

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1640/PUN/2014

निर्धारण वर्ष / Assessment Year : 2009-10

The Income Tax Officer,  
Ward 2(1), Pune

.... अपीलार्थी/Appellant

Vs.

Shri Vilas Babanrao Rukari (HUF),  
149, Shivdarshan, Mukund Nagar,  
Pune – 411037

.... प्रत्यर्थी / Respondent

PAN: AAFHV6744K

आयकर अपील सं. / ITA No.1645/PUN/2014

निर्धारण वर्ष / Assessment Year : 2009-10

Shri Vilas Babanrao Rukari (HUF),  
149, Shivdarshan, Mukund Nagar,  
Pune – 411037

.... अपीलार्थी/Appellant

PAN: AAFHV6744K

Vs.

The Income Tax Officer,  
Ward 2(1), Pune

.... प्रत्यर्थी / Respondent

Assessee by : S/Shri Nikhil Pathak / Suhas Bora  
Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 21.03.2018	घोषणा की तारीख / Date of Pronouncement: 25.05.2018
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**आदेश / ORDER****PER SUSHMA CHOWLA, JM:**

The cross appeals filed by Revenue and assessee are against order of CIT(A)-II, Pune, dated 21.03.2014 relating to assessment year 2009-10 against order passed under section 143(3) of Income Tax Act 1961 (in short the 'Act').

2. The cross appeals filed by Revenue and assessee were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The Revenue in ITA No.1640/PUN/2014 has raised the following grounds of appeal:-

1. *The learned Commissioner of Income-tax (Appeals) erred in allowing the plea of the assessee that it had converted the land as stock-in-trade in A. Y. 2006-07 without there being any proof, more so when it had not even filed the return of income for that year.*
2. *The learned Commissioner of Income-tax (Appeals) erred in allowing the income as capital gains to be taxed u/s 45(2) of the Act, though the assessee was not doing any business of Development and Construction.*
3. *The learned Commissioner of Income-tax (Appeals) erred in failing to appreciate that the assessee did not incur any expenditure for earning receipts during the year and considering the non applicability of section 45(2) of the Act, the direction for deduction of proportionate cost was not correct as the cost of acquisition of land was allowable while calculating the capital gain on sale of land in the A. Y. 2006-07.*

4. The assessee in ITA No.1645/PUN/2014 has raised the following grounds of appeal:-

*On the facts and in the circumstances of the case:-*

1. *The learned CIT (Appeals) erred in confirming the addition made by the A.O. amounting to Rs.3,03,95,968/- on the ground that the amount received by the appellant are revenue receipts and not advances as claimed by the appellant.*
2. *The learned CIT (Appeals), has not justified in confirming the action of the AO and his conclusion that the amount received in the financial year 2008-09 to be taxed as business receipts.*

3. *The learned CIT (Appeals) erred in not appreciating the following important facts and the submissions of the appellant that:*
- a) *The appellant had converted capital asset into stock in-trade.*
  - b) *The Capital Gain is taxable in the year in which the units will be finally sold i.e. on the execution of the sale agreement.*
  - c) *The advances received from the developer cannot be treated as taxable business receipts in the hands of the appellant.*
  - d) *The business receipts are to be taxed in the hands of appellant in the year in which the possession is finally handed over at the time of execution of sale deed of the constructed flats by the developer.*
  - e) *The agreement between the appellant and the developer is a joint venture and not a development agreement.*
  - f) *The method of accounting followed by the developer is project completion method.*
  - g) *The developer also considered the payments given to appellant as advances and only on 31.03.2011, when the sales are recognized he has considered that the amount paid to appellant is land cost.*
  - h) *The appellant has also offered all the receipts in the A.Y. 2011-12 and paid the tax by treating the receipts under the head business income as well as tax on capital gain for A.Y. 2006-07 in view of provisions of section 45(2) of the Act.*
4. *Without prejudice to above grounds, the learned CIT(A) has erred in not accepting the contention of the appellant that the amount received by the appellant are eligible for deduction u/s 80IB(10).*
5. *The appellant denies his liability to pay interest U/sec.234B & 234C of the Income Tax Act, 1961 and therefore it be deleted.*

5. The issue raised in the cross appeals filed by the Revenue and assessee is against assessability of land sold by the assessee.

