IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad
(Through Video Conferencing)

Before
Shri A. Mohan Alankamony, Accountant Member
AND
Shri S.S. Godara, Judicial Member

ITA Nos.1477 & 1478/Hyd/2016		
Assessment Years: 2013-14		
The Deputy Commissioner of Income Tax, Central Circle – 2(4), Hyderabad.	Vs.	Sri Tummala Chittaiah, Hyderabad. PAN : ABTPT7370C.
(Appellant)		(Respondent)
Assessee by:	Shri Gurram Rama Chandra Rao	
Revenue by:	Sri Rajendra Kumar.	
Date of hearing:	15.02.2022	
Date of pronouncement:	24.02.2022	

O R D E R

Per S. S. Godara, J.M.

These Revenue's twin appeals for A.Y 2013-14 arise against the Commissioner of Income Tax (Appeals) – 4, Hyderabad's separate orders; dated 08.06.2018 and 11.06.2018 passed in case Nos. 0130 and 0506/2016-17/ITO, Ward-16(1)/CIT(A)-4/Hyd/18-19 involving proceedings u/s 143(3) of the of Income Tax Act, 1961 [in short, 'the Act'] respectively.

Heard both the parties. Case files perused.

2. We note during the course of hearing that the Revenue's following identical substantive grounds in the instant appeal :

> *"1. In the facts and circumstances of the case, and in law, the Ld.CIT(A) failed to appreciate that capital gains arises when the assessee enters JDA and is squarely covered by the provisions of section 2(47) rws 53A of Transfer of Property Act.*
>
> *2. In the facts and circumstances of the case, the Ld.CIT(A) erred in not following the jurisdictional HC decision in the case of Potla Nageswara Rao Vs. DCIT.*
>
> *3. In the facts and circumstances of the case, the Ld.CIT(A) erred in allowing the additional ground with regard to deduction u/s 54F, even though the conditions stipulated therein are not fulfilled."*

3. Both the learned representatives next took us to the CIT(A)'s detailed discussion deleting long term capital gains addition in issue amounting to Rs.7,80,41,738/- and Rs.4,05,42,393/-, respectively, we note that the CIT(A)'s identical detailed discussion deciding the issue in assessee's favour reads as under :

5.0 Addition on account of determining Long Term Capital Gains (LTCG) – Rs.7,80,41,738/-:

5.1 During the course of assessment proceedings, it was found and observed that in the previous year relevant to the A.Y.2013-14, the assessee has entered into a Development Agreement cum General Power of Attorney on 10-05-2012 with M/s.Ramky Estates & Farms Ltd here after known as REFL. On verification of the agreement, it was seen that the assessee has agreed to give land to an extent of Ac 2-21 Gts situated in Sy.Nos.176, 177 and 178 of Narsingi Village, Rajendranagar Mandal, Ranga Reddy District, for development vide the said agreement. Accordingly, as per sub-clause (a) of clause III of the Agreement, the assessee shown to have agreed to transfer entitlement of the undivided share to the developer or anyone nominated by the developer in development, with the right to enter into Agreement for sale of such undivided share and also the construction agreement for corresponding construed area in the building(s) to be constructed on the Scheduled Property and has granted license and permission to the Developer to enter upon and construct the project over the Schedule Property. Further, as per sub-clause (b) of clause III of the Agreement, some amounts were shown to have bee received by the assessee as

refundable in nature. Thus, as per the provisions of section 2(47)(v) of I.T.Act r.w.s. 53A of Transfer of Property Act, the above transaction is a 'transfer' and is exigible to Capital Gains, as per the AO. In this connection, the assessee has been directed to show cause why capital gains on the transfer of land should not be brought to tax for the A.Y.2013-14. In response, the assessee filed the submissions and the essence of the same run as under:

The land under development is an agricultural land, being situated at Narsingi Village and not falling within the limits of GHMC as on the date of development agreement as such not a capital asset and the same is retained as on date of assessment.

