IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'B', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

AND SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No.425/Hyd/2011	:	Assessment year 2007-08
ITA No.420/Hyd/2011	:	Assessment year 2002-03
ITA No.421/Hyd/2011	:	Assessment year 2003-04
ITA No.422/Hyd/2011	:	Assessment year 2004-05
ITA No.423/Hyd/2011	:	Assessment year 2005-06
ITA No.424/Hyd/2011	:	Assessment year 2006-07

Shri Suresh Kumar D. Shah, Hyderabad	V/s.	Dy. Commissioner of Income-tax Central Circle 2, Hyderabad.

(PAN - AAACC 8954 G)

(Appellant) (Respondent)

Appellant by **:** *Shri K.C.Devadas*

Respondent by : *Smt. Mythili Rani*

Date of Hearing	19.10.2011
Date of Pronouncement	16.12.2011

O R D E R

Per Chandra Poojari, Accountant Member:

This is a bunch of six appeals. These appeals are directed against two orders of CIT(A)-I, Hyderabad –one order dated 28.11.2010 for the assessment year 2007-08 and a common order also dated 28.11.2010 for the assessment years appeal 2002-03 to 2006-07. Since common issues are involved, these appeals are being disposed off with this common order for the sake of convenience.

ITA No.425/Hyd/2011 : Assessment year 2007-08

2. First issue involved in this appeal, covered by grounds No.2 to 8 relates to chargeability of capital gains at Rs.1,20,94,810 on the sale of land; and capital gains at Rs.16,93,17,260 in relation to the land given for development and treating the same as 'transfer' in terms of S.2(47)(v) of the Income-tax Act.

3. Facts of the case in brief are that a search and seizure operation under S.132 of the Act was carried out in the residential premises of the assessee. The assessee filed return of income for the year under consideration admitting total income of Rs.2,51,253 and agricultural income of Rs.3,500. In the course of assessment proceedings, the assessing officer examined the issue of capital gains on account of the land sold and also land given for development purposes. The assessee alongwith his wife and son had sold one acre of landed property situated at Survey No.163(OP), at Vettinagulapalli Village on 12.4.2006 for a consideration of Rs.1,21,090,000. The assessee had claimed exemption on the said transactions stating that the land was agricultural in nature. The assessing officer examined the issue in detail and came to a conclusion that the land was not agricultural in nature and no agricultural operation was carried on the same. He accordingly treated the said land as a capital asset and computed the long term capital gain at Rs.1,20,94,810. He also found that the assessee alongwith his wife and son had handed over 14 acres of land situated at Vattinagulapalli village to M/s. Dakshin Shelters Pvt. Ltd for development purpose. Since the possession of the land was already handed over the assessing officer held that the said transaction came within the purview of S.2(47) of the Act The assessing officer observed that a detailed order on the same issue was passed in the case of Sri Brij Gopal Shah (HUF) for assessment year 2007-08 and in the case of Shri Krishna Kumar Shah(HUF

for assessment year 2006-07. He also relied on the decision of the Hyderabad 'B' Bench of the Tribunal in the case of Shanta Vidyasagar Annam V/s. ITO dated 9.6.2006 in ITA No.888/Hyd 2003 wherein it was held that the land gets transferred merely by entering into a development agreement and that the date of development agreement is the date of transfer of the land. The assessing officer examined various clauses in the development agreement entered into by the assessee and came to a conclusion that capital gain is exigible on the said transaction. He accordingly computed the long term capital gain on this asset at Rs.16,93,17,260. The total income was computed at Rs.18,15,63,320 and a tax demand of Rs.5,40,36,820 was raised.

4. On appeal, the CIT(A), dealing with the sale of 1 acre of land in the first place, upheld the addition by way of long term capital gain of Rs.1,20,94,810 made by the assessing officer, with the following observations-

> **"03.1 .....I find from the assessment order that the assessing officer has obtained the land revenue records from the MRO Rajendra Nagar Mandal. The pahanis obtained from the MRO revealed that the land situated at survey No.163 was vacant for more than 10 years. The certified copies of the revenue records were obtained by the AO for the period of 1997-98 to 2007-08. Even the assessing officer had personally visited the landed property and noticed that the entire land was barren surrounded by rocky mountains and not fit for agricultural activities. Apparently, during the assessment proceedings, the assessee had submitted a copy order issued by the MRO to Krishna Kumar Shah dated 18.8.2005 wherein it was claimed that the land was agricultural in nature. The assessing officer had examined the certificate filed by the assessee and found that the land situated at Survey No.163 was not mentioned in the said order. In fact the assessee had sold land situated at survey No.163 only. Accordingly, the assessing officer concluded that the evidence field by the appellant in fact goes against him. The appellant had also filed certain letters issued by Jai Sri Mata Rice Mill claiming that he had sold paddy to the above rice mill. The AO had examined the Managing Partner of the said rice mill who denied to have known the appellant. In fact he had submitted that on Sri A.Rami Reddy had approached him to issue such letters. Considering the detailed examination made by the Assessing officer I am of the view that the land sold by the appellant was non-agricultural in nature and the AO had rightly computed the long term capital gin on sale of the said land. To that extent I do not find any infirmity in the order of AO in making**

addition of long term capital gain of Rs.1,20,984,810/- computed by him……"