6. Briefly, in the facts of the case, the assessee for the year under consideration had furnished return of income declaring total income of ₹ 10,01,110/-. The case of assessee was taken up for scrutiny. During the course of assessment proceedings, the assessee submitted copy of

Development Agreement dated 24.02.2016 entered into by Shri Vilas Babanrao & Others (Owners) with J.K. Developers. The residential land admeasuring 02H-14r i.e. 21400 sq.mtrs. out of 04H-28R of S.No.85, Hissa No.1/1, Manjri Bk., lies within the limits of Revenue village Manjri Bk. and within the limits of Zilha Parishad, Pune. As per para 13 at page 12 of the said Development Agreement, only physical possession of the said property was to be handed over to the developer by the vendor at the time of execution of Development Agreement i.e. 24.02.2006. The Development Agreement was duly registered with the Sub-Registrar, Haveli-III and stamp duty of ₹ 2,83,845/- was paid on registration value of property shown at ₹ 2,83,84,500/-. The Assessing Officer was of the view that the transfer of immovable property was complete only when the Conveyance Deed was registered and for the purpose of capital gains, the transfer was treated as complete with the delivery of possession, when the agreement to sell / buy immovable property was entered into. The Assessing Officer thus, observed that capital gain was attracted in assessment year 2006-07 i.e. the year under appeal. Further, in para N of page 6 of the Development Agreement noted the assessee to have agreed to entrust and developer had agreed to develop all the said land for consideration of 18% amount on gross sales, excluding certain charges. During the course of assessment proceedings, the learned Authorized Representative for the assessee furnished the details of payment received from J.K. Developers i.e. in assessment year 2007-08, sum of ₹ 2,58,37,188/- was received and in assessment year 2009-10, sum of ₹ 3,03,95,968/- was received. The Assessing Officer noted that the amount of ₹ 2.83 crores being registration value of property, was to be considered for calculating income from capital gains in assessment year 2006-07 and the same was reduced from total receipts of ₹ 5.62 crores. As per the Assessing Officer, the assessee had received

₹ 2,78,48,656/- over and above the registration value during the year under assessment. The assessee was given an opportunity to explain why the said amount of ₹ 2.78 crores should not be treated as his business income for assessment year 2009-10 and capital gains to be levied in assessment year 2006-07. The assessee in reply pointed out that although the agreement for development was entered into on 24.02.2006, the land was agricultural land and that the developer was required to apply for permission to change to NA. Secondly, it was pointed out that the amount of consideration was indeterminate at that time and signing of development agreement and handing of possession of land was merely a temporary measure for carrying out construction work by the developer. The Assessing Officer did not agree with the contention of assessee, where the Conveyance Deed was signed and registered and also possession was delivered to the developer on the same day, hence the said transaction could not be said to be temporary measure. The Assessing Officer also noted that delivery of land was in the residential zone as per development plan applicable to Pune Region and also that the assessee had never declared agricultural income in the previous return of income. However, the fair market value of the said property was ₹ 80,25,000/- and stamp duty valuation was ₹ 2.83 crores. The second point which was noted was on the issue as to why advance received in financial years 2007-08 and 2008-09 should not be taxed as business income. The Assessing Officer was of the view that where the assessee was not developing the said property nor was he partner in J.K. Developers and in such circumstances, the assessee was not entitled to claim of deduction under section 80IB(10) of the Act. The Assessing Officer held that sum of ₹ 2.78 crores is to be assessed as business income of the assessee.