Without prejudice to the claim that land is not a capital asset.

a) *The development agreement of the type entered by the assessee do not fall in to the provisions of Sec.53A of TP Act to deem the said arrangement as transfer, within meaning of Sec.2(47) of I.T.Act.*
b) *Full value of the consideration cannot be ascertained as on the date of agreement for development to compute the capital gains.*
c) *No computation based on hypothetical value is permissible and such computation do not confirm to 'real income theory', as propounded by Supreme Court.*

In this connection the assessee relied upon the judicial decisions, relatable to each of the above arguments and drawn the conclusions as under:

a) *A mere license is not the same as possession. Therefore, no transfer can be said to have taken place on the date of allowing possession.*

b) *When section 53A of TP Act fails by not allowing possession, no gain can be taxed under section 2(45)(v).*
c) *There could be no transfer of the asset merely because an assessee has entered into a development agreement.*
d) *A license is a legal concept under Easement Act and the same can be adopted in an agreement as per the volition of parties to the contract.*
e) *The terms of the contract cannot be altered by a third party when there is a meeting of minds by the parties to the contract.*
f) *There is no transfer of the immovable property on the date of execution of the contract.*
g) *An attempt to tax will offend the theory of real income as propounded by Apex Court.*
h) *Full value of consideration cannot be same as fair market value.*
i) *Computation section fails as full value of consideration cannot be estimated and therefore, there could be no charge.*

5.1.1 Further, the assessee made alternative claim for deduction u/s.54F, stating that he is eligible for such deduction, while relying on certain judicial decisions.

5.1.2 However, the AO after examining the submissions of the assessee, had arrived at the conclusion that the Joint Development Agreement(JDA) dtd.10-05-2012, is very much in force during the year under reference and assessee has neither taken any legal action nor terminated the said agreement and lack of progress in development cannot be the ground to negate the provisions of Sec.53A of TP Act vis-à-vis Sec.2(47) of I.T.Act. Thus, the AO further observed that the terms of agreement is operational and resulted in 'transfer' and agreement being considered as valid, to fasten the capital gains liability on the assessee for the year of JDA. In this connection the AO applied

the ratio of decision of Jurisdictional High Court in the case of Potla Nageswara Rao Vs DCIT, CC-4, Hyderabad (ITTA No.245 of 2014) dtd.09-04-2014, to arrive at the further conclusion based on the said decision that the language of definition of Sec.2(47) of I.T.Act does not contemplate any payment of consideration and the payment of consideration on date of agreement is not a compulsory requirement, which can be deferred to future date. Accordingly the AO concluded as under, so as to apply the ratio of decision of High Court to the facts of the case and computed the capital gains:

"Accordingly, the Hon'ble High Court held that the element of factual possession and agreement are contemplated as transfer within the meaning of section 2(47) of Income Tax Act and further held that when the transfer is complete, automatically, consideration mentioned in the agreement of 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. Since the element of factual possession and agreement exist in the present case, the transaction results in transfer within the meaning of section 2(47) of I.T.Act read with section 53A of Transfer of Property Act. Hence, the Long Term Capital Gains on transfer of land works out to Rs.7,80,41,738/- as per the working sheet enclosed. Accordingly, the said amount was bought to tax, as capital gains."

5.1.3 Further, while computing the capital gains arising out of JDA, the AO rejected the claim of the assessee for the deduction u/s.54F, on the ground that assessee should have constructed the house property within 3 years from the year of agreement i.e., on or before 31-03-2015 and no such construction was made as per the enquiries made.

5.2 The appellant objected for the said assessment/treatment and also the conclusions drawn by the AO, out of the JDA. The essence of submissions of the appellant are as under:

(i) The possession of land was not handed over in the case as such the provisions of section 53A of TP Act/2(47) of I.T.Act were not attracted. The possession in this case was only a license granted to builder to construct and the possession being an essential component of section 53A of TP Act and without possession. Section 53A fails, as held in case of N.Karuna vs Appropriate Authority 118 Taxman 401 (AP) and Mrs.Sadia Shaik vs CIT (Bombay) and in this case with substantial time lapsed, construction started with no municipal sanction obtained by the developer/transferee.

(ii) The full value of the consideration being essential component which would suffer tax under head capital gains was not ascertainable on the date of development agreement and the full value of consideration as on the date of development agreement cannot be

estimated for taxing capital gains as future event and such estimate would militate against theory of real income, as one would be liable to pay tax on income which has neither accrued nor received, as per accounting principles.

(iii) A claim was made that in case capital gain is taxed, the benefit need be given the following judicial precedents and the AO did not deliberate on any of the above arguments.

