

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 211/VIZ/2017
(Asst. Year : 2013-14)**

ITO, Ward-2(2),
Guntur.

vs.

Alapati Rajendra Prasad,
D.No. 4-5-29/85, 4th Line,
Vidya Nagar, Guntur.

(Appellant)

PAN No. AETPA 0460 M
(Respondent)

Assessee by : Shri G.V.N. Hari – Advocate.
Department By : Shri D.K. Sonawal – CIT DR

Date of hearing : 04/04/2019.
Date of pronouncement : 23/04/2019.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-1, Guntur, dated 30/12/2016 for the Assessment Year 2013-14.

2. Facts of the case, in brief, are that assessee is an individual derived income from salary, house property, share income from partnership firms, other sources besides agricultural income, filed his return of income declaring total income of Rs. 4,77,840/- and agricultural income of Rs. 1,50,000/-. The case of the assessee

was selected for scrutiny under CASS and after following due process, assessment was completed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'Act') dated 31/03/2016. The assessee had entered into an oral agreement with the land owners of the property consisting of 5375 sq.yds. of land, MTC tiled, ACC structures situated at Kothapet, Guntur. The purchase consideration was agreed upon at Rs. 5,22,50,000/-, out of which, the assessee has paid an amount of Rs. 4,62,50,000/- during the F.Y. 2005-06 and the remaining balance amount of Rs.60,00,000/- was paid during the F.Y. 2009-10. Even after paying the entire consideration, the owners of the land were not coming forward for registration of the property in favour of the assessee as the land price has been steeply increased subsequent to the agreement. The assessee filed a suit in O.S.No.308/2011 on 11/11/2011 for specific performance of oral agreement of sale. The dispute was settled by the Lok Adalat, Guntur vide award passed on 02/07/2012 wherein assessee has been directed to pay a further sum of Rs. 15,00,000/- and also bear expenses relating to the execution of registration of sale deed. The land owners were directed to register the property in favour of the assessee either by execution of sale deed or sale-cum-GPA. Accordingly, the assessee got executed a sale-cum-GPA on 12/07/2012 for the

entire property for a consideration of Rs. 5,37,50,000/-. Immediately thereafter, the assessee executed the sale deed on 16/07/2012 and sold 3480 sq.yds., out of total property admeasuring 5375 sq.yds. for a consideration of Rs.5,22,00,000/-. The guide line value for levy of stamp duty was Rs.7,72,08,000/- as on the date of sale. During the course of assessment proceedings, the assessee has offered a sum of Rs. 65,33,033/- to tax towards long term capital gain on sale of 3480 sq.yds. For this purpose, the assessee has adopted sale consideration of Rs.7,72,08,000/- in terms of section 50C of the Act. In the assessment order, the Assessing Officer has noted that the assessee has not declared any capital gains in the return of income filed for the year under consideration. When this fact was put to the AR of the assessee at the time of assessment proceedings, the assessee's counsel has filed a detailed reply dated 28/03/2016 which is as follows:-

"The assessee has purchased 5375 sq. yards site along with tiled and ACC structures for Rs. 5,37,50,000/- from Boorugu Surya Prakasa Rao and others in the year 2005-06 by an oral agreement and paid an amount of Rs.4,62,50,000/- on 02.11.2005 out of total consideration of Rs.5,37,50,000/-. Because of disputes with the vendors of the property, they have not come forward to register the property. The negotiations with the vendors are going on and the assessee has paid an amount of Rs.60,00,000/- on 06.05.2009 to the vendors. Since the issue was not settled even after negotiations for 6 years, the assessee has filed Civil Suit in

the court on 14.11.2011 for specific performance. Before the suit comes for hearing, the vendors and the assessee negotiated a settlement and case was referred to Lok Adalat and filed compromise petition on 02.07.2012 wherein vendors agreed to register the property for Rs. 5,37,50,000/- Lok Adalat passed an award for sale of the property for Rs. 5,37,50,000/- by the vendors. Obeying the award of the Lok Adalat the vendors registered the property to the assessee on 12.07.2012 for Rs. 5,37,50,000/- through agreement of sale cum General Power of Attorney.

