आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, VICE PRESIDENT
&
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No. 126/Hyd/2023
Assessment Year: 2016-17

Sruthi Riedl, Hyderabad [PAN No. AGGPP6953R]	Vs.	Income Tax Officer, (International Taxation)-2, Hyderabad
(Appellant)		(Respondent)

निर्धारिती द्वारा/Assessee by:	Shri H. Srinivasulu, AR
राजस्व द्वारा/Revenue by:	Ms. T. Vijaya Lakshmi, CIT-DR

सुनवाई की तारीख/Date of hearing:	28/08/2023
घोषणा की तारीख/Pronouncement on:	08/11/2023

आदेश / **ORDER**

PER LALIET KUMAR, JM:

This appeal is filed by the assessee, feeling aggrieved by the order passed by the Income Tax Officer, (International Taxation) – 2, Hyderabad dt.06.01.2023 invoking proceedings u/s 147 r.w.s. 144C(13) of the Act for the A.Y 2016-17 on the following grounds :

“1. The assessment order passed on 06.01.2023 after DRP approval u/s 147 r.w.s 144C(13) is bad in law and not based on the correct facts.

2. The A.O and DRP erred in reopening the assessment U/s 147 on wrong facts and there by the assessment order is bad in law. There was no valid reason for reopening the assessment U/s 147.

3. The Ld A.O/DRP did not appreciate that there was no escapement of income which is a prerequisite for reopening the assessment U/s 147, and capital gain of Rs. 2,56,90,030 was wrongly taxed in AN 201647.

4. The Id A.O/DRP failed to appreciate that the physical possession of land under the Joint Development Agreement (JDA) dated 04/04/2007 was given in F.Y 2007-08 to the developer and the second JDA dated 10.02.2016 is in continuation of the JDA dated 04.04.2007.

5. The A.O/DRP erred in reopening the assessment U/s 147 solely on the basis of a report from I & Cl and did not make any enquiry before reopening the assessment. Thus, on the basis of borrowed satisfaction the assessment was wrongly reopened and the A.O did not fulfil the conditions stipulated in section 147.

6. The Ld A.O/DRP failed to appreciate that after second JDA dated 10.02.2016 there is no change in the position of the land owners before and after the second JDA.

7. The Ld A.O/DRP failed to consider the order of A.O, non-corporate, circle - 3(1), Chennai passed U/s 148A in the case of Smt. Vijayalakshmi, another owner of the same JDA dropping the proposal of reopening of the assessment for AN 2016-17.

8. The Ld A.O/DRP erred is not mentioned the reasons recorded for reopening the assessment on the body of notice U/s 148, which makes the proceedings initiated as void.

9. The Ld A.O/DRP erred in reopening the assessment U/s 147 as there was no capital gains chargeable to Tax in AY 2016-17 arising from the JDA dated 04.04.2007 and the JDA dated 10.02.2016 did not alter the factum of handing over of possession to the developer.

10.The Ld A.O/DRP erred in giving a finding that possession of land was given in consequences of second JDA dated 10.02.2016 as against the fact that possession of land was given to the developer as per JDA dated 04.04.2007.

11.The Ld A.O/DRP failed to appreciate that no capital gain arose in assessment year 2016-17 on account of JDA dated 10.02.2016 as this JDA was in continuation of first JDA dated 04.04.2007.

12.The Ld A.O/DRP erred in giving a finding that the developer in terms of JDA dated 04.04.2007 did not perform any act in furtherance of the JDA, in reality the developer had spent a sum of Rs.16.02 Cr (Rs. 3.75 Cr + 12.27 Cr).

13.The Ld A.O/DRP failed to appreciate that in respect of some owners of land who are also parties namely, Harsha Keteneni, Apollo Corporate Services and Consultants (P) ltd and H.Bhaskar Reddy, to the JDA dated 04.04.2007, Ld ITO, ward 6(3), Hyderabad held that no capital gain arose in AY 2016-17 but capital gain arose in AY 2007-08. The revenue has to be consistent in its approach and Ld A.O failed it consider the principle of consistency on the same set of facts.

14.The Ld A.O/DRP erred in giving a finding that sharing ratio of built up area was determined in the JDA dated 10.02.2016 and not in JDA dated 04.04.2007.

15.The Ld A.O/DRP erred in giving a finding that no possession of land was given in JDA dated 04.04.2007 and was given in JDA dated 10.02.2016.

16.The Ld A.O/DRP erred in giving a finding that the developer after entering into JDA dated 10.02.2016 immediately prepared plans and with in a period of one week after entering into JDA got the plans approved by the competent authority.

17.The Ld A:O/DRP erred in giving a finding that there was no need to enter into a tripartite agreement during the previous year relevant to AY 2016-17 if possession of land was given in pursuance of JDA dated 04.04.2007.

18.The Ld A.O/DRP erred in bringing to tax the JDA dated 10.02.2016 by invoking the provisions of section 2(47) r.w.s 53A of the Transfer of Properties Act, 1882 when there was no transfer of land and payment of consideration during the current assessment year i.e 2016-17.

19.The Ld A.O/DRP failed to appreciate that the mere licence given to carryout the development activity does not result in 'Transfer' as envisaged in section 2(47) r.w.s 53A of the T.P Act and accordingly no capital gain arises in A.Y 2016-17.

20.The hon'ble DRP failed to consider the facts correctly and upheld the action of Ld A.O. There was no capital gain, of Rs. 2,56,92,030 accrued to the assessee in real sense.

21.The Ld A.O/DRP erred in adopting the cost of project of Rs.177,50,70,000 without any basis and enquiry. The cost of project is not relevant to, the assessee and there is no provision in the Act to. adopt

'deemed sale consideration' except as provided in sections 50C, 50CA.and 50D."

2. The brief facts of the case are that assessee being an NRI has filed the return of income for the A.Y. 2016 - 17 declaring an income of Rs.18,26,340/- towards income from house property and towards income from short term and long term capital gains and the case was processed. Thereafter, information was received from l&CI, Hyd that the assessee along with 46 other persons had entered into Joint Development Agreement cum General Power of attorney with M/s Trendset Jayabheri Projects LLP, Hyd for construction of residential and commercial project vide registered deed bearing no. 2357/2016 on 10.02.2016 having a total value of Rs.177,50,70,000/- for an area of Ac.12.09 Gts. The assessee transferred her share of land admeasuring 12.50 Gts valued at Rs.453,75,000/- for the said development and has not offered any capital gains on the said transaction for the A.Y. 2016— 17. Since, the assessee has not offered any chargeable long term capital gains on the above referred transaction, reassessment proceedings were initiated for the A.Y. 2016 - 17 on 26.03.2021 after obtaining approval of Addl.CIT IT, Hyderabad. Accordingly, a notice u/s 148 was issued to the assessee on 26.03.2021 and was duly served on the assessee through mail.

2.1. In response, the assessee has filed return of income on 09.04.2021 declaring income of Rs.18,26,340/- towards income from house property and towards income from short term and long term capital gains, which income was reflected in the original return of income. Subsequently, the assessee filed a letter on

18.05.2021 requesting to provide the reasons for the reopening of the assessment u/s 148 and the same were duly provided to the assessee vide letter issued on 12.07.2021.

2.2. Subsequently, notices u/s 143(2) and 142(1) were issued to the assessee on 16.11.2021 to explain the transactions and also to submit the details of income etc, in the return of income filed. The assessee furnished letter on 24.11.2021 stating that she has not entered / executed any sale deed during the relevant A.Y. 2016 - 17 and has only entered into a modified development Agreement cum General Power of Attorney dated 10.02.2016 vide document no. 2357/2016, which is in continuation of Original Development of Agreement cum GPA executed on 04.04.2007.

2.3 However, it was noticed that the assessee entered into JDA for the development of her land during the relevant A.Y. 2016 - 17 and hence, the assessee was asked vide this office notice u/s 142(1) issued on 13.12.2021, as to why the long term capital gains will not arise for the A.Y. 2016-17 and the same may not be brought to tax. In response, the assessee submitted that herself along with other adjoining owners have entered into a joint development agreement with M/s Trendset Bharat Project Developers Pvt Ltd (Trendset) on 04.04.2007 and gave possession of the land. However, due to severe financial difficulties, the developer could not carry out the development works as agreed and the project was stalled. Subsequently, a tripartite development agreement was entered by all the landowners including the assessee with M/s Trendset Jayabheri Projects LLP along with the

original developer M/s Trendset Bharat Project Developers Pvt Ltd on 10.02.2016.

2.4. The assessee further submitted that the possession of the land was already given to the original developer i.e., Trendset vide development agreement entered on 04.04.2007 and as could be seen from clause 1.1 of the tripartite agreement entered on 10.02.2016, possession of the land was given by the first developer i.e., Trendest to the second developer i.e., Trendset Jayabheri Projects LLP. Further, from the JDA entered on 10.02.2016, it can be understood that the same was in continuation of the JDA entered on 04.04.2007 and was specifically entered only to facilitate new developer. Thus, there was no change in the position of the land owners before and after the second JDA. Hence, the assessee submitted that the reasons recorded for re-opening of the assessment are not justified and correct and requested to drop the proceedings initiated u/s 147 of the Act.

2.5. Further, Assessing Officer observed that during the relevant year, the assessee has sold unlisted shares of M/s Sai Life Sciences Ltd for a consideration of Rs.55,45,400/- which were acquired during the year 2004 - 05 for a consideration of Rs.6,00,000/- and after indexed cost of acquisition of Rs.13,51,250/-, the assessee had shown long term capital gains of Rs.41,94,150/-. After claiming deduction u/s 54EC, the assessee had set off the balance capital gains of rs.21,94,150/- with capital loss of A.Y. 2012 - 13 & 2013- 14. Hence, opined that since the assessee sold the unlisted shares, no indexation benefit can be allowed and finally worked out of the long term capital gain

at Rs.5,81,317/- as mentioned at Page 18 of the assessment order dt.06.01.2023.

3. Aggrieved with the draft assessment order dt.29.03.2022 by making additions against the long term capital gains, assessee opted for filing objections before the Dispute Resolution Panel, Bangalore requesting to consider her plea that she had retained only 43% of land and thus the value of JDA should have been only Rs.1,95,11,250/- instead of Rs.4,53,75,000/-.

4. The DRP after hearing the objections raised by the assessee has upheld the addition of Rs.2,56,92,030/- as discussed in Para 21.1 of the order of Assessing Officer in the hands of the assessee. The DRP also upheld the addition of Rs.5,81,317/- towards the difference of Long Term Capital Gains on sales of unlisted shares as per her submissions dated 12.09.2022 wherein she mentioned that she was not contesting the said addition. Thereafter, Assessing Officer completed the assessment assessing the total income of the assessee at Rs.2,80,99,687/-.

5. Aggrieved with the final assessment order dt.06.01.2023, assessee is now in appeal before us.

6. Before us, ld.AR for the assessee submitted that the lower authorities have erred in making and confirming the addition of Rs.2,56,92,030/- towards the long term capital gains as discussed by the Assessing Officer at Para 21.1. in his order which is to the following effect :

"21. Hence, in view of the above, the assessee is liable to offer the long term capital gains on entering the JDA on 10,02.2016 relevant for the A.Y. 2016 - 17. Notwithstanding to the claim, the assessee has submitted that the total JDA value of Rs.177,50,70,000/- and her proportionate share of consideration arrived is not correct. The detailed working of the same is as under:

21.1 The assessee's share of land is 12.5 Guntas out of the total land of 489 Guntas and accordingly, the assessee's share of value on account of JDA is at Rs.4,53,75,000/- i.e., Rs. 177,50,70,000 X 12.5 / 489. The sharing ratio agreed in the JDA is at 57 :43 in the proportion of developers and land owners respectively. Hence, the value of the share of value fore gone by the assessee is at Rs. 258,63,750/- I.e., (Rs.4.53,75,000/- X 57%). Hence, the deemed sale consideration on account of JDA is at Rs.2,58,63,750/-. The assessee submitted the copy of the purchase deed of the said property where in it was mentioned that the same was purchased on 19.02.1997 for Rs.85,000/- and the proportionate cost of acquisition of the land which has foregone by way of entering JDA is at Rs.48,450/- I.e., Rs.85,000/- X 57%.

21.2 Accordingly, the working out of the capital gains is worked out as under:

Deemed sale consideration
as discussed above :Rs.2,58,63,750/-

Less: Indexed cost of acquisition-
48450 X 1081/305 :Rs. 1,71720/-

Net taxable long term capital gain ***:Rs.2,56,92,030/-***

7. In support of the case of assessee, ld.AR has filed written submissions, wherein he mentioned assessee's submissions, objections against reopening of assessment u/s 147, salient features of both Joint Development Agreements dt.04.04.2007 and 10.02.2016 etc. which is to the following effect :

*"**Written Submissions of Appellant**:*

Issue in dispute LTG - Rs. 2,56,92,030 arising from land given for Joint Development Agreement.

1. The Appellant is a non-resident Indian and filed her return of Income admitting the Total Income of Rs. 19,26,340 for A.Y 2016-17.

2. A notice U/s 148 was issued on 26.03.2021, in response, a return of income was filed on 09.04.2021 declaring the same income as was admitted in the original return u/s 139(1). It appears original return was accepted by the department U/s 143(1)(a).

3. The A.O completed the assessment on 06.01.2023 U/s 147 r.w.s 144C(13) by determining the total income of Rs. 2,80,99,687 mainly, comprising of long term Capital Gain of Rs. 2,56,92,030 arising from the Joint Development Agreement dated 101h February, 2016.

In the present appeal, the Appellant is raising two issues for consideration of Hon'ble ITAT.

A. Reopening of Assessment U/s 147 is bad in law
B. No Capital gain accrues from JDA, 2016.

1. Objections of the appellant against the reopening of the assessment U/s 147

3.1. A notice U/s 148 dated 26.03.2021 was issued and the assessee filed the return of income on 09.04.2021. After filing the return, the appellant filed a letter dated 18.05.2021, seeking the reasons for reopening of the assessment [page 1 of Paragraph - 1].

3.2. In response, the [TO (Int. Taxation) - 2, Hyderabad furnished the reasons on 12.07.2021 which are placed at page 4 of paper book - 1 of the appellant filed before the Hon'ble ITAT on 12.04.2023.

Brief Facts:

4. The appellant along with 44 adjacent land owners had entered into a Joint Development agreement cum GPA on 4" April, 2007 with Trend set Bharat Project Developers (P) Ltd [herein after referred to as "Trend set" or First Developer] for construction of a Residential cum commercial complex on land admeasuring 12.09 Acres and the appellant's share of land is 12.5 Guntas or 1500 square yards (Approximately)

5. Salient features of JDA - 4th April, 2007

5.1 The appellant along with 44 other land owners entered into a JDA with the First Developer on 4th April, 2007. (Pages: 19 to 31 of paper book - 1) Appellant name : Page: 27.

5.2 The sharing Ratio of Built up area between the land owners and the Developer is 45:55. (Page: 57 of PB-1) —Total Extent of land —12.09 Acres.

5.3Allotment of built up area shall be stipulated in a supplementary agreement which was entered into on 09.02.2018. [Page: 59 & 61 of PB -1].

5.4The Developer paid the security Deposit of Rs. 12.27 Cr to various land owners. (Pages 61 & 337 of PB - 1).

5.5Time for completion of project - 30 months plus grace period of 6 months from the date of sanction of plan - page : 63 of PB - 1).

5.6Handing over of possession of land to First Developer. (para 11)

"Today the owners have delivered vacant physical possession of their respective land in the schedule property to the Developer for commencement of the Development work"
(Page 63 of PB — i)

5.7During the subsistence of JDA, 2007, the land owners cannot transfer the land to any person. (Page 67 of PB - 1).

5.8The first developer had executed a part of work like levelling, excavation etc and incurred expenditure of Rs. 3.81 Crs on the scheduled property. (Page 337 of PB — 1).

6. Owing to various reasons, the first developer i.e Trendset could not carryout the further development of the project on the agreed timelines and the 'Trend set' approached 'Trend set Jayabheri Projects, LLP' [An LLP of Trend set and Jayabheri group herein after referred to as 'second developer' Ito take over the development of the project on 'as is where is basis from the Trend set i.e first developer.

7. For new arrangement wherein the second developer shall complete the project from as is where is basis and the land owners had no objection to the new arrangement and the JDA dated 10th Feb, 2016 was entered into and the appellant had signed on it.

8. ***Salient Features of JDA dated 10th February, 2016***

8.1. The first Developer assigned the JDA, 2007 to Trendset Jayabheri project LLP in continuation of JDA —2007. [Page 119 to 125 of PB -1].
8.2. The appellant along with 46 other land owners were signatories to the JDA 2016 and the land owners number increased from 45 to 47. (Pages 105 to 117 of PB - 1)

8.3. Trendset Jayabheri project LLP is wherein Trendset Bharat Project Developer (P) Ltd is a partner and it is the second developer (Page 119 of PB —1).

8.4. The first developer handed over the possession of the land to the second developer and extent of land remained the same from JDA, 2007 to JDA, 2016. The extract from JDA, 2016 is as under:

"The second party being in possession of the scheduled property has today, handed over the possession of scheduled property to third party / the present developer with all its rights including to enter upon the scheduled property and develop the same in terms of this agreement for which the land owners of first part have no objection"

Thus, there was no transfer of land U/s 2(47) of the IT Act under the JDA dated 10th Feb, 2016 and the Ld A.O did not consider the JDA dated 4th April, 2007.

8.5. The land was in possession of the first developer and commenced the work on the scheduled property. (Page 125 of PB - 1)

8.6. The land owners expressed no objection to the assignment of JDA, 2007 to the second developer on 'as is where is basis to the new arrangement. Page 127)

8.7. The second developer shall obtain the regulatory permissions with in a period of six months plus 3 months grace period (Page 131 & 141) and complete the of project in '36 months from date of approval of plan.

8.8. The second developer shall enter into a supplementary agreement with in 30days from the date of obtaining the approval of plans. (page 131)

8.9. Sharing of built up area between the land owners and the second developer is 43:57. (Page 137)

8.10. The landowners handed over original title deeds to the second developer. (Page 143)

8.11. The land owners agreed not to transfer the land during the subsistence of JDA, 2016. (Page 145)

8.12. The land owners and the first developer declared that they did not transfer the land rights prior to signing-of JDA, 2016. (page 163)
8.13. The second developer obtained the municipal approval to the plans on 09.05.2017. (page 17 of PB - 1).

9. With the above facts, the appellant submits her objections against reopening of assessment U/s 147.

9.1. No independent enquiry was caused by the A.O before reopening the assessment. Mere 'Information' without independent verification of facts does not constitute 'Reason to believe' U/s 147.

The appellant relies on the following decisions :

i. ACIT vs Dhariya constructions 328 ITR 515 (SC).
ii. Sesasterlite Ltd —417 ITR 334 (Born).
iii. Kamadhenu steel & Alloys Ltd - 248 CTR 33(Del).
iv. RMG polymers - 396 ITR 5 (Del)
V. R.K Machine Tools Ltd - 100 ITR (Trib) 73, [ITAT, Delhi]

9.2. Ld A.O acted on the borrowed satisfaction and not supplied the underlying material on which he relied up on. The appellant relies on: Charu Chains Jewellery (P) Ltd 456 ITR 352 (Del).

