IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'B', HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

S.No.	ITA No.	AY	Appellant	Respondent
1	1583/H/17	2010-11	T. Prabhakar Rao (HUF), Sec'bad. PAN – AAAHT 5253 N	Income-tax Officer, Ward – 10(5), Hyd.
2	1584/H/17	-do-	T. Ramesh (HUF), Sec'bad PAN – AAAHT3794 G	-do-
3	1585/H/17	-do-	T. Narayana Rao (HUF), Sec'bad PAN – AAAHT 3563 R	-do-
4	1586/H/17	-do-	T. Narsimha Rao (HUF), Sec'bad PAN – AACHT 9711 M	-do-
5	1587/H/17	-do-	T. Ashok Kumar (HUF), Sec'bad PAN – AACHT 9712 J	-do-
6	1588/H/17	-do-	T. Kashinath (HUF), Sec'bad PAN – AABHT 8867 P	-do-
7	1589/H/17	-do-	T. Jaya Prakash (HUF), Sec'bad PAN – AACHT 8427 L	-do-
8	1590/H/17	-do-	T. Nagraj (HUF), Sec'bad PAN – AACHT 2363 R	-do-
9	1591/H/17	-do-	T. Balakrishna (HUF), Sec'bad PAN – AACHT 2362 Q	-do-
10	1592/H/17	-do-	T. Rajeswar Rao (HUF), Sec'bad PAN – AAAHT 9214R	-do-

Assessee by: Shri A.V. Raghuram
Revenue by: Smt. M. Narmada

Date of hearing: 16/05/2018
Date of pronouncement: 25/05/2018

O R D E R

PER BENCH:

These appeals are filed by the Assessees, who are family members, against orders of CIT(A) - 6, Hyderabad, all dated, 27/06/2016. As issue is identical in all these appeals,

they were clubbed and heard together, therefore, a common order is passed for the sake of convenience.

2. Briefly the facts as taken from T. Balakrishna (HUF) in ITA No. 1591/Hyd/2017 are, the assessee along with other family members had entered into an agreement with M/s Saptagiri Construction for development of the property bearing No. 9-1-219/232, St. Mary's Road, Secunderabad and for construction of a multi-storeyed commercial complex consisting of shops, showrooms, offices, parking places and other commercial units etc., vide 'Agreement for Development-cum-GPA' that was got registered vide document No. 40/2000 dated 10/01/2000.

2.1 As per the above agreement cum GPA it was agreed that the developer would bear all the expenses including construction and other costs that may arise from time to time. It was agreed that after completion of the said construction the land lords would get 45% of the built-up area, as earmarked in the sanctioned plan, free of cost in lieu of utilisation of the land owned by landlord. The Developer would retain the remaining 55% of the built-up area. As per the terms and conditions of the Agreement for Development-cum-GPA and subsequent Supplementary Agreement dated 17/01/2000 and other oral settlements the landlords were supposed to receive the constructed area of their share in the financial year 2009-10 relevant to the A.Y. 2010-11. Though the original agreement had been entered into on 10/01/2000 and token amounts of advances was received as per clause-30(a) to (e) of the Agreement, the Developer was to get the land vacated from the occupants like residential portions, part of petrol pump etc. and if necessary the developer was to provide alternative accommodation elsewhere to the occupants for

getting possession of the land for carrying on development activity on the said land. The developer therefore did not immediately take possession of the said land and had commenced the same after getting the land vacated in the year 2003. According to the Assessing Officer, as agreed, the developer completed the construction and was ready to handover the completed 45% share of the landlord in the financial 2009-10 which was seen from the developer's letter dated 22/12/2009 addressed to the land lords (assessee) that mentioned settlement amounts to be paid and stated that the construction of the portion allotted to landlords was complete and requested the landlords to take possession of the completed share (i.e.45%) of the built-up area. Thus, according to the Assessing Officer, though there was an agreement in the year 2000, the construction work was completed in F. Y 2009 - 10 and therefore capital gains arising, if any, in the hands of the landlords were assessable to tax only in the AY 2010-11.

2.2 In view of the above observations, the AO issued a notice u/s. 148 to the assessee and later a letter was issued, asking the assessee to show cause as to why the Capital Gains arising on account of transfer of property in question, should not be taxed in view of the provision of Section 5OC of the I.T. Act, 1961. In response to the said notice, the assessee submitted its objections, which are as under:

> *(I) A combined reading of the charging section 45 and section 2(47) showed that Capital Gains in its case would arise either in the previous year 1999-2000 when development agreement was entered into or in the previous year 2003-04, when all the tenants were vacated and construction was started and that it could not arise in the previous year 2009 -10 pertaining to the A.Y. 2010-11 when the builder was ready to hand over possession of the built -up area.*

(II) The charging section mandated some positive action i.e. transfer on part of the Transferor (owner of the property) and not on the part of the Transferee (Builder) Reliance was placed on the decision of Bombay High Court in the case of Chaturbhuj Dwarkdas Kapadia. (260 ITR 491).