5. Dealing with the addition by way of capital gains made in respect of the other piece of land given under development agreement, the CIT(A) noted that the main contention of the assessee was that the provision of S.53A does not apply to the development agreement and consequently there is no applicability of S.2(47) of the Act, so as to compute capital gains on development agreements. It was also contended that the so called possession of the land given was to enable the developer to undertake the work on the land for the purpose of laying out plots and carrying on construction which is not possible without entering into the land and this facility was a mere licence and does not confer any right of ownership of land to the developer. These contentions of the assessee did not find favour with the CIT(A), who besides referring to the decision of the Tribunal in the case of Smt. Santa Vidya Sagar Annam (supra), relied upon by the assessing officer in the assessment order, also relied on the decisions of the Tribunal in the case of Dr.T.Ahyuta Rao V/s. ACIT(ITA lNo.916/Hyd/2004); and of the Bombay High Court in the case of Chaturbhuj Dwarka Das Kapadia V/s. CIT(260 ITR 491); Pune Bench decision of the Tribunal in Taher Allmohammed Poonawala V/s. Addl. CIT(124 TTJ (Pune)387). Hyderabad Bench of the Tribunal in the case of Dr.Maya Shenoy V/s. ACIT(2009)124 TTJ(Hyd) 692, and concluded following the ratio laid own in those cases that as on the date of signing of the agreement in the present case, the assessee has given possession of the land for the purpose of development by M/s. Dakshin Shelters P. Ltd. and as such there was a transfer in terms of S.2(47)(v) of the Act and hence capital gains is exigible in the case of the assessee in the year in which the development agreement has been entered into and possession has been handed over. He also referred to the appellate orders dated 26.7.2010 passed in the cases of Shri Brij Gopal Shah

HUF for assessment year 2007-08 and Shri Krishna Kumar Shah HUF for the assessment year 2006-07.

6. Aggrieved by the order of the CIT(A) assessee preferred the present appeal before us.

7. Learned counsel for the assessee, reiterating the contentions urged before the lower authorities submitted that the land sold was agricultural land, which was situated beyond 8 kms from the end of municipal limits of Hyderabad, and as such the CIT(A) was not correct in confirming the assessment of capital gains at Rs.16,93,17,260. He also disputed the conclusion of the lower authorities that the capital gains accrues on the date of execution of development agreement, i.e. on 12.4.2006, on the ground that such conclusion is totally contrary to the statutory provisions of law and is clearly unsustainable. It is submitted that development was a form of transfer through the medium of exchange and an exchange postulated the existence of both the properties in the order to constitute a 'transfer'. He also submitted that the capital gains accrued to the assessee only when the developer has handed over the built up area to the assessee in accordance with the development argument and therefore, under the facts an circumstances of the case, the CIT(A) ought to have held that there was no transfer within the meaning of S.2(47) of the Act. It is also submitted that till date the developer has not done any development on the land belonging to the assessee and the entire project is in a standstill and therefore, to state that the transfer took place on the date of execution of the development agreement is beyond statutory comprehension and is therefore clearly not sustainable in law. It is also contended that by virtue of G.O.Ms No.111 of 1996, no development can take place on the land belonging to the assessee, which was the subject matter of the development agreement, on account of statutory restrictions and

therefore, the CIT(A) ought to have clearly held that there was no transfer exigible to capital gains within the meaning of S.2(47) of the Act and therefore, he ought to have clearly held that no capital gains accrued for the assessment year 2007-08 and ought to have deleted the entire capital gains assessed.

8. Learned counsel for the assessee submitted that the assessing officer has overlooked the prima facie evidence, forming part of seized material, being Annexure ASKS/08/10, while rejecting the contention of the assessee that the land of one acre sold is agricultural land. He submitted that the lower authorities have erroneously arrived at the conclusion that the lands in question of the assessee, are non-agricultural lands, by proceedings on the presumptions that they were vacant at the time of the inspection of the assessing officer.

9. The learned counsel for the assessee taking us through the relevant pages of the paper-book that detailed documentary evidence has been produced by the assessee to prove that agricultural operations were being carried on the lands in question upto the year 2006-07 and Revenue records issued by the Mandal Revenue Officer, Rajendranagar clearly disclose that the Survey Nos.163(P) 263(P) and 264(P) of Vattinagulapalli(V) are agricultural lands. He pointed out that the MRO, presently redesignated as Tahsildar, is the only competent authority and Recording Authority, for preparation and maintenance of Revenue records and also Custodian of the Revenue Records of all villages falling within the Mandal and the land revenue records prepared and maintained including annual pahani patrikas are only in respect of lands in which agricultural operations are being carried on, for raising crops in each facli year.