9.3. Mere entering into a JDA on 10.02.2016 does not result in transfer of land U/s 2(47) of the Act. There was no finding in the reasons recorded that physical possession of land was given by the appellant to the second developer on 10.02.2016. Thus, there was no transfer U/s 2(47)(v) of the LT Act.

9.4. Ld A.O in the reasons recorded observed that the appellant along with 46 land owners entered into a JDA with the Trend set Bharat Project Developer Pvt Ltd and the Trend Set Jayabheri Project LLP on 10.02.2016. It is not fully correct. The appellant entered into a JDA with Trend set Bharat Project Developers Pvt Ltd on 4th April, 2007 and It was an arrangement by the first developer with the second developer and the appellant had no objection to the JDA, 2016. The appellant gave the physical possession of land to the first developer on 4th April, 2007 and it is the second developer who took the possession on 'as is where is basis from the second developer on 10.02.2016. Thus, inaccurate facts were recorded for reopening of the assessment by the A.O.

9.5. Ld A.O observed that Long Term Capital Gain of Rs. 4,53,75,000 has escaped assessment. This finding is not factually correct. The sharing ratio in the JDA dated 10.02.2016 between the land owners and the second developer was 43:57 and the estimated cost of construction for the stamp duty purpose of the entire project was Rs. 177,50,70,000. The appellant transferred 57% of her land of 12.5 Guntas. The amount of capital gain workouts to Rs. 2,56,92,030 (page 15 of PB-I) after completion of the project including built up area which was not in existence either on 4th April, 2007 or on 10th February, 2016. In first stage only FMV of land transferred is taxable which ought to have been in A.Y 2008-09 and the same is lower than Rs 2.56Cr.

Thus, the escapement of LTG was Rs. 2.56 Cr and not Rs. 4.53 Cr as recorded by the A.O in the reasons recorded for reopening the assessment U/s 147.

9.6. The appellant gave possession of land to the first developer on entering into the JDA dated 4th April, 2007. Thus, the transfer of land U/s 2(47) took place in A.Y 2008-09 and not in A.Y 2016-17 as recorded by the A.O. As per the principle laid down by the jurisdictional High Court in Potla Nageshwar Rao, capital Gain arises in A.Y 2008-09 and not in A.Y 2016-17. Thus, the reasons recorded are not in consonance with the jurisdictional High Court decision.

9.7. No permission for building the residential cum commercial complex was received from the competent authority on 10.02.2016 i.e date of JDA. The Greater Hyderabad Municipal Corporation approved the plans of project submitted by the second developer on 09.05.2017 i.e A.Y 2018-19. Mere signing of JDA does not result in accrual of income.

9.8. The assessment has to be reopened on correct facts. In the present case reasons recorded contained factual errors. In this context, the appellant relies on the following decisions.

1) Ankita A.choksey Vs ITO - 411 ITR 207 (Born).
2) Sagar enterprises Vs ACIT 257 ITR 335 (Guj).
3) Shodiman Investments (P) Ltd —422 ITR 337(Born).

10.The assessee objected to the reopening of the assessment on 24.11.2021 and 11.02.2022 (Pages 7 to 16 of PB-1). Ld A.O did not pass a speaking order separately disposing of the objections and there by violated the ratio laid down by the apex court in GKN Drivershaft India Ltd - 259 ITR 19.

11 In following cases from the same JDA i.e 10.02.2016, proceedings U/s 147 were dropped by the A.Os.

A. Smt. Vellanki Vijaya Lakshmi order dated 30.06.2022 by the DCIT, non-corporate circle 3(1),Channai.

B. Sri. Harsha Ketheneni, ITO, ward 6(3), Hyderabad.
Thus, the revenue is not consistent in its approach.

12 Ld A.O estimated the Capital Gains on the Total cost of the project amounting to Rs. 177.50 Cr. The building on 10.02.2016 did not exist and it is going to come into existence in future. Thus, the estimated capital gain is only an Hypothetical income and not a real Income. Thus, there was no escapement of Income in A.Y 2016-17 as presumed by Ld A.O while reopening of the assessment.
13.The approval accorded by the Add CIT for reopening of the assessment was not furnished to the assessee.

Thus, the appellant prays before the Hon'ble bench, that the notice issued U/s 148 is invalid and the assessment may be quashed.

14.A.0 Findings in Assessment order, brief Iv:

14.1. The JDA, 2007 fell apart as there was no act in furtherance of JDA.

14.2. Number of land lords changed from 45 to 47 (Five went out seven came in)

14.3. Project cost went up from Rs. 47.33 Cr to 177.50 cr.

14.4. Sharing Ratio changed from 45:55 to 43:57 in JDA, 2016.

14.5. Comparison of JDAs

The change of land lords from 45 to 47 means the land lords have not relinquished their rights over the property and have not transferred the possession of property to the first developer i.e Trend Set.

14.6. The first developer did not apply for approval of building plans to GHMC and it is the second developer who had applied for approval of plans on 17.10.2016 within One week of JDA dated 10.02:2016. Thus, the second developer acted in furtherance of the project and spent:

2015-16 F.Y - Rs. 17.95 Cr.
2016-17 F.Y— Rs. 33.85 Cr.

14.7. Ld A.O Relied on the ratio laid down in the following cases:

A. Balbir Singh maini - 395 ITR

B. CIT Vs Dr. Aravind S. Dhadke —401 ITR 96 (Born)

C. Various other cases as listed in the assessment order.

Thus, the possession of land was given-to the second Developer after entering into JDA dated 10.02.2016.

<u>15.Submissions of Appellant of on merits:-</u>

16.1. No transfer of land took place U/s 2(47) in A.Y-2016-17.

16.2. No physical possession of land was given by the appellant to the second developer under the JDA dated 10.02.2016.
16.3. The possession of land & control over the land was with the first developer and possession of the land was given by the first developer to the second developer.

For ease of reference, relevant clause from JDA dated 10.02.2016 is extracted below

"The second party being in possession of the schedule property has today, handed over the possession of scheduled property to third party/the present Developer with all its rights including to enter upon the schedule property and develop the same in terms of this agreement for which the landowners of first part have no objection."

16.4. Ld A.O's finding that JDA dated 4th April, 2007 fell apart is not factually correct. The JDA dated 10.02.2016 is in continuation of JDA dated 4th April, 2007. [pages 131 to 139 of PB-I JDA dated 10/02/2016]

16.5. As a matter of fact, the physical possession of land was given by the appellant to the first developer on 4th April, 2007. For ease of reference, the relevant clause from JDA dated 04.04.2007 is extracted below.
"Today the owners have delivered vacant physical possession of their respective land in the schedule property to the Developer for commencement of the development work."

16.6. Sharing Ratio of built up area has changed from the first developer to the second developer from 45:55 to 43:57. The Ld A.O accepted the fact in the assessment order that the cost of project increased from Rs. 43.57 Cr to Rs. 177.50 Cr and his computation of Capital Gain is on the increased cost of project on account of increase in the cost of construction, thus, the sharing ratio has under gone a change with the second developer on account of increase in cost of construction.

16.7. A.O observed that number of land owners changed from 45 to 47 and there was relinquishment of right and hand of over of land in JDA, 2016. Ld A.O did not appreciate the conditions stipulated in the JDA dated 4th April, 2007. The appellant raises the following objections against this findings of Ld A.O:

***First:** The appellant is not concerned with the change of owners and the appellant's relationship with the developer did not change.*

***Second:** I draw the kind attention of the Hon'ble Bench to the clause 21 of JDA dated 4th April, 2007. Under this clause, no owner who entered into the JDA dated 04.04.2007, cannot sell the land during the subsistence of the JDA. In view of this clause, the sellers agreed to make the purchasers of land as, parties to the JDA and for this precise reason, the number increased from 45 to 47. The relevant clause 21 of the JDA dated 04.04.2007 is extracted below.*

"The owners covenant and undertakes that they will not to attempt to sell, deal with or dispose or alienate or otherwise enter with any other agreement in respect of their respective land in the schedule property with any other persons at any point of time during the subsistence of this Development Agreement, subject to clause 10 of this Agreement."

Third: *In the sale deeds of owners who sold the land it is clearly mentioned that the physical possession was with the first developer and the vendor has given the symbolic possession to the new owner of land and the relevant portion is extracted below from one of owners i.e K.Gopala Krishna sale deed dated 28.01.2016.*

"The Vendor hereby represents to the Purchaser that the Vendors predecessor in title i.e., M/s. Chola Punam Park Private Limited and Walden Properties Private Limited (formerly Nija Developers Printe Limited) have entered into a Development Agreement cum General Power of Attorney with Trendset Bharat Project Developers Private Limited (the "Developer") on 04.04.2007 granting development rights over the Property and the Vendor herein has further agreed to adhere and grant the development rights over the Property to the said Developer in accordance with the already registered Development Agreement cum General Power of Attorney. This Development Agreement cum General Power of Attorney is registered as Document No. 7033 of 2007 (the "DAGPA") With the office of the District Registrar, Ranga Reddy District.

The Purchaser is aware of the existence of the DAGPA and explicitly acknowledges, agrees, and undertakes that pursuant to the execution and registration of Sale Deed, he shall adhere and abide by the terms and conditions of the DAGPA and shall extend the required support in the best interest of the transaction as he will be subrogating in place of the Vendor.

The Vendor has represented to the Purchaser that he is the absolute owner of the Property with uninhibited rights of alienation over the Property. That Vendor's predecessors in title have delivered the actual physical possession of the Property to Trendset Bharat Project Developers Private Limited for carrying out the development contemplated under the aforementioned DAGPA. Thus, the Vendor is handing over the symbolic possession of the Property to the Purchaser under this Sale Deed.