Expecting favourable judgment from the court, the assessee has spent an amount of Rs.1,25,00,000/- towards development of the above property and vacation of the property by the occupants during the financial' year 2012-13. Out of the above property the assessee has sold 3480sq. yards site along with tiled and ACC structures there in for Rs.5,22,00,000/ on 16-072012. But SRO value as on the date of registration of sale deed is Rs. 7,72,08,000/-. Since SRO value is more than actual consideration, SRO value is to be adopted for calculation of capital gains as per provisions of Sec. 50C of the IT Act, 1961. The proportionate cost of property sold is Rs.3,98,11,152/- and development expenses are Rs.80,93,023/-. The balance property of 1895 sq.yards site along with tiled structures herein was registered in the name of the assessee as regular sale deed on 16-07-2012 by the assessee himself since the agreement of sale-cum-general power of attorney is in his own name.

Copies of the purchase and sale deeds are already submitted.

The property is purchased in the year 2005-06. But due to some dispute the property was registered on 12-07-2012 as per award of the Lok Adalat. Hence, gains on sale of property of 3480s q.yards site along with tiled and ACC structures on 16-07-2012 shall be treated as long term capital gains. The assessee by over sight has not offered the long term capital gains on sale of property of 3480 sq.yards site along with tiled and ACC structures therein in the return of income filed for the Asst. year 2013-14 on 15-04-2014. We are enclosing herewith detailed working sheet of calculation of long term capital gains on property sold applying provisions of Sec. 60C of the IT Act, 1961. Long Term Capital Gains are arrived at Rs. 65,33,033/-. Hence, we are offering long term capital gains of Rs. 65,33,033/- as income and agreeing for addition this income to the total income returned while completing the scrutiny assessment u/s.143(3)."

3. It was submitted before the Assessing Officer that for the purpose of calculation of capital gains, the oral agreement entered by the assessee for the F.Y. 2005-06 has to be taken into consideration not the date of purchase of the property. The Assessing Officer has considered the argument of the assessee and noted that the assessee has not paid the entire sale consideration and therefore, it is a part performance of contract hence, the case of the assessee cannot be considered for long term capital gains. He further pointed out that the possession of the property is with the vendors and the same has been handed over to the assessee only after award is passed by the Lok Adalat. Therefore, for the purpose of indexed cost of acquisition, the date of execution of the sale deed should be considered and not on the date of oral agreement entered into by the assessee. He further observed that the assessee has taken possession after payment of Rs. 15.00 lakhs on 12/07/2012. Therefore, the property in the possession of the assessee is only for 3 to 4 days and held that it is only a short term capital gain and cannot be considered as a long term capital gain.

4. Aggrieved, assessee carried the matter in appeal before the Id.CIT(A). Before the Id. CIT(A) he has submitted in detail that the assessee entered into an oral agreement and paid an amount

of Rs. 4,62,50,000/- which is more than 80% of the value of the property and the payment made is through banking channel in the F.Y. 2005-06 therefore, the assessee's case has to be considered as a long term capital gain. He relied on various case laws before the Id. CIT(A). The Id. CIT(A) by considering the explanation given by the assessee, reversed the order passed by the Assessing Officer and held that the assessee's case has to be considered as a long term capital gain.

5. On being aggrieved, assessee carried the matter in appeal before this Tribunal.

6. Ld. Departmental Representative strongly supported the order passed by the Assessing Officer and placed reliance on the ground of appeal.

7. On the other hand, Id. counsel for the assessee has submitted that the assessee had entered into an oral agreement in the F.Y. 2005-06 and substantial amount was paid which is more than 80% and therefore, the assessee is having a right on the property, therefore his case has to be considered as a long term capital gain and not as a short term capital gain. He also submitted that when the vendors are not ready to execute the sale deed, he filed a suit in O.S.No. 308/2011 on 11/11/2011 for specific performance of oral agreement of sale and the same is

referred to Lok Adalat, Guntur wherein award was passed. Subsequently, on 02/07/2012 as per the direction of the Court, the assessee paid an amount of Rs. 15.00 lakhs and the vendors have executed the sale-cum-GPA. Under these facts and circumstances of the case, the case of the assessee has to be considered as a long term capital gain. He also relied on the following case laws:-

- i) Amarjeet Thapar Vs. ITO & Ors. [(2019) 173 DTR (Bom.) 305]
- ii) Ms. Nita A. Pater Vs. ITO [(2011) 7 ITR 659]
- iii) Praveen Gupta Vs. ACIT [(2011) 137 TTJ 307]
- iv) Girish C. Bathija Vs. ITO [(2008) 113 TTJ 521]
- v) CIT Vs. Vijay Flexible Containers [(1990) 186 ITR 693]
- vi) CIT Vs. Tata Services Ltd. [(1980) 122 ITR 594]

