IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

ITA No.	Asst. Year	Appellant	Respondent
1587/Hyd/16	2007-08	Khambhampati Jayalakshmi, HYDERABAD **[PAN: BRXPK3414R]**	Income Tax Officer, Ward-11(5), HYDERABAD
1588/Hyd/16	2007-08	G. Rama Kowmudi HYDERABAD **[PAN: AGZPG8239Q]**	
1598/Hyd/16	2007-08	Jillela Dasaratha Reddy, Rep. by his GPA Holder, J. Pedda Venkata Reddy HYDERABAD **[PAN: BYWPD5239F]**	
1599/Hyd/16	2007-08	Potham Viswanatha Reddy, HYDERABAD **[PAN: AHNPP3887G]**	
1600/Hyd/16	2007-08	R. Subba Lakshmi, HYDERABAD **[PAN: AHGPR8601M]**	
1679/Hyd/16	2007-08	M.S. Lakshmi Bai, HYDERABAD **[PAN: AHHPK2080G]**	

For Assessee : Shri S. Rama Rao, AR
For Revenue : Shri D. Prasad Rao, DR

Date of Hearing : 27-03-2018
Date of Pronouncement : 23-05-2018

O R D E R

PER BENCH :

These are assessee's appeals against separate but similar orders of the Commissioner of Income Tax (Appeals)-5,

Hyderabad, on the issue of bringing to tax the capital gains in the impugned year. Since the issues are almost common in all these appeals, we have heard all these files together and adjudicated by this common order. For the sake of convenience, the facts in ITA No. 1587/Hyd/2016 in the case of Smt. Khambhampati Jayalakshmi are discussed in detail here under:

2. Brief facts of the case are that assessee an individual, did not file any return of income for the AY. 2007-08. The AO issued notice u/s. 148 of the Act on 27-03-2014 requiring the assessee to file the return of income as the AO is of the view that capital gain arose during the year under consideration as assessee entered into a development agreement along with seven others on 14-08-2006. Assessee filed the return of income on 24-10-2014 admitting NIL income.

2.1. Assessee along with seven others entered into a development agreement with the developer i.e., M/s. Siri Balaji Construction. The agreement was entered into on 14-08-2006. The development agreement is in respect of 2 acres and 33 guntas of land situated at Nizampet Village, Qutbullapur Mandal, Ranga Reddy District. The details of ownership of the lands are as under:

S.No.	Name of the land owners	Extent (Guntas)
1.	G. Rama Rao	
2.	K. Kondal Rao	56.5
3.	M.S. Lakshmi Bai	20.5
4.	K. Jaya Lakshmi	6.5
5.	J. Dasaratha Reddy	9.0
6.	P. Viswanatha Reddy	7.0
7.	R. Subba Lakshmi	7.0
8.	Smt. G. Rama Kowmudi	6.5
	Total	113 guntas or 2 acres 33 guntas

2.2. It can be seen that assessee (Smt. K. Jaya Lakshmi) along with four others (3,5,6, and 7 above) are the owners of 1 acre and 10 guntas. It was claimed that they purchased the said land of 1 acre 10 guntas on 03-08-2006 vide registered document No. 15999 of 2006 dated 03-08-2006.

2.3. Assessee made the claim before the AO that capital gain did not arise for the AY. 2007-08 as approvals of HUDA and the local authority were not obtained during the FY. 2006-07 relevant for the AY. 2007-08. AO did not accept any of the explanations submitted but completed the assessment u/s. 143(3) r.w.s. 147 of the Act. He computed the total income at Rs. 81,44,067/- by making the following additions:

i. determined the value of the constructed area of the flats received by the assessee at Rs. 58,99,300/- and treated the entire amount as the income of assessee.;

ii. treated the refundable deposit of Rs. 15,94,767/- as the income of the assessee.

iii. added Rs. 6.5 Lakhs on the ground that there are not sources for acquisition of the property;

Before the AO, assessee made the following claims:

i) Capital gains did not arise for the AY. 2007-08 as approvals of HUDA and local authority were not obtained in the FY. 2006-07;

ii) The cost of construction cannot be adopted at Rs. 550 per Sq. Ft., as the entire construction was not carried out by the developer;

iii) Refundable deposit cannot be considered as part of sale consideration when the cost of construction of the entire area was treated as consideration;

iv) The source of purchase of land was explained and so, the same cannot be considered as 'un-explained investment'.

These contentions were not accepted by the AO and accordingly made the additions. Aggrieved, assessee filed an appeal.

3. Before the Ld.CIT(A), it was submitted that approvals were granted on 27-03-2008 and deemed possession as per the terms of agreement was only after the permissions were obtained. Moreover, the supplementary agreement was entered which is also acknowledged by the AO, was executed on 09-05-2008 registered as Document No. 3542/2008 and

possession of land was handed over to the builder for development as per the supplementary development agreement and further that the developer has not completed the development and assessee has to approach the Lok Adalat and as per the compromise, the refundable deposit was adjusted towards the cost of construction and the agreement was not fulfilled. Therefore, the capital gains did not arise in the year under consideration. Ld.CIT(A), while directing the deletion of the refundable deposit in the case of Shri K. Kondala Rao and Shri G. Rama Rao, co-owners for the same property, however, directed the AO to examine whether the deposit was refundable or not. Hence, assessee is aggrieved on that also. He confirmed the assessment of capital gains in the year under consideration, mainly based on the terms of agreement, as was done in other cases.

4. Ld. Counsel submitted that the order of CIT(A) is not correct as per law and facts. Referring to the facts, it was submitted that even though assessee has entered into an agreement with M/s. Siri Balaji Constructions for construction of multi-storied buildings, the permission were obtained from Panchayat/HUDA only on 29-03-2008, the land would be physically delivered to the developer only after the sanction of plans by the concerned authorities. Therefore, the contention of Revenue that possession was handed over was not correct. Further, it was submitted that the said developer failed to construct the flats in full and defaulted on the same. Therefore, assessee along with other co-owners filed the case

before the Lok Adalat against the developer and finally a Compromise Agreement was entered in E.P. No. 42/2012 in O.S. No. 872/2011, dt. 25-09-12. Accordingly, since the developer expressed his inability to undertake any further construction, the onus fell upon the assessee and other co-owners and also M/s. Siri Balaji Constructions Flat Owners Association comprising of the flat owners to complete the same and the refundable deposit was adjusted towards completion of the same. Referring to the documents placed in the Paper Book, it was the submission of the Ld. Counsel that the development agreement did not go through and ultimately assessee and other co-owners have completed the project and sold to third parties, therefore, taxing the capital gain on so called development agreement does not arise.

4.1. With reference to second agreement with M/s. Siri Lakshmi Balaji Constructions, wherein 14 duplex apartments were to be handed over, there was no approval either from the Panchayat or from the HUDA and ultimately the development agreement itself was cancelled by way of cancellation of 'supplementary agreement to development agreement cum GPA' on 24-09-2012. Despite placing the above facts with complete evidences, both Ld.AO and CIT(A) erred in considering that there was transfer of property within the meaning of Section 2(47) only because the agreements were entered on 14-08-2006. It was the submission that Ld.CIT(A) erred in confirming the assessment of capital gain in spite of the fact that possession of land-in-question was not handed over to the

developer which is *sine qua non* for roping a transaction within the purview of Section 2(47)(v). In addition to that, it was also contended that Ld.CIT(A) erred in not appreciating that when the development agreement itself was cancelled or rescinded there cannot be any capital gain involved in the transaction and that no real income had accrued to assessee. Further it was submitted that there was no attempt to develop the property for construction of Dupleix apartments by the developer M/S Siri Lakshmi Balaji Construction Company and the agreement was finally cancelled. In the second case, the property was under a Developement Agreement with M/S Siri Balaji Constuctions as per which, the developer was to construct and hand over 187863 sq feet of constructed space to the assessee and others in lieu of their parting within 5358 sq yards of land in an area of acres 2.06 guntas to the developer. It is clear from the totality of facts that there was an unwillingness to abide by the terms of the contract, especially when the time of 30 months to hand over the constructed portion to the assessee and others was the essence of the contract. As per the above time frame, the developer was to hand over the constructed portion by February 2009. Yet, even as late as 2012, the same did not take place. The assessee even submitted photographic evidence to the Lok Adalat, City Civil Court which finally gave its consent to a compromise settlement vide its order as No. 872/2011. Even this Court Order was not acted upon till a final compromise agreement was reached again under the auspices of the Court in an Execution Petition (EP) moved by the assessee and others in

E.P. No. 42/2012 in as. No. 872/2011 (supra). In the final compromise agreement entered into, the developer clearly expressed his inability to take up any further construction in the entire project including the assessee's share and it was then accordingly determined that the same will be undertaken by the appellant and other co-owners themselves along with the 3rd party being the Siri Balaji Flat Owner's Association. In these circumstances, it can hardly be said that the transferee was willing to perform his part of the contract. Therefore Sec 2(47) r.w 53A is not applicable to the facts of the case and hence there is no taxability to capital gains.