The Vendor has today delivered the symbolic possession of the Property to the Purchaser, pursuant to this Sale Deed the Purchaser shall be entitled to enter upon, hold, possess, and enjoy the Vendor's undivided share in the Property in terms of the DAGPA and receive the income"

Fourth: *The land owners of JDA, 2007 had transferred the development rights to new owners and the physical possession remained with the first developer.*

16.8. Ld A.O failed to appreciate that extent of land on which development of residential cum commercial project remained the same i.e 12.09 Acres in JDA, 2007 and JDA, 2016.

16.9. Ld A.O observed that JDA dated 04.04.2007 fell apart and there was no act in furtherance of JDA, 2007.

The appellant submits that the finding of Ld A.O is not correct. The first developer gave security deposits of Rs. 12.27 Cr and incurred expenses Rs. 3.81 Cr (Approximately) on levelling of land, execution etc. There was a good intention to develop the project on the part of the first developer owing to various factors, the first developer could not complete the project on time and the first developer formed a new LLP along with another person i.e Jayabheri group and continued with the development of the project. It is not a case where the first developer completely exited from the project development.

16.Without prejudice to the above submissions, no capital gains arise in AY 2016-17 because the second developer had applied for the approval of the plans on 17.10.2016 and the competent authority gave the approval for construction plans on 09.05.2017. Therefore, even under the second JDA i.e 2016, the capital gain arises in AY 2018-19 and not in A.Y 2016-17.

17.Without prejudice to the above submissions, the capital gain should be restricted to 57% of the land transferred and the FMV of land as stipulated U/s 50C to be adopted as deemed sale consideration and indexed cost of acquisition of cost of land to the appellant be allowed as cost of acquisition.

18.The revenue has to be consistent in its approach in treatment and interpretation of JDA, 2016. The revenue in the following cases did not bring the capital gains to taxation in AY 2016-17. Further, Ld CIT(A) also allowed the appeals of the assessees in certain cases.

A. Cases in which CIT(A) allowed the assessee's appeal

i. Smt. Kavya Khajer ITA No: 10336/2015-16 dated 21.06.2022
ii. Sri. Lakshmi Narayana Khajar in ITA No: 1033/2015-16 dated 22.06.2022.

B. In the following co-owners cases, the assessments have been completed by National Faceless Assessment Centre accepting the Income returned/dropping the proceedings U/s 147.

I. Mr. Vankina Chamundenswara Rao
ii. A. Bhaskar Reddy, HUF
iii. Apollo Corporate Services Pvt Ltd.

C. The appellant relies on the ratio laid down in:

i. J.K charitable 308 lTR 161 (SC)
ii. Radhasam satsang 193 hR 321 (SC)

iii. Chittaharanjan A. Dassanna Charya – 429 ITR 570 (Kar)

19.The Hon'ble ITAT, Hyderabad has been consistently taking the view that JDA cannot be construed as a Transfer U/s 2(47)(v) of the Income Tax Act in the absence of performance of the contract by the developer. Handing over of possession which is nothing but a licence and receiving advance is not relevant. There are a catena of decisions of the Hon'ble ITAT, Hyderabad and a few are listed below.

- *I. Binjusaria Properties (P) Ltd (2015)40 ITR (Trib) 230 (ITAT)(Hyd)*
- *ii. Fibars Infratech (P) Ltd Vs ITO - ITA No 474/Hyd/2013.*
- *iii. K.Radhika Vs DCIT 17 SoT 180(Hyd)*
- *iv. S.Ranjith Reddy Vs DCIT, 6(1), Hyderabad 144 lTD 461*
- *V. ABVSlDrakash Vs ACIT, Central circle-1, Hyd in ITA No: 462/Hyd/2013.*
- *vi. Smt. Sudha Giri Vs ITO 6(3), Hyd in ITA No: 1578/Hyd/2014.*
- *vii. Vijaya Productions Pvt Ltd - ITAT, Chennai*

The appellant relies on the apex court decision in the case of Seshasayee steels (P) Ltd 421 ITR 46.

20.Rebuttal of A.O's findings:

The Assessing officer's argument is that the second JDA entered in 2016 is independent of the first JDA. The reason for coming to the said conclusion was based on certain wrong assumptions/interpretations. The assumptions of the A.O and the rebuttal against the same is presented in the below mentioned tabular format :

Assumptions / Interpretations of the Assessing Officer	***Rebuttal***
Sharing Ratio was determined in the JDA,2016 and the same was 'missing in was determined as 45:55 landlords Old JDA, 2007	*The same is not correct. Sharing ratio developer in the JDA, 2007 and the same is 43:57 in the JDA, 2016. The cost of construction has increased from Rs. 47.53 Cr to Rs. 177.5 Cr.*
Possession of the Land was not given along with the JDA, 2007. He reproduced a para from the second JDA, 2016 in support of the same.	*Possession of the Land was given to the developer in the JDA, 2007. Clause 11 of the agreement clearly indicates that. The clause relied on by the assessing officer, in fact, states that the first developer handed over the land to the second developer and not land lords to the second developer.*

Certain land lords in the JDA, 2007 sold their lands and the buyers entered into as parties in the JDA, 2016 and hence possession of property was not given in the JDA, 2007.	*It is not correct that the parties have sold land. In fact they have transferred the development rights and the buyers of the said rights have joined as parties in the JDA, 2016. The AO has mentioned this fact in Kolli Gopal Krishna Asst. Qrder. The sale deed pertaining to Mr Kolli Gopala Krishna clearly indicates that they have only transferred the development rights and not the land as alleged by the AO.* *A. In fact, the said sale deed also clearly mentions that vendors predecessors in title have delivered the actual physical possession of the Property…… and the vendor is handing over the symbolic possession of the property under the said sale deed. Therefore, the AO statement that land is transferred subsequent to entering JDA and hence possession is not given is completely wrong understanding of facts.*
Relevance of the various case laws cited by the AO	*The assessee case is different. The developer has carried out certain excavation works and also spent huge amount of money. Also prepared drawings and however later could not proceed further owing to various factors mainly, Telangana agitation. Therefore, the case 1aws relied on by the AO are not applicable. The facts in the decisions relied on by the AO are that after entering into JDA, no work has been carried out by the developer which is not the case of the assessee. The first developer has executed some works and later could not continue. Therefore, willingness to perform the contract was established by the first developer and even going by the decisions relied on by the AO, the JDA cannot be taxed in the AY. 2016-17.* ***In fact, the AO did not distinguish the decision of the Hon'ble supreme court in the case of Balbir Singh Mania which isa direct decision in the context of JDA taxation.***
Sharing ratio in JDA, 2007 and JDA, 2016 is different.	*The said observation of the AO contradicts his own remarks. He*

	argued that no sharing ratio was determined in the JDA, 2007 else where in the assessment order and states that sharing ratio was reduced from 45 to 43% in the subsequent paras. It is submitted that due to paucity of time and increase in the overhead costs, the land lords agreed for the change in the sharing ratio. The change only proves that the JDA, 2016 is only an extension of the JDA, 2007. Further, the said change in the sharing ratio, no where affects handing over of the land.
The developer after entering into JDA on 10/02/2016 immediately prepared plans and within a period of one week after entering into JDA 1.e, 17/10/2016 got plans were submitted and approval was received.	*It is not a week. There was a gap of nearly 9 months between the dates mentioned in the assessment order itself. The Second JDA entered on 10/02/2016 i.e., during the A.Y. 2016- 17. The second developer applied for municipal permission on 17/10/2016 i.e, during the A.Y. 2017-18 and finally the plans got approved on 09/05/2017 i.e,. during the A.Y. 2018-19. All the actions fall in different assessment years. Therefore it cannot be said that willingness to perform is established in the AY 2016-17 as alleged by the AO and hence no capital gain arises in the said asst. year.*
The second developer has shown an amount of Rs. 17.95 crores as spent towards property during the F.Y 2015¬16 which reflects that the developer continued actions in furtherance of the JDA.	*The said amounts pertain to the advances to the land lords and excavation works executed by the first developer which were transferred to the second developer upon entering into JDA, 2016. In fact, this reimbursement was omitted in the Tripartite Agreement and however parties entered into a separate supplemental agreement to the Tripartite Agreement, agreeing for this reimbursement. Therefore, the AO's contention that the second developer has spent substantial amounts is not correct. They only reimbursed the expenditure incurred by the first developer. The second developer commenced work only after municipal plans were approved. Therefore, the. execution of works in furtherance of*

	JDA was not established in the AY 2016-17.
If the possession of the property is parted by the land lords in the JDA, 2007, there is no need to enter tripartite agreement during the current assessment year i.e 2016-17.	*There is a clear mention of parting possession in the JDA, 2007 as well as in the JDA, 2016. The land lords entered into tripartite agreement only as a consenting parties for the smooth completion of the project and assurance to the' second developer.*

8. On the other hand, in support of their case, ld. DR for the Revenue relied upon the following decisions:

i) Smt. Naga Padmaja Vangara Vs. Income Tax Officer (145 Taxmann.com)115 (Hyd.Trib)

ii) K. Vijaya Lakshmi Vs. ACIT (91 Taxmann.com 253)

iii) Potla Nageswara Rao Vs. DCIT 50 taxmann.com 137 A.P 2014

iv) Chaturbhuj Dwarakadas Kapadia of Bombay vs. CIT (120 Taxman 497).

8.1. The ld. DR has also drawn our attention to the written submissions filed in ITA 434/Hyd/2022 which are to the following effect :

(a) Para 20 of the development agreement states that the second development agreement dt: 10/2/2016 was made and executed in suppression of the first development agreement dt 4/4/2007 which means this is a new development agreement and old agreement stands suppressed or cancelled.