10. Inviting our attention to pages 25 to 86 of the paper-book, it is submitted that lands in question belonging to the assessee are agricultural lands and agricultural operations were carried on upto 2005-06. It is further submitted that the lands belonging to the assessee are dry lands which are capable of agriculture and paddy crop and vegetables are grown with the aid of assessee's own irrigation well, which was fitted with electric motor, upto the year 2006-07. Even now, as on date, the small cross-bunds laid on the land of the assessee is evident for retention of sufficient water for irrigation to the crops gross in these fields and the well through which irrigation was done still exists. It is submitted that the assessee and his family members have been carrying on agriculture from the past 30 years growing paddy, vegetables etc. The conclusion of the assessing officer that the land was barren and surrounded by the rocky mountains and not amenable to agricultural operations is without any basis, and the land is amenable to cultivation and operations were carried out regularly. Referring to the sworn statement of the assessee recorded during search proceedings, dated 9.10.2007 and dated 5.11.2009, it was submitted that the Deputy Director of Income-tax(Investigation), having satisfied with the statement of the assessee that agricultural operations were carried on by the assessee, did not carry out any further investigation. Referring to the sworn statement of the assessee recorded during search assessment proceedings, dated 5.11.2009, it was submitted that it was confined to eliciting information on agricultural income of the assessee It is submitted that the sale bills for the agricultural produce sold were produced before the assessing officer and some of the bills for the purchase of pesticides and fertilizers, vegetable seeds were also produced by the assessee before the assessing officer. He also disputed the inferences drawn on the basis of statement dated 16.12.2009 of Shri Narasimha Reddy, Managing Partner of M/s. Jai Sri Matha Rice Mill, and submitted that merely basing on the averment of Shri Narasimha Reddy that he did not know Suresh Kumar, it was concluded

that the paddy sold did not belong to the assessee. However, the fact remains that Shri Ram Reddy, assessee's representative used to sell the paddy on assessee's behalf and an affidavit to that effect was filed from Shri Ram Reddy before the assessing officer during the assessment proceedings. It was also pointed out that to a specific query of the assessing officer, in the course of statement recorded on 5.11.2009, as to whether he could confirm that the paddy was belonging to Surseh Kumar only, Shri Narasimha Reddy never answered the same, which according to the learned counsel, clearly indicated that the paddy belonged to the assessee. It was submitted that it was only on the last date of hearing on 21.12.2009, the assessee came to know about the sworn statement of Narasimha Reddy after concluding the hearing on the said date, as it was at that time only that the assessing officer handed over a copy of the sworn deposition dated 16.12.2009 to the assessee and as such the assessee was not given any opportunity of being heard on the statement of Shri Narasimha Reddy, much less the opportunity of cross-examining Shri Narasimha Reddy. It was in that context that the assessee filed the affidavit of Shri Ram Reddy, who sold the paddy on assessee's behalf, but the assessing officer without considering the affidavit of Shri Ram Reddy, reached his conclusions as to the nature of the lands in question.

11. Referring to the visit of the assessing officer for inspection as to the nature of land, it is submitted that the assessing officer visited without the assistance of any one like Mandal Surveyor, Mandal Revenue Inspector or village level officer of the village or even the assessee who was the owner of the lands in question, and as such, such visit would not serve any purpose as it is very difficult to identify the particular survey No. on ground, without a village map, village officer, etc. Even as on the date, without the assistance of the relevant material or assistance of the concerned authorities, one cannot identify

the survey nos. of a village, as the survey stones of various survey nos. are missing on ground for the past several years.

12. The learned counsel for the assessee submitted that the observations of the assessing officer based on the provisions of S.10 (37) of the Act are baseless as the land of the assessee is not situated in the municipal area or within 8 Kms from the municipal limits and in fact the assessing officer has got himself totally confused about the applicability of S.2(14) and 10(37) of the Act and he has wrongly focused his attention on S.10(37) with is not relevant for the assessee's case.

13. Placing reliance on the decision of the Gujarat High Court in the case of CIT V/s. Siddharth J. Desai (139 ITR 628), it is submitted that the Hon'ble High Court in that case has reviewed several decisions and evolved 13 factors for answering whether the land is agricultural or not. Dealing with those factors as fulfilled by the assessee, it is stated as follows-

(a) The assessee had paid land revenue up to 19980-99. Thereafter Government has waived land revenue for dry agricultural lands.
(b) Land has actually been used for agricultural purpose right form the ownership, and as stated in the sworn affidavit, paddy, vegetables, etc. were grown.
(c) Land has been used for agricultural purposes from longer period, i.e. from almost 30 years right from the ownership, which was not disputed by the assessing officer.
(d) The land was purchased by the mother of the assessee long back and was used for agriculture. After partition of the land among the assessee, his brothers and his mother, the same was continued to

be used for agriculture, and as such there was no investment involved.