8. We have heard both the sides, perused the material available on record and orders of the authorities below.

9. The assessee is an individual entered into an oral agreement to purchase a site consisting of 5375 sq.yds. along with MTC tiled and ACC structures situated at Kothapet, Guntur. The purchase price was agreed upon by both the parties for Rs. 5,22,50,000/-, out of which an amount of Rs. 4,62,50,000/- has paid in cash by the assessee (paper book at page No. 21 & 22). The remaining balance amount of Rs. 60,00,000/- was paid during the F.Y. 2009-10. The case of the assessee is that vendors after receiving the entire sale consideration refused to execute sale deed in

favour of the assessee, by which assessee had filed a suit for specific performance in the District Court Guntur in O.S.No. 308/2011 on 11/11/2011, the same was referred to Lok Adalat and renumbered as 1309/2012. The Lok Adalat passed an award on 02/07/2012 by considering the agreement of both the parties and directed the assessee to pay an amount of Rs. 15.00 lakhs to one of the vendors-Sri Boorugu Ramesh Babu and also directed all the vendors to execute sale deed or sale-cum-GPA in favour of the assessee or his nominees. As per the directions of the Lok Adalat, the vendors have executed sale-cum-GPA on 12/07/2012 in favour of the assessee. Thereafter, assessee executed the sale deed on 16/07/2012 for 3480 sq.yds. out of the total property admeasuring 5375 sq.yds. for a consideration of Rs. 5,22,50,000/- The guidelines value of the property is Rs. 7,72,08,000/- on the date of sale, for which assessee offered a sum of Rs. 65,33,033/- for taxation towards long term capital gain by adopting sale consideration of Rs. 7,72,08,000/- in terms of section 50C of the Act. The issue before the Assessing Officer for consideration was whether gain in the hands of the assessee by virtue of sale proceeds received by the assessee on account of sale of property dated 12/07/2012 has to be considered as long term capital gain or short term capital gain. According to the Assessing Officer, the

amount received by the assessee has to be assessed as capital gain under the head 'short term capital gain' for the reason that the assessee has paid only Rs. 5,22,50,000/- out of Rs.5,37,50,000/-, therefore it is only a part performance of contract on the part of the assessee. He has not paid full consideration. According to the Assessing Officer, the assessee has not paid an amount of Rs. 15.00 lakhs to the vendors-defendant No.8 Sri Boorugu Ramesh Babu and it was paid only after directions given by the Lok Adalat. We find that the assessee has already paid more than 80% of sale consideration in the F.Y. 2005-06 and subsequently, he paid the remaining balance amount and therefore the assessee has paid full consideration. The assessee is already having interest on the property therefore the amount paid as per the directions of the Lok Adalat cannot be considered that the assessee only performed part performance. On that count alone, it cannot be treated that the sale consideration received by the assessee is a short term capital gain. The Assessing Officer further pointed out that the assessee has not taken the possession of the property and received only on 12/07/2012. The case of the assessee is that subsequent to the payment of the entire amount, the assessee has further spent Rs. 1,25,00,000/- towards development and therefore submitted that

the property is in the possession of the assessee though no registration has taken place. The Assessing Officer came to a conclusion that the property is in the hands of the assessee subsequent to the order passed by the Lok Adalat and execution of sale-cum-GPA dated 12/07/2012, therefore, the sale proceeds received by the assessee out of the sale of land of 3480 sq.yds. has to be assessed as short term capital gain. We find that when the assessee paid substantial amount in the F.Y. 2005-06 and the assessee is having interest on the property, in our opinion, the Assessing Officer is not justified in treating the sale proceeds received by the assessee out of the sale of land dated 12/07/2012 as a short term capital gain. In this case, the assessee has paid the entire sale consideration and the vendors are not ready to execute, then he filed a suit for specific performance and the matter has been referred to Lok Adalat. Before the Lok Adalat, the vendors and vendee agreed for the terms and conditions which were entered in F.Y. 2005-06 and accordingly sale-cum-GPA was executed, therefore the transaction took place in the F.Y. 2005-06 and not on the date of execution of sale-cum-GPA executed. In this context, the Hon'ble Bombay High Court in the case of *Amarjeet Thapar* (supra) has observed that the assessee had entered into an agreement for purchase of the property in the

year 1992. The sale deed could not be executed only because the appropriate authority refused to grant no objection certification and instead, ordered compulsory acquisition thereof. This order was declared as illegal and *ab initio* void by the High Court, the sale deed was ordered to be executed in favour of the assessee-petitioner, there is no reason for not to accept the assessee's contention that the execution of the sale deed by virtue of the judgment of the High Court would relate back to the original agreement to sale. The petitioner was thus entitled to claim the benefit of cost indexation from the said date. The entire basis of the department in the reasons recorded in order to dispute the assessee's computation of the capital gain, therefore is rendered invalid. The above decision of the Hon'ble Bombay High Court squarely applies to the facts of the present case for the reason that when the assessee has already paid more than 80% of the sale consideration, it cannot be find fault with the assessee as the assessee has performed his duty by paying almost all the sale consideration. It is the duty of the vendors to have executed the sale deed. Under these facts and circumstances of the case, we are of the opinion that the judgment of the Hon'ble Bombay High Court squarely applies to the facts of the present case.

10. In the case of *Ms. Nita A. Patel* (supra), the ITAT, Mumbai 'I' Bench has observed that the property was purchased by the assessee by way of agreement on 27/12/1990 and assessee obtained certificate u/s. 269UL(3) as early as 13/02/1991. The Assessing Officer held that since the assessee got possession of the flat after paying Rs. 18.00 lakhs to the tenant only on 06/01/1992, she held the property from that date and accordingly calculated the indexed cost of acquisition from that date not justified. Word 'held' used in Explanation to section 48 refers to ownership rights only and not physical ownership or physical possession of the property. The assessee was holding the rights on the property from 27/12/1990 and accordingly the indexation has to be allowed from that date.

11. In the case of *Praveen Gupta* (supra), the ITAT, Delhi 'F' Bench has observed that the assessee had entered into an agreement to acquire a flat in 1995 and the assessee had identified a particular property which he intended to buy and the builder was also bound to provide that property by accepting certain advance payment and making agreement for balance payment. The assessee had acquired a right to get a particular flat from the builder and that right itself is a capital asset. The word 'held' used in section 2(14) as well as in clause (iii) of

Explanation to section 48 clearly depicts that the assessee must have some right in the capital asset which is subject to transfer. The assessee can be said to have held the flat when he made the payment to the builder and received the allotment letter. Therefore, benefit of indexation cost of acquisition of the flat has to be granted to the assessee from 1995 and not from the date of execution of conveyance deed in 2001. In the present case, the assessee has already paid more than 80% of the amount in the F.Y. 2005-06, therefore the Assessing Officer in not granting the indexation cost from that year, in our opinion, not justified.

12. In *Girish C. Bathija* (supra), the ITAT, Mumbai 'D' Bench has observed that the assessee had entered into agreement for the purpose of purchase of flat on 15/02/1992 and the same was sold on 06/10/1997. The builder had delivered the possession of the flat on 16/11/1997. Thus, on the date of sale, the nature of asset held by the assessee was only certain rights in the flat and the asset that was transferred is the right to acquire the flat. The date of acquisition thereof is the date of entering into agreement for purchase i.e. 15/02/1992. Therefore, capital gain arising on sale of said rights is assessable as long term capital gain. The facts are squarely applies to the present case.

13. In *Vijay Flexible Containers* (supra), the Hon'ble Bombay High Court has considered that right to obtain a conveyance of immovable property falls within the express 'property of any kind' uses in section 2(14), it is not mere right to sue. In the present case, the assessee had entered into an agreement for purchase of immovable property and had paid a certain sum as earnest money. Later on, suit for specific performance of the agreement was filed and consent decree was passed in favour of the assessee for a certain sum. The assessee's right to have the immovable property conveyed to him was a property. Having given up the right to claim specific performance by conveyance to him of the immovable property was a relinquishment of capital asset. There was, therefore a transfer of capital asset. Payment of earnest money under the agreement for sale was the cost of acquisition of capital asset. The ITO was therefore justified in bringing to tax the amount received by assessee under the consent decree.

14. From the above judgments, it is very clear that when the assessee is having a right over the property it is not a mere right to sue, a right of conveyance also. In the present case, the assessee is having interest or right conveyance in the matter. When the assessee has paid substantial amount which is more

than 80% in the F.Y. 2005-06, therefore, the sale of land executed by the assessee has to be considered for the purpose of capital gains and indexation cost has to be granted from the date of payment of substantial amount.

15. In the case of *Tata Services Ltd.* (supra), the Hon'ble Bombay High Court has observed that the word 'property' used in section 2(14), is a word of the widest amplitude and the definition has re-emphasises this by use of the words 'of any kind'. Thus, any right which can be called property will be included in the definition of 'capital asset'. A contract for sale of land is capable of specific performance. It is also assignable. Therefore, a right to obtain conveyance of immovable property, was clearly 'property' as contemplated by section 2(14) of the Act. We therefore by considering the entire facts and circumstances of the case and also by following the aforementioned case-laws, we are of the opinion that the assessee is entitled for indexation cost for the land sold 3480 sq.yds., dated 12/07/2012 relates back to F.Y. 2005-06 and he is entitled for the sale consideration received as long term capital gain.

16. The Id. CIT(A) has considered the entire facts of the case and various case laws held that the gain in question should be assessed as a long term capital gain and allowed the appeal filed

by the assessee. For the sake of convenience, the relevant portion of the order of the Id.CIT (A) is extracted as under:-

"I have gone through the facts of the case, contents of the assessment order, written submissions of the assessee and the case laws referred and relied by the A.O and the assessee. A.O while passing the scrutiny assessment order has quantified as short term capital gains at Rs.3,33,50,370/- against the capital gains offered subsequently at Rs.65,33,033/-.

The assessee contention is that the capital gain has to be quantified as the long term capital gain but not short term capital gain on the property purchased by the assessee. The fact is that the assessee has purchased a site admeasuring about 5,375 sq. yds. along with tiled and ACC structures for Rs.5,37,50,000/- from M/s. Boorugu Surya Prakasa Rao and others in the year 2005-06 by means of verbal agreement and paid an amount of Rs.4,62,50,000/- on 02-11-2005 out of the total consideration referred to above. But because of the disputes with the vendors of the property who were reluctant to register the property in favour of the appellant, negotiation were undertaken with those Vendors and during the course of such negotiations, the appellant paid a further sum of Rs.60,00,000/- on 06-05-2009. But still the dispute did not come to an end and resultantly, the Appellant filed Civil Suit in the Court at Guntur on 14-11-2011 for Specific performance and before the above SUIT came up for hearing, both the Vendors and the appellant negotiated a settlement and thus the same was referred to Lok Adalat and they filed compromise petition on 02-07-2012 whereby the Vendors agreed to register the property for Rs.5,37,50,000/- as agreed to earlier. The Lok Adalath passed an AWARD under Sec.21 of the Legal Services Authority Act, 1987, on 2nd day of July, 2012 in case No.1309/2012 (in S.No. 308/2011 on the file of the Judge, Family Court, Guntur) and the operative part of its Award is recorded INFRA for ready reference.

"The defendants agreed to sell the schedule property of 5375 Sq. Yds. @ Rs.10,000/- per sq. yard to the Plaintiff for a total consideration of Rs.5,37,50,000/- (Rupees Five Crores Thirty Seven lakhs and fifty thousand only). The payments of Rs.5,22,50,000/- paid commencing from 18-05-2005 on wards and on other dates advanced by the Plaintiff to the Defendants is adjusted towards the total sale consideration payable by the plaintiff to the defendants. The balance amount of Rs.15,00,000/- payable to defendant No.8, Boorugu Ramesh Babu shall be paid at the time of execution of the Sale Deed or Sale-cum-GPA in favour of the plaintiff or in favour of the nominees of the plaintiff.

The defendants declare that they have executed a Memorandum on 9th day of February, 1981 agreeing to hold the plaint schedule property as tenants-in-common and each of the defendants are having a definite share since the property cannot be partitioned by metes & bounds without materially impairing its value & utility. The Defendants also declare that M/s. Boorugu Viswanatham Brothers, Banking Department was dissolved by the partners on 09-02-1981. Except the Defendants, there are no other persons holding share in the plaint schedule property". The Stamp Duty, Registration Charges and all expenses connected with the execution & registration of the sale deed, other taxes/costs in future shall be solely borne by the plaintiff ".

In consequence to the Award passed by the Lok Adalath as indicated supra, the Vendors of the property, under review, executed an Agreement of Sale-cumG.P.A. - Reg. No. 8192/2012, dt. 12-07-2012 alienating the rights over the site of 5375 sq. yds. along with tiled house of the plinth area of 5050 sq. ft. in favour of the appellant, Sri Alapati Rajendra Prasad, 5/0. Sri Sivarama Krishnaiah, Guntur for a consideration of Rs.5,37,50,000/-.

Later on, the appellant sold a part of the above property, viz., site at Kothapet-T.S. No.50, admeasuring about 3480 sq. yds. to Veeraanjaneya Infra Projects Private Limited, Guntur, represented by its Directors : Sri Katakam Krishna Rao, Bapatla for a consideration of Rs.5,22,00,000/- and the remaining part of site of 1895 sq. yds. and tiled house of the plinth area of 2890 sq. ft. was registered in the appellant's name through Registered Sale Deed bearing Reg. No.8259/2012, dt. The 16th day of July, 2012 for Rs.1,89,50,000/-.

As the Capital gain arising out of the aforesaid Sale transaction did not find place in the ROT filed by the appellant earlier for the aforesaid assessment year under review, the Ld. A.O. issued a Notice under Sec.142(1) of the Act proposing its quantification and addition. In reply the appellant filed explanatory replies dt.14-03-2016 and 28-03-2016, the substance of which is that there was verbal agreement to purchase the property cited above from Boorugu Surya Prakasarao and others in the year 2005-06 for a consideration of Rs.5,37,50,000/- that the initial payment of Rs.4,62,50,000/- was paid on 02-11-2005 and that date should be construed to be the date of Agreement; that due to the failure of the Vendor to register the property, Civil Suit was filed in the Court at Guntur on 14-11-2011 for specific performance that ultimately, Registration of the same could be effected to as per the award of Lok Adalath cited Supra; that by oversight the capital gain arising out of sale of a part of the above site admeasuring about 3480 sq. yds. along with a part of the tiled and ACC structures referred to above for Rs.5,22,00,000/- of which the SRO's value was Rs.7,72,08,000/-; was not accounted for earlier, and that with

reference to the above Sale deed, the Long Term Capital Gains would work out to Rs.65,33,033/- and that he is agreeable for making addition to the above extent towards Long Term Capital Gains for the aforesaid assessment year while completing the Regular assessment under Sec. 143(3) of the Act.

It is to pertinent to mention the following court judgments.

The Hon'ble Supreme Court of India in the case of COOPER (RC) Vs. UNION OF INDIA AIR 1970 it was held that "in its normal connotation property means the highest right a man can have to anything, being that right which one has to lands or tenements, goods which does not depend on another's courtesy.

Hon'ble Delhi High Court in the case of Jasbir Singh Sarkaria. in RE (2007) 164 TAXMAN 108 (MR - New DELHI) wherein it is held "that possession need not necessarily be sole and exclusive possession and so long as the Transferee is by virtue of the possession given, enabled to exercise general control over the property would also constitute possession.

The Hon'ble High Court of Bombay in the case of CIT Vs. Vijay Flexible Containers (1990) 186 ITR 693 it was held that "right to obtain conveyance of immovable property is a "property". Generally, under the Agreement to purchase immovable property, the buyer has the right to have the property conveyed to him and under the law; he is entitled to exercise that right not only against the vendor, but also against the transferee with notices or a gratuitous transferee. Such right could also be assigned, what is acquired under such agreement is, therefore "property" within the meaning of the Act".

Hon'ble Bombay High Court in the case of (CIT Vs. Tata Services LTD. (1980) 122 FIR 594 (Born); it was held that "The right to obtain conveyance of an immovable property was held to be a capital asset".

Hon'ble Madras High Court in the case (K.R. SRINATH Vs. ASST. CIT (2004) 268 FIR 436(Mad) it was held that "of Right to claim specific performance of an agreement was held to be a capital asset".

Hon'ble Calcutta High Court in the case CIT Vs. All India Tea and Trading Co., Ltd. (1979) 117 FIR 525 it was held that "held by the assessee in Sec. 2(14) include physical, actual, constructive and also symbolic possession of property of any kind CIT Vs. All India Tea and Trading Co. Ltd. (1979) 117 FIR 525(Cal). In the Instant case, the appellant employed a security guard in the premises and such expenses which formed part of Development expenses of Rs.1,25,00,000/- were also allowed by the Ld. A.O. to the extent of 50% thereof. It is, therefore, evident from the above that the appellant took over possession over the impugned property in his own right from the date of holding contract and payment of 1st Installment in the year 2005 and such act of the appellant of pursuing his right over the property would constitute possession within the meaning of Sec. 53A of T.P. Act read with Sec. 2(47)(v) of

the I.T. Act, 1961.

Hon'ble ITAT, Delhi Bench in the case of ITO V. Balaram Bhasim (2006) 154 Taxman (118)(Del) wherein it is held "that even if property in question had not been registered in the name of the assessee, but because of agreement, ownership rights to the extent of one-half of property vested with father of assessee and his legal heir, i.e., assessee inasmuch as he had right to possession and enjoyment of property and such rights were in the nature of capital assets for purposes of Sec45 and, therefore, consideration received by assessee for transfer of his rights in property was liable to be treated as long term capital gains".

Hon'ble ITAT, Mumbai in the case of Girish C. Bathiza Vs. ITO (2008) 113 TTJ 521 wherein it is held "that where the assessee entered into an agreement for purchasing a FLAT on 15-02-1992 of which possession was given by builder on 16.11.1997, however, prior to obtaining possession by assessee flat was sold on 06.10.1997, it was held that nature of asset which is transferred is only certain rights in a FLAT for which the date of acquisition should necessarily be the date of entering into an agreement i.e., 15.02.1992. Thus, the gain in question should be assessed as a long term capital gain.

Hon'ble High Court of Delhi in the case of Guisham Malik Vs. CIT (2014) 223 Taxman 243 held that "in terms of Sec. 2(42A), period of 36 months in respect of booking rights of an apartment with a builder has to be counted from the date of execution of agreement to sell".

Hon'ble Supreme Court in CIT Vs. Podar Cement Pvt. Ltd. (1997) 226 FIR 625 (SC) to the effect "that it is not the title, but the beneficial right, that is considered to be relevant for purposes of taxation". From the aforesaid factual and legal background of the case, it is noticed that the Agreement was proved to have been entered into by both the Appellant and the Vendors as long back as 18-05-2005 itself, when the ^{1st} installment of Purchase consideration was paid to the Vendors as evidenced by the Registered Deeds; that the appellant also established his readiness and willingness to make the remaining payment of Rs.75 lakhs and to get the regular conveyance deed executed in his favour in the year 2005-06 itself; that since then he was holding right over the impugned property; that security guard was also kept for preservation of the property, so as to avoid any encroachments; even from the F.Y. 2005-06; that going by the concept of relate back upheld by the Lok Adalat Award he is deemed to have derived Possessionary rights I ownership rights as per the mandatory provisions contained in the Transfer of Property Act read with the provisions contained in I.T. Law; that the appellant only pursued his ownership rights in the court of law as per the provisions contained in specific relief act for getting the property registered in his name but not to obtain damages and that in the aforesaid factual and legal background, it is construed that the capital gain would fall

within the ambit of Long Term Capital Gains only; but not Short Term Capital Gains as observed by the A.O. Going by the fact that various provisions laid down by law only refer to the "property held but not property owned", it is noticed that the determination of income by the A.O. under the head Short Term Capital Gains may have to be disregarded and the assessee's claim that the impugned transaction should be brought to tax under the caption "Long Term Capital Gains" is found to be genuine and acceptable.

Taking into consideration the totality of the facts, circumstances and court judgments, the date of acquisition should necessarily be the date of entering into an agreement i.e., 15.02.1992 and the gain in question should be assessed as a long term capital gain. Hence, the addition made by the A.O is deleted and the assessee's grounds of appeal are allowed.

17. So far as case-law relied on by the Department in the case of *Gulshan Malik Vs. CIT* [(2014) 223 Taxman 243] is concerned, the facts are entirely different, no application to the facts of the present case.

18. Therefore by considering the facts and circumstances of the case and by following the various case-laws referred above, we find no reason to interfere with the order passed by the Id.CIT(A). Thus, this appeal filed by the Revenue is dismissed.

19. In the result, appeal filed by the Revenue is dismissed.

Order Pronounced in open Court on this 23rd day of April, 2019.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated: 23rd April, 2019.

vr/-

Copy to:

1. *The Assessee – Alapati Rajendra Prasad, D.No. 4-5-29/85, 4th Line, Vidya Nagar, Guntur.*
2. *The Revenue – ITO, Ward-2(2), Guntur.*
3. *The Pr.CIT, Guntur.*
4. *The CIT(A)-1, Guntur.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.