(b) This is not just an assignment of development rights with land owners as consenting parties. The agreement may perused. There are a number of changes in the terms of the development agreement to which

the owners have been made party - the permission for plans to be obtained by the new developer, amount of built up area and its sharing ratio, club house, maintenance charges collection, the maintenance of the project by the developer, the, contribution to corpus fund etc (from paragraphs 2 to 18 of the agreement). The only point of the no objection comes in para 1 where the second party (earlier developer assigned its rights). When land owners and the developer are coming up with new terms, saying this is only an assignment of development rights is incorrect, for that is only 1 part of the agreement and in every other aspect it is drawing up of a new agreement.

(c) Even if it is said that there is no cancellation of earlier agreement, this development agreement still falls within the provision of section 2 (47) (v) of the IT Act that defines transfer in relation to capital asset. The stated 2(47(v) refers to the transaction in relation to part performance of contract under section 53A of the Transfer of Property Act which reads as under:-

[53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

(d) The current agreement fulfills the conditions laid out in the above -

1) *person contracts to transfer - both the landowners (first party) and the earlier JDA holder (second party) have contracted to transfer by way of no objection and by handing over of possession of property respectively*

2) consideration in the contract - built up area

3) terms ascertained with reasonable certainty - yes

4)transferee taken possession of property - yes (third party)

5) transferee has performed or is willing to perform his part of the contract - yes

(e) There is no stipulation in the above provisions of section 53A of the Transfer of Property Act that the possession to the transferee should be directly from the land owner."

9. We have heard the rival submissions and perused the material on record. In the present case, the DRP/Assessing Officer had made addition in the hands of the assessee on the ground that the transfer of land took place on account of the Joint Development Agreement (JDA) dt.10.02.2016 entered between assessee and other 46 persons as land owners (hereinafter called as ("Group of assessee"), M/s. Trendset Bharat Project Developer Pvt. Limited (TBPD) and M/s. Trendset Jayabheri Project LLP (TJP).

9.1. It is the case of the assessee that prior to execution of the document dated 10.02.2016, the "Group of assessee" had entered into registered JDA on 04.04.2007 with TBPD and at the time of entering into JDA, the possession of the entire land of Ac.12.09 gts was handed over to the TBPD under the JDA dt.04.04.2007. The "Group of assessee" had received the security deposit of Rs.12.27 crores from TBPD. Besides that the share in the built-up area was agreed in the ratio of 45 : 55 between the "Group of assessee" and the TBPD.

9.2. TBPD in pursuance of the registered joint development agreement dt 04.04.2007 executed various works of levelling of

excavation work etc and had spent approximately Rs.3.75 crore for that purposes.

9.3. As the TBPD was having financial constraints and other technical problems, therefore, the TBPD had approached TJP for taking over the development of the project on as is where is basis. The TJP had agreed to complete the development project in accordance with the terms and conditions of the new arrangement were agreed between the "Group of assessee", TBPD and TJP vide development agreement cum General Power of Attorney dt.10.02.2016.

9.4 The development agreement cum General Power of Attorney dt.10.02.2016 (hereinafter called as "2nd JDA") is the foundation of the addition made by the Assessing Officer and confirmed by the DRP. It is the case of the Revenue before us that the transfer within the meaning of section 2(47) of the Act has taken place pursuant to the 2nd JDA as the 1st JDA has not been acted upon and fell apart. It is the case of the Assessing Officer that the TBPD has not taken sanction either from the concerned authorities for conversion of agricultural land into residential area or the approval of construction plan.

9.5. In the light of the above said finding of the Assessing Officer, the whole issue which is required to be adjudicated by us is whether transfer took place at the time of entering into first agreement on 04.04.2007 or it took place after entering into the 2nd JDA.

9.6. For the above-said purposes, it is necessary for us to consider various terms mentioned in the 1st JDA dt.04.04.2007. We are reproducing hereinbelow some of the important terms of the 1st JDA dt.04.04.2007 which are relevant for the adjudication of the present dispute. At internal page 19 of the 1st JDA, it was mentioned as under :

> *"Thus the owners became the absolute owners and in exclusive possession of agricultural plots nos.1 to 20 together with proportionate passage rights for the said agricultural plots totally admeasuring Ac.12.09 gts (including passage area of 0.09 gts) situated in Survey No.5 of Kondapur Village, Serlingampally Mandal, R.R.District (hereinafter referred to as the SCHEDULE PROPERTY).*

9.7 The relevant clauses i.e., 2, 3, 4, 8, 9, 11, 21, 26 at page 57 afterwords of the agreement provides as under :

> *"2. (a) In like of the development work granted by the owners in favour of the Developer, the Owners and the Developer shall share the built up area (inclusive of all common areas i.e., usable area, floor area like balconies, staircase, lift, corridors and etc., and the parking area in the ratio of 45:55 i.e., 45% in favour of the owners and 55% in favour of the Developer. The Owners and the Developer shall be entitled for the undivided share of land in the schedule property in the above said ratio i.e., 45 %: 55 %.*
>
> *(a) It is made clear that the total built up area and the parking area i.e., commercial area and the residential area or any other structures sanctioned by the Government / HUDA / Municipal Authority for the total extent of Ac.12-09 Gts., of land shall be proportionately calculated to the share of the schedule property and the same shall be proportionately shared by the Owners and the Developer. However, amenities being developed by the Developer in the schedule property shall be the common property of both the Developer and Owners.*

(b) The Owners and Developer shall share the terrace area or any additional area granted by the Government in the same ratio of 45% : 55% to the Developer. However, after completion of the project all terrace rights shall vest as per HUDA mandate.

(c) The allotment of the built-up area shall be depended upon the actual extent of the land available in the Schedule Property, after conducting survey of the total land area and the same shall be incorporated in the Supplementary Agreement to be executed by and between the Owners and the Developer for allotment of the built-up area. It is further agreed that the allotment between the Owners and Developers shall be mutual between the Owners and Developer shall be mutual and the allotment among the owners shall be as part transparent lottery system."

…….

(3) The Developer at its costs and expenses undertakes to obtain necessary permissions such as conversion of land use from the HUDA / Govt. of A.P. and sanctioned building plan from the HUDA / Municipal Authority or any other authorities.

(4). The Owners along with other Owners undertake to sign the applications, affidavits, building plans, revised plans, declarations etc., for obtaining the building plant for the total extent of Ac.12.09 gts, including passage area of Ac.0.09 gts) of land from the Government / HUDA / Municipal Authority viz., conversion of land use from residential use zone to commercial use zone and sanctioned building plans for construction of Commercial / Residential area.

(8) The Owners agree to refund his/her respective security deposit to the developer upon handing over of the possession of his / her respective share. If the owners fail to refund the interest free secutiy deposit, the developer can retain the proportionate built up area and one of the 45% built up area allotted to the share of the owners to the extent its meets the security deposits at the then market value and it can deal with the same absolutely and that the owners hereby agree for the same. The developer shall have lien over the property of the defaulting owner and consequently exercise the right to transfer the same through valid sale deeds in favour of the developer / attorney of their nominees.

(9) The developer undertakes to complete the constructions of the commercial / residential area as per the sanctioned HUDA / Municipal Plan for the total extent of Ac.12-09 gts of land and the specifications annexed herewith and shall deliver possession of the built up area and the car parking areas allotted to the share of the owners, within 30 (THIRTY) months from the date of the sanctioned plan granted by the HUDA / Municipal Authority with a grace period of six months. The developer shall complete the construction of the commercial / residential area with all the finishing work, colouring / painting etc., in the above said period and it shall be habitable for use and occupation. It is also mutually agreed that if for any reason the project is delayed due to any force Majeure, restraint orders of the court, natural calamities, the period of completion shall be extended accordingly.

(*11) Today the owners have delivered vacant physical possession of their respective land in the schedule property to the developer for commencement of the development work.*

(21). The Owners covenant and undertakes that they will not to attempt to sell, deal with or dispose or alienate or otherwise enter with any other agreement in respect of their respective land in the schedule property with any other person/s at any point of time during the subsistence of this development agreement, subject to clause 10 of this agreement.

(26) Subject to clause 26 above, if any party commits breach of the terms and conditions of this agreement, the other party shall be entitled to enforce this contract for specific performance and shall be entitled for the damages against the defaulting party.

*(d**) to enter into agreements of sale in respect of its share of 55% in the schedule property or any part thereof by virtue of these presents for such consideration, terms and conditions and covenants as he may deem fit and proper and register the same before the concerned authority, if required.***

(e) to execute, sign and present for registration the sale deed (s), conveyances and indentures and admit execution, inter-alia conveying the developer's allocated share of 55% in the schedule property.

(f) to receive and appropriate the sale consideration advances, rents and other monies and to acknowledge and pass receipts there for from the buyers, lessees and other person or persons entering into any kind of transaction in respect of its 55% share in the schedule property;

This development Agreement -cum – General Power of Attorney for consideration paid and received shall be irrecoverable and be binding on

the successors in interest, heirs, executors, administrators, legal representatives, agents and assigns of both the owners herein."

9.8 The conjoint reading of the above said clause of the registered 1st JDA clearly shows that the transfer within the meaning of section 2(47) had taken place on 04.04.2007. As the possession of the land has been transferred by the "Group of assessee" to the TBPD and TBPD had also paid the security to the "Group of assessee". Further, the ratio of built up share has been agreed in the ratio of 45 : 55 between the "Group of assessee" and the TBPD. As per 1st JDA, the developer (TBPD) had a right to enter into agreement of sale in respect to its share of 55% in schedule property and register it as "owner" [Para 26 of 1st JDA]. Once the developer has a right to enter into agreement of sale of the property, then Assessing Officer cannot assume the "Group of assessee" continues to be the owner of their land falling as share of TBPD and no transfer has taken place pursuant to 1st JDA. In view of the above, the taxable event i.e., transferring right in land had taken place in the year 2008-09 and not in the year under consideration. Our above said view is duly supported by the decision of the jurisdictional High Court in the case of Potla Nageswara Rao has held as under :

"9. 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. Hence, the learned Tribunal has rightly held that the appellant is liable to pay tax on the capital gains for the

assessment year. Accordingly, we do not find any element of law to admit this appeal."