(e) The agricultural land was sold on 12.4.2006, till which date the assessee had carried on agricultural operations and he never applied for conversion of the same from agricultural use or non-agricultural use as required under Rule 70 of AP(TA) Land Revenue Rules, 1951 and also under A.P. Agricultural (Conversion for Non-Agricultural Purposes) Act, 2006.

(f) On the relevant date, i.e date of sale/development agreement, the land had not ceased to be put to agricultural use and it was also not put to any alternative use and it was used only for agriculture.

(g) The land was entered in revenue records and was actually used for agriculture by ploughing and tilling the land and the assessee intended to use it for agricultural purposes.

(h) The land was situated in Vattinagulapally village, which is an underdeveloped area, which is more than 8 Kms from the city limits, having a village population of less than 10000.

(i) The land is surrounded by other agricultural lands, where agricultural operations are being carried on.

(j) The land was not developed by plotting and providing roads and other facilities.

(k) Before the transfer, no portion of the land was sold for the purposes other than agriculture.

(l) The land of the assessee is situated in Vattinagulapally Village, R.R. District, Andhra Pradesh and hence Bombay Tenancy and Agricultural Land Act does not apply to the case of the assessee and the land was sold as agricultural land.

(m) The land was sold on acrage basis and not on yardage basis.

In view of the above, it is affirmed that all the above 13 factors are fulfilled in assessee's case. It is also stated that the assessing officer has allowed rebate in respect of agricultural income while making the assessment, which establishes the fact that the land is agricultural and the assessee derived agricultural income.

14. It is further submitted that Project Director of Outer Ring Road Project, vide his letter dated 29.11.2005 sought clarification from the Commissioner of Income-tax(TDS), AP Hyderabad, on the liability to deduct TDS in respect of compensation payable and in response, it was clarified by the CIT(TDS) vide his letter dated 7.12.2005 that deduction at source would not be required in respect of agricultural lands which are falling outside the limit of GHMC income and consequently no TDS was effected on the amount of compensation paid to the assessee.

15. In support of the above contentions with regard to the nature of the land in question, reliance is placed on the following decisions-

(a) CIT V/s. Siddhartha J. Desai(139 ITR 628)-Guj

(b) CIT V/s. Minguel Chandra Pais & Anr (282 ITR 618)-Bom.

16. Specifically with regard to the capital gains assessed in respect of the land covered by the development agreement, it is submitted hat provisions of S.53A of Transfer of property Act are not applicable to the transaction of the development agreement and consequently, provision of S.2(47)(v) are also not applicable to development agreement. Without prejudice to this contention, it is submitted that as per the terms and conditions of the development agreement, the assessee is entitled to 35% of plots alongwith construction thereon in lieu of 65% of the area of land out of 14 acres to be shared by the

developer, and as rightly observed by the assessing officer, the assessee family had received an amount of Rs.98 lakhs refundable deposit from the developer and the possession of the land was also handed over as per S.2(47) of the Act on 12.4.2006. It is submitted in this context that the assessee has not received any consideration from the developer from 12.4.2006 till date, though more than four years have elapsed and the developer has not performed any work in fulfillment of the terms and conditions of the development agreement, and the assessing officer is also clearly aware of the fact that the assessee has not received any consideration in respect of the land. It is submitted that against 65% of land agreed to be given to the developer only refundable security advance was received by the assessee and the so called possession of the land given was given to enable the developer to undertake the work on the land for the purpose of laying out plots and carrying on construction which is not possible without entering the land. Thus, the possession given is a mere licence and does not confer any rights of ownership of land on the developer. It is further submitted that in terms of clause 5.1 of the agreement, the developer has to get all the clearances including for change of land use and relaxation/exemption for land use change from bio conservation to residential/commercial use within six months with extension of another six months, after which time, the position was to be reviewed mutually. The Developer, according to the counsel has failed to get the necessary clearances and in the circumstances requested the assessee vide letter dated 12.4.2007 to renew the agreement and GPA for a further period of one year from 12.4.2007 with automatic extension for another six months. Notwithstanding the same, even after four years, the agreement has not been renewed and hence the entire transaction failed.

17. It is further submitted that even though as per clause 11 of the Development Agreement, the owners and assessee had handed over to the

developer, copies of Pahani Patrikas, Records of Rights, Khasra and other documents relating to property which is agricultural in nature, the assessing officer failed to question the developer in this regard.