7. The assessee furnished written submissions before the CIT(A) which are reproduced at pages 3 to 16 of the appellate order. The said written submissions were forwarded to the Assessing Officer, who in reply, forwarded remand report which is reproduced at pages 18 and 19 of the appellate order along with rejoinder of assessee at pages 19 to 24 of the appellate order. The CIT(A) then took note of the submissions of assessee, wherein the main contention was that the Assessing Officer had failed to appreciate the year of taxability of capital gains and also the Assessing Officer had wrongly considered stamp duty value as on 24.02.2006 as the cost, while computing deduction instead of fair market value of said land. The assessee submitted that the land had been converted into stock-in-trade from capital asset and in this regard, application was submitted before the Collector, Pune for getting the land as non-agricultural land for the purpose of carrying on the development on the said land. The profits and gains from transfer by way of conversion by the owner of capital asset into stock-in-trade of a business carried on by him, was chargeable to income tax, as income of the previous year in which such stock-in-trade was sold or otherwise transferred. The assessee contended that definition of 'transfer' in section 2(47) of the Act was applicable only in relation to capital assets and not to stock-in-trade, which stood excluded from the definition of capital asset in section 2(14) of the Act. Further, reference was made to the Development Agreement dated 24.02.2006, under which the assessee had handed over the possession of property for construction of project and the assessee did not receive any consideration for handing over the possession of property to the developer, but as per the agreement had got the right to receive 18% of the amount on gross sales excluding certain charges. As per the assessee, transfer of title and handing over of possession was merely a temporary measure for carrying out

construction work by the developer and the exclusive possession of the property in legal sense remained with the assessee which was finally handed over at the time of execution of sale deed of the constructed flats. It was stressed by the assessee that the nature of transaction between the parties by way of Development Agreement could not be said to be sale of immovable property, which was stock-in-trade or otherwise transfer as provided in the Transfer of Property Act. The assessee thus, contended that when legal title and possession of the property was with the assessee, then the transfer was not possible, merely by allowing the developer to carry out the construction work. Reliance was placed on various decisions for the said proposition. The assessee claimed that mere licence was given to the developer to exploit the said land for the purpose of construction. It was further submitted before the CIT(A) that the receipts as per Joint Venture Agreement were linked to the gross sale proceeds of the flats constructed in the project and until and unless flats were constructed and the developer receives consideration from the purchaser, the right of assessee to receive any consideration from the developer does not accrue to the assessee. The assessee clarified that the income does not accrue to the assessee at the time of entering into Joint Venture Agreement, but it accrues only when the flats were booked by the developer and the possession was given to the customers, who had booked the flats. It was further pointed out that the transfer of property by virtue of Development Agreement entered into by the assessee on 24.02.2006 within meaning of section 45(2) of the Act as the said land was stock-in-trade on the date of said agreement and further though the assessee had given possession to the developer vide above agreement, provisions of section 2(47) of the Act defining the term 'transfer' cannot be applied as what was handed over to the developer was not capital asset but

stock-in-trade. The assessee thus, pointed out that merely because development rights of converted land were given to the developer, that could not be treated as sale or transfer of land which was stock-in-trade of assessee. The assessee concluded by saying that there was no dispute that there was an element of business in the transaction but the dispute was only in respect of year in which business income was to be taxed. The assessee stressed that income from land was to be taxed in the year when the possession of flats constructed by the developer was given to the customers and till the time the amount received from flat purchasers were advances and the same were actually considered as advances. The assessee then challenged the order of Assessing Officer in considering the value adopted by stamp duty authority for the purpose of stamp duty on the Development Agreement, which in turn, was based on circle rates, without considering peculiar features of the property sold, could not form the foundation to determine the fair market value of the property transferred. The assessee thus, contended that addition made by the Assessing Officer by considering the amount received by assessee from M/s. J.K. Developers in financial years 2007-08 and 2008-09 after deducting stamp duty value as on the date of development agreement as business income was both incorrect and unwarranted. On without prejudice, it was further submitted that in case it is held that the amount received was taxable, then the assessee was entitled to claim the deduction under section 80IB(10) of the Act. The assessee explained that as per Development Agreement, which was in the nature of Joint Venture Agreement, the assessee was also engaged in the development of housing project and being joint developer, the deduction under section 80IB(10) of the Act, be granted to the assessee. The assessee strongly opposed the proposition that Joint Venture Agreement was a case of sale of property and was not in the

nature of business development. The assessee also explained that since the gross sales from the sale of flats were recognized by the developer in the year ending 31.03.2011, the assessee also recognized the revenue in assessment year 2011-12 and paid taxes by treating the receipts under the head 'business income' as well as tax on capital gains which was to be paid in the year of sale.