(III) That a notice was issued u/s. 133 (6) dtd.16/08/2013 for the A.Y. 2007-08 in which the Assessing Officer had observed that though the development agreement was entered into in the year 2000, the effective transfer of Capital asset was made in the year 2006 And hence, the assessee was liable for capital gains in that year. Thereafter, on the same issue, notice u/s. 147/148 was issued for the assessment year under consideration. Mere readiness of the builder to hand over built up area to the Property owner would not amount to transfer by the owner of the property.

(IV) The property owners till date had not taken possession of the built up area as the builder has not fulfilled his responsibilities/terms as per the Development Agreement dated 10/01/2000 viz. the builder had not constructed the building as per Municipal sanction; the builder had not obtained completion certificate nor occupancy certificate from the concerned authorities; the portion falling to the property owner was isolated and did not have access to corridor/lifts etc. The matter was settled in Arbitration and final award was passed on the 15/10/2016.

(V) Plain reading of the Final award passed by the Sole-Arbitrator made it crystal clear that the possession had not been handed over to the Land owners as on that date. Hence, no capital gains had accrued and there was no Capital gains tax liability.

2.3 The AO did not find the reply of the assessee to be acceptable. According to him, in the final award, it was mentioned that though the construction was not in accordance with the terms and conditions of the Development agreement, the developer was ready to handover the possession on the said date as intimated by it in its letter dated 22/12/2009. Since the builder was ready to handover the said construction and the construction work was completed in the F.Y. 2009-10

and was ready to be taken possession of by the land lord, capital gains arising if any, in the hands of the landlords were assessable to tax only in the assessment year 2010-11. According to the Assessing Officer, alterations/additions/ deletions if any, in keeping with the development agreement to the existing completed construction were subject matters of appeal etc. and were not relevant for determining the capital gains.

2.4 The Assessing Officer observed that the proposed construction consisted of 108,000 sq. ft. which the builder and the land lord had agreed to share in the ratio of 55:45. The land lords belonged to two families Viz. Telukunta and Dandoo, each having equal share of the land transferred. Hence, out of the total built-up area, both Telukunta and Dandoo families got 50% share each i.e. 50% of 48,600 sq. ft. which came to 24,300 sq. ft. each. The assessee, a member of Telukunta group, owned 4.16% of the land lords' portion. In view of the same, sale consideration attributable to its share was proportionately worked out by adopting the value of the completed construction as per the SRO rates. Taking the cost per square feet at Rs.2,100/- as per SRO in the year 2009, the Assessing Officer recalculated the cost of constructed area at Rs.5,10,30,000/- (Rs.24,300 x 2100). Alternatively, he also took the consideration value of the land foregone i.e. 55% of 4534 sq. yards i.e. 2493.7 sq. yards at Rs.11,96,97,600/-by taking the SRO value of the land as on 2009 at Rs. 48,000 per sq. yard. Telukunta's family share being 50%, the consideration to be considered in their hands was taken at Rs.5,98,48,800/-. As the amount of Rs.5.98 crores was higher than cost of construction of Rs. 5.10 crore, the Assessing Officer calculated the Long Term Capital Gains by adopting Rs.5.98 crore as full value of consideration. After deducting

indexed cost of acquisition of Rs.47,28,055/- and cost of the structure in the year 2000 of Rs. 12,00,000/-

as given by the assessee (Telukunta's share 50% of 12 lakhs : Rs. 6,00,000/-) which after indexation came to Rs.9,74,808/-, long term capital gains were taken at Rs.5,41,45,937/-. As the assessee's share was 4.16%, long term capital gains falling to its share were computed at Rs.22,52,470/-. The assessee had filed Rs.1,14,025/- return of income. After allowing the basic exemption, the total income was assessed at Rs. 22,06,495/-.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

4. The CIT(A) upheld the validity of reopening of assessment made by the AO u/s 147 of the Act as well as upheld the computation of long term capital gains done by the AO. As regards the contention of the assessee that the fair market value of the superstructure as on 01/04/1981 should have been adopted and indexed, was accepted by the CIT(A) and directed the AO to take 1981 as base year and recalculate the indexed cost of acquisition and recompute the long term capital gains as the AO adopted the value of superstructure at Rs. 12 lakhs but allowed indexation with effect from FY 2000-2001. However, he has not disputed the claim that the superstructure existed since 1981.