18. Inviting our attention to the provisions of S.2(47)(v) of the I.T. Act and S.53A of the Transfer of Property Act, 1882, it is submitted that where the assessee has a right to revoke the agreement in certain eventualities, the transaction is not 'transfer' either under S.2(47)(v) of the IT Act or under S.53A of the Transfer of Property Act. Further, placing reliance on the decision of the Hon'ble Supreme Court in the case of Srimant Sham Rao Suryavanshi & Another V/s. Prahlad Bhairoba Suryavanshi (dead by LRS) and Others (AIR (2002) SC 960), wherein certain conditions were stipulated for being fulfilled by the transferee in order to protect or defend his possession under S.53A of the Transfer of Property Act, and the fulfillment of those conditions in the present case, it is submitted that the development agreement in the present case was not yet renewed and hence not in force, and as such the transaction is not covered by S.533A of the Transfer of Property Act and consequently, it does not amount to transfer under S.2(47) of the Income-tax Act, 1961.

19. Learned counsel for the assessee further submitted that the developer is not ready with his part of the contract as built up area and plots are not yet ready even on the paper and neither the assessee nor the developer have any control over the transaction, as several hurdles need to be crossed before the developer is ready to complete his part of the contract, and as such, the provisions of S.53A of the Transfer of Property Act have to be understood in this context, and that being so, it has no application in the case of a Development Agreement. He also contended that possession in the present case was given for the limited purpose of development of the property, and not to confer any ownership rights and in fact, in the case of the assessee, it is

mere exchange of property land not sale since the products of exchange are not in existence.

20. Distinguishing a development agreement from any transfer, it is submitted that conditions under S.2(47) are not satisfied in the case of a development agreement, and consequently no transfer is involved and therefore, no capital gain tax arises.

21. In support of the above contentions, reliance is placed on plethora of decisions, which are noted below-

(a) State of Kerala V/s. K.T. Shaduli (AIR 1977(SC) 1627)
(b) CIT V/s. Sidhartha J. Desai (139 ITR 628)-Guj
(c) CIT Vs. Minguel Chandra Pais & Anr. (282 ITR 618)-Bom.
(d) Shrimant Shamrao Suryavanshi & Anr. V/s. Prahlad Bhairoba Suyryavanshi (Dead) by LRs and Otehrs (AIR (2002) SC 960)
(e) R.Vijaylaxmi V/s. Appu Hotels (257 ITR 4)-Mad
(f) General Glass Co.(P)Ltd., V/s. DCIT(108 TTJ 854(Mum)
(g) DCIT V/s. Geeta Devi Pasari (104 TTJ 375)-Mum.
(h) DCIT Vs. Asian Distributors Ltd. (70 TTJ 88)-Mum
(i) CIT V/s. Sanjeev Kumar Jain (310 ITR 178)-P&H
(j) Jindal Stainless Steel V/s. ACIT (1 ITR (Trib) 484)-Del.
(k) Shantilal Godawat & Ors V/s. ACIT (126 TTJ 135)-Jodh

Elaborate written submissions have also been filed reiterating the above contentions in the light of the above case-law.

22. The Learned Departmental Representative on the other hand, strongly opposed the submissions of the learned counsel for the assessee, and supported the orders of the lower authorities. He submitted that the assessing

officer has obtained the revenue records for the period 1997-98 to 2007-08 and even personally visited the lands of the assessee in question, and it is based on the evidence gathered in this process, that the assessing officer has come to the conclusion that the lands in question were not of agricultural nature. Even though the assessee has filed certain letters from Jai Sri Mata Rice Mill, to whom the assessee claimed to have sold the paddy, Learned Departmental Representative submitted, examination of the Managing Partner of the said mill by the assessee clearly established that the falsity of the assessee's claim and those letters were issued at the request of one A. Ram Reddy. He submitted that the affidavit of the said Shri Ram Reddy filed by the assessee, are only make believe and accommodative documents, which cannot be relied upon. As for the land covered by the development agreement, Learned Departmental Representative, submitted that the view taken by the lower authorities is based on the categorical and unambiguous statutory provisions contained in S.2(47)(v) of the Act, and the settled position of law, elaborately discussed by the CIT(A) in the impugned order, which clearly stipulate that it is the date of the development agreement, which is crucial, has the effect of 'transfer' in favour of the developer to whom possession of the property is handed over. He relied upon the following judgements:

(a) Chaturbhuj Dwakada Kapadia Vs. CIT (260 ITRr 491)
(b) Jasbir Singh Sarkaria (294 ITR 196) Advance Rulling
(c) Ajai Kumar Sah JagatiVs. ITO (55 ITD 348)
(d) Gripwell Industries Ltd. Vs. ITO (99 ITD 368)
(e) Dr. T. Achutha Rao Vs. ACIT (106 ITD 388)