5. Coming to legal propositions relied on by the CIT(A), it was submitted that in all the cases, where CIT(A) has relied on, there was handing over of the possession on which there was no dispute, whereas in this case there was no handing over of the possession. Relying upon the decision of Hon'ble Bombay High Court in the case of M/s. Chaturbhuj Dwaraakdas Kapadia Vs. CIT [260 ITR 491] (Bom) it was submitted that Ld.CIT(A) wrongly applied to the facts of the case. Explaining further, it was submitted that the Hon'ble Bombay High Court gave the judgment in a case related to a sale of property in the guise of development agreement, whereas in this case, the agreements were genuine development agreements and there is no passing of control over the property to the developer so as to invoke the Transfer of Property Act. Ld. Counsel distinguished the cases of Jasbir Singh Sarkaria [294 ITR 196] (AAR) where it was also transfer

of property by way of supplemental agreement of Dr. Maya Shenoy Vs. ACIT [124 TTJ 692], where there is a possession which was handed over in favour of the developer. Referring to the jurisdictional High Court in the case of Potla Nageswara Rao Vs. DCIT [365 ITR 249] (AP), it was submitted that the terms of agreement have been fulfilled by the said developer and the consideration had been quantified in that case, the issue there in was that consideration was not received but not on the incidence of capital gains. In this case, neither consideration was quantified nor possession was handed over and subsequent events do indicate that the development agreements have not been fulfilled. On these facts, it was submitted that the Ld.CIT(A) even though noted the facts therein, has wrongly confirmed the order and has not looked at the requirements of Section 2(47)(v) in order to rope in the transactions within its purview. Ld. Counsel relied on the principles laid down by the Co-ordinate Bench in the case of M/s. Binjusaria Pvt. Ltd., in ITA No. 157/Hyd/2011, dt. 04-04-2014 to submit that *'willingness to perform for the purposes of Sec. 53A is something more than a statement of intent; it is the un-qualified and un-conditional willingness on the part of the vendee to perform its obligations under the contract. Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of Section 53A of Transfer of Property Act will come into play*'. Since in both the cases, there is no willingness to perform as one agreement was cancelled outright and other agreement was subjected to Lok

Adalat proceedings and onus of completion fell on the assessees and co-owners and the Flat Owners Association, it cannot be stated that developer has fulfilled the conditions of agreement and therefore on the facts of the case, no capital gains can be levied on assessee.

5.1. Ld. Counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini [338 ITR 531(SC)] to submit that income from capital gain on a transaction which never capitalised is at best a hypothetical income which cannot be brought to tax. He also relied on the following judgments:

i. Amiantit International Holding Ltd., AAR [322 ITR 678];
ii. State Bank of Travancore Vs. CIT [158 ITR 102];
iii. CIT Vs. Ashokbhai Chimanbhai [56 ITR 42];
iv. Assam Roller Flour Mills Vs. CIT [227 ITR 43];

for various concepts. Lastly, Ld. Counsel relied on the recent amendment to the Finance Act, 2017 by which new provision of Sub-Section 5A u/s. 45 has been introduced to support the concept of real income.

5.2. With reference to cost of purchase which is also added as 'unexplained investment', it was the contention that assessee has furnished necessary evidences before the CIT(A) as AO has not given sufficient opportunity, but Ld.CIT(A)

rejected the admission of additional evidence and hence, request for one more opportunity to explain the investment.

6. Ld.DR, however, while accepting that the facts as stated by the Ld. Counsel were placed before the AO and CIT(A) that one agreement has been cancelled and other agreement has been subjected to litigation, however, relied on the orders of the AO and CIT(A) that development agreements have indeed given rise to taxability of capital gains as possession was handed over and the principles laid down by the jurisdictional High Court in the case of Potla Nageswara Rao Vs. DCIT (supra) will indeed apply. He relied on the detailed orders of AO and CIT(A).

7. We have considered the rival contentions and perused the Paper Books placed on record and case law relied upon. As briefly stated above, assessee along with seven others has entered into the development agreement with M/s. Siri Balaji Constructions. Shri K. Kondal Rao and Shri G. Rama Rao are having 56.5 guntas between them and balance of the land is owned by six others, whose appeals are considered in this order. The facts are similar and developer is also similar and the orders passed by the AO in the six cases are also similarly worded, Ld.CIT(A) also being the same incumbent, deleted the addition on refundable deposit in the case of Shri K. Kondal Rao and Shri G. Rama Rao, whereas surprisingly, in these batch of appeals directed the AO to examine whether the

deposit was refundable or not in spite of having the Lok Adalat order placed before him.

7.1. The issue is whether the capital gains can be levied in the impugned assessment year. This issue has been examined in detail in the case of Shri K. Kondal Rao in ITA No. 1232/Hyd/2016, who is one of the co-owners by a separate order, wherein it was held as under:

"12. We have considered the rival contentions and perused the Paper Book placed on record along with relevant case law. The case of Revenue is that the provisions of Section 2(47) are attracted on the transactions of development agreements in the year. The AO relied on the provisions of Section 53A of the Transfer of Property Act and perused the case law including that of jurisdictional High Court in the case of Potla Nageswara Rao Vs. DCIT (supra) to support the contentions that the development agreements entered into by assessee has led to transfer of property. It is the contention of assessee that the provisions of Section 2(47) are not attracted as one agreement has been cancelled subsequently and another agreement has not been fulfilled- so that the capital gains is not attracted in the year under consideration. Both the parties relied on various case law, but it is to be noted that case law will apply only when the facts are similar.

12.1. There is no dispute that the agreement with M/s. Siri Lakshmi Balaji Constructions for building 14 duplex apartments for the assessee and other co-owners have been cancelled subsequently and there was no development at all under that agreement. Even though an agreement was entered if it is not fulfilled and assessee has not derived any benefit is not understandable how the capital gains can be levied when there is no transfer of property at all. As stated earlier, there was no approval even for the plans with reference to the development agreement with M/s. Siri Lakshmi Balaji Constructions. Hence, the action of AO in brining to tax the so called capital gains of Rs. 34,99,824/- on an agreement which stands cancelled does not arise.

12.2. Coming to the development agreement with M/s. Siri Balaji Constructions, even though assessee has entered into

development agreement with the said concern for construction of multi-storied buildings and assessee's share of constructed area is defined and some refundable deposit was taken, the fact was that permissions came only on 29-03-2008 for effective possession as per terms of agreement i.e, in the next assessment year and later, the builder failed to construct the flats and defaulted on the same. Assessee and other co-owners had to proceed legally against the said builder and Lok Adalat Court has finally settled the issue by way of Compromise Agreement. There were interim injunction orders given in order in I.A. No. 738/2011 in O.S. No. 872/2011, dt. 14-06-2011 followed by the order in O.S. No. 872/2011, dt. 27-08-2011 and another order in E.P. No. 42/2012 in O.S. No. 872/2011, dt. 25-09-2012. By the last order dt. 25-09-2012, the dispute has been compromised/settled and the award was passed whereby the land owners and flat owners and some third parties were formed into a committee for construction of the building, identifying the powers of the committee and also how the advance amounts to be adjusted against various payments or moneys to be paid and how the builder's portion can be sold and apportioned for completion of the project. This indicates that the agreement originally entered into by the developers/builders have not been fulfilled and therefore, the said agreement cannot be taken as a basis for bringing to tax the capital gains, as if there was a transfer with in the meaning of Sec 2(45). The Hon'ble Bombay High Court in the case of M/s. Chaturbhuj Dwaraakdas Kapadia Vs. CIT (supra) has held that 'if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability'. This decision was relied upon by the Revenue so as to bring the capital gains to tax in the year of entering into tax. But as already stated, there is no passing/transferring of complete control over the property in favour of the developer and in fact the development itself was taken over by a separate committee as there was failure on the part of developer to complete the project as agreed upon. In these circumstances, we are of the opinion that there is no transfer of property even on the so called development agreement with M/s. Siri Balaji Constructions and consequently levy of capital gains tax on that is bad in law.

12.3. ITAT in the case of M/s Binjusaria Private Ltd (supra) referred to the decision of the co-ordinate Bench in the case of Smt K. Radhika wherein it was held that "willingness to perform for the purposes of Sec 53A is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations under the contract. Unless the party

has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of Sec 53A of Transfer of Property Act will come into play." The ITAT further held "In my opinion the handing over of the possession of the property is only one of the conditions. When the transferee by its conduct and by its deeds demonstrates that it is unwilling to perform its obligations under the agreement, the date of agreement, ceases to be relevant. In such a case it is the actual performance of the transferee's obligations which can give rise to the situations envisaged under Sec 53A of the TP Act.". From the above, it is clear that "Willingness to perform" has to be adjudged on the basis of the reality of facts in each case.

12.4. The Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini (supra) in the judgment dt. 04-10-2007 has clearly held that for the purpose of Section 45 and 48 of the Act, some real income must arise on the assumption that there is transfer of a capital asset. This income must have received or have accrued u/s. 48 as a result of the transfer of capital asset. The income from capital gains on a transaction which never materialised was at best a hypothetical income. The same cannot be brought to tax. In the above said case, the Hon'ble Supreme Court has held as under:

> *"Held, dismissing the appeals, (i) that the joint development agreement was essentially an agreement to facilitate development of 21.2 acres so that the developers built at their own cost, after obtaining necessary approvals, flats of a given size, some of which were then to be handed over to the members of the society. Payments were also to be made by the developer to each member ill addition to giving each member a certain number of flats depending upon the size of the member's plot that was handed over. Payments under the third instalment 'were only to be made after the grant of approvals and not otherwise, and this was never done because no approvals could be obtained as the High Court ultimately interdicted the project. The joint development agreement never having been registered and having no efficacy in the eye of law, 110 "transfer" could be said to have taken place under the document. Subclause (v) of section 2(47) of the Act was not attracted on the facts of this case. [The court did not go into the other questions whether under the joint development agreement possession was or was not taken, whether only a licence was granted to develop the property, and whether the developers were or 'were not ready and willing to carry out their part of the bargain.]*
>
> *(ii) That under the joint development agreement the owner continued to be the owner throughout the agreement, and had at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession*

alone was given under the agreement, and that too for a specific purpose-the purpose being to develop the property, as envisaged by all the parties. Therefore, section 2(47)(vi) would also not rope in the present transaction.

(iii) That admittedly, for want of permissions, the entire transaction of development envisaged in the joint development agreement fell through. In point of fact, income did not result at all for this reason. This being the case, there was no profit or gain arising from the transfer of a capital asset, which could be brought to tax under section 45 read with section 48 of the Act. The assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, there 'was no debt owed to the assessees by the developers and therefore, the assessees had not acquired any right to receive income under the joint development agreement. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract sections 45 and 48 of the Act".

In view of the above judgment, we are of the opinion that no capital gains arises in the case of development agreement which has not fulfilled.

12.5. The principles laid down by the jurisdictional High Court in the case of Potla Nageswara Rao Vs. DCIT (supra) does not apply as there was physical possession of the land which was handed over to the developer and the agreement has been fulfilled. Moreover, the issue was only with reference to non-receipt of sale consideration which the Hon'ble High Court has held that receipt of consideration is not material for bringing to tax the capital gains as per the definition of transfer u/s. 2(47)(v) of the Act.

12.6. However, in this case, both the development agreements entered into by assessee and other co-owners did not envisage handing over of the physical possession of the land until the approvals of the building plans and one agreement M/s. Siri Lakshmi Balaji Constructions was even cancelled on 24-09-2012 as the developer failed to proceed with the development activity and no plans were approved by any authority. With reference to agreement with M/s. Siri Balaji Constructions, even though the said concern partly fulfilled the agreement, it could not complete the construction and ultimately land owners and flat owners completed the project and properties were sold by the 'committee' as per the orders of the Lok Adalat.

12.7. The contention that no gains can said to have really accrued to the assessee during the year is also supported by the following decisions:

(a) In the case of Amiantit International Holding Ltd- AAR 322 ITR 678, it was held that "capital gain" cannot arise on the basis of uncertain or indefinite future contingencies or hypothetical and imaginary estimations"

(b) In the case of State Bank of Travancore Vs CIT (158 ITR 102), the Hon'ble Supreme Court - also held that "it is the income which has really accrued or arisen to the assessee that is taxable". It held that "in examining any transaction or situation the court would have more regard to the reality of the situation than a purely theoretical or doctrinaire aspect. ----If the actuality of the situation or the reality of a particular situation makes an income not to accrue, then very different considerations would apply". In his dissenting judgment justice Tulzapurkar also held "that in order that income should accrue, it should not merely fall due or become legally recoverable, but should also be factually and practically realizable during the accounting year or years. --factual or practical unrealisability thereof may prevent its accrual depending upon the facts and circumstances attending upon the transaction." The Supreme Court accordingly concluded that "whether the income has really accrued or arisen to the assessee must be judged in the light of reality of the situation".

(c) Hon'ble Supreme Court in the case of CIT vs. Ashokbhai Chimanbhai (56 ITR 42) inter-alia held that II normally for profit to accrue or arise there should be a right under the statute or under contract between the tax payer and others which entitles the former to make a demand for those profits..... Income becomes taxable in the footing of accrual only after the right of the tax payer to the income accrues or arises, and in the case of an agreement which makes profits receivable at or in the happening of a contingency, the fact that profits are the results of transactions spread over a period which covers a period preceding the happening of that contingency, would not make the receipt liable to be paid to those who are entitled to receive it . "

(d) This view is further supported by the decision of the Hon'ble Rajasthan High Court in the case of Assam Roller flour mills vs. CIT (227 ITR 43) which advocated the doctrine of "Relating

back". It held that subsequent events which have a bearing on the issue should be considered before coming to a conclusion on the same. The issue in this case was the maintainability of the claim of liability regarding a penalty of Rs. 4 lakhs imposed by the Collector of customs on April 16 1978 on the assessee relevant for the assessment year 1979-80. This penalty was subsequently cancelled by the Secretary to the Government of India on February 20th,1982. In this regard Hon'ble High Court held that "the general rule is that deduction can be permitted in respect of only those expenses or losses which were accrued in the relevant assessment year. This general rule, however is required to be applied after taking into account such subsequent events, legal or factual, which may have an effect on the decision on the issue." Accordingly, taking into account the subsequent events which mainly consisted of a fire breaking out in the assessee's business premises in June 1982, closure of the assessee's business and later on a company taking over the remains of the assessee's business, and the order of the Government of India knocking off the penalty in question in 1982, the court on the basis of the doctrine of "relating back" held that the liability in question stood wiped out in the assessment year 1979-80 itself. The honorable High Court justified its decision on the ground that "that the aim of the law is to do substantial justice between the parties and to impart them not merely legal or technical justice, but as far as possible real and substantial justice". This doctrine of 'Relating Back' advocated by the Hon'ble Rajasthan High Court above when applied mutatis mutandis to the facts of the assessee's case clearly support the fact that the subsequent events of cancellation of agreements, unwillingness of the developer to complete the construction and the consequent obligation imposed on the assessee and the Flat owners association to complete the same based on the compromise agreement entered into in the Civil Court, has nullified any income that could have been said to accrue or arise to the appellant on signing of the Development agreements. The recent amendment to the Finance Act 2017 by which a new provision of sub section SA under section 45 has been introduced accords with the above concept of real income. In the Memorandum explaining the above provisions, the Hon'ble Finance Minister clearly acknowledged the fact that the existing provisions have caused a genuine hardship to the owner of lands which have entered into a development agreement regarding the taxability of Capital Gains in the year of transfer and sought to alleviate it. This is a recognition of exactly the problems relating to accrual,

the lack of transparency in taxing the gains when agreements are cancelled genuinely etc. By deeming the Capital gains to be accruing in the year of completion of project rather than in the year of transfer of the asset under section 45 (1), this change in statute strengthens the argument that what is relevant is the 'Real Income' that has accrued to the assessee which can only be ascertained when the certificate of construction is obtained by the developer from the competent authority after the completion of the project and not some hypothetical income. We were informed that assessees' have filed capital gains returns in the respective years when the properties were sold.

12.8. Keeping in mind the legal propositions and the facts in this case as discussed above, we are of the considered opinion that the incidence of capital gains does not accrue or arise in the year under consideration and so the orders of AO and Ld. CIT(A) are liable to be set aside. We order accordingly. The grounds raised by assessee on this are allowed.