5.2.1 While elaborating on the additional grounds raised by the assessee it was submitted that one of the requirement of section 53A of TP Act is willingness and readiness on part of the other party (Transferee) to execute the project and in this case, no work has been started, till date, though the agreement is dtd.10-05-2012 and even municipal sanction was not obtained, for which the confirmation letter from the developer is obtained and furnished. It was also submitted that no capital gains could be assessed to tax merely on the basis of signing the JDA and in cases where the municipal sanctions deferred, the capital gains would be arising in the year of such approvals/sanctions and assessee relied on decisions of ITAT, Hyderabad in case of Smt.Sudha Giri Vs ITO (ITA No.1578/Hyd/2014) dtd.31-07-2015. With no sanction plan approved in this case in the

year 2012-13, no capital gain would arise for A.Y.2013-14, as per the assessee.

5.2.2 While continuing the submissions, the appellant had contended that the facts of the case under reference are distinguishable from the facts of Potla Nageswara Rao, which was primarily relied on by the AO in assessment order. As per the assessee,

(a) *in Potla's case - the court was of the view that each and every individual case stands on its own footing. Thus the said observation of the court is required to be judged as to how facts of appellate's case fits into the facts of Potla's case.*

(b) A perusal of the order of the High Court in Potla's shows that agreement was entered into on 07-03-2013, with the Municipal plan was approved in the same previous year ending on 31-03-2003 and both the dates fell in the previous year 2002-03 relevant to assessment year 2003-04. In contrast, the appellant entered into the development dtd.10-05-2012 but no sanction was obtained from the competent authorities after a lapse of 4 years, to commence construction and sanction of the plan is an essential requirement to launch a project is well accepted in the case of Potla and other cases decided by the ITAT. With the plan not been sanctioned in the same previous year, the decision of the Court would have been different in Potla's case. Hence

on this point alone, the case of Potla can be distinguished and the same may not to be applied to appellant's case.

(c) The next issue relates to the possession as envisaged in section 53A of the TP Act and this issue has not be elaborately discussed in the order more by the Hon'ble Court more particularly with reference to the case of N.Karuna v Appropriate Authority [2001] 118 Taxman 401 (AP) decided by the High Court of AP.

(d) Reading of the decision in Potla Nageswara Rao case indicate that the case was decided keeping in view the concept of **an agreement of sale** as it would be clear from & 6 of Page-3 of the judgment, where there is a clear reference to agreement of sale and there is no dispute about this legal aspect as held by the Hon'ble Court, because while reaching this conclusion, the Hon'ble Court appears to have been influenced by the concept of sale. In case of a sale as stipulated under section 54 of TP Act payment of consideration is not a definite requirement and a sale postulates price paid, partly paid and promised to be paid. However, a development agreement cannot be equated with an agreement of sale, since in a development agreement consideration is an important factor and a consideration which is in the womb of the future and uncertain is no consideration.

5.2.3 On the alternate ground of assessee, on the issue of claim for deduction u/s.54F, the submissions made by the assessee run as under:

"Even assuming but not admitting that capital gain is leviable on the date of entering into the development agreement, the appellant is entitled to deduction under section 54F for all the units which would fall to his share. The claim of the appellant was not accepted by the AO for the reason that the construction was not completed within three years of transfer.

- It has been decided in these judgments that the expression "a" is plural and the assessee is entitled to deduction under section 54 F in respect of all flats falling to his share. It was urged that since this was the predominant view of all High courts on this issue including that of jurisdictional High Court/ITAT in respect of eligibility of deduction under section 54F, the same is binding on the Assessing officer. It is submitted that although there was an amendment section 54 and 54F substituting the word "a" with 'one' with effect from 1-04-15, the same is **prospective** as held in the case of CIT v Karpagam 226 Taxman 197 (Mad). *The Assessing officer did not dispute the proposition on the issue of allowability of deduction in respect of all flats falling to the share of land owner as his order is silent on this aspect.*

- This is a case in which the AO was of the opinion that capital gain is assessable in the year of development agreement taking into account the notional value as deemed consideration for working out 'full value of consideration for computing capital gain under section 45 read with section 48 . He was of the view that capital gain accrued during the assessment year 2013-14 which was the year when 'transfer' took place. He was also of the view that receipt of consideration is not material and a notional/deemed consideration would suffice. It is submitted that in the same logic he should have allowed deduction under section 54F on a notional basis since residential houses were in the process of construction. It is submitted that two divergent interpretation cannot be adopted; one for the purpose of 'transfer' treating a notional consideration as full value of consideration and another for the purpose of allowing deduction under section 54F.

- The condition precedent to claiming benefit under the said provision is that capital gain realized on transfer of capital asset should have been invested either in purchasing residential house or in constructing residential house within three years from the date of transfer.In this case as per AO's own observation ,the capital asset (land) has been parted with on 10-05-2012 for which the assessee would be compensated by way of receipt of constructed area in future. It is submitted that since the constructed area could be translated into flats, the appellant is entitled to deduction of in respect of all flats as held by various High Courts cited above.

- It is principle in law that in completing assessment, the Assessing officer should follow the doctrine of ***'parity of reasoning"*** or 'parity principle' to compute income and deduction. Therefore at the same breath, the AO cannot hold that the income can be assessed in the year of development agreement by deeming 'full value of consideration' which lies in the womb of future on a notional basis and at the same time adopting a different approach to give deduction under section 54F. It is submitted that once an income is computed adopting full value of consideration of all the flats on a notional/deeming basis, deduction should be allowed in respect of entire constructed area (flats). To do otherwise would result in a lopsided assessment and the process of computation of income as mandated by the Act would fail.

- At this stage it is profitable to refer to the interpretation of a deeming provision as reported in ITR 129 440 (SC). In this judgment the Court followed the observation of Lord Asquith in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109 at p. 132 observed as under:

"If you are bidden to treat an imaginary state of affairs as real, you must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it; and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

5.2.4 It was also contended that, in the case of the appellant, the deduction was denied only because the *flats were not constructed,* for the purpose of claiming deduction under section 54F, but the AO has not disputed allowability of deduction in respect of multiple flats. In support of his claims, the appellant relied on certain judicial decisions.

5.3 Perused the submissions of the appellant and the observations made by the AO in the assessment order. As to the facts of the case, the appellant, an individual entered in to a Joint Development Agreement with M/s.REFL on 10-05-2012, for development of his land admeasuring Ac 2.21 guntas, located at Narsingi Village, as per which the assessee is entitled for certain percentage of (31.07% as per the JDA and the sheet enclosed to assessment order) the total constructed area and the project was envisaged for completion within 60 months from the date of construction approvals, with a further grace period of 6 months. However, as per the information brought on record, even as on date of assessment order, the development agreement was not implemented, with no municipal sanctions shown to have been obtained, due to some disputes. There is no change in status of such development even as on date, as per the information brought on the record. Whereas, the AO had gone by the interpretation of certain clauses of Joint Development

Agreement (JDA) dtd.10-05-2012 and concluded that the assessee had granted license to the developer for entering the land and develop the same for the purpose of construction and as per the said agreement the developer in turn is entitled to enter in to a agreement with prospective buyers of built up area, namely villas/flats, made on such land, as such the AO interpreted the said handing over of the property as handing over the possession of property for purpose of construction and treated it as 'transfer' within the definition/meaning as provided in section 2(47) of I.T.Act, 1961 vis-à-vis the provisions of Section 53A of T.P.Act, 1882 and fastened the liability of capital gains arising out of the JDA, to the assessee, for the year under reference being the year of the said agreement. In this connection, the AO had heavily relied on the decisions of Jurisdictional High Court of A.P., dtd.09-04-2014 in the case of Potla Nageshwara Rao vs DCIT (ITTA No.245 of 2014). As per the AO, once the possession of property is given, the question of receipt or non-receipt of consideration do not matter, as the said consideration might be received on the date of agreement or can be deferred to the subsequent period/year. In this case, thus the consideration, which is the cost of the constructed area, falling in to the share of the assessee as a land owner, was deemed to have been received as on the date of agreement, i.e., 10-05-2012, which is falling in the F.Y.2012-13, related to A.Y.2013-14. Thus, the AO computed the value of

prospective constructed area at Rs.7,81,37,943/- which is equivalent to the share of the assessee in total constructed area, that has been set to be constructed as per JDA and after reducing the cost of the land in the hands of the assessee, which was taken at Rs.96,205/-, the capital gain has been worked out to Rs.7,80,41,738/- and was brought to tax as income of the assessee for the year under reference.

5.3.1 As per the AO, the decision of High court of A.P. in the case of Potla Nageshwara Rao is squarely applicable to the facts of the case as per which the language of section 2(47) of I.T.Act, 1961 is clear and there is no requirement of receipt of sale consideration as on date of agreement. Since element of factual possession and agreement exist in present case, the 'transfer' within the meaning of section 2(47) has been concluded to have been complete in this case. In the process, the AO shown to have rejected the following contentions and submission of the appellant, on the ground of applying the ratio of decision of A.P. High Court.

1. The land under development is agriculture land for the purpose of being treated as capital asset,

2. For coming under the purview of sec.53A, there should be fulfillment of conditions such as (i) Contract for consideration (ii) Contract in writing and ascertainable (iii) Contract signed by Transferor (iv) Contract pertain to transfer of immovable property (v) The

transferee taken possession of property (vi) Transferee wiling to perform the contract. All are applicable cumulatively and were not present in this case as per the assessee.

5.3.2 Thus, with all the conditions shown to have been fulfilled in a development agreement, except handing over the possession, the assessee relied upon the judicial decisions that have distinguished the application of clauses of JDA in the respective cases, where the possession of land/asset is not complete where either there is no willingness on part of developer or where permissions for construction are not being granted during the year of JDA. Distinction between the application of provisions of section 53A of TP Act to the Agreement for sale vis-à-vis the Joint Development Agreement was made by the assessee and it was contended that the word 'transfer' is not complete in Joint Development Agreements, where the permission granted was only to construct but not in absolute terms. This contention of the assessee was also seems to have been over ruled by the AO, solely based the application of ratio of High Court order in case of Potla Nageswara Rao(supra).

5.3.3 The further contention of the assessee was that the facts of case law relied upon by the AO for fastening the capital gains in the year of agreement, as in the case of Potla Nageswara Rao (supra), are

distinguishable on two or three of the following issues/facts, as submitted by appellant during the course of appellate proceedings:

1. In the case of Potla Nageswara Rao, the consideration was ascertainable and the developer was wiling to perform the contract during the year, as such date of receipt of consideration was considered irrelevant, where as in the present case, no such consideration was ascertainable and the developer was not in a position to execute the contract.

2. The agreement and approvals by Municipal Authorities had taken place during the same year in the case of Potla Nageswar Rao, where as in the case of the assessee no approval was obtained during the year and such approval is still pending even as on day of assessment order and also as on today and no construction started during the year.

5.3.4 Further, the AO presumed that once the possession has been handed over to the developer by virtue of which such Development Agreement, the developer undertakes the construction and enters in to agreements for sale of constructed area with prospective buyers, whereby the transfer is complete, as per the provisions of sec.53A of TP Act vis-à-vis sec.2(47) of I.T.Act. However, such presumption found to be only theoretical with one of the main condition for transfer of property as per TP Act i.e., willingness to

perform on the part of contractor/developer as transferee is missing during the year of agreement. Further, catena of judicial decisions are of the opinion that handing over of the possession of property is only one of the condition u/s.53A of TP Act, but is not the sole and isolated condition and when one of the condition such as the lack of willingness on part of the developer or lack of approval/sanction by local authorities were also held to be falling the meaning of 'transfer' u/s.2(47) of I.T.Act vis-à-vis the Sec.53A of TP Act, 1882.

5.3.5 The other invariable observation of the AO, where the Development Agreement was entered but stated to be not executed by the developer, was that the agreement was in force during the year and the assessee has not taken any action to terminate the agreement, based on which the capital gains are fastened to the year of JDA. In this context, it may be relevant to refer to the fact, that the contract/development period runs for 60 months as in case of the assessee and if such action is to be taken, it can only happen after the expiry of period of contract and some times after the expiry of the grace period as well. Even in case of taking legal action against the developer, it may only confine to the specific act of claiming damages but may not entitle him to get the promised constructed area or the equivalent consideration. In this context, it may be relevant to the observation of the Judicial Authorities on the specific issue.

5.3.6 Further, as could be made out from the facts of the case, the appellant neither started construction nor granted the permission from the Municipal Authorities, during the year under reference. The specific clauses of Agreement indicate the facts of the case little more clearly.

"The Developer shall construct and complete the Project in accordance with and in conformity with the sanctions, approvals, etc. and the responsibility therefore shall be that of the Developer alone". The Developer shall construct and complete the Project in accordance with and in conformity with the sanctions, approvals, etc and the responsibility therefore shall be that of the Developer alone (Clause IV(f) of JDA).

"It is mutually agreed that the Developer shall complete the construction in all respects within a period of 60 (sixty) moths from the date of obtaining construction approvals with a grace period of 6 (six) months." (Clause VI(a) of JDA).

5.3.6.1 The Hon'ble ITAT, Hyderabad had occasions to adjudicate on the same issue, where the reference was made to the decision of Hon'ble High Court of AP in case of Potla Nageswara Rao but considered the issue in favour of the assessee, based on facts of each case, which are similar to the facts of the case under reference, in similar conditions. In the case of Sudha Giri Vs ITO (ITA No.1578/Hyd/2014) vide it's order dtd.31-07-2015, the Hon'ble ITAT, 'A' Bench, Hyderabad, while further relying on the decisions of

(a) M/s.Binjusaria Properties Pvt Ltd vs ACIT, Central Circle-4, Hyderabad, in ITA No.157/Hyd/2011 dtd.04-04-2014.

(b) ACIT vs. Sri R.Srinivasa Rao and others in ITA No.1786/Hyd/2012 dtd.28-08-2014.

(c) Ms.K.Radhika Vs. DCIT in ITA No.208/Hyd/2011,
had held as under;

"As can be seen from the above decisions, no rule can be made out that in all cases of development agreements, there is a deemed transfer unless certain parameters like developer's willingness to perform, the intention of the parties, terms of the conditions which are required to be examined case by case." (Para 20 (part) of the order).

5.3.6.2 It may also be relevant to refer to the decision of ITAT in the case of ITO vs Sham Kumar (ITA No.1604/Hyd/2014) dtd.20-03-2015, which was also referring to the decision of High Court of AP in Potla Nageswar Rao Vs DCIT, though distinction was not made as to the facts of the cases, while allowing the appeal of the said assessee, on similar facts. The relevant part of the order run as under:

"Taking into the totality of the facts into consideration we are of the opinion that the provisions of deemed transfer u/s.2(47)(v) cannot be invoked on the facts of the present case and for the A.Y. in dispute before us. The assessee has not received any consideration except for refundable deposit of Rs.3.00 crores and there is no evidence brought on record by the Revenue to show that actually some construction has taken place at the impugned property in the previous year relevant to the A.Y. under consideration and the right to receive the sale consideration has actually accrued to the assessee. The assessee is not exigible to capital gains on the entire sale consideration without the accrual of the consideration to the assessee.

We are also fortified by the decision of the Coordinate Bench in the case of Bhavya Construction Ltd & Others (ITA No.1788/Hyd/2012). The ratio of the decision is that unless there is willingness on the part of the Developer to perform his part of the Contract, there cannot be a transfer of capital assets as envisaged u/s.2(47)(v) r.w.s. 53A of the Transfer of the Property Act. The ratio laid down as above squarely applies to the facts of the present case as the Department has failed to

controvert the findings of the ld CIT(A) by bringing material on record to show that the developer has taken steps toward developmental activities. Hence, the capital gains cannot be brought to tax in the year under appeal."

5.3.7 Thus, going by the facts of the case, where the conditions stipulated as per the provisions of sec.53A of TP Act, were not fully fulfilled in this case, with no municipal sanction obtained and no work resumed during the year of agreement, as such it could not be presumed that capital gains had arisen during the year of Development Agreement. The AO had gone by the ratio of the decision of Hon'ble High Court of AP in the case of Potla Nageswara Rao, to hold that once the possession is given the transfer is complete and capital gains accrued, regardless of receipt of consideration. The AO did not get in to the details whether all the conditions stipulated u/s.53A of TP Act were fulfilled during the year or not in the case of the assessee, as averred by Hon'ble High Court of A.P, in case of Potla Nageswara Rao (supra) where in a specific observation regarding the governing facts/clauses of agreement was made, which run as under:

"We are of the view that each and every individual case stands on its own footing"

5.3.8 As to the further facts of the case, there was no resumption of contract, with no sanction obtained by the developer, not only till the end of the year, but also even date. Hence, on facts, the 'transfer' of property by virtue of the JDA was stated to be not complete during the

year, to give rise to the capital gains, as per the Joint Development Agreement. Hence, on facts of the case, no capital gains are held to be arisen during the year, by taking this important factor, into consideration.

5.4 Even, if the AO gone by the sheer logic of applying the ratio of Jurisdictional High Court in case of Potla Nageswara Rao vs DCIT in toto, as to the facts of the case of the assessee, on the ground that mere signing of Agreement is enough to give rise to capital gains, irrespective of the fact that there was no willingness on part of the developer to take the JDA, forward, it may be relevant to observe that the appellant is eligible for the deduction u/s.54F, based equally on such deemed/presumed transfer. The claim of the assessee, however, was not accepted by the AO, in assessment order, for the reason that construction was not completed within 3 years of transfer.

5.4.1 In this context, it may be relevant to refer to the specific submissions and contention of the assessee on the said subject matter, which are enlisted at para 5.23 of this order, where in the assessee contended that in case department wishes to tax the same, he is entitled to deduction under section 54F in respect of all flats falling to his share as decided in the cases of CIT v Syed Ali Adil [2013] 352 ITR 418 AP, CIT v Gita Duggal [2013] 30 Taxmann 30 Delhi, (SLP

dismissed by SC) ITO v. Smt.Rohini Reddy [2010] 122 ITD 1) Hyd, Vithal Krishna Kanjeearm, 36 Taxman 542 (ITAT, Hyderabad), Smt.K.G.Rukmini Amma [2011] 331 ITR 211 Kar. (SLP rejected by SC).

5.4.2 The contention of the assessee/appellant in this regard are examined. In this case, the AO was of the considered view that capital gains accrued to the assessee during the A.Y.2013-14, being the year when transfer of capital asset took place as per JDA, where receipt of consideration is not material and deemed/notional consideration would suffice. However, on this issue, the contention of the assessee was that AO should have allowed deduction nu/s.54F on same notional basis, since the residential house being the multiple housing units, was in the process of construction, since two divergent interpretations cannot be adopted on the same basis, with one for the purpose of 'transfer' for treating the notional consideration as full consideration for purpose of computing capital gains and another for the purpose of investment of consideration for purpose of allowing deduction u/s.54F. It was also contended that even as per AO's own observations the capital asset (land) has been parted on 10-05-2012 as per clause of JDA for which the assessee would be compensated by way of receipt of constructed area in future and since the constructed area could be translated in to flats, appellant is eligible for deduction u/s.54F, as per the judicial

decisions, relied upon by the assessee. The contentions of the assessee appear reasonable for the reason that parity principle may guide the AO in computing income as well as in allowing deductions, on equal footing. It may not be possible for the AO to adopt two different yardsticks on the same issue, where he could determine the capital gains on deemed basis while rejecting the claim of deduction, on the same basis. With the conditions as regard to the eligibility of deduction such as treating the multiple dwelling units as one house, without getting effected by the recent amendments and treating the houses under construction as completed, with reference to the stipulated period of 3 years, as per provisions of section 54F are almost settled, the appellant's claim u/s.54F, against the capital gains on deeming basis as per clauses of JDA are held to be eligible, subject to the other conditions as stipulated in such provisions. On these lines, the alternate ground of the appellant, treated as Allowed.

5.4.3 Thus, based on the facts of the case, as brought on record and following the ratios of the judicial decisions, it is reasonable to hold that there were no fulfillment of all the conditions as stipulated under TP Act, so as to treat the transfer of land under JDA as 'transfer' without there being no municipal sanction and construction activity during the year and even in case of accrual of capital gains on deemed basis, such capital gains are eligible to be considered as exempted, as

per provisions of sec.54F, on the same deeming basis, as per the doctrine of 'parity of reasoning'. Thus, the grounds related to this issue are treated as Allowed.

4. Both the learned representatives reiterate their respective stands against and in support of the CIT(A)'s identical detailed discussion deleting the impugned long term capital gains addition.

5. The Revenue's case before us in light of the recitals for the alleged Joint Development Agreement cum General Power of Attorney dt.10.05.2012 (in both cases) that M/s. Ramky Estates & Farms Ltd ("REFL"), is that the same duly involved "part-performance" u/s 53A of the Transfer of Property Act as prescribed method of "transfer" u/s 2(47)(v) of the Act. The learned departmental representative vehemently contended in light of the hon'ble jurisdictional high court's decision in Potla Nageswara Rao Vs. DCIT (supra) such a part-performance indeed gives rise to the consequential capital gains in light of the hon'ble apex court's landmark decision in CIT Vs. Balbir Singh Maini (2018) 398 ITR 531 (SC). The Revenue's further argument before us is that CIT(A) has accepted the assessee's section 54F deduction claim without even considering as to whether the corresponding statutory conditions have been satisfied or not at the tax-payers' behest.

6. Learned authorized representative has placed strong reliance on the CIT(A)'s foregoing detailed discussion holding that the impugned joint development agreement dt.10.05.2002 nowhere amounts to "transfer" u/s 2(47)(v) r.w.s. 53A of the Transfer of Property Act.

7. We have heard the rival arguments and find no merit in the Revenue's stand. There could hardly be any dispute about the law having settled in hon'ble apex court's decision in Balbir Singh Maini (supra) that a part-performance very well amounts to 'transfer' within the meaning of section 2(47)(v) even on "accrual" basis. The most vital question that arises for our adjudication in the instant lis therefore is as to whether the joint development agreement herein is in the form of part-performance u/s 53A or not ? The Revenue has invited our attention to the "JDA" recitals that the assessee had transferred possession of the capital asset in issue to M/s. Ramky Estates & Farms Ltd. A perusal of the said agreement rather indicates in page 8(i) that "the owner hereby agrees in favour of the Developer, its agents, employees, labourers, contractors, and the other persons as may from time to time to be deputed by the latter; license to have ingress into, egress form and regress into the Schedule property herein for the purpose of developing the scheme as settled in these presents." We fail to understand as to how such a mere licence would amount to a 'transfer'; or for that, part-performance u/s 2(47)(v) r.w.s. 53A of the Transfer of Property Act; respectively. We make it clear that a "license" is defined u/s 52 of the Indian Easements Act, 1882 that it is a right to do so, or continue to do in or on the grantor's immovable property which would in the absence of such right does not amount to an easement or an interest in the property …. the right is called license". We accordingly adopts stricter interpretation as per hon'ble apex court's recent landmark decision in Commissioner of Customs Vs. Dilip Kumar 2018 (9) (SCC) 1 FB to hold that the assessee's impugned lincense herein does not amount to "transfer" giving rise to capital gains. This is also for the

reason that the Revenue has failed to pinpoint any material that the assessee's impugned licence is also covered under any other clauses in section 2(47) as he had not transferred or surrendered or extinguished any of his rights in favour of the developer in above terms.

8. Coupled with this, there is no rebuttal from the Revenue side that the CIT(A)'s findings in para 5.3.8 holding the developer not to have obtained any building sanction is contrary to the facts on record. We quote hon'ble apex court's recent decision in Seshasayee Steel Pvt. Ltd. Vs. ACIT (2020) 115 taxmann.com (5) SC that such a licence having not acted upon by the developer to perform its obligations, does not amount to a "transfer" u/s 2(47) of the Act. We therefore uphold the CIT(A)'s findings deleting impugned long term capital gains addition in both these assessment years.

9. The Revenue's latter substantive grounds raising section 54F deduction / issue become academic in light of our findings on the main issue.

No other ground has been pressed before us.

10. These Revenue's twin appeals are dismissed in above terms. A copy of the common order be placed in respective case files.

Order pronounced in the Open Court on 24th February, 2022.

Sd/-	**Sd/-**
(A. MOHAN ALANKAMONY) **ACCOUNTANT MEMBER**	**(S.S. GODARA)** **JUDICIAL MEMBER**

Hyderabad, dated 24th February, 2022.
TYNM/sps

Copy to:

S.No	Addresses
1	Sri Tummala Chittaiah, 7-1-29/B, Leela Nagar, Ameerpet, Hyderabad.
2	The Deputy Commissioner of Income Tax, Central Circle – 2(4), Hyderabad.
3	CIT(A)-12, Hyderabad.
4	Pr. CIT(Central), Hyderabad.
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order