23. Heard at length the pleadings of both the sides and also perused the case-records in the light of the compilation filed and precedents cited. First, we deal with the issue relating to computation of

capital gain on sale of 1 acre of land. According to the assessee, the land is situated 8 KM away from the municipal limits of Hyderabad and same was put to agriculture use and no capital gains arises. On the other hand, the lower authorities were of the opinion that the land was barren land and no agricultural operations were carried on for the last 10 years. The assessee placed revenue records suggesting the land for agricultural usage and it was submitted before us that the agricultural operations has been carried on and the sale of such land to be treated as income exempt from tax. But the fact is that the entire land which is subject matter before us is a barren land surrounded by rocky mountains and not fit for agricultural operations. The assessee though filed copy of the order of the MRO dated 18-8-2005 stating that the land was agricultural land, it was found by the lower authorities that the impugned property bearing Survey No.163 was not mentioned in the order of the MRO. The assessee filed a letter from M/s Jai Sri Mata Rice Mill claiming that he had sold paddy as it was stated by the Managing Partner of the Rice Mill. However, later the Managing Partner stated that the letter was issued at the insistence of one Mr. Rami Reddy and he denied the purchase of any paddy from the assessee. Further, coming to the facts of the case that the land is assessed to land revenue as agricultural land under the State Revenue, it is certainly relevant fact but it is not conclusive. To ascertain the true character and the nature of the land, it must be seen whether it has been actually put to use for agricultural purpose for a reasonable span of time prior to the sale of such land and further whether on the relevant date the land was intended to put to use for agricultural purposes for a reasonable span of time in the future. After examining the facts of the case, we found that the assessee along with his brothers entered into sale agreement for the sale of the impugned property with the vendor and it was not for the purpose of agriculture but for the

purpose of development. On the date of the land was sold, the land was no longer agricultural land. There was no evidence regarding carrying out the agricultural operations in the impugned land. In the absence of evidence that it was put to agricultural use by the assessee and the land was actually cultivated till the sale of the land, we are not in a position to hold that the land is an agricultural land. In our opinion, the sale of the land for non agricultural purpose and the land was not subject to cultivation before sale, we have to draw conclusion that the sale of land cannot be considered as sale of agricultural land. In the circumstances, we have to hold that the sale of land is not sale of agricultural land and it is to be considered as capital asset and on that sale, capital gain is chargeable.

24. Now, coming to the ground relating to the chargeability of capital gain on account of development agreement, we may hold in the first place, for the reasons discussed in the preceding paras, that the contentions raised with regard to agricultural nature of the land, which is subject matter of the development agreement, have to be rejected, since both the lands of the assessee, i.e. 1 acre sold during the year and the land given for development agreement are contiguous and within the same survey numbers, having the very same features. We may now deal with the other contentions of the assessee with regard non-chargeability of capital gains in respect of the land, which was not 'transferred' but only given for development. We may refer to the provisions of S.2(47)(v) which reads as follows:-

"2.....
(47)....
(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in s. 53A of the Transfer of Property Act, 1882 (4 of 1982)"

25 The importance of the word "transfer" is due to the reason that under the charging section, viz. S.45, the capital gain is taxable on "transfer of a capital asset". Precisely, this section prescribes that "*any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income-tax under the head capital gains and shall be deemed to be the income of the previous year in which the transfer took place"*. (emphasis supplied by italicized print)

26. Thus the fundamental features which determine the taxability of capital gain, are that the gain ought to be from the transfer of a capital asset. This section has a large scope of its operation due to the presence of deeming provision which says that the gain shall be the deemed income of that previous year in which the transfer took place. This phrase can be interpreted in the manner that the total profits may actually be received in any other year, but for the purposes of S. 45, the gain shall be the deemed income of the year of transfer of the capital asset. It shall not be out of context, at this juncture, to mention an observation of the Hon'ble Authority of Advance Rulings in the case of Jasbir Singh Sarkaria, cited supra, that the expression used in sec. 45 is "arising", which cannot be equated with the expression "received" or even with the expression "accrued" as being used in the statute. The point which deserves notice is that the amount or the consideration settled may not be fully received or may not technically accrue but if it arises from the agreement in question, then the deeming provisions shall come into operation. Another point is also equally noticeable that by the presence of the deeming provision, the income on account of arisal of the capital gain should be charged to tax in the same previous year in which the transfer was effected or deemed to have taken place. Due to the presence of this statutory fiction, the actual year in which the entire sale

consideration is received, is beside the point but what needs to be judged is the point of time at which the transfer took place either by handing over of the possession or by allowing the entry into the premises or by making the constructive presence of the vendee nevertheless duly supported by a legal document.

27. But the issue do not get settled only by the interpretation of s. 45 and s. 2(47)(v) because the definition of "transfer" not merely prescribes allowing of possession but to be retained in part performance of a contract of the nature referred in s. 53A of the Transfer of Property Act. Therefore, it is further requisite to deal with the relevant section contained in Transfer of Property Act.

28. Transfer of Property Act contains S.53A under the heading "Part performance" and, for deciding the case in hand, it is necessary to quote the impugned section verbatim as follows:

> **" Where any person contracts to transfer for consideration any immovable 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 the contract, though required to be registered, has not been registered, or, 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 transfer 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 effect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

29. The doctrine of "part performance" is undoubtedly based upon the doctrine of equity. If one party has performed his part of duty then equity demands that the other party shall also perform his part of the obligation. If one party stood by his words then it is expected from the other party to also stand by his promise. Naturally an inequitable conduct of any person has no sanction in the eyes of law.