13. The sixth ground of appeal is that interest u/s 234B has been charged incorrectly. It was submitted that there is an error in computing the period for which interest u/s 234B is liable to be charged. The only question was relating to the method of computation of the interest. This ground becomes academic since the addition itself was not approved.

14. In the result, appeal of assessee in ITA No. 1232/Hyd/2016 is considered allowed".

7.2. Since the facts are similar, we hold that the capital gains does not arise on the facts of the case and accordingly, AO is directed to delete the addition of security deposit as well as the so called constructed area cost. Assessee's grounds on this issue are allowed.

7.3. Coming to the issue of treating unexplained investment of the purchase of land, as seen from the orders of the AO, he has not given sufficient opportunity and Ld.CIT(A) did not admit additional evidence, on which we are of the

opinion that it could have been remitted to the AO for proper verification. Considering the plea made by assessee, we set aside the issue to the file of AO to examine the source of investment, after giving due opportunity to assessee and consider the issue afresh as per the facts of the case and applicable law. Ground in this regard (Ground No. 8) is allowed for statistical purposes.

8. In the result, the appeal of assessee is allowed for statistical purposes.

ITA No. 1588/Hyd/2016 (G. Rama Kowmudi):

9. This assessee is a co-owner having an extent of 6.5 guntas along with other parties in this batch of appeals. In this case, AO assessed the proportion of security deposit received to the extent of Rs. 15,94,767/- and also value of constructed flats at Rs. 58,94,100/-.

9.1. For the reasons stated in the case of Smt. K. Jayalakshmi in ITA No. 1587/Hyd/2016 herein above, we hold that there is no capital gains for the impugned assessment year and accordingly, the additions made by the AO stands deleted. Grounds are considered allowed.

10. In the result, this appeal of assessee is allowed.

ITA No. 1598/Hyd/2016 (Jillela Dasaratha Reddy, Rep. by his GPA Holder, J. Pedda Venkata Reddy):

11. This assessee is a co-owner having an extent of ac 0.9 guntas along with other parties in this batch of appeals. In this case, AO assessed the proportion of security deposit received to the extent of Rs. 22,08,140/- and also value of constructed flats at Rs. 82,20,850/-. In addition, AO also brought to tax the consideration paid of Rs. 9 Lakhs on 03-08-2006 as unexplained investment, being the cost of purchase of land.

11.1. For the reasons stated in the case of Smt. K. Jayalakshmi in ITA No. 1587/Hyd/2016 herein above, we hold that there is no capital gains for the impugned assessment year and accordingly, the additions made by the AO stands deleted. Grounds are considered allowed.

11.2. With reference to the cost of purchase, it was the submission before the Ld.CIT(A) that assessee is working in USA since 1999 and the said amount was invested out of his earnings in USA. In support, copies of the returns filed by assessee are filed. Ld.CIT(A), however, did not accept on the reason that the source of investment was not explained before the AO. The admission of additional evidence was rejected.

11.3. After considering the rival contentions, we are of the view that the issue of source of investment can be re-examined

by the AO as assessee has sources from USA and the case is represented by his father, GPA holder Shri J. Peda Venkata Reddy, one more opportunity should be given to assessee to explain the sources. The issue of investment is consequently, set aside to the file of AO for fresh examination. The grounds on this are considered allowed for statistical purposes.

12. In the result, this appeal is allowed for statistical purposes.

ITA No. 1599/Hyd/2016 (Potham Viswanatha Reddy):

13. This assessee is a co-owner having an extent of ac 0.7 guntas along with other parties in this batch of appeals. In this case, AO assessed the proportion of security deposit received to the extent of Rs. 17,17,440/- and also value of constructed flats at Rs. 64,52,600/-. In addition, AO also brought to tax the consideration paid of Rs. 7 Lakhs on 03-08-2006 as unexplained investment, being the cost of purchase of land.

13.1. For the reasons stated in the case of Smt. K. Jayalakshmi in ITA No. 1587/Hyd/2016 herein above, we hold that there is no capital gains for the impugned assessment year and accordingly, the additions made by the AO stands deleted. Grounds are considered allowed.

13.2. With reference to the cost of purchase, it was the submission before the Ld.CIT(A) that assessee has received money from his brother-in-law, Shri J. Dasaratha Reddy, who is working in USA since 1999 and the said amount was sent out of his earnings in USA. In support, copies of the bank account and confirmation were filed by assessee. Ld.CIT(A), however, did not accept on the reason that the source of investment was not explained before the AO. The admission of additional evidence was rejected.

13.3. After considering the rival contentions, we are of the view that the issue of source of investment can be re-examined by the AO as assessee has sources from USA. One more opportunity should be given to assessee to explain the sources. The issue of investment is consequently, set aside to the file of AO for fresh examination. The grounds on this are considered allowed for statistical purposes.

14. In the result, this appeal is allowed for statistical purposes.

ITA No. 1600/Hyd/2016 (R. Subba Lakshmi):

15. This assessee is a co-owner having an extent of ac 0.7 guntas along with other parties in this batch of appeals. In this case, AO assessed the proportion of security deposit received to the extent of Rs. 17,17,440/- and also value of constructed flats at Rs. 61,97,400/-. In addition, AO also

brought to tax the consideration paid of Rs. 7 Lakhs on 03-08-2006 as unexplained investment, being the cost of purchase of land.

15.1. For the reasons stated in the case of Smt. K. Jayalakshmi in ITA No. 1587/Hyd/2016 herein above, we hold that there is no capital gains for the impugned assessment year and accordingly, the additions made by the AO stands deleted. Grounds are considered allowed.

15.2. With reference to the cost of purchase, it was the submission before the Ld.CIT(A) that assessee has received money from her husband through his brother-in-law, Shri J. Dasaratha Reddy, who is working in USA since 1999 and the said amount was sent out of his earnings in USA. In support, copies of the bank account and confirmation were filed by assessee. Ld.CIT(A), however, did not accept on the reason that the source of investment was not explained before the AO. The admission of additional evidence was rejected.

15.3. After considering the rival contentions, we are of the view that the issue of source of investment can be re-examined by the AO as assessee has sources from USA. One more opportunity should be given to assessee to explain the sources. The issue of investment is consequently, set aside to the file of AO for fresh examination. The grounds on this are considered allowed for statistical purposes.

16. In the result, this appeal is allowed for statistical purposes.

ITA No. 1679/Hyd/2016 (M.S. Lakshmi Bai):

17. This assessee is a co-owner having an extent of ac 0.20.5 guntas along with other parties in this batch of appeals. In this case, AO assessed the proportion of security deposit received to the extent of Rs. 50,29,651/- and also value of constructed flats at Rs. 1,88,49,050/-. In addition, AO also brought to tax the consideration paid of Rs. 20.50 Lakhs on 03-08-2006 as unexplained investment, being the cost of purchase of land.

17.1. For the reasons stated in the case of Smt. K. Jayalakshmi in ITA No. 1587/Hyd/2016 herein above, we hold that there is no capital gains for the impugned assessment year and accordingly, the additions made by the AO stands deleted. Grounds are considered allowed.

17.2. With reference to the cost of purchase, it was the submission before the Ld.CIT(A) that assessee is an income tax assessee and filed returns of income regularly, admitting the incomes derived by her independently. It was submitted that AO was not justified in holding that the appellant had no source for acquisition of property. Ld.CIT(A) did not agree with the contentions.

17.3. After considering the rival contentions, we are of the view that the issue of source of investment can be re-examined by the AO as assessee has own sources. One more opportunity should be given to assessee to explain the sources. The issue of investment is consequently, set aside to the file of AO for fresh examination. The grounds on this are considered allowed for statistical purposes.

18. In the result, this appeal is allowed for statistical purposes.

19. To sum-up, ITA No. 1588/Hyd/2016 is allowed and all the remaining appeals are allowed for statistical purposes.

Order pronounced in the open court on 23rd May, 2018

Sd/-	Sd/-
(P. MADHAVI DEVI)	**(B. RAMAKOTAIAH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated 23rd May, 2018

TNMM

Copy to :

1. Khambhampati Jayalakshmi, C/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

2. G. Rama Kowmudi, C/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

3. Jillela Dasaratha Reddy, Rep. by GPA Holder, J. Pedda Venkata Reddy, C/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

4. Potham Viswanatha Reddy, C/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

5. R. Subba Lakshmi, C/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

6. M.S. Lakshmi Bai, C/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

7. Income Tax Officer, Ward-11(5), Hyderabad.

8. CIT(Appeals)-5, Hyderabad.

9. Pr.CIT-5, Hyderabad.

10. D.R. ITAT, Hyderabad.

11. Guard File.