9.9. In the present case, the parties have entered into registered JDA on 04.04.2007 and the "Group of assessee" have also handed over possession to the TBPD pursuant to the agreement. Hence, for all purposes, transfer took place in the assessment year 2008-09. Hence, an addition, if any, can be made in the assessment year 2008-09 for the consideration mentioned in the JDA dt.04.04.2007. Undoubtedly, no additions were made in the hands of the "Group of assessee" on the basis of 1st JDA dt.04.04.2007 by the Revenue.

10. The Revenue has made the addition on the basis of the 2nd JDA dt.10.02.2016 on the pretext that the 1st JDA dt.04.04.2007, fell apart and the Assessing Officer had estimated the capital gain on the total cost of the project. In our considered opinion, the Revenue cannot make the additions on the basis of 2nd JDA as the rights and obligations of the "Group of assessee" and TBPD were crystalized by virtue of 1st JDA, which was binding on both the parties and was irrevocable. However, for the purpose of completeness, we are reproducing hereinbelow some of the terms of the 2nd JDA.

10.1. At page 11 of the JDA dt.10.02.2016, it was mentioned in Para R and S as under :

R. WHREAS the Land Owners of First Party in order to develop the said property for better advantage entered into a Regd. Development

Agreement cum GPA with Second Party / previous Developer vide Regd. Development Agreement Doc. No.7003 of 2007 dated 04.04.2007 for development of the said property as per the terms and conditions contained therein and handed over possession of the schedule property to Second Party on the date of development agreement i.e., on 04.04.2007

S. WHEREAS the second party has undertaken the development and commenced works such as leveling, excavation work and other works on the land. The second party, due to its pre-occupation and other commitments, is not in a position to carry out further development work on the agreed timelines, it has approached third party / the present developer to implement the development of the project by taking over the development of the property / project on as is where is basis and complete the project as per the terms set out in this agreement.

10.2. Similarly, in Para No.5.1 of JDA at page 11, it was mentioned as under :

"5.1. In consideration of the Land Owners of First Part granting developmental rights to third party / the present developer, third party / the present developer with its own funds construct and deliver to the landowners of First Part 43% of commercial and residential super built up areas which includes all common areas, circulation areas, balcony areas and parking includes all common areas, along with proportionate share of undivided land in the proposed commercial / residential apartment complex in the schedule property. In consideration for developing the schedule land at its own cost and delivering the landowners share at free of cost, the third party / the present developer is entitled for the remaining / balance 57% of commercial and residential built up areas which includes all common areas, circulation areas, balconies areas and parking areas along with proportionate share of undivided land in the proposed residential / commercial complex. It is agreed between the parties that third party shall construct a minimum of 20 lakhs sq. feet of saleable that third party shall construct a minimum of 20 lakhs sq. feet of saleable area on the schedule property or as permitted by the approving authorities like GHMC / Fire Department / Airport Authority of India etc. The word "super built-up area" mentioned herein shall mean the total constructed area including balconies, sit outs, staircases, lift rooms, electrical meter room, pump room, generator rooms, security room, common areas and circulation areas excluding car parking area."

10.3. The relevant clause i.e., Clause (1) of 2nd JDA dt.10.02.2016, at page 12, was reproduced hereinbelow for ready reference :

<u>"PERMISSION FOR DEVELOPMENT:</u>

1. The second party ***being in possession*** *of the schedule property has today,* ***handed over the possession*** *of schedule property to* ***third party*** */ the present developer with all its rights including to enter upon the schedule property and develop the same in terms of this Agreement for which the landowners of First Part have no objection.*

1.2.......

1.3. The Landowners of First Part and the second party hereby agree not to disturb or interrupt third party / the present developer in the course of consideration and development of the schedule property. However, the landowners of First Part shall always on a prior intimation and consent from Third Party be entitled to inspect the progress of the work to ensure that the Third Party / Present Developer is carrying out construction as per specifications.

1.4. The Third Party shall appoint Contractors, Civil Engineers, Architects, Consultants, Project Management Consultancy (PMC) as desired by it, and to effective development and completion of the buildings on the schedule property in such manner as the Developer may deem fit and proper. The Third Party / PMC shall furnish a quarterly report communicating to the land owner nos.21 and 33 viz., Sri K. Ajay Kumar & Sri. Avula Bhaskara Reddy for themselves and on behalf of and as representatives of the other landowners of First Part herein declare and confirm that since they are large in number, it is not possible for all of them collectively to take time to time decisions and to interact with the Thid Party / Present Developer and hence for their convenience, the landowners herein hereby appoint landowner nos.21 and 33 of the First Part as their authorized representatives to deal with the Third Party from time to time on their behalf in terms of this Agreement and further authorized to execute Rectification Deeds if necessary and further declare that time to time decisions to be taken by such representatives with the Third Party shall be deemed to be collective decisions taken by all the landowners of First Part."

11. The finding of the Assessing Officer mentioned at Para 11 of his order, is read as under ::

"11. After verification of the material available on the records and the replies filed the assessee, the assessment is completed as under :

Brief facts of the case are as under :

i. Originally, the assessee along with 44 landlords have entered into Joint Development Agreement on 04.04.2007 with M/s. Trendset Projects Pvt. Ltd with a project cost determined at Rs.47,33,52,000/- and the sharing ratios were not determined.

ii. In furtherance to the said development agreement, as there was no act in furtherance to the said JDA by the developer, the said JDA fell apart.

iii. Subsequently, on 10.02.2016, the assessee along with other landlords (now 47 land lords) have entered into JDA with M/s. Trendset Jayabheri LLP with a project cost at Rs.177,50,70,000/- and the sharing ratio is determined for each land lord. In the said JDA, erstwhile developer i.e. Trendset Projects was also made a party.

iv. It is noticed from the said latest JDA entered on 10.02.2016 that new land lords have joined and entered into the said JDA in place of old land owners. Some of the land owners have sold their land subsequent to the JDA entered on 04.04.2007. The said details of the old and new parties' names are tabulated as under :

Sl.No.	*Names of the parties as per JDA dt.04.04.2007*	*Sl.No.*	*Names of the parties as per JDA dt.10.12.2016*
19	*M/s. Cholapunam Park Pvt. Ltd*	*20*	*Kolli Gopala Krishna*
20	*M/s. Nija Developers Pvt. Ltd*	*25*	*Kethineni Goutham*
25	*Tammineedi Subbaa Rao*	*26*	*Kethineni Ananthalakshmi*
42	*T. Vijaya Kumar*	*28*	*Kethineni Satyanarayana*
43		*29*	*Kethineni Sriharsha*
--		*45*	*M/s. Kamadhenu Estates*
		46	*Aishwarya Konijeti*

v. On comparison of both the development agreements, it is noticed that the parties as mentioned in the first two columns with serial numbers appearing in the original JDA dated 04.04.2007

are not appearing in the 'latest JDA dated 10.022016 and names of new parties against the serial numbers in the above table are mentioned. The said change in the parties' names means that the land lords have not relinquished their rights over the property and have not transferred the possession of the property to the original developer viz M/s Trendset. In response to the said query, the assessee submitted that vide the original JDA, the possession of land falling in her share has been already handed over to the original developer M/s Trendset and there in no change as far as the assessee's share is concerned. However, the version of the assessee cannot be accepted as the assessee along with other land owners have entered JDA and effect of the clauses in the said JDA will have on the assessee also. As brought out in the earlier paragraphs, the land owners have not relinquished their share of land, which includes the assessee's share also. Now the assessee cannot claim that she independently has handed over the possession. Hence, the claim of the assessee does not have any merits and hence rejected.

vi. The assessee submitted that if it is presumed that there was no transfer of land to the first developer (original developer) under the provisions of Sec 2(47) on account of no further works were carried on, then immediately after entering the JDA, the new developer also did not take up any work but got the plans prepared and submitted to GHMC only on 17.10.2016, which were got approved on 09.05.2017 and hence, there cannot be a transfer u/s 2(47) so as to levy capital gains during the relevant assessment year 2016 - 17. The claim of the assessee is not acceptable as, it is noticed that the original developer has not obtained any approved plans as evidenced from the latest JDA dated 10.02.2016, as per Clauses 2.1 and 2.2.. It is mentioned that the developer M/s. Trendset Jayabheri shall prepare a comprehensive Plan and shall bear all the expenses and necessary fees to the GHMC/HMDA etc. The relevant excerpts of the said clauses are reproduced here as under:

Clause 2.1 Third Party / the present Developer shall prepare a comprehensive plan for construction of Multi-storied residential apartment complex on the .part of the scheduled land and commercial complex on the part of the land as per the building bye-laws and shall submit the plans and shall submit the plans along with necessary.... to get them sanctioned. It is the sole discretion of the third. party / present developer, the extent of land.....

Clause 2.2 The third party / present developer shall bear all the expenses for preparation of the said plans, and shall pay the necessary fees to the GHMC/HMDA ... etc.

As seen from the above and also as submitted by the assessee herself, immediately after entering JDA on 10.02.2016, the developer has got plans prepared and submitted by 17.10.2016 I.e., immediately within a week after entering the JDA. It shows that the developer has done acts in furtherance to the clauses as mentioned in the latest development agreement. Hence, the assessee's version cannot be accepted.

vii. Further, in response to the notice issued u/s 133(6) to the developer M/s. Trendset Jayabheri Project LLP, it is submitted by the said developer that during the F.Y. 2015-16 and 2016-17, amounts of Rs.17.95 crores and Rs.33.85 crores respectively were spent towards the property development and reflected under "Inventories" in Balance Sheets for the respective years. It shows that the said developer has continued actions in furtherance to entering the development agreement.viii. If the assessee's version that the possession of the property is with the original developer M/s. Trendset, then there is no need for entering a tripartite agreement (JDA) with the new developer M/s. Trendset Jayabheri. On a close scrutiny of new JDA entered on 10.02.2016, it is very much clear that the land owners have not parted with their ownership of the land and have not relinquished their rights over the property. The said details of clauses of the latest JDA dt.10.02.2016 have been discussed in the notice u/s 142(1) issued on 18.01.2022.

12. In our view, the finding recorded by the lower authorities is without any basis and contrary to record. Undoubtedly, possession was handed over by the "Group of assessee" to the TBPD on 04.04.2007. However, the Assessing Officer has raised suspicion on the basis of the finding given at Para (iv) supra, on the pretext that as against five persons, the names of seven persons are appearing in the 2nd JDA and further, it was concluded that Smt. Mulpuri Meena had sold her share to M/s. Kamadhenu Estates vide sale deed dt. 06.02.2016. Similarly, the sale deed dt.28.01.2016 was executed by Mr. P. Dayananda Pai in favour of Mr. Kolli Gopala Krishna. The Assessing Officer relied upon Para

4.1 of the sale deed dt.28.01.2016 wherein it is mentioned as under :

> *4.1. The vendor has today delivered the symbolic possession of the property to the purchaser pursuant to this sale deed the purchaser shall be entitled to enter upon, hold, possess, and enjoy the Vendor's undivided share in the Property in terms of the DAGPA and receive the income and profits there from, as the sole and absolute owner, without any interference or disturbance from the Vendor, any predecessor-in-title and / or from persons claiming through, under or in trust from the Vendor.*

13. In our view, the above said conclusion of the Assessing Officer/DRP is not correct as they have failed to appreciate and read the sale deed as a whole. In the sale deed, at Page 2, the following covenants are mentioned C to F.

> *"(C) The Vendor hereby represents to the Purchaser that the Vendors predecessor in title i.e., MIs. Chola Punam Park Private Limited and Walden Properties Private Limited. (formerly Nija Developer Private Limited) have entered into a Development Agreement cum General Power of Attorney with Trendset Bharat Project Developers Private Limited (the "Developer") on 04.04.2007 granting development rights over the Property and the Vendor herein has, further agreed to adhere and grant the development rights over the Property to the said Developer in accordance with the already registered Development Agreement cum General Power of Attorney. This Development Agreement cum General Power of Attorney is registered as Document No. 7033 of 2007 (the "DAGPA") with the office of the District Registrar, Ranga Reddy District.*
>
> *(D) The Purchaser is aware of the existence of the DAGPA and explicitly acknowledges, agrees, and undertakes that pursuant to the execution and registration of Sale Deed, he shall adhere and abide by the terms and conditions of the DAGPA and shall extend the required support in the best interest of the transaction as he will be subrogating in place of the Vendor.*
>
> *(E) The Vendor has represented to the Purchaser that he is the absolute owner of the Property with uninhibited rights of alienation over the property. That Vendor's predecessors in title have delivered the actual physical possession of the Property to' Trendset Bharat Project*

Developers Private Limited for carrying out the development contemplated under the afore-mentioned DAGPA. Thus, the Vendor is handing over the symbolic possession of the Property to the Purchaser under this Sale Deed."

(F) 'The Vendor, hereby represents to the Purchaser that no person other than the Vendor has any-right, title 'or interest of any manner whatsoever in respect of the Property. 'The Vendor has agreed to sell the Property to the Purchaser representing that he is the absolute owner thereof with uninhibited rights of alienation over the same and that he will fulfil al1 legal requirements leaving behind no impediments in law for the conveyance of the Property in favour of Purchaser.

14. From the reading of the above said covenants, it is clear that the seller has sold his rights in the property subject to the registered JDA dt.04.04.2007. Further, in clause E, it was clearly mentioned that the actual physical possession was handed over by the vendor's predecessor at the time of entering into 1st JDA dt.04.04.2007 and only a symbolic possession was given to the purchaser at the time of possession.

15. In view of the above, it is clear that the finding recorded by the revenue authority is contrary to record and is not sustainable as the possession was all along been with the TBDP after 04.04.2007 and it had only handed over possession to TJP on 10.02.2016. In view of the above, it cannot be said that the transfer took place on 10.02.2016 and not on 04.04.2007.

16. The Assessing Officer had also given the reason that there is a change in sharing ratio of built up area between the "Group of assessee" and the second developer / 1st developer. Earlier it was 45 : 55 and in the 2nd JDA, it is 43 : 57. In our view, this reduction in the share of the "Group of assessee" cannot be made the basis

of holding that the earlier JDA fell apart and a fresh JDA came into existence. As mentioned hereinabove, the "Group of assessee" were merely consenting / conferring party to the JDA and all their rights, substantially flown from the 1st JDA. Even if there is some modification in the sharing of the constructed built-up area rights, then it will not amount to total abdication of the 1st JDA at the most, it can be said to be negotiation / re-alignment of rights among the parties had happened, however the basic facts remained that the possession of the property had been transferred to TBPD on 04.04.2007. In our view, the assessee was left with no right in the property after entering into the Joint Development Agreement dt.04.04.2007 save and except the right to receive the built-up area in pursuance to Joint Development Agreement dt.04.04.2007. We are of the opinion that once the transfer has taken place on 04.04.2007 based on registered JDA then no addition can be made in the assessment year based on subsequent agreement dt.10.02.2016.

17. In our view assessee has neither received any consideration pursuant to the agreement dt.10.02.2016 nor the assessee had transferred the land to M/s. Trendset Jayabheri Project LLP nor there is increase in size of the assessee's built-up area. As mentioned herein above in the registered 2Nd JDA, the possession of the property was handed over by M/s. Trendset Bharat Project Developer Pvt. Limited to M/s. Trendset Jayabheri Project LLP at the time of entering into agreement dt.10.02.2016 (refer Para 103 supra).

18. The law is fairly settled that the contents of the registered document dt.10.20.2016 evidencing handing over of the possession by TBPD to TJP cannot be disputed by the assessing officer. Law is fairly settled in the Evidence Act that the contents of the registered document will prevail over the other pieces of evidence. No contrary evidence had been produced by the revenue to contradict the contents of 2nd JDA dt.10.02.2016.

19. The undisputed facts are that Joint Development Agreement dt.04.04.2007 was a registered agreement and at the time of entering into the said agreement, assessee along with others received a total security amount of Rs.12.27 crore from M/s. Trendset Bharat Project Developer Pvt. Limited and handed over the possession to TBPD.

20. In our view, the issue needs no further deliberation as the judgements relied upon by the Revenue are in fact, supporting the case of the assessee instead of supporting the Revenue. The decision of the Hon'ble Supreme Court relied upon by the assessing officer in fact supports the case of the assessee as the JDA was registered, the possession was handed over to the developer and substantial security deposits were received by the "Group of assessee". The Assessing Officer has misread the decision and has not appreciated the ratio of the decision. For completeness, we are reproducing with emphasis of the decision of the Hon'ble Supreme Court which clearly shows that in case, the agreement is registered, the date of registration would be the

date of transfer. In the case of BalbirSinghMaini [2017] 86 taxmann.com 94 (SC) it was held as under:-

> *"**20.** The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act**. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A**. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi (supra), that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration**. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered**. **This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document**. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question. [Emphasis supplied by us]*
>
> ***21.** However, the High Court has held that Section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. We are afraid that we cannot agree with the High Court on this score. Under Section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted*

to the expression "or in any other manner whatsoever" in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. We have, therefore, to see whether the impugned transaction can fall within this provision.

22. *The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property.* ***The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof***[1] *The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.*

23. *A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, and that too for a specific purpose -the purpose being to develop the property, as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction.*

24. *The matter can also be viewed from a slightly different angle. Shri Vohra is right when he has referred to Sections 45 and 48 of the Income Tax Act and has then argued that some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset.*

25. *……This Court in E.D. Sassoon & Co. Ltd. v. CIT AIR 1954 SC 470 at 343 held:*

"……………………………………………………………………………………………………

."

26. *This Court, in CIT v. Excel Industries [2013] 358 ITR 295/219 Taxman 379/38 taxmann.com 100 (SC) at 463-464 referred to various judgments on the expression "accrues", and then held:*

……………………………………………………………………………………….."

27. *In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.*

28. *In the present case, the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being*

obtained. This being the case, in the circumstances, there was no debt owed to the assessees by the developers and therefore, the assessees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act."

21. In the decision first cited in the case of Smt. K. Naga Padmaja Vangara Vs. ITO, the Tribunal at Paras 12 to 14 had held as under :

"12. The learned DR, on the other hand, drew the attention of the Bench to the detailed order passed by the learned CIT (A) on the issue of computation and or taxability of capital gain and submitted that the learned CIT (A) in his detailed order has rejected the claim of the assessee. His decision is based on the decision of the ITAT Hyderabad Bench in the case of Smt. K. Vijaya Lakshmi (Supra) where it has been held that provision of section 45(5A) cannot be applied retrospectively.

13. Further, the Hon'ble A.P High Court in the case of Potla Nageswara Rao (Supra) has held that transfer is complete on the execution of the JDA and thus was liable to be taxed in the impugned A.Y. He accordingly submitted that the order of the learned CIT (A) being based on the basis of the decision of the jurisdictional High Court and jurisdictional Tribunal, the grounds raised by the assessee should be dismissed.

14. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the ITA No 34 of 2020 Naga Padmaja Vangara various decisions cited before us by both sides. We find the assessee in the instant case has entered into a Joint Development Agreement cum-GPA with M/s Dhanush Builders & Developers for development of 791 sq.yards bearing Plot No.27 & 28, R.S. No.189/4A, Narayanapuram, Rajahmundry, A.P vide doc No.2038/2016 dated 24.02.2016. As per the agreement, she got 8 Flats of 1100 sq.ft. each. The total market value of the project as per the document (SRO) is Rs.2,70,50,000/- (land value Rs.79,10,000/- and market value of constructed area is Rs. 1,91,40,000/-. Since the assessee had not disclosed the land transfer transaction in her return of income, the Assessing Officer after considering the share of the assessee in the project at 40% determined the consideration and transfer of the property at Rs. 1,08,20,000/-. After deducting the indexed cost of acquisition of Rs. 11,717/- he determined the LTCG at Rs. 1,08,08,283/-. We find in appeal, the learned CIT (A) following the decision of the Coordinate Bench of the Tribunal in the case of K. Vijaya Lakshmi (Supra) held that the

provisions of section 45(5A) cannot be applied retrospectively. Similarly, following the decision of the Hon'ble A.P High Court in the case of Potla Nageswar Rao (Supra) where it has been held that the transfer is complete on the execution of the JDA, he held that the assessee is liable to capital gain tax in the impugned A.Y i.e. A.Y 2016-17 when the Jt.Development Agreement was entered into between the assessee and M/s. Dhanush Builders & developers for development of the property. We do not find any infirmity in the order of the learned CIT (A) on this issue. Since the learned CIT (A) in his detailed order has decided the issue regarding the year of taxation of the capital gain and also the manner in which the capital gain should be computed which is based on the decision of the jurisdictional High Court and the Coordinate Bench of the Tribunal. Therefore, we do not find any ITA No 34 of 2020 Naga Padmaja Vangara infirmity in the order of the learned CIT (A) in dismissing the grounds raised before him. Accordingly, the grounds raised by the ass are dismissed."

22. The sum and substance of the above said decision was that the transfer is complete on the execution of the JDA. In the present case, the JDA was entered between the assessee, other land owners and M/s. Trendset Bharat Project Developer Pvt. Limited on 04.04.2007 and therefore, this decision supports the case of assessee. No fresh transfer can happen in "Law" by the assessee during the year under consideration i.e., A.Y. 2016-17. Similarly, in the case of K. Vijaya Lakshmi Vs. ACIT, Circle 11(1), Hyderabad, the SMC Bench in Para 6.3 and 6.4 has held as under :

"6.3. As far as the issue of bringing to tax the capital gains during the year, it was the contention of assessee that possession was not given and assessee retained possession of the property thereby the capital gains arises in the year in which the new flats were handed over. Ld. Counsel in his arguments, elaborately read out various portions of the agreement to substantiate assessee's claim, whereas the Ld.DR relied on various other clauses to state that possession was handed over. As far as the development agreement is concerned, it is noticed that assessee did permit M/s. Diamond Infra to enter into the premises, do all the necessary things for construction of apartments. It is the common

agreement by many people, who has purchased lands/plots in the developed area. It is also noticed that the said assessee went to construct the apartments and hand over the flats as per the schedule to the respective persons, including assessee. Some of the agreement holders also sold the flats in semi-finished condition or in fully developed condition, whereas few like assessee retained the flats as such. Therefore, I am of the opinion that assessee did hand over the possession and provisions of Section 2(47) regarding transfer certainly get attracted. Since there is part performance of the contract in the nature referred to in Section 53 of Transfer of Property Act, 1882, Clause(v) of Section 2(47) is clearly attracted. Therefore, I agree with the stand of AO that the capital gains did arise during the year under consideration as the agreement was entered on 12-05-2008. Accordingly, the issue of bringing to tax the capital gains during the year is to be upheld. Even though Ld. Counsel tried to distinguish the jurisdictional High Court judgment in the case of Sri Potla Nageswara Rao Vs. DCIT (supra) that it applies to a case, where there is no sale consideration and the issue is on non-receipt of sale consideration. I do not agree with that as the issue of transfer in the case of development agreement and consequent levy of capital gain in the year of entering into development agreement has been crystalised by the said judgment of the jurisdictional High Court in the case of Sri Potla Nageswara Rao Vs. DCIT (supra). Ld. Counsel relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini (supra), where the entire transaction of development of land envisaged in JDA fell through. In those facts of the case, the Hon'ble Supreme Court held that no profits or gains arose from the transfer of capital asset so as to attract Section 45 and 48 of the Act. However, in the present case, the agreement has been undertaken and has been completed, therefore the jurisdictional High Court decision still holds good. Accordingly, I agree with the order of the CIT(A), confirming the capital gains during the year.

6.4. One of the arguments raised by the Ld. Counsel is that new Section 45(5A) has been introduced which defers the capital gains to the year of completion of the project by the Finance Act, 2017. This being substantive provision, I am of the opinion that this cannot be applied to the development agreement entered into earlier, in which 2(47)(v) would certainly get attracted. In view of that, I reject the contention and uphold the taxability of the capital gains in the year under consideration."

23. From the reading of the above, it is abundantly clear that the SMC Bench had merely followed the decision of Potla Nageswara Rao wherein the jurisdictional High Court has held that the year of entering into JDA would be the year of taxability. Since in the case in hand, the JDA was entered into on 04.04.2007,

therefore, the amount, if any, was required to be taxed in the assessment year 2008-09 only and not in the subsequent year. Further, the Tribunal after relying upon the newly inserted provision of section 45(5A) has held that the transaction which has happened prior to the insertion of new section would not be covered by Section 45(5A) of the Act and the capital gains would not be leviable on completion of development agreement.

24. Further, we noted that neither the consideration was received by the assessee pursuant to the Joint Development Agreement dt.10.02.2016 nor the possession was handed over to it by her, therefore, it cannot be said that any transfer took place within the meaning of Section 2(47) of the Income Tax Act, 1961. In the present case, neither the sale has taken place nor the exchange nor the relinquishment by any of them including the assessee in favour of TJP. As mentioned hereinabove, the possession of the property was handed over by TBPD to TJP pursuant to new Joint Development Agreement dt.10.02.2016 and the assessee has not received any consideration. Furthermore, once the Joint Development Agreement dt.04.04.2007 was existing and pursuant thereof, transfer has taken place in favour of TBPD, therefore, the assessee was left with no other right in the property except the rights provided under JDA dt.04.04.2007. Reliance upon the subsequent agreement dt.10.02.2016 by the Revenue to tax the income in the hands of the assessee based on new JDA is without any basis, as the assessee cannot transfer any land to TJP which it does not possess. The transfer, if any, had been done by

TBPD to TJP. As per Section 45 of the Income Tax Act, the capital gain arising from transfer of a capital asset is chargeable to the head 'Income from Capital Gains' in the year in which the transfer took place. As we have held the transfer took place in the assessment year 2008-09, therefore, the capital gains on account of transfer of land is taxable in the assessment year 2008-09 only.

25. In our view, the second JDA had merely transferred the obligation of TBPD to TJP and corresponding entitlement of assessee in built-up area. There is another reason for requirement of allowing the appeal of the assessee as in the present case, the permission from the municipal authorities pursuant to the Joint Development Agreement dt.10.02.2016 was obtained by TJP on 17.10.2016 and the plans of the TJP was approved on 09.05.2017. Therefore, transfer of the capital asset as per newly inserted Section 45(5A), which was inserted on 01.04.2018, also happened in the subsequent assessment year i.e., A.Y. 2017-18 as the plans were approved on 09.05.2017 and certificate of completion would have been issued thereafter. Further, in our opinion, section 45(5A) is not applicable to the assessment year under consideration as it was inserted w.e.f. 01.04.2018 and was prospective in nature. In our considered opinion, no addition can be made even in the year 2016-17 on the basis of Section 45(5A) of the Act.

26. The above view of ours is also supported by the view taken by the Assessing Officer of other similarly situated assessees / persons mentioned by the assessee / revenue in the written submissions mentioned hereinabove. For the above said purposes, it will be apt to refer the name of the assessees i.e., Apollo Corporate Services and Consultants Private Limited, A. Bhaskar Reddy, HUF, and Sri Harsha Ketineni, wherein the assessee have not been taxed in the year 2016-17 and the Assessing Officer concluded that the taxable event happened in the year 2007-08 and not in A.Y. 2016-17. The Revenue has not given any cogent reasons for taking the contrary view and applying different yardsticks in the case of the assessee. In the result, the grounds nos. 10 to 21 raised by the assessee on merit are required to be allowed.

27. As we have granted the relief to the assessee on merits, therefore, the legal grounds nos. 1 to 9 raised by the assessee with respect to reopening of assessment have become academic and therefore, dismissed as infructuous.

28. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this the 8th day of 2023

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Hyderabad, Dated: 08/11/2023
TYNM

Copy forwarded to:

1. *Mrs. Sruthi Riedl, Plot No. 27, Navodaya Cooperative Housing Society, Rd.No. 14, Banjara Hills, Hyderabad.*

2. *The Income Tax Officer, International Taxation-2, Hyderabad.*

3. *Dispute Resolution Panel (DRP), Bengaluru.*

4. *Director of Income Tax (IT & TP), Hyderabad.*

5. *Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.*

6. *D.R. ITAT, Hyderabad.*

7. *Guard File.*

//By Order //