30. In the light of the ingredients of this section, which has been argued from both the sides, now we proceed to examine the factual matrix of the case in hand, herein below:

(a) Starting words of s. 53A are " where any person contracts" which means just the existence of a contract. The assessee is the "person" who has entered into a contract with the developer vide agreement dated 12.4.2006.

(b) This sections says "to transfer" means the said contract is in respect of a transfer and not for any other purpose. The term "transfer" is to be read along with the s. 45 and s. 2(47)(v) of I T Act. It is pertinent to clarify that one must not mistake to identify the issue of capital gain with the term "transfer" as defined in s. 54 of Transfer of Property act. At the cost of elaboration, we may like to add that in the past there was a long line of pronouncements; while deciding income tax cases, that unless and until a sale deed is executed and that too it is registered, transfer cannot be said to have been effected. The consequence of said catena of decisions was that no capital gain tax was directed to be levied

so long as "transfer" took place as per the generally accepted connotation of the term under Transfer of Property Act. The resultant position was that the levy of capital gain tax thus resulted in major amendments in the income-tax statute. The main objective of those amendments was to enact that for the purposes of capital gains, the transaction involving transfer of the nature referred are not required to be registered under Registration Act. Such arrangement does not include transfer of certain rights vesting to a purchaser; however such "transfer" does confer certain privileges of constructive ownership with connected bundle of rights. Indeed it is a departure from the commonly understood meaning of the definition "transfer" while interpreting this term for tax purpose. On the facts of this case, the developer has got bundle of rights and thereupon entered into the property. Thereafter, we have to see what has happened and what steps the transferee has taken to discharge the obligation on his part. If transferee has taken any steps to construct the flats, undisputedly then, under the provision of Income Tax Act a "transfer" has definitely taken place.

(c) The existence of the "consideration" is the essence of the contract. In this case the amount of consideration has to be paid to the assessee in the form of cash as well as in kind i.e., the flats to be constructed by the developers to be handed over to the owners.

(d) Next is the important phrase i.e., "terms necessary to constitute the transfer can be ascertained with reasonable certainty". According to us, in this case, the terms and conditions of the contract were unambiguous thus clearly spoken about the rights and duties with certainty of both the signing parties. We are concerned mainly with two certainties; one is passing of substantial consideration and second is

passing over of possession. As far as the payment of consideration is concerned, we have already noticed that it is in the form of both cash as well as kind and payment made to the assessee has not been brought on record by the lower authorities and the same to be examined and considered by the CIT(A).

(e) The other factor which governs the happening of transfer is the handing over of possession. This sections says "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". Retention of possession is open of the facet of part performance of contract. The agreement in question can be said to be a distinct transaction that has given rise to the event of allowing the contractor to enter into the property. What is contemplated by s. 2(47)(v) is a transaction which has direct and immediate bearing on allowing the possession to be taken in part performance. It is at that point of time that the deemed transfer takes place. According to us the possession as contemplated in cl. (v) need not necessarily be sole and exclusive possession, so long as the transferee is enabled to exercise general control over the property and to make use of it for the intended purpose. The mere fact that the assessee owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of the agreement, did not restrict the rights of the developer or did not introduce any incompatibility. In a situation like this when there is a concurrent possession of both the parties, even then cl. (v) has its full role to play. There is no warrant to postpone the operation of cl.(v) to that point of time when the concurrent possession would become exclusive possession of the developer. Any other

interpretation i.e., possession means exclusive possession, shall defeat the purpose of amendment. The possibility of staggering of payment linked with possession is ruled out by this amendment so that the taxability of gain may not be shifted to an uncertain distant date. We have no hesitation in saying that even if some part of consideration remains to be paid, the transaction shall not affect the liability of capital gains tax so as to postpone the same indefinitely. What is meant in clause (v) is the "transfer" which involves allowing the possession so as to allow developer to undertake development work on the site. It is a general control over the property in part performance of the contract. The date of that transaction determines the date of transfer. To our understanding of the language of the Act, it is enough if the transferee has, by virtue of the impugned transaction, has a right to enter upon and exercise the act of possession effectively then such an act amounts to legal possession over the property.

(f) The last noticeable ingredient is, "the transferee has performed or is willing to perform his part of the contract". To ascertain the existence of willingness on the part of the transferee one must not put stop at one event but willingness is to be judged by the series of action of the transferee. The transferees survey the land and to attract purchases put up hoardings plus sales-office and carry out site development work. Landscaping, sales promotion, execution of construction and completion of project are all incidental to demonstrate the willingness of the transferee. On one hand, the power of attorney grants bundle of possessor rights to the developer simultaneously and on the other hand transferee's gesture of payment of consideration coupled with development work can be said to be a positive step towards willingness to fulfill the commitment. Facts of this case thus suggest that

the developer had never intended to walk-out of the project. However, whether the developer has performed its part of the contract by taking steps to construct the flats or not has to be verified by the lower authorities.

31. To sum up the owners have entered into an agreement for development of the property and certain rights were assigned to the developer who in turn had made the substantial payment and consequently entered into the property and thereafter if the transferee has taken any steps in relation to construction of the flats, then it is to be considered as transfer u/s. 2(47)(v) of the I.T. Act. The fact that the legal ownership continued with the owners to be transferred to the developer at a future distant date really does not affect the applicability of s. 2(47)(v) as per the reasons assigned hereinabove. If the transferee was undisputedly willing to perform its part of the contract even though there is notification bearing G.O. No.111, whereby the Government putting restriction on construction, then we have to hold that there is transfer u/s. 2(47)(v) of the Act. This is because the possession and control of the property is already vested with the transferee and the impugned development agreement has not been cancelled and it is still in operation. Entering into the property and handing over of the possession was instantaneous thus entire conspectus of the case has attracted the provision of S. 45 of the Act on fulfillment of conditions laid down in section 53A of the Transfer of Property Act.

32. Accordingly, we set aside the above issue relating to transfer of property u/s. 2(47)(v) of the IT Act to the file of the CIT(A) to decide the same afresh in light of the above observations and after considering the ratio laid down by the Hon'ble Bombay High Court in the case of

Chaturbhuj Dwarkadas Kapadia vs. CIT (supra) and also the order of the Tribunal in the case of Dr. Maya Shenoy V/s.ACIT(124 TTJ (Hyd) 692). This ground is partly allowed for statistical purposes

33. In grounds of appeal No.9 to 11, it is pleaded that the entire search proceedings under S.132 of the Act were initiated in the name of Suresh Kumar D. Shah (HUF) on 9.10.2007 and as such the assessing officer erred in making an assessment of the capital gains in the status as individual which was not the subject matter of 132 proceedings and hence the entire assessment made under S.143(3) read with S.153A in the status of "individual' on 29.12.2009 is erroneous, invalid and bad in law and is liable to be quashed. It is also contended in the alternative that the CIT(A) erred in confirming the full value of consideration assessable at Rs.16.94 crores in respect of the property which was subject to development agreement; and the CIT(A) has also erred in confirming the value of the land as on 1.4.1981 at a ridiculously low figure of Rs.1000 per acre while computing the capital gains arising out of Development Agreement. We find that the grounds No.9 to 11 have not emanated form the order of the CIT(A) and consequently, the contentions raised by the assessee through those grounds cannot be entertained by us at this stage. We accordingly reject the same.

34 In the result, appeal ITA No.425/Hyd/2011 of the assessee for the assessment year 2007-08, is partly allowed for statistical purposes

ITA No.420/Hyd/2011 : Assessment year 2002-03
ITA No.421/Hyd/2011 : Assessment year 2003-04
ITA No.422/Hyd/2011 : Assessment year 2004-05
ITA No.423/Hyd/2011 : Assessment year 2005-06
ITA No.424/Hyd/2011 : Assessment year 2006-07

35. Effective grievance of the assessee in these appeals is against the action of the CIT(A) in confirming the additions made by the assessing officer

for the relevant years, disbelieving the agricultural income disclosed by the assessee and treating such amounts of income as income from other sources. The amounts of addition involved treating such agricultural income as income from other sources for these years is given below-

Assessment year	**Amount**
	Rs.
2002-03	5,400
2003-04	3,400
2004-05	9,000
2005-06	7,000
2006-07	11,000

36. We have heard both sides and perused the material available on record. The above additions treating the agricultural incomes disclosed as income from other sources have been made, in view of the finding of the assessing officer for the assessment year 2007-08, that the lands in question of the assessee are of non-agricultural nature. Inasmuch as we have upheld the view taken by the lower authorities that the lands in question are of non-agricultural nature, while dealing with the contentions of the assessee on that aspect in the context of appeal ITA No.425/Hyd/2011 for the assessment year 2007-08, vide para Nos.23 and 24 hereinabove, the issue involved in these appeals has to be decided in against the assessee and consequently, the impugned additions made by the Assessing Officer, treating the agricultural income disclosed by the assessee for these years as income from other sources, are liable to be upheld. We do so accordingly.

37. In the result, all the five appeals in ITA Nos. 420, 421, 422, 423 and 424/Hyd/2011 are dismissed and ITA No. 425/Hyd/2011 is partly allowed for statistical purposes.

Order pronounced in the court on 16th December, 2011

Sd/-	Sd/-
(Asha Vijayaraghavan)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Dt/- 16th December, 2011

Copy forwarded to:

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2. Dy. Commissioner of Income-tax, Central Circle 2, Hyderabad.
3. Commissioner of Income-tax(Appeals)-I, Hyderabad.
4. Commissioner of Income-tax Central, Hyderabad
5. Departmental Representative, ITAT, Hyderabad.

B.V.S.