8. The CIT(A) after noting the facts of case and the arguments of assessee and the order of Assessing Officer, held that taxing of business receipts received by the assessee during the two financial years i.e. 2007-08 and 2008-09, during the year under appeal was *prima facie* not correct. The CIT(A) was of the view that *the amount received as business receipts ought to have been taxed year-wise, then the appellant has received sum of money as part of consideration for the development.* It was further observed that the Development Agreement was dated 24.02.2006 i.e. after conversion of capital asset into stock-in-trade as on 19.01.2006. Thus, the profit or gain arising from transfer by way of conversion by the owner of capital asset into or its treatment by him as stock-in-trade of a business carried on by him was chargeable to income tax, as income of the previous year in which such stock was sold or otherwise transferred as per provisions of section 45(2) of the Act. The CIT(A) thus, held that though levy of capital gains was made obligatory, but section 45(2) of the Act postpones the levy of capital gains till the converted asset is actually sold or otherwise transferred. He held that action of conversion within meaning of the word 'transfer' took place earlier, but the tax had to be levied in the year of its actual sale and not in the year of conversion. Further, fair market value of asset on the date of said conversion or treatment shall be deemed to be the full value of consideration received or accruing as a result of transfer of capital asset. So, far

as the issue relates to taxability of business receipts received by the assessee, the CIT(A) held that the agreement dated 24.02.2006 entered into by the assessee with J.K. Developers was Development Agreement and the case of sale simplicitor and not Joint Venture Agreement. The CIT(A) then reflected on the role of assessee in the development and whether it was taking any risk and held that the transaction in question was not an adventure in the name of trade and income arising out of such transaction was liable to the assessee as business income under the profits and gains of business. However, the same is to be assessed in the year of sale. The CIT(A) recognized that the assessee in no way was connected with the development of property. However, it had received ₹ 45 lakhs though nomenclature as security deposit, but in fact it was an adjustable / deductible from the payments to be made in the later period. The assessee as per clause 3 of agreement had handed over the title deeds and documents relating to the said property to the vendor J.K.R. Developers. He stressed that the substance had to be seen than the form of transaction, where the assessee had converted the investment into stock-in-trade and thereafter, entered into Development Agreement and given possession to the developer, the provisions of section 2(47) of the Act defining the term 'transfer' could not be applied as the asset handed over to the developer was stock-in-trade and not capital asset. The CIT(A) further noted that the assessee had not disputed the treatment of receipts as business receipts but had disputed the year in which the said receipts were to be taxed. The CIT(A) after analyzing various terms of Development Agreement, concluded by holding that incidence of tax in respect of receipts from the developer were the years in which they had been received i.e. assessment years 2008-09 and 2009-10. The CIT(A) concluded the issues as under:-

- “1. The taxability of the business receipts will have to be done based on the receipts by the appellant in each of the financial year(s) relevant to the Asstt year(s).
2. The cost of the asset/stock in trade to be taken is the fair value given by the approved valuer as on the date of conversion from investment to stock-in-trade i.e. 19.01.2006.
3. The said cost of the asset i.e. the fair value is to be deducted in proportion to the constructed area sold during the year for which the business receipts have been received by the appellant.
4. The capital gains to be taxed u/s 45(2) as well as the business receipts are to be taxed simultaneously in the same year when the business profit on sale of such stock accrues to the appellant i.e. A.Yrs. 2008-09 and 2009-10 and subsequent years when the said receipt has been received.
5. The contention of the appellant that the business receipts are to be taxed in the year in which possession is handed over of the constructed flats to the purchaser is not tenable.”

9. The CIT(A) further held as under:-

“3.5.10 In view of the above fact the Assessing Officer has rightly taxed the appellant during the year under consideration, however, the amount to be taxed during the year will be limited to the business receipts received during the year amounting to Rs.3,03,95,968/- and the cost to be taken as a deduction will be the proportionate amount of the fair value limited to the extent of area constructed by the developer during the year. It is relevant to point out that the appellant has received business receipts to the extent of Rs.2,58,37,188/- during F.Y. 2007-08 i.e. A.Y. 2008-09 which will have to be taxed during that year itself for which the Assessing Officer has to initiate necessary action with respect to reopening of the said assessment. The cost of deduction will have to be again limited to the extent of area constructed during that year and the work in progress i.e. the stock-in-trade brought forward in the next A.Y. i.e. 2009-10 will be again reduced to the extent of work carried out or area constructed by the developer. During the aforesaid years in my considered opinion the liability of capital gain will also have to be taxed once the same is worked out during A.Y. 2006-07 u/s 45(2). The appellant has not shown to have incurred any expenses towards the transaction nor does the development agreement indicate liability of any expenses to be 'incurred by the appellant. Thus the only expense to be allowed will be limited to the fair cost of the said property as worked out by the valuer in each of the year(s). The Assessing Officer will have to work out the amount of deduction to be granted to the appellant in each of the years against the business receipt being part of the 18% of gross sale proceeds is received by the appellant. The developer M/s JKR Developer in the profit & loss account have shown a total amount of Rs.7,27,73,695/- as land cost which appears to be the total amount paid towards the consideration of the said land as per the development agreement i.e. 18% of the gross sale proceeds. This aspect needs to be examined so as to ascertain the total amount of business receipts received by the appellant and the other co-owners over a period of time. The taxation of the receipt in respect of the other co-owners of the land also needs to be examined in the light of the above fact during the said period.”

10. The CIT(A) also decided the issue of deduction allowable under section 80IB(10) of the Act and held that it would be the developer who was developing land and building housing project who would be eligible to the said deduction and not the land owner i.e. assessee. He also held that the assessee had admitted that he had not made the claim of deduction in the return of income and had also not filed requisite audit report in form No.10CEB along with return of income and hence, the assessee was not entitled to claim deduction under section 80IB(10) of the Act.

11. Both the assessee and Revenue are in appeal against the order of CIT(A).

12. Both the learned Authorized Representatives elaborately took us through various covenants of Development Agreement and also referred to the audited accounts of developer, wherein it had recognized sale of ₹ 42.39 crores in assessment year 2011-12 and also shown the land cost at ₹ 7.27 cores.

13. The assessee is in appeal before us vis-à-vis year of taxability, wherein grounds of appeal No.1 to 3 are raised by the assessee. The learned Authorized Representative for the assessee pointed out that grounds of appeal No.4 and 5 are not pressed.

14. The Revenue on the other hand, is in appeal against directions of CIT(A) in holding that only the amount received during the year is to be taxed and also on the ground that quantification of capital gains in assessment year 2006-07 and its taxation in the respective years.

15. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is in respect of agreement entered into by the assessee with M/s. J.K.R. Developers. The assessee terms it to be Joint Venture Agreement. However, the terms of agreement if seen, are in respect of development agreement, wherein the assessee has contributed his land for development and the developer has undertaken construction of project and it was agreed that the land owners, of which the assessee is one of the parties would receive the amount out of sale consideration of project. The assessee has no role to play in the development and once it has no role to play, then it cannot be called as Joint Venture Agreement. The issues raised in the cross appeals are two-fold – (a) taxability of capital gains on conversion of land owned by the assessee into stock-in-trade and (b) business profits to be assessed in the hands of assessee for exploitation of stock-in-trade. In order to determine the issue, reference needs to be made to the provisions of the Act.

16. Under section 4 of the Income Tax Act, income tax is to be charged in respect of total income of the previous year. Section 5 of the Act talks of the scope of total income to include all income from whatever sources derived (a) is received or due to be received in India in such year by or on behalf of such person; (b) accrues or arises or is due to accrue or arise to him in India during such year; or (c) accrues or arises to him outside India during such year. In other words, all income which arises to the assessee from whatever sources or is received by the assessee is to be taxed in the hands of assessee. However, taxation is as per the claim provided in the Income Tax Act. In order to charge income from capital gains, Chapter-E enlists the relevant provisions of the Act. Section 45(1) of the Act talks of any profits or gains arising from transfer of

capital asset effected in the previous year shall be chargeable to income tax under the head 'Capital gains' and shall be deemed to be the income of previous year in which transfer took place. The term 'transfer' is defined under section 2(47) of the Act, which clearly talks of transfer in relation to capital asset including sale, exchange or relinquishment of asset' or extinguishment of rights therein; or compulsory acquisition thereof under any law; in case where the asset is converted by the owner thereof into or is treated by him as stock-in-trade of a business carried on by him, such conversion or treatment or maturity or redemption of a zero coupon bond; or any transaction involving the allowing of the possession of immovable property as referred to in section 53A of Transfer of Property Act; or any transaction which has effect of transferring or enabling the enjoyment of any immovable property. Certain exceptions are provided under sub-section 45 of the Act as to the taxability of capital gains. One such exception is provided under clause to sub-section (2) to section 45 of the Act, wherein it has been laid down that notwithstanding anything contained in sub-section (1) profits or gains arising from transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of business carried on by him shall be chargeable to income tax as his business of previous year in which such stock-in-trade is sold or otherwise transferred by him and for the purpose of section 48 of the Act, fair market value of asset on the date of such conversion or treatment shall be deemed to be the full value of consideration received or accruing as a result of transfer of capital asset. Interpreting the provisions of the Act, wherein the assessee holds capital asset and converts the same into stock-in-trade, then such conversion is transferred as per section 2(47)(iv) of the Act, such transfer is exigible to capital gains under the provisions of section 45(1) of the Act. However, exception is provided in sub-section (2),

wherein it is laid down that the profits and gains which arises on treatment of capital asset as stock-in-trade shall be chargeable to tax in the previous year in which such stock-in-trade is sold or otherwise transferred by him. Further, the mode of computation of capital gains is also provided in sub-section (2) that the fair market value of the said asset on the date of conversion or treatment shall be deemed to be the full value of consideration received or accrued as a result of transfer of capital asset i.e. on the date of conversion of capital asset into stock-in-trade.

17. Now, coming to the facts of the present case. The assessee was owning capital asset, which was converted into stock-in-trade in assessment year 2006-07. The first aspect is the computation of capital gains on such conversion of capital asset into stock-in-trade, wherein as per section 45(2) of the Act, it is clearly laid down that fair market value of asset on the date of such conversion is to be deemed to be the full value of consideration. The Assessing Officer in the facts of present case had adopted the valuation as per stamp valuation authorities i.e. market value of property to compute the income from capital gains in the hands of assessee on conversion of land into stock-in-trade. However, the CIT(A) has directed that fair market value of the asset on the date of conversion i.e. value as determined by the valuation officer be taken as value of consideration received on the date of transfer. We find merit in the stand of CIT(A) in this regard and the ground of appeal raised by the Revenue on this issue is dismissed. This is the determination of capital gains in the hands of assessee and the second issue is the year of taxability of such capital gains.

18. Section 45(2) of the Act very clearly provides the taxability of such capital gains in the hands of assessee in the previous year in which such stock-in-trade is sold or otherwise transferred by him. The assessee has given the land for development and is entitled to receive 18% of total sale consideration as his share of business profits. There is no dispute between the assessee and the Revenue authorities that the business income has arisen to the assessee. However, the dispute has arisen only to the year of taxability of such business profits. The assessee in assessment years 2008-09 and 2009-10 had received certain advances from the developer, which developer had received against booking of flats. The CIT(A) has held that such advances are to be taxed in the hands of assessee in the year of receipt itself, since the amount has been received. However, the case of assessee is that the amount is though received but the income arising therefrom only arises in assessment year 2011-12 i.e. the year in which flats were fully developed and handed over to the flat buyers. In assessment years 2008-09 and 2009-10, it was only an advance and the same could not be treated as business profits of assessee as there was no concrete right to receive the said amount in assessment years 2007-08 to 2008-09.

19. In order to decide the part of this issue, reference is made to the terms of Development Agreement between the parties. The agreement is Development Agreement, copy of which is placed at pages 9 to 37 of Paper Book. The Preamble of said agreement enlists the sequence of events by which the said land came to be owned by several owners. The owners were desirous of constructing a building on the said land but due to not having proper experience in construction and development of land, entrusted the same for development to M/s. J.K.R. Developers. As per clause 9 of the Preamble, the Party of the

Second Part M/s. J.K.R. Developers has agreed to develop the land. It is further provided that after negotiations between the parties, the First Party had agreed to entrust the land and the Second Party had agreed to develop the said land for total consideration of 18% of amount on gross sales (excluding stamp duty, MSEB Meter charges, Society charges, Club house charges, parking charges, etc. work charges). The said covenant further provides that 18% of amount on gross sales which will be collected by the Party of Second Part on the saleable area from the prospective purchasers as per agreement to sell which will be executed with the said prospective purchasers and in pursuance of that arrived and concluded contract between them. As per clause (1) of said agreement, consideration had to be given every after 15 days of each month on the collection amount during the said 15 days and also refundable (adjustable security deposit of ₹ 45 lakhs) was to be paid to the Party of First Part by the Party of Second Part, which would be adjusted / deductible from the payment to be made to the Party of the First Part. Beside other terms agreed upon between the parties, as per clause (6) of the said agreement, it was agreed that First Part shall execute, authorize and grant irrevocable license to the Second Party to bring in all types of building material at site, store it and use the same for construction, etc. Further, the Second Party had the license to purchase the aforesaid building materials and to construct the boundary walls, fencing and also to construct the buildings on the said land or any part thereof. The actual physical possession of the said property for development purpose shall be given at the time of execution of said agreement. It was the case of Assessing Officer that the assessee had given the physical possession of said property under the Development Agreement, but it may be clarified herein itself that the possession of said property was given for the development purpose. As per clause (6), the Second Party / Developer had

exclusive right to develop the said property. The rights and obligations of the First Party are provided in clause 8 (a) as the First Party had right to receive consideration from Second Party. As per clause (b), the First Party shall sign and handover to the Second Party all plans, applications, declarations, etc. as may be required for submission to the concerned authorities for construction of buildings. Clause (d) provides that all charges including land revenue and property tax payable to the local authorities was the responsibility of the First Party. Clause (e) talks about the First Party not requiring to make any contribution towards construction cost and expenses. Clause 9 talks about rights and obligations of Second Party, wherein clause (a), the Second Party shall pay consideration of the said property to the First Party as mentioned in clause (1). Under clause (b), Second Party shall be entitled to sub-divide the said land by obtaining sanction to the layout of the said land. As per clause (c), the Second Party shall be entitled to sell, mortgage or any other manner alienate the constructed or non constructed premises to the prospective buyers, mortgagee, etc. The said clause also provide the authority to mortgage the premises agreed to be purchased to the prospective buyers for the purpose of obtaining housing loan, etc. It was further provided that the First Party shall not be personally liable for repayment of such loan amount or interest thereon. As per clause (d), funds for the construction had to be arranged by the Second Party. Clause 10(a) provided a specific covenant between the parties that the First Party shall at their own cost and risk assure / ensure that the Second Party is entitled and permitted to develop the said property and further is free to develop the said property without any hindrance from any persons. As per clause (b), the First Party shall execute all agreements to sell, mortgage, sale deeds, cancellation deeds, supplementary agreements or any indenture as vendor or confirming party for the

purpose and to enable the Second Party to sell, mortgage the premises / flats in the building with or without constructed portion or space to the prospective buyers. As per clause 10(g), it was agreed between the parties that as and when required by the Second Party, the First Party shall sign / execute sale deed(s) of apartments in respect of the said property with or without construction in the name of Second Party / Developer or to execute any other deeds, etc. but in any circumstances, the final Conveyance Deed shall and will not be executed by the First Party without receiving full agreed consideration along with interest on delayed period on delayed amount, if any. Clause 10(l) provides specific agreement between the parties that in the light of consideration paid or to be paid by the Second Party to the First Party, after payment of consideration, there was no time limit to complete the transaction. However, it is provided that proper conveyance along with newly constructed building in favour of nominee / assignee of the Second Party would be completed within five years. Vide clause 13, it was specifically agreed by and between the parties here to that in pursuance of license and authority granted by the First Party to the Second Party i.e. Developer, as per clause 6 written for the purpose to develop the said property and enjoyment of development rights and construction of the buildings on the said property, the actual physical possession of the said property is to be handed over to the developer by the vendor at the time of execution of Development Agreement. It is further provided that the First Party and the Second Party shall handover the possession of said property at the time of execution of final Conveyance Deed to nominee of the Second Party which will include the ultimate buyers of the said land with or without construction thereon or buyers of the individual tenements in the buildings which are to be constructed in the said land.

20. Reading the covenants of agreement, it transpires that as agreed upon between the parties the consideration i.e. totaling of 18% of gross receipts excluding the other charges, is to be collected by the Second Party on the saleable area from prospective purchasers. As per the agreements for sale entered into with them and would be given to the party of First Part after 15 days of each month on the collection amount during the period of 15 days. However, it is also provided in the said agreement itself that in case any part of consideration is not handed over, then the same would be handed over along with interest before execution of any agreement to sell to the prospective buyers or flat or tenement owners. This implies that the amount as and when it is collected by the developer i.e. Second Party has to be handed over in proposition to the assessee but it is the nature of amount received by the assessee, which has to be determined in the present facts of the case. The said amount received by the assessee is an advance receipt because the right to collect the said amount would crystallize on the day when the tenants or portion of land is sold by the developer to the prospective buyers. Undoubtedly, the assessee has received advance amount equivalent to his share in the year under consideration but we cannot lose sight of the events that it is an advance. It cannot be said to be the sale consideration of the portions sold by the assessee. It is not case where the assessee has sold developed plot of land. The agreement between the parties is to develop the project and sell tenements / flats to the prospective buyers. Reading the terms of agreement, it is clear that the terms have been agreed between the parties for developing the said plot of land and it is eventually sale to different buyers. In order to safeguard its interest, the assessee as owner of the plot of land had agreed to receive consideration in advance i.e. at the time when the amount is received in part but in advance by the developer. But the said

amount received by the developer cannot crystallize the transaction of sale of different flats / tenements to the prospective buyers till the project is completed. The developer M/s. J.K.R. Builders has recognized the completion and sale of developed portion in assessment year 2011-12 and has offered the income to tax in the said year. Consequently, the business profits arising to the assessee were taxable in the hands of assessee in the year when the project was completed and tenements / flats were handed over to the prospective buyers. The year under appeal is the year when the assessee received advance which does not culminate any completion of transaction and assessability of the amount as business profits in the hands of assessee. Accordingly, we hold so. The other aspect of the issue is that since the amount is not assessable to tax as his business profits in the year under consideration, the capital gains arising on conversion of capital asset into stock-in-trade is also not to be taxed in the hands of assessee in the year under consideration but in the year in which the business profits are to be taxed. The assessee has offered the said income in assessment year 2011-12 as offered by the developer in assessment year 2011-12. The Revenue has opposed the said by pointing out that the developer had followed the project completion method, which is one of the method for recognizing the revenue. However, the said method which has been followed by the developer is one of recognizing accrual of income in the hands of builder. Accordingly, we find no merit in the stand of Revenue in this regard. Accordingly, we hold so.

21. We have already in the paras hereinabove held that the capital gains has to be worked out on the basis of fair market value of the property as on the date of conversion and not on the basis of market value of the property. Accordingly, grounds of appeal No.1 to 3 raised by the assessee are allowed. The grounds of

appeal No.4 and 5 raised by the assessee being not pressed, are dismissed as not pressed. The issues raised by the Revenue vide its grounds of appeal are thus, dismissed.

22. In the result, appeal of assessee is partly allowed and appeal of Revenue is dismissed.

Order pronounced on this 25<sup>th</sup> day of May, 2018.

Sd/-  
(ANIL CHATURVEDI)  
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-  
(SUSHMA CHOWLA)  
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 25<sup>th</sup> May, 2018.

GCVSR

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-II, Pune;
4. The CIT-II, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune