessee” include physical, actual, constructive and also

symbolic possession of a property of any kind. The AO has failed to appreciate the genesis of certain rights in the pieces of lands under consideration. A careful reading of the events, actions, MOUs, agreements, reservation letter dated 20-08-2007 and the allotment letter dated 10.12.2009 makes it clear that the right of the assessee was created as a result of surrender of the land by the assessee to the JDA and notification issued on 27-10-2005 to provide additional compensation. This assurance was finalized when the reservation letter is issued on 20-08-2007. Therefore, the holding period of the capital asset transferred by the assessee has to be counted from 20.08.2007 and not from 21.07.2011 when the physical possession of the plot was given to the assessee.

(ii) We may submit that what the appellant had received was not an ownership of freehold land, rather what he got was leasehold right in the land. It means the appellant got certain rights as lessee in the land. Consequently, what the appellant transferred, in terms of section 45 of The Income-tax Act, was his leasehold rights in the two plots of land. Leasehold rights are capital assets. The appellant got rights as a lessee. The geneses of the leasehold rights cannot be delinked from the reservation letter. It is reiterated that the specification of the plot numbers, the physical possession and the issuance of lease deed are further improvements of the right borne out of the reservation letter and each improvement increased the value of the right acquired as a result of the reservation letter. It was a process of maturity. The physical possession of land was not a new and independent right. Similarly, the receipt of lease deed also does not create a new right which is independent from the right acquired by the appellant as a result of a reservation letter. Thus, the holding period of the right in the property is to be considered from the reservation letter i.e. from 20-08-2007 only. On this basis the holding period of the capital asset would be more than 36 months and therefore the gain is to be assessed as long term capital gain and not the short term capital gain as assessed by the AO.

(iii) The Ld. CIT(A) has not appreciated the above contention of the assessee and has held that what the assessee sold on 02.08.2011 is the plot of land which was acquired by him on 21.07.2011. Even if it is held to be sold it is the right in plot which was relinquished and exchanged into the physical plot on 21.07.2011. The right in plot is acquired on 28.04.2007 when the reservation letter was issued. The definition of transfer u/s 2(47) includes exchange or relinquishment of the asset. Therefore, the right in the plot which was converted into physical plot has a holding period of more than three years. The value of the right is the same as is agreed to be transfer by the assessee for which sale deed is executed. Therefore, in any case, what assessee sold is a long term capital asset and thus AO be directed to compute long term capital gain in sale of the property under consideration."

3.1. On the Contrary, the ld. Departmental Representative supported the orders of the authorities below and submitted that there is no illegality into the orders of the authorities below. He submitted that the transfer of property had not taken place in

the year 2007 as claimed by the assessee. In fact, in the year 2007, there is no transfer of property or any right.

3.2. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below. We find that the Ld. CIT (Appeals) in Para 3.1.2. of his order has decided the issue as under :-

> "3.1.2 (i) The brief facts of the case are that 19,251 sq. mtr, of agriculture land at village Jirota Tehsil Sanganer, Jaipur was acquired by JDA and the JDA allotted developed residential land which was 15% of the acquired land to the owners of the land as a compensation in the earlier years, which was sold in the FY 2005-06 relevant to the AY 2006-07. Subsequently, the Urban Development Department, Govt. of Rajasthan, vide notification dated 27.10.2005, stated that in addition to 15% developed land already allotted to the owners of surrendered land, the Govt. has taken a decision to allot additional 5% residential land an 5% commercial land i.e. 10% additional land to the owners who have surrendered their land at village Jirota, Tehsil Snganer, Jaipur. Subsequently, in view of the above referred notification dated 27.10.2005, the JDA issued reservation letter dated 20.08.2007, in favour of the appellant as POA for 1035 sq. mtr. Of residential land and 962 sq.mtr. commercial land. Further, vide separate allotment letters dated 10.12.2009, the JDA allotted four plots of commercial land to the appellant. Now, in the allotment letters, the area of the plots as well as their numbers were specified. The possession of these plots were to be given by the JDA after making deposit of cess to JDA by the appellant.
>
> (ii) Vide two registered 'Agreement to Sell' dated 26.05.2010, the appellant agreed to sale the two plots for consideration of Rs. 59 Lac and 52 Lac to M/s Gulmohar Build Home Pvt. Ltd (M/s Gulmohar). The appellant has received part payment out of the above sale consideration, however, the possession of the plots were not handed over to M/s Gulmohar as the appellant hand not received the possession of the plots from JDA. The possession of the above plots was handed over to the appellant by the JDA on 21.07.2011 as is evident from the registered sale deeds dated 02.08.2011 executed by the appellant in favor of M/s Gulmohar. The AO treated the date of acquisition as 21.07.2011 i.e. the date on which possession of the plots was given by the JDA to the appellant and computed short terms capital gains thereof against long term capital gains claimed by the appellant

(iii) During appellant proceedings, it was admitted by the appellant that through reservation letter it did not receive ownership of freehold land, rather it got leasehold right in the land i.e. the appellant got certain rights as lessee in the land and the appellant transferred, in terms of section 45 of the Income-tax Act, its leasehold rights in the two plots of land and leasehold rights in land are nothing but are capital assets. The appellant did not get absolute ownership right over the land. The appellant got rights as a lessee. The geneses of the leasehold rights cannot be delinked from the reservation letter. It was reiterated that the specification of the plot numbers, the physical possession and the issuance of lease deed are further improvements of the right borne out of the agreement and each improvement increased the value of the right acquired as a result of the agreement and it was a process of maturity. The physical possession of land was not a new and independent right. Similarly, the receipt of lease deed also does not create a new right which is independent from the right acquired by the appellant as a result of the reservation letter. It was the contention of the appellant that thus the holding period of the right in the property is to be considered from the reservation letter i.e. from 20.08.2007 only and on this basis, the holding period of the capital asset would be more than 36 months and therefore the gain is to be assessed as long term capital gain and not the short term capital gain as assessed by the AO.

(iv) I have dully considered the submission of the appellant, assessment order and the material placed on record. The issue under consideration is when the plots were acquired by the appellant and on which date these were sold. In the assessment order, the AO has taken the date of acquisition as 21.07.2011 whereas it was the contention of the appellant that it acquired capital asset through reservation letter issued by JDA on 20.08.2007.

(v) During the appellant proceeding, it was the contention of the appellant that vide reservation letter 20.08.2007, it got rights, which are nothing but a capital asset in view of the definition of capital asset as defined in section 2 (14) of the Act as 'capital asset 'means property of any kind hold by the assessee and in view of the terms of the reservation letter, it could sale and transfer the plots (Clause No. 11); it could pledge the plots with bank / financial institution etc. (Clause No. 15) allotted to its through the above referred reservation letters (s). Thus, the right for allotment of plots was acquired by it on 20.08.2007 which may be considered as the date of acquisition of the plots sold by the appellant during the year under consideration as through the reservation letter it got the unconditional rights in the land under consideration.

(vi) The above contention of the appellant has been considered very carefully in the light of the material placed on record. It is noted that the reservation letter dated 20.08.2007 was issued in the name of the appellant as Power of Attorney holder only and not in its own capacity. Further, only the area of the land to be allotted in future was stated in the said reservation letter. The locality and the exact location of the plots to be allotted were not specified thereof. The appellant has to deposit certain fees to the JDA in view of urban ceiling laws and only thereafter, the plots would be allotted to the appellant. It would be appropriate to reproduced clause no. 11 and 15 of the reservation letter as relied upon by the appellant as under:

''11. इस आरक्षण पत्र के आधार पर उक्त भूखण्ड को सरकार/जीवन बीमा निगम/शिड्यूल्ड बैंक/सरकारी ऋणदात्री संस्था/नेशनल हाउसिंग बैंक अथवा रिजर्व बैंक द्वारा मान्यता प्राप्त ऋणदात्री संस्थाओं के पास भवन निर्माण के ऋण के लिए गिरवी/रहन रखता है तो जविप्रा को काई आपत्ति नहीं होगी।

15. आवंटी द्वारा भूमि विक्रय करने पर क्रेता द्वारा भूखण्ड का हस्तान्तरण जयपुर विकास प्राधिकरण वे नियमों के अनुसार प्राधिकरण से करवाना होगा।''

(vii) Thus, it is evident from the above clauses of the reservation letter that the appellant was allowed to sale or pledge the 'भूखण्ड' or the plots allotted subsequently and not the right, to sell the rights, acquired by the appellant through the reservation letters. These clauses made reference to the 'भूखण्ड' and not to the rights in the plots which were given to the appellant through the reservation letter. It is further noted that vide allotment letter dated 10.12.2009, the specific plots were allotted to the appellant by the JDA, still the possession of the plots were not given to the appellant by the JDA. It is also noted from the 'Agreement to Sell' dated 26.05.2010 executed between the appellant and M/s Gulmohar that possession of the plots was still not given to the appellant by the JDA. It is evident from the sale deed dated 02.08.2011 that the possession of the plots were given by the JDA to the appellant only on 21.07.2011. It is pertinent to mention here that vide registered sale deeds dated 02.08.2011, the appellant has sold the specific plots in a particular locality and not the right for allotment of plots of land which were to be allotted to it free of cost by the JDA in view of the terms of the reservation letters. Had the appellant sold the rights acquired through the reservation letter dated 20.08.2007, then the position may be different.

(viii) It was the contention of the appellant that through the reservation letter, it acquired rights in the leasehold land as a lessee. I fail to understand that how these leasehold rights could be acquired by the appellant as a lessee in the absence of a piece of land. For acquiring leasehold rights in land, the land must be specific and in existence as no leasehold rights exist in vacuum. Vide reservation letter dated 20.08.2007 in the capacity of POA, the appellant acquired rights for the future allotment of plots and nothing more. On a careful perusal of the reservation letter, it is noted that through the said letter, no leasehold rights were given to the appellant by the JDA, as claimed by the appellant in its written submissions. In fact, it could be seen from the allotment letter dated 10.12.2009 issued by the JDA that the plots were, now leased to the appellant for a period of 99 years. Further, vide allotment letter dated 10.12.2009, the plots were allotted to the appellant in its own capacity and still the possession of the plots was given by the JDA to the appellant only on 21.07.2001. Thus in view of the provisions of section 2 (47) of the Act, it is held that the appellant acquired the plots under consideration on 21.07.2011 only and not prior to that and thus the AO was justified in not taking the date of acquisition of plots as 20.08.2007 as claimed by the appellant. Accordingly, this ground of appeal is hereby rejected.

3.2 Ground of appeal No. 1 (ii): Adopting the sale value of the plots as per section 50C, on the basis of value assessed by the Sub-Registrar on the date of sale (i.e. 02.08.2011) as against that on the date of agreement (i.e. 26.05.2010), when the sale consideration was determined.

3.2.1. Determination :

(i) The brief facts are that the appellant vide 'Agreements to Sell' dated 26.05.2010 with M/s Gulmohar, agreed to sell the specific plots under consideration to M/s Gulmohar for consideration of Rs. 59 Lac and Rs. 52 Lac, and received part payments thereof and the balance payments were to be made by M/s Gulmohar at the time of registry. It was the contention of the appellant that through the above 'Agreements to Sell', it sold the rights in the plots allotted to it in consequence of the reservation letter dated 28.04.2007. As the possession of these plots were given by JDA to the appellant on 21.07.2011, the appellant in pursuance of the said agreement dated 26.05.2010 sold nothing but the right to allotment. However, according to the Assessing Officer, the appellant received the possession of the plots under consideration from JDA on 21.07.2011 and handed over the possession of these plots to the buyer i.e. M/s Gulmohar on 02.08.2011, the sale was

therefore completed on 02.08.2011. As per the Assessing Officer sale agreement dated 26.05.2010 is a mere agreement. Full payment is not received and it is not a final sale deed and therefore the value as per the stamp authorities on the date of the sale deed i.e. 02.08.2011 is to be considered for computing the capital gain and not 26.05.2010 as claimed by the appellant. Since, the sale consideration as stated in the agreements to sell dated 26.05.2010 is lower than five the value adopted by the sub registrar of properties for charging stamp duty at the time of registration of sale deeds i.e. 02.08.2011, the Assessing Officer invoked the provisions of section 50C of the Act and has taken the sale consideration at Rs. 1,53,53,298/- against sale consideration of Rs. 1,22,85,000/- declared by the appellant in the sale deeds.

(ii) During the appellate proceedings, it was submitted by the appellant that in its case the property value was assessed by the stamp valuation authority on 26th May, 2010 i.e. on the date of 'Agreement to Sell' of the rights in the property itself. There was no difference in the declared consideration and the value adopted by the stamp valuation authority. The valuation was made as 'Agreement to Sell' was got registered with the registering authority. The 'Agreement to Sell' was irrevocable. As per terms and conditions laid down in serial no. 6, the buyer would have full rights to legally enforce specific compliance/performance of the agreement including forcible registration, through the court of law. It was further submitted that once the property is assessed by the stamp valuation authority in connection with a transaction of transfer, the value so assessed should only be considered for the purpose of section 50 C of the Act. The land is same, the buyer is same and the consideration is same. The consideration was not found to be less than the value assessed for the first time.

(iii) It was further submitted that section 50C was introduced by Finance Act, 2012 w.e.f. 01.04.2003. Similar type of section i.e. section 43C was inserted by Finance Act, 2013 w.e.f. 01.04.2014. Section 43CA provides that where the date of agreement fixing the value of consideration for transfer of assets and the date of registration of such transfer of assets are not the same, in that case stamp duty value as on the date of the agreement fixing the value of the consideration is to be considered. Going by the corollary, the Assessing Officer should have taken the value as assessed on 26.05.2010. In the case of the appellant the value of the property was duly assessed on 26.05.2010 and the stamp duty was paid on the basis of the value so assessed. Any assessment made later on, therefore would not be relevant for the purpose of section 50C of the Act. Section 50C was incorporated to prevent large scale under- valuation of

the property in the sale deed as to defraud the government of revenue. In the case of the appellant, there is no under- valuation of property.

(iv) It was also submitted that consideration the anomaly in section 43CA vis a vis section 53C, a proviso is inserted to section 53C by Finance Act 2016 w.e.f. 01.04.2017 to provide that where the date of agreement fixing the amount of consideration and the date of registration for transfer of the capital assets are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of the consideration for such transfer. This proviso is to remove the unintended hardship and therefore it has a retrospective effect in view of the principle laid down by the Supreme Court in case of CIT v. Alom Extrusions Limited 319 ITR 306.

(v) I have duly considered the submission of the appellant, assessment order and the material placed on record. It is an undisputed fact that the 'Agreement to Sell' dated 26.05.2010 were registered with the sub registrar and there was no difference between the sale consideration and the value assessed by the sub registrar for the purpose of stamp duty. However, it is to be mentioned that vide the said 'Agreements to Sell' dated 26.05.2010, the appellant has transferred only the rights in the said plots and not the absolute rights thereon as on the said date even the appellant was not having possession of the said plots. Whereas as per sale deeds dated 02.08.2011, the appellant has transferred the plots under consideration in absolute terms. If the contention of the appellant is accepted , the plots were already transferred on 26.05.2010 i.e. on the dated of execution of 'Agreement to Sell' then what was the need for further executing the sale deeds on 02.08.2011. It is to be noted that as per provisions of section 50C of the Act, the value assessed or adopted by the sub registrar for charging of stamp duty or the sale consideration for such transfer is to be seen and in the instant case under consideration, the transfer took place only on 02.08.2011 i.e. the date of execution of sale deeds. There is fallacy in the argument of the appellant that transfer took place on 26.05.2010 i.e. at the time of 'Agreement to Sell' as in view of the provisions of section 2(47) of the Act, the transfer is complete if the part payments were made and the possession was given to the buyer. However, in the instant case under consideration, on the date of execution of 'Agreement to Sell' i.e. 26.05.2010, the appellant itself was not having the possession of the plots under consideration and thus there was no question of giving the possession of the plots to the buyers i.e. M/s Gulmohar on 26.05.2010.

(vi) The appellant relied on the provisions of section 43C of the Act and stated that section 43C provides that where the date of agreement fixing the

value of consideration for transfer of assets and the date of registration of such transfer of assets are not the same, in that case stamp duty value as on the date of the agreement fixing the value of the consideration is to be considered.

(vii) I have gone through the provisions of section 43CA of the Act and for the sake of convenience, the same is reproduced as under:

"43CA. Special provision for full value of consideration for transfer of assets other than capital assets in certain cases-(1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the asset.".

(i) It is to be noted that the section 43C of the Act do not apply to capital assets as already specified in the section itself i.e. it is related to the stock in trade or business assets. Thus, this contention of the appellant deserves to be rejected.

(ix) It was the another contention of the appellant that a provision is inserted to section 53C by Finance Act 2016 w.e.f. 01.04.2017 to provide that where

the date of agreement fixing the amount of consideration and the date of registration for transfer of the capital assets are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of the consideration for such transfer. This proviso is to remove the unintended hardship and therefore it has a retrospective effect.

(x) I have duly considered the above contention of the appellant very carefully. It is noted that the section 50C of the Act has been amended by the Finance Bill 2016 and is applicable w.e.f 01.04.2017 i.e. from ASSESSMENT YEAR 2017-18 and thus is not applicable to the instant case under consideration and the said amendment has not been made with retrospective effect as claimed by the appellant. In fact, section 50C(1) of the Act has been amended and not the proviso to section 50C was inserted as claimed by the appellant. It is to be noted that in the instant case under consideration, there is difference between the 'Agreement to Sell' dated 26.05.2010 and the registered sale deeds executed on 02.08.2011. In the 'Agreements to Sell', the appellant transferred its rights in the plots under consideration without having the possession of the plots whereas in the sale deeds not only the rights in the said plots were transferred but actually possession of the plots was also handed over by the appellant to the buyer of the plots. Further, if the contention of the appellant is accepted then the transfer should have taken place in the FINANCIAL YEAR 2010-11 i.e. relevant to the ASSESSMENT YEAR 2011-12, whereas the appellant itself has considered the transfer in the ASSESSMENT YEAR 2012-13 i.e. the year under consideration meaning thereby the year in which the sale deeds were executed. Hence, this contention of the appellant is hereby rejected."

3.3. Now first, issue to be determined is that what should be the holding period for the assessee in respect of the property in question. The contention of the assessee is that the assesee transferred the right unto the capital asset, which was accrued to him when Jaipur Development Authority (in short JDA) had issued reservation letter dated 20/08/2007 and not to be reckoned from the date when the allotment letter dated 20/12/2009 was issued to the assessee. The authorities below rejected the claim of the assessee on the ground that no specific property was

allotted. Hence, the period cannot be from the date when reservation letter was issued. The reservation letter merely stated about the reserving the rights of the assessee unto a piece of land admeasuring 962 square mtrs. of land to the assessee. But no specified property was earmarked for such purpose. Therefore, in the light of the provisions of Income Tax Act, the assessee cannot be termed as having any right in the capital asset in question. It was only when the JDA issued allotment letter dated 10/12/2009, whereby the JDA allotted plots of commercial land to the assessee. The allotment letter gave the specific number and earmarked this specific property to the assessee. Therefore, it can not be conferment of the rights into the property which was only crystallized vide allotment letter dated 10/12/2009.

3.4. It is the contention of the assessee that the term capital asset has a very wide import. The Assessing Officer has narrowed down its meaning in as much as he has given undue significance to the physical possession of the property. He failed to appreciate that any right of an assessee which can be lawfully exercised is also a property under Section 45 of the Act, even a beneficial right or a thing considered as having a money value is a property. It is an established law that the word property should be given liberal and wide connotation. The reliance was placed on the judgment of the Hon'ble Delhi High Court rendered in the case of PNB Finance Ltd. vs. CIT, 252 ITR 291 (Del.) that the 'property' is a comprehensive term negative of every possible interest which a party can have. Further, reliance is placed on the Judgment of the Hon'ble Bombay High Court rendered in the case of CIT vs. Hindustan Hotels Ltd., 335 ITR 60 (Bombay).

3.5. The ld. Counsel urges that since by way of reservation letter dated 20/08/2007 there was a contract in the term of assurance by the JDA, this assurance

gave right to the assessee into the capital asset. We have carefully considered the rival contentions and the case laws relied on by the Ld. Counsel for the assessee. The Hon'ble Delhi High Court in the case of PNB Finance Ltd. vs. CIT (supra) held as under :-

> " The all inclusive definition of the term "capital asset" brings within its ambit property of any kind held by the assessee, except what has been expressly excluded by clauses (i) to (iv) thereunder. Thus, the expression "capital asset" has a wide connotation. But for the exemptions statutorily provided, the exempted properties would also otherwise fall within the denied meaning. The term "property", though has not statutory meaning but is of widest import and subject to any limitations which the context may require, it signifies every possible interest which a person can acquire, hold or enjoy (see Ahmed G.H Ariff V. CWT(1970) 76 ITR 471 (SC). According to Stroud's Judicial Dictionary of Words and Phrases (sixth edition), "property" is a comprehensive term indicative of every possible interest which a party can have. In Rustom Cavajee Cooper's case (1970) 40 Comp Cas 325 (SC), it was also observed that the expression "property" has a wide connotation and (page 354) " it includes not only assets, but the organization, liabilities and obligations of a going concern as a unit". In view of the wide meaning of a expression capital asset in Section 2 (14) of the Act and "property" as understood in its ordinary wide connotation, we have no hesitation in holding that the business undertaking of the assessee was a "capital asset". In fact, learned counsel for the assessee did not dispute before us that the "undertaking" of the assessee was a "capital asset" with in the meaning of Section 2 (14) of the Act. The question is, accordingly, answered in the affirmative."

The Hon'ble Bombay High Court in the case of CIT vs. Hindustan Hotels Ltd. (supra) held as under :-

> " In our view whether the construction of the building has been completed or not would also not make any difference. It is well settled by now that, unlike in England, in India, the concept of dual ownership is recognized in that sense that the land may belong to one person and the building standing thereon may belong to another. Reference may be made in that connection to the decision of the Supreme Court in Dr. K.A. Dhairyawan v. J.R Thakur, AIR 1958 SC 789 and a decision of the Division Bench of this court in CIT v. Fazalbhoy Investment Co. P. Ltd. (1977) 109 ITR 802 (Bom). Once the concept of dual ownership is accepted it matters not whether the construction of a building is completed or not. It also matters not whether

> the building is constructed by the owner of the land or by somebody else. In the case of a leasehold land, the leasehold right would also be a capital asset under section 2 (14) of the Income-tax Act in the hands of the lessee. In a given case the owner of the land and the owner of the building may be the same person but that does not mean that the two assets merge merely because they are owned by the same person. The capital gain arising out of the sale of the land of the building can and would be required to be bifurcated, a gain arising out of the sale of land and a gain arising out of super structure whether the building is complete or not. Consequently, we are of the view that the Tribunal was right in holding that the capital gain arising out of the sale the leasehold interest in the land and incomplete building will have required to be bifurcated into the gain arising out of a sale of leasehold interest in the land and the sale of the incomplete building. Question (A) is therefore answered in favour of the assessee and against the revenue."

In the light of the above case laws, the term property needs to be given a wide import. The Ld. CIT(A) has noted that the reservation letter conferred rights on the assessee but such rights were in the capacity of Power of Attorney. The Ld. CIT(A) further observed that there was no specific property hence, the rights were not enforceable at that point of time. We do not concur with the two objections of Ld. CIT (A) in view the ratio laid down by the Hon'ble Delhi High Court rendered in the case of PNB Finance Ltd. Vs CIT (Supra). However, we find that the rights conferred vide reservation letter dated 20/08/2007 were conditional, there is no finding in this respect. As per the Indian Contract Act, 1872 a contract would not be an agreement unless the other party accepts the offer of the other party. In the present case the Reservation letter was utmost an offer by the JDA to the assessee subject to certain conditions. It is not clear from material placed before us as to when the assessee performed the requirements as laid down into the conditions. In our considered view the assessee could claim the rights from the date, when he fulfilled the conditions. For example, if an individual is offered something subject to certain conditions, and

if the conditions are not fulfilled the contract fails for want of acceptance. Therefore, we restore the issue to the file of the AO for verification. The AO is hereby directed to verify as to when the assessee complied with the conditions embodied into the Reservation letter dated 20/08/2007. Thereafter, the AO would decide the issue afresh in the light of above discussion. This ground No.(1) (i) and (ii) are allowed for statistical purpose.

4. Ground No. (1)(iii) is against adopting the sale price of the plot as per section 50C of the Act. The ld. Counsel for the assessee reiterated the submissions as made in the written submissions. The submission of the assessee are reproduced as under:-

3. In respect of the second issue i.e. what should be the full value of consideration received or accrued as a result of transfer vis-a-vis section 50C of the Act, we are to submit as under:-

(i) The AO considered the full value of consideration of the two plots at Rs.74,78,100/- and Rs.66,81,150/- respectively as against the actual consideration of Rs.59 lacs and Rs.52 lacs respectively u/s 50C for computing the capital gain by holding that the sale agreement dated 26.05.2010 is a mere agreement, full payment is not received, it is not a final sale deed and therefore, the value as per the stamp authorities on the date of the execution of the sale deed is to be considered u/s 50C for computing the capital gain.

(ii) It is submitted that the AO erred in not correctly appreciating the intent of the provisions of section 50C of the Act in the context of the facts and circumstances of the case of the appellant. Section 50C has two important features. Firstly, it speaks about the consideration received or accruing as a result of the transfer. Secondly, it speaks about the value adopted or assessed or assessable by the stamp valuation authority. If the declared consideration is less than the value adopted or assessed or assessable by the stamp valuation authority, then for the purposes of section 48, the value so adopted or assessed or assessable shall be deemed to be full value of the consideration.

(iii) In the present case, the value of the property was assessed by the stamp valuation authority on 26th May, 2010 when the agreement to sale is registered. There is no difference in the declared consideration and the value adopted by the stamp valuation authority on this date. The agreement to sale was irrevocable. As per terms and conditions laid down in serial no. 6, the buyer would have full rights to legally enforce specific compliance/performance of the agreement including forcible

registration, through the court of law. Thus, once the property is assessed by the stamp valuation authority, the same has to be considered for the purpose of section 50C of the Act in as much as the property is the same, buyer is same and the consideration is same. The consideration was not found to be lower than the value assessed at the first instance. Therefore, the same cannot be ignored for computing the capital gain u/s 50C.

(iv) It is submitted that FA, 2016 has inserted a proviso to section 50C w.e.f. 01.04.2017 which reads as under:-

"Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer."

This amendment was explained in Memorandum explaining the provisions of Finance Bill, 2016 as follows:-

"Rationalization of Section 50C in case sale consideration is fixed under agreement
executed prior to the date of registration of immovable property

Under the existing provisions contained in Section 50C, in case of transfer of a capital asset being land or building on both, the value adopted or assessed by the stamp valuation authority for the purpose of payment of stamp duty shall be taken as the full value of consideration for the purposes of computation of capital gains. The Income Tax Simplification Committee (Easwar Committee) has in its first report, pointed out that this provision does not provide any relief where the seller has entered into an agreement to sell the property much before the actual date of transfer of the immovable property and the sale consideration is fixed in such agreement, whereas similar provision exists in section 43CA of the Act i.e. when an immovable property is sold as a stock-in-trade. It is proposed to amend the provisions of section 50C so as to provide that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of computing the full value of consideration. It is further proposed to provide that this provision shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, on or before the date of the agreement for the transfer of such immovable property."

Thus, the Government recognized the genuine and unintended hardship to the assessee where the date of agreement to sale is prior to the date of sale and between

there is a variation in the value assessable /assessed in respect of a property by the stamp valuation authorities. Accordingly, this amendment which is to intended to remove unintended and undue hardship should be given retrospective effect. In this connection reliance is placed on the following cases:-

CIT Vs. Vatika Township Pvt. Ltd. 367 ITR 466/ 109 DTR 33 (SC)
The Supreme Court at Para 32 & 33 held that legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. However, if legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect.

Allied Motors Pvt. Ltd. Vs. CIT 224 ITR 677 (SC)
This case relates to section 43B, which was inserted in the statute book from 01.04.84. The proviso was added w.e.f. 01.04.88. It was held that proviso is inserted to remove unintended consequences and therefore has a retrospective effect. The Apex Court at page 686 held as under:-

"The rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section, to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole."

CIT Vs. Alom Extrusions Ltd. 319 ITR 306 (SC)
Relaxation allowed by first proviso to s. 43B was restricted only to tax, duty, cess and fee, and did not apply to contributions to labour welfare funds. Since the second proviso resulted in implementation problems, it was deleted by Finance Act, 2003, thereby equating tax, duty, cess and fee with contributions to welfare funds. Thus, omission of second proviso and the corresponding amendment of first proviso by Finance Act, 2003, are curative in nature and are effective retrospectively w.e.f. 1st April, 1988, i.e., the date of insertion of first proviso. If the contention of the Department that the amendments are effective prospectively is accepted, it would cause hardship and indivious discrimination among the assessees.

(v) Considering the same, **Hon'ble ITAT, Ahmedabad Bench in case of Dharamshibhai Sonani Vs. ACIT (2016) 142 DTR 62 (PB 10-16)** held that amendment to sec. 50C by inserting provisos vide Finance Act, 2016 w.e.f. 01.04.2017 has been made to remove an apparent incongruity which resulted in undue hardships to the taxpayers. Hence, such an amendment has to be treated as effective from the date on which the law containing such an undue hardship or incongruity was introduced. Thus, proviso to sec. 50C should be treated as curative in nature and applicable with retrospective effect from 01.04.2003, i.e. the date from which sec. 50C was introduced.

(vi) In view of above, the lower authorities were not justified in substituting the sale consideration u/s 50C in respect of the two plots i.e. BC-29 & BC-26 at Rs.1,41,59,250/- as against the actual consideration at Rs.1,11,00,000/- which is also the value adopted/assessed by the stamp authorities on the date of the agreement dated 26-05-2010. Therefore, the addition to the extent of Rs.30,59,250/- be directed to be deleted.

(vii) Without prejudice to above, what the assessee transferred is the leasehold right in the plot allotted to him through reservation letter dt. 28.04.2007. Section 50C is applicable only when the capital asset is land or building or both. Therefore, section 50C cannot be invoked to compute capital gain arising on transfer of the leasehold rights even when the land is acquired on 99 years land. For this reliance is placed on the decision of **Mumbai ITAT in case of Farid Gulmohamed Vs. ITO(IT) (2016) 46 CCH 300 (PB 17-24)** where it was held that section 50C could not be invoked to computer capital gain arising on transfer of leasehold rights."

4.1. On the contrary, Ld. Departmental Representative opposed the submission and supported the order of the authorities below.

4.2. Since we have restored the issue to the assessing officer, whether the capital asset is a long-term capital asset or short-term capital asset for decision afresh, this ground is also restored to the AO for afresh consideration after adjudicating upon the issue whether capital asset is a short-term capital asset or long term capital asset in terms of our decision on ground No. 1(i) & (ii). Ground No. 1 (iii) is allowed for statistical purpose.

5. Ground No. 1(iv) is against not giving benefit of indexation for cost of improvement. The ld. Counsel of the assessee reiterated the submissions as made in the written brief.

5.1. On the contrary, Ld. Departmental Representative submitted that there is no illegality into the order of the Ld. CIT (appeals). The Ld. Departmental representative submitted that the claim of the assessee has been rightly rejected by the ld. CIT (A).

5.2. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. Since, we have restored the issue to the assessing officer whether the capital asset is a long term capital asset or short-term capital asset for decision afresh. This ground is also restored to AO for afresh Consideration after adjudicating upon the issue whether capital asset is a short–term capital asset or long-term capital asset in terms of our decision on ground no. 1(i) & (ii).

6. Ground No. 1(v) is against not allowing the exemption Under Section 54F of the Act. The Ld. Counsel for the assessee has reiterated the submissions as made in the written brief. He submitted that the lower authorities did not allow the deduction, according to them the capital assets transferred is a short term capital asset. However, as mentioned in Para 2 above the property transferred is a long term capital asset. Therefore, the AO be directed to allow the claim of deduction under Section 54F of the Act.

6.1. On the contrary, the Ld. Departmental Representative opposed the submissions and submitted that the authorities below have rightly rejected the claim of the assessee that the capital asset of transferred was a long term capital asset.

6.2. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below. Since we have restored the issue to the Assessing Officer whether the capital asset is a long-term capital asset or short term capital asset for decision afresh, this ground is also restored to the AO for afresh consideration after adjudicating upon the issue whether capital asset is a short-term capital or long-term capital asset in terms of our decision on ground no. 1(i) & (ii).

Thus, all the grounds of the assessee's appeal are allowed for statistical purpose.

7. In the result, the appeal of the assessee is allowed for statistical purpose.

Order is pronounced in the open court on 28.02.2017

Sd/-	Sd/-
(भागचन्द)	(कुल भारत)
(BHAGCHAND)	(KUL BHARAT)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

Jaipur

Dated:- 28/02/2017.

Pooja/

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

1. The Appellant- Shri Girish Bhutra, Jaipur.
2. The Respondent – ITO Ward 2(1), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 926/JP/2016)

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant. Registrar