5. Aggrieved by the order of the CIT(A), the assessee is in appeal before us raising the following grounds, which are common in all the appeals under consideration:

> *1. On the facts and in the circumstances of the case, the order of the Id. Commissioner of Income Tax (Appeals)-6, Hyderabad, dismissing the appeal of the Appellant is perverse, illegal and unsustainable on facts and in law.*

2. The Commissioner (Appeals) erred in sustaining the reopening of assessment under section 148 of the Income Tax Act. The Commissioner (Appeals) failed to appreciate that as per the settled position of law, there was no escapement of income to tax in the previous year relevant to asst. year under consideration and therefore the reopening is bad in law.

3. Without prejudice to above, The Commissioner (Appeals) erred in sustaining the action of the Assessing Officer in bringing to tax the alleged capital gains in the asst. year under consideration.

4. Without prejudice to above grounds, the Commissioner (Appeals) erred in upholding the action of the Assessing Officer in adopting the cost of land surrendered for development at Rs.5.98 crores. The Commissioner (Appeals) ought to have appreciated that what the Appellant got on surrender of land is the super structure, which costed the builder Rs. 1.93 crores, and therefore the same ought to have been adopted.

For these and other grounds that may be urged at the time of hearing, it is prayed that the Hon'ble Tribunal may be pleased to allow the appeal."

6. The ld. AR of the assessee submitted that the AO has issued notice u/s 148 of the Act based only on the letter of the builder dated 2009 and taxed the capital gains based on the provisions of section 50C of the Act by observing that since the builder was ready to handover the possession and the construction was completed and was ready for taking possession by the landlords, the capital gains is to be taxed in the AY 2010-11. Ld. AR submitted that to attract capital gains, there should be transfer and mere readiness of the builder to handover built up area to the property owner would not amount to transfer by the owner of the property. Further, he submitted that capital gains arises in the case of development agreement in the year of execution of the development agreement and not in the year of handing over possession of the property as per subsection (1) of section 45

which is the charging section read with section 2(47(v) of the Act.

6.1 Ld. AR submitted that various judicial rulings support the above view. Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (2003) (260 ITR 491), Jasbir Singh Sarkaria (2007) 294 ITR 196 (AAR), Potla Nageshwar Rao Vs. DCIT (2014) 365 ITR 249 (AP). This contention was already accepted by the department as mentioned above, wherein the proceedings were dropped against the notices issued by the intelligence wing and under 133(6) of the Act based on the same facts. Hence, there is no transfer in AY 2010-11.

6.2 He submitted that re-opening the assessment again on the same facts by another AO amounts to change of opinion and is bad in law. There are various judicial pronouncements which state that a mere change of opinion cannot be a basis for issuing notice under section 148 of the Act. Vijay Power Generators Ltd. v. ACIT (Delhi)(Trib.), Jagdishbhai Govindlal Patel v. ITO (2015) 371 ITR 419/ 232 Taxman 334 (Guj) (HC) The AO has just ignored the above contention and has not addressed the above issue at all.

6.3 Referring to the above submissions, ld. AR submitted that the notice u/s.148 of the Act is bad in law and the AO has failed to bring sufficient material on record to show that transfer has taken place during the AY 2010-11 and, therefore, requested the Bench to quash the notice u/s.148 of the Act and pass the order on merits of the case.

6.4 With respect to the calculation of capital gains, the ld. AR submitted that the sale consideration adopted by the AO for the calculation of capital gain is the stamp duty value of

the land or stamp duty value of constructed portion whichever is higher. According to ld. AR, the sale consideration should be the cost of construction of the structure and not the stamp duty value of the land. The same has been held in the case of ITO Vs. N.S.Nagraj ITA No.676/Bang/2011. The cost of construction of the semi-finished building is Rs.4,30,00,000/- as per the sale deed executed by the builder on 27-08-2008. Out of this 45% i.e. Rs.1,93,50,000/-. The assessee's family share is half of this i.e. Rs.96,75,000/-. The AO has to adopt this value as full value of consideration instead of stamp duty value of land.

6.5 Ld. AR submitted that there is also a mistake apparent from records with respect to the cost of structure i.e. the indexation has been done from 2009 onwards instead of 1981. If done from 1981 the value would be Rs. 6,00,000 (Rs.12,00,000/2)*632/100 = 37,92,000/-. Instead, the AO has taken the indexed value as Rs.9,75,808/-.

7. On the other hand, ld. DR relied on the orders of revenue authorities.

8. Considered the rival submissions and perused the material on record. We notice that the assessment was reopened by issue of notice u/s 148 on 29/03/2016 and the reason for reopening was submitted by AO vide letter dated 20/06/2016 (we notice that the assessee letter reference was mentioned as 18/04/2014, whereas the actual letter reference was 18/04/2016), there is a typographical mistake committed by AO). The reasons recorded by AO to reopen the assessment was as under:

> *"On verification of the letter of the developer M/s Saptagiri Constructions letter dt: 22.12.2009 it is noticed*

> *that the builder was ready to handover the possession of construction space to the land lords in the FY 2009-10 relevant to the AY 2010-11. Therefore there was simultaneous transfer of possession of 55% of land by the assessee to the builder and possession of 45% of built-up are by the builder to the assessee in FY 2009-10 in terms of section 2(47) of the Income Tax Act, 1961 read with section 53A of the Transfer of property Act. On verification, it is noticed that the assessee has not filed his ROI for the A. Y 2009-10. In the view of the above, the income under the head Capital Gains chargeable to tax on account of transfer of the said land has escaped assessment within the meaning of Sec.147 of the Income Tax Act, 1961".*

It is clear that the main reason for reopening/initiating the proceedings are the letter of the builder, in which, it is stated that the buildings are ready for occupation as per the Joint Development Agreement (JDA). It was also brought to the notice in the initial state itself that the building constructed by the developer are not as per the norms agreed and subsequently subject to litigation. The final order of the Arbitral award was also submitted before the AO. It clearly shows that the building constructed by the developer is not as per approval and the same was not accepted by the assessee nor possession was taken.

8.1 Before us, the question raised is, in the case of 'JDA" transaction, at what point of time, capital gain arises. It is settled law that in the year in which the possession of the property is passed on to the developer is the year in which the provision of capital gains get attracted. In the case of Potla Nageswara Rao (supra) the Hon'ble AP High Court held as under:

> *"The element of factual possession and agreement are contemplated as transfer within the meaning of the aforesaid section. When the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the assessment year when the agreement*

was entered into and possession was given. Here, factually it was found that both the aforesaid aspects took place in the previous year relevant to the assessment year 2003-04."

From the above decision, when the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the AY when the agreement was entered into and possession was given. Therefore, in the given case, the assessee has entered into 'JDA' in the year 10/01/2000 and possession was handed over for development. But due to occupation of the property by the tenants, the developer was able to vacate the tenents only in the year 2003. Hence, it can be construed that the actual vacant possession was handed over to the developer only in 2003. Therefore, the actual transfer took place in the year 2003. The provisions of capital gains are attracted in the year 2003. Hence, the stand of the AO to charge the capital gains in the year 2010-11 is not proper. Secondly, the reason for bringing to tax in the year 2010-11 was the letter of the developer to announce that the building is ready for occupation without complying to the 'JDA' and approval norms. Even though the same was brought to the notice of the AO, according to us, the reason for reopening the assessment is on faulty ground.

8.2 In our considered view, the income chargeable to tax falls only in the AY 2003-04 and not in AY 2010-11. Therefore, the assessment completed u/s 144 r.w.s. 147 is held to be not in accordance with law, hence, the same is quashed.

8.3 Since, the assessment itself is quashed, the other grounds raised by the assessee are not required to be adjudicated at this stage. Therefore, the ground raised by the assessee in this regard is allowed.

8.4 As the facts and grounds raised in all other appeals are identical to that of ITA No. 1591/Hyd/2017 in the case of T. Balakrishna (HUF), following the conclusions drawn therein we allow the grounds raised in these appeals as well.

9. In the result, all the appeals under consideration, are allowed.

Pronounced in the open court on 25th May, 2018.

Sd/-	Sd/-
(P. MADHAVI DEVI)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 25th May, 2018
kv

Copy forwarded to:

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8	T. Nagraj (HUF), Sec'bad	
9	T. Balakrishna (HUF), Sec'bad	
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11	ITO, Ward – 10(5), IT Towers, AC Guards, Hyderabad	
12	CIT(A) - 6, Hyderabad	
13	Pr. CIT - 6, Hyderabad	
14	The DR, ITAT, Hyderabad	
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S.No.	Description	Date	Intls	
1.	Draft dictated on			Sr.P.S./P.S
2.	Draft placed before author			Sr.P.S/PS
3	Draft proposed & placed before the second Member			JM/AM
4	Draft discussed/approved by second Member			JM/AM
5	Approved Draft comes to the Sr.P.S./PS			Sr.P.S./P.S
6.	Kept for pronouncement on			Sr. P.S./P.S.
7.	File sent to the Bench Clerk			Sr.P.S./P.S
8	Date on which file goes to the Head Clerk			
9	Date of Dispatch of order			