

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

Before Shri G S Pannu, Accountant Member
& Shri Ram Lal Negi, Judicial Member

ITA No.1574/Mum/2013 Assessment Year: 2007-08

ITA No.3299/Mum.2013 Assessment Year: 2008-09

ITA No.3303/Mum/2013 Assessment Year: 2008-09

Jaiprakash L Singh, Khwaish, Laxmi Singh Estate, S V Road, Goregoan (W), Mumbai 400 062	Vs.	DCIT 24(3)/ ITO 31(2)(1) Mumbai
PAN AACPS4994F (Appellant)		(Respondent)

CO No.161/Mum/2016

(Arising out of ITA No.1264/Mum/2015 for Assessment Year :2007-08)

Jaiprakash L Singh, Mumbai 400 062	Vs.	ITO 31(2)(1) Mumbai
PAN AACPS4994F (Cross Objector)		(Respondent)

ITA No.1264/Mum/2015 Assessment Year: 2007-08

ITA No.2531/Mum/2015 Assessment Year: 2008-09

ITA No.4530/Mum/2013 Assessment Year: 2008-09

ITA No.2530/Mum/2015 Assessment Year: 2008-09

ITO 31(2)(1)/ACIT 31(2) /ACIT 24(3) Mumbai	Vs.	Jaiprakash L Singh, Mumbai 400 062
(Appellant)		PAN AACPS4994F (Respondent)

For the assessee/Cross-objector : Shri M Subramanian

For the Revenue : Shri N S Janpangi (CIT-DR)

ITA No.2345/Mum/2013 Assessment Year: 2008-09

ACIT 24(3) Mumbai	Vs.	Satyaprakash Singh, 25 Laxmi Niwas, Near MTNL, SV Road, Goregaon (W), Mumbai 400 062
(Appellant)		PAN AAGPS0472A (Respondent)

ITA No.2532/Mum/2015 Assessment Year: 2008-09

ITA No.2533/Mum/2015 Assessment Year: 2008-09

ITA No.4529/Mum/2013 Assessment Year: 2008-09

ACIT 31(1)/ACIT 24(3) Mumbai	Vs.	Harinarayan L Singh, B-3 Harindra Bunglow, Laxmi Singh Compound, SV Road, Goregaon (W), Mumbai 400 062
(Appellant)		PAN AARPS9776J (Respondent)

ITA No.3301/Mum/2013 Assessment Year: 2008-09

ITA No.3302/Mum/2013 Assessment Year: 2008-09

Harinarayan L Singh, Mumbai 400 062	Vs.	DCIT 24(3) Mumbai
PAN AARPS9776J (Appellant)		(Respondent)

ITA No.3052/Mum/2015 Assessment Year: 2008-09
&
SA No. 268/Mum/2018
(arising out of ITA No.3052/Mum/2015 Assessment Year: 2008-09)

Dr. Neelam Omprakash Singh, C/o Neelam Nursing Home, Laxmi Palace, S V Road, Malad (W), Mumbai 400 064	Vs.	ACIT Rg 11(3) Mumbai
PAN ABDPS7751C		
(Appellant/Applicant)		Respondent)

ITA No.3195 Mum/2015 Assessment Year: 2008-09

ACIT Rg 16(3) Mumbai	Vs.	Neelam Omprakash Singh, Mumbai 400 064
		PAN ABDPS7751C
(Appellant)		Respondent)

ITA No.3093/Mum/2013 Assessment Year: 2009-10

ACIT 24(3) Mumbai	Vs.	Satyaprakash Singh 25, Laxmi Niwas, Near MTNL, S V Road, Goregaon (W), Mumbai -400 064
		PAN AAGPS0472A
(Appellant)		Respondent)

ITA No.3261/Mum/2013 Assessment Year: 2008-09

Satyaprakash Singh Mumbai -400 064	Vs.	DCIT 24(3) Mumbai
PAN AAGPS0472A		
(Appellant)		Respondent)

ITA No.4041/Mum/2014 Assessment Year 2010-11
ITA No.4705/Mum/2012 Assessment Year: 2008-09

DCIT 24(2) Mumbai	Vs.	Ms Natasha Omprakash Singh C/o Neelam Nursingh Home, Laxmi Palace, S V Road, Malad (W) Mumbai -400 064 PAN BCSPS7886P
(Appellant)		Respondent)

For the assessee : Shri Rahul Hakani
For the Revenue : Shri N S Janpangi (CIT-DR)

Date of Hearing :19.04.2018	Date of Pronouncement : 19.04.2018
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ORDER

PER G.S.PANNU,A.M:

The captioned appeals preferred by assessees and the Revenue, involving assessment years viz. 2007-08, 2008-09 & 2009-10, are in respect of four different assessees belonging to one family. At the time of hearing, it was a common point between the parties that the disputes in all the appeals stand on an identical footing therefore, they have been clubbed, heard together, and we pass this consolidated order for the sake of convenience and brevity.

2. The cross appeals by the assessee and the Revenue, bearing ITA Nos. 3303/Mum/2013 & 4530/Mum/2013 respectively for assessment year 2008-09 in the case of Jaiprakash L Singh are being taken up at the threshold as the lead case. Before we proceed to refer to the specific grounds raised, a brief background of the manner in which the captioned proceedings have arisen can be summarized as follows. The assessee, Shri Jaiprakash Singh, along with his four brothers, was co-

owner of a land situated at Goregoan (West). The land belonged to one Shri Laxmi Singh Udit Singh, father of the assessee, who died intestate on 15.03.1986, leaving behind his widow – Smt Kaudhlya Laxmi Singh, his five sons and five daughters. Smt. Kaudhlya Laxmi Singh and five daughters relinquished their rights in favour of sons. One of the sons, Dr. Omprakash Singh also died intestate on 07.06.1991 leaving behind his widow Smt. Neelam Omprakash Singh, along with a son and a daughter. The co-owners entered into development agreement with M/s. Brickworks Trading Pvt. Ltd. on 09.10.2002, whereby they agreed to give the land for development and construction of building to the developer. On the same date the power of attorney was also executed in favour of the developer which was also duly registered.

3. The return of income for A.Y. 2008-09 was filed by the assessee on 12.02.2009 declaring Long term capital gain of ₹ 8,06,47,126/- in respect of development rights assigned to M/s. Brickworks Trading Pvt. Ltd. The return of income, so filed was in terms of section 139(4) of the Act, was regularized by the Assessing Officer by issuing notice u/s. 148 of the Act. In the ensuing assessment made u/s. 143(3) r.w.s 147 of the Act, vide order dated 28.12.2011, the total income has been assessed at ₹ 18,18,59,920/- The difference between the returned income and the assessed income can be understood as follows. The Assessing Officer perused the development agreement dated 09.10.2002 and noted that the sale proceeds of the sale of flats, shops and other premises to be developed on the impugned land were to be shared between the developer and the assessee co-owners in the ratio of 60:40. The said 40% was equally divisible between the co-owners and, thus, the assessee's share was 1/5th. It was noted by the Assessing

Officer that in terms of further deed of rectification with the developer dated 25.03.2008, the assessee was allotted four flats, two pent houses and one shop in addition to the revenues which were already shown in different years as per the agreement earlier agreed upon. The supplementary agreement also entitled the assessee to receive 8% of the shopping area in a mall to be developed. The Assessing Officer issued notice u/s. 133(6) to M/s. Brickworks Trading Pvt. Ltd. and ascertained the details of the consideration paid to the assessee including the built-up area in the proposed development. The Assessing Officer required the assessee to explain as to why the value of flats/shops/pent houses allotted to the assessee in terms of the rectification deed dated 25.03.2008, was not included in the working of Long term capital gain. The Assessing Officer was not satisfied with the explanation and in para 12 of his order, he has added a sum of ₹ 5,34,84,990/- to the return of income, representing the value of flat/pent house/ shop etc., allotted to the assessee. Secondly, the Assessing Officer examined the working of Long term capital gain and noted that the indexed cost of acquisition was not appropriately adopted. The Assessing Officer was also not satisfied with the Fair Market Value (FMV) of the plot as on 01.04.1981 adopted by the assessee as the cost of acquisition. On both these aspects, he further made an addition of ₹ 9,80,42,847/-. Thirdly, he also made an addition of ₹ 29,37,229/- with respect to the flats which were in turn sold by the assessee. Thus, as against returned Long term capital gain of ₹ 8,06,47,126/- the Assessing Officer computed the same at ₹ 18,16,27,202/-. All these additions were carried in appeal before the CIT(A), who has allowed partial relief. The CIT(A) set aside the action of the Assessing Officer with regard to the indexed value of the cost of acquisition as also inclusion of the value of

flats/penthouse/shops in the computation of Long term capital gain. These aspects have been challenged by the Revenue before us in ITA No. 4350/Mum/2013 whereas, not being satisfied with the order of the CIT(A), the assessee is in appeal in ITA No. 3303/Mum/2013. Since the two cross appeals raise common issues they are being taken up together.

4. The aforesaid discussion would show that the differences between the assessee and Revenue pertain to computation and quantification of long term capital gains. However, at the time of hearing, the learned representative for the assessee has not urged the original Grounds raised in the Memo of appeal but gave a twist to the entire controversy and raised an additional Ground on a point of law, whereby it is contested that there is no transfer of asset in the previous year relevant to assessment year under consideration and, therefore, no part of the capital gain can be assessed in the instant year. Pertinently, the said Ground is based on the meaning of the expression "transfer" contained in section 2(47) of the Act and, having regard to the terms and conditions of agreement dated 09.10.2002; and, as it involves a point of law for which necessary facts are available on record, the said Additional Ground was admitted for adjudication. Another pertinent aspect brought out was that a similar point was raised in the case of two of the other co-owners namely, S/Shri Awadhnarayan Singh and Satya Prakash Singh, which came up before the Tribunal in ITA No.7363/Mum/2003 & Ors for A.Y. 2007-08 and the Tribunal vide its order, dated 02.03.2016, admitted such plea and held that 'transfer' in terms of the said development agreement took place in A.Y. 2003-04 and accordingly no capital gain was assessable in the instant year. For all the said

reasons, it was deemed fit to admit the Additional Ground and accordingly the respective counsels were heard on this at the threshold.

5. As a consequence the appeal has been heard on the preliminary issue to the effect that since 'transfer' in terms of the development agreement dated 09.10.2002 has taken place in A.Y. 2003-04, the assessment of capital gain in this year is not justified. On this aspect, we have perused the decision of the Tribunal dated 02.03.2016 (supra), wherein the relevant discussion is as under:

"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 assessee 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 assessee 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 assessee 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 Co-operative 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 assesseees 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 assesseees 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."

6. Ostensibly, our co-ordinate Bench has considered the terms and conditions of the development agreement dated 09.10.2002 entered with M/s. Brickworks Trading Pvt. Ltd. and examined the same in the light of the judgment of Hon'ble Bombay High Court in the case of Chaturbhu Dwarkadas Kapadia vs. CIT (260 ITR 491). Following the ratio of Hon'ble Bombay High Court, it has been concluded that the 'transfer' for the purpose of chargeability of capital gain shall be the year in which the said agreement has been entered into, which is A.Y. 2003-04 and not the captioned assessment years before us.

7. We may also note here that in the case of one of the co-owner Shri Awadhnarayan Singh, the matter again came up for A.Ys 2008-09 and 2009-10 and, vide order dated 24.08.2016 in ITA Nos. 3337 & 3338/Mum/2013 & Ors., the

Tribunal followed the earlier decision of the co-ordinate Bench dated 02.03.2016 (supra), and held that the capital gain in question was to be assessed in A.Y. 2003-04. Therefore, following the said ratio, we set aside the order of the CIT(A) and direct the Assessing Officer to re-compute the income of the assessee in the instant year in the light of the aforesaid precedents.

8. In the result, the appeal of the assessee in ITA No. 3303/Mum/2013 is allowed to the above extent and the cross appeal in ITA No.4530/Mum/2013 is dismissed.

9. Now we may refer to the other appeals pertaining to Jaiprakash L. Singh. ITA No.2530/Mum/2015 is an appeal by the Revenue for assessment year 2008-09, which is directed against an order dated 19/02/2015 passed by the CIT(A) under section 154 of the Act amending his earlier order dated 20/04/2013. In the said appeal, the Revenue has challenged the rectification carried out by the CIT(A) accepting some of the points raised by the assessee regarding valuation of property as on 01/04/1981 for the purposes of computing capital gains. This appeal of the Revenue is rendered infructuous as in the original proceedings for assessment year 2008-09 we have already held that the capital gain is assessable in assessment year 2003-04 and not in the instant year. Thus, this appeal of the Revenue is dismissed.

10. ITA No.3299/Mum/2013 is an appeal filed by the assessee for assessment year 2008-09, which is directed against an order passed by the CIT dated 08/03/2013 under section 263 of the Act holding the assessment order dated 28/12/2011 as erroneous and prejudicial to the interest of the Revenue on issues which are relating to the computation and quantification of the capital gains.

10.1 The said appeal is rendered infructuous, inasmuch as, qua the original assessment order dated 28/12/2011, we have already held in the earlier paras that the capital gain is assessable in assessment year 2003-04 and, the issues relating to computation of capital gains are rendered academic in the instant assessment year. Thus, the order of the CIT is rendered infructuous and accordingly the appeal of the assessee is allowed.

11. ITA No.2531/Mum/2015 is an appeal by the Revenue, which arises from the order of the CIT(A) dated 19/02/2015, which in turn has arisen from the order passed by the Assessing Officer under section 143(3) r.w.s. 263 of the Act dated 25/03/2014. The said proceedings are as a consequence of the order passed by the CIT dated 08/03/2013, which we have already held to be infructuous while dealing with the appeal of the assessee in ITA No.3299/Mum/2013 for assessment year 2008-09 in earlier paras. Thus, the impugned assessment is untenable and accordingly the appeal of the Revenue is dismissed.

12. Thus, in so far as the appeals of assessee, Jaiprakash L Singh pertaining to assessment year 2008-09 are concerned, they are disposed off as above.

13. The other remaining appeals pertaining to Jaiprakash L Singh are in relation to assessment year 2007-08. The said appeals are disposed of in the same light as for the assessment year 2008-09 in the light of the principal issue that the capital gains in question is liable to be assessed in assessment year 2003-04.

14. In so far as the other captioned appeals relating to the other co-owners are concerned, the facts and circumstances relating to the preliminary issue regarding the year of assessability of capital gains stand on similar footing, therefore, our

finding in the cross appeal in ITA Nos.3303/Mum/2013 & 4530/Mum/2013 in the earlier paras shall apply *mutatis mutandis* in these appeals also.

Accordingly, the appeals by the assessee stand allowed to the above extent and those by the Revenue are dismissed.

15. In view of the above, the Stay Application No.268/Mum/2018 in the case of Dr. Neelam Omprakash Singh is rendered infructuous and is dismissed.

The above decision was pronounced in the open court in the presence of both the parties on this day of 19th April, 2018.

Sd/-

(Ram Lal Negi)
JUDICIAL MEMBER

Mumbai, Dated : 19th April, 2018.
SA/VM

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT , Mumbai.
5. The DR, 'J' Bench, ITAT, Mumbai

Sd/-

(G S Pannu)
ACCOUNTANT MEMBER

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai