IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, MUMBAI

BEFORE SRI MAHAVIR SINGH, JM

ITA No. 6677/Mum/2016

(A.Y:2008-09)

Ms. Rukiyabanu Gullam Mohiuddin Ahmedji I-6, Ahmedji Manzil, S. No.5/361, S.M. Road, Antop Hill, Mumbai-400 037 **PAN No.AMRPA1524G**	Vs.	**Income Tax Officer 21(2)(2),** Mumbai
Appellant	..	**Respondent**

ITA No. 6678/Mum/2016

(A.Y:2008-09)

Mr. Ahmedmiya G. Ahmedji, Prop of Misri Darbar, C.S. No.5/361, Adjacent to Shaikh Misri Dargah, S.M. Road, Antop Hill, Mumbai-400 037 **PAN No.AAFPA4710J**	Vs.	**Income Tax Officer 21(2)(2),** Mumbai
Appellant	..	**Respondent**

ITA No. 6679/Mum/2016

(A.Y:2008-09)

Ms. Khairunnisha Kalyankar, Flat No. 102, A Wing, Dosti Galaxy, S.M. Road, Antop Hill, Wadala(E), Mumbai-400037 **PAN No.AAMPK1761G**	Vs.	**Income Tax Officer 21(2)(3),** Mumbai
Appellant	..	**Respondent**

ITA No. 6680/Mum/2016

(A.Y:2008-09)

Mr. Kazim Arif Ahmedji, Prop of Khan Enterprise, Opp. Shaikh Misri Dargah, S.M. Road, Antop Hill, Mumbai-400 037 **PAN No. AJKPA5236H**	Vs.	**Income Tax Officer 21(2)(3),** Mumbai
Appellant	..	**Respondent**

ITA No. 6681/Mum/2016

(A.Y:2008-09)

Mushtaque Ahmed Son & L/h of Late Razia Abdul Gafoor Mukri Mujawar House chwal, Near Shaikh Misri Dargah, S.M. Road, Antop Hill, Mumbai-400 037 **PAN No. AAJPM7870P**	Vs.	**Income Tax Officer 21(2)(2),** Mumbai
Appellant	..	**Respondent**

Assessee by	..	Shri N.B. Khandelwal, AR
Revenue by	..	Shri T.A. Khan, DR

Date of hearing	..	**17-08-2017**
Date of pronouncement	..	**23-08-2017**

O R D E R

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of CIT(A)-38, Mumbai, in appeal Nos. CIT(A)-38/ITO 21(2)(2) & (3)/IT 188,187, 190,191 &189/2014-15 dated 31-03-2016. The Assessments were framed by ITO Ward-21(2)(2), Mumbai for the A.Y. 2008-09 vide order dated 25-03-2014, 27-03-2014, 24-03-2014 under section 143(3) read with section 147 of the Income Tax Act, 1961(hereinafter 'the Act').

2. At the outset, it is noticed that these five appeals are time barred by 140 days and assessee has filed condonation petition along with affidavit of the assessee stated that the order of CIT(A) received on 29-04-2016 and addition to the extent of 22,29,875/- was made on account of the long term capital gain which has been confirmed by CIT(A). On this assessee was advised by the consultant that he has to file application under section 154 of the Act for rectification of the order and rectification application dated 04-05-2016 was filed with CIT(A) but no action was taken by CIT(A) on that application. Subsequently, the consultant advised

the assessee to file appeal before ITAT and accordingly, appeal was filed before ITAT on 15-11-2016, thereby causing delay of 140 days. The relevant Paras of affidavit reads as under: -

> *"2. That I received an Order of CIT(A)-38 for the assessment year 2008-09 of the Income Tax Act 1962 on Date 29-04-2016*
>
> *3. That as per the said Order I found that Addition to the extent of Rs 2229875 as LTCG has been confirmed.*
>
> *4. That I was advised by my consultant that the said order is factually incorrect and an application for rectification under section 154 shall be filed. And the application Dated 04/05/2016 filed with CIT(A) 38.*
>
> *5. That in response to the said application for rectification I have not received any order for rectification nor informing me of the rejection of the application. Meanwhile I received an online letter Dated 28/10/2016 for the income tax. Gov.in for direct tax dispute resolution scheme for demand outstanding for of Rs. 9,44,730 same as before Appeal with CIT(A) and I had to contact my C.A. but because of Festivals & holidays I could not make early and further delayed preparing the appeal.*
>
> *6. That I was advised by my consultant to file an appeal before the Hon'ble ITAT for relief but the appeal has already become barred by time limitation on the basis of service of CIT(A)' order Nevertheless the appeal was filed before this Hon'ble ITAT on date 15/11/2016.*

An application for condonation of delay as provided under section 5 of the LIMITATION ACT, 1963 to be filed along with affidavit.

7. That I am Senior Citizen aged about 64 years and not keeping well and not having educational background and not aware of the provision for filing appeal and limitation period thereof.

8. That in this way there is a delay of 140 days for which an application under Section 5 of the Limitation Act has been filed alongwith memorandum of appeal.

9. That delay in filing the appeal is because of a genuine belief of the applicability of a particular provision of the Income Tax Act 1962 which was neither accepted neither rejected the CIT (A) and further for pending application for rectification of appeal order with Commissioner of Income Tax Appeal-38, Mumbai.

10) That I had no intention to jeopardize the interest of the revenue by delaying the filing of the appeal."

3. Exactly identical worded petitions are filed in the case of other assessee's of the group. When these facts were pointed to the Learned Sr. DR, he fairy conceded that the appeal can be admitted and delay can be condoned. Accordingly, I condoned the delay and admit the appeals.

4. The only common issue in these five appeals of assessee of the same group is as regards to the assessment of long term capital gain on entering development agreement dated 27-12-2007 between the developer and other 7 joint co-owners without any considerations. For this assessee has raised identical worded grounds and the grounds has

raised by Ms. Rukiyabanu Gullam in ITA No. 6677/Mum/2016 for AY 2008-09 reads as under: -

> *"1. The learned Counsel of Income-tax (Appeals) erred in confirming the additions to the extent of Rs. 22,29,875/- as Notional Long term Capital Gain on entering the development Agreement on 27-12-2007 between Developer & 8 Joint Owners without consideration and without fulfilling provisions of section 2(47) of the Income Tax Act 1961 and section 53A of the Transfer of Property Act, since no sale effected during the year.*
>
> *2. Without prejudice to ground No.1, the Learned CIT(A) further erred in working out Long Term Capital gain at Rs. 22,29,875/- without giving Cost Indexation benefit to the appellant, without giving any reason."*

5. Briefly stated facts are that the property bearing Cadastral Survey No. 361 admeasuring 3255.98 Sq. mtrs, excluding the land measuring 1113 Sq. Yards on which there existed the Dargah of Hazrat Shaikh Misri, Shaikh Misri Jama Masjid and Private Burial ground of Ahmedji family. The assessee along with 7 co-owners entered into development agreement for the purpose of re-development of the slum, in which they were residing, with the developer M/s Jiva Builders & Developers on 07-01-2010 as per the document/ deed was confirmation of the documents/ deed registering with the registrar after payment of Stamp Duty of Rs. 31,420/- through the development agreement signed on 27-12-2007. This property was ancestral property inherited by the assessee Ms. Rukiyabanu Gullam Mohiuddin Ahmedji along with 7 co-owners namely Shri Ahmedmiya Gulam Mohiuddin Ahmedji, Mrs. Mehmooda Kazi, Mrs. Razia Abdul Gafoor Mukri, Mr. Kazim Arif Ahmedji, Mr. Talib Yonusmia

Ahmedji, Mrs. Kairunnisa Ismali Kalyankar, Ms. Najmussabah Gulam Mohiuddin Ahmedji. The assessee is the co-owner of 1/8th undivided share of the property. The property is situated at CS No., 1/361, 2/361, 3/361 and 389 of Matunga Division, Antop Hill, Wadala. The said property consisting of slum structuring Pucca Chawls mainly residential and few structure being used as shop/ commercial premises and undivided as slum by additional collector (est.) on 19-08-1993 under section 41(1) of the Maharashtra Slum area (IC & R) Act 1971. Earlier co-owners entered into agreement with one M/s Raj Realtors vide agreement date 11-11-1994 i.e. development agreement to re-develop the property under Slum re-development scheme. This development agreement became unsuccessful after about 14 years and M/s Raj realtors vide release deed dated 03-08-2008 and letter of surrender dated 04-07-2008 withdrawn from the development agreement. Subsequently, the assessee along with other seven co-owners entered into agreement for development dated 27-12-2007 as M/s Jiva Builders and Developers for re-development of property whereby, the co-owners, the holders of re-development of the property will be provided on completion of development of property an independent residential building admeasuring 1500 sq. ft. of carpet area and three shops in rehabilitation component of Ground floor each of 150 sq. ft. carpet area and 5500 sq. ft. incentive FSI in sale component building free of cost in term of ready flats on ownership basis as per clause 2 and 4 of development agreement.

6. In view of the above, the AO estimated the market value of this property as per value of circle rate / stamp duty authorities for payment of stamp duty and registration fee charges at Rs. 5,78,30,500/-. According to AO, the assessee has transferred this property inter of section 2(47) of the Act read with section 53A of the Act Transfer of Property Act and according to him, in view of clauses in the development agreement dated 27-12-2007, the assessee along with 7 co-owners has transferred the

development right of the property to the developer M/s Jiva Builders and Developers and therefore, they have earned capital gains and the same is to be assessed as long term capital gain. He assessed accordingly. Aggrieved, assessee preferred the appeal before CIT(A), who also confirmed the action of the AO and assessed the long term capital gain after rectifying the earlier orders at Rs. 22,29,875/- in each of the co-owners i.e. restricted to 5 co-owners which are in appeal before Tribunal. For this CIT(A) has observed which reads as under: -

> *"4.4.2 Ground No.2.3 & 4: The grounds of appeal no.2,3 & 4 are in respect of addition of Rs.48,27,410/- on account of LTCG and will be taken together for consideration and decision.*
>
> *I. The appellant has argued that neither the appellant or the 7 co- owners of the property had transferred the property within the meaning of section 2(47) of the I.T. Act r.w.s. 53A of the transfer of property Act and that they have not received any consideration either monetary or otherwise during the year and neither possession of the property was handed over to the developer nor the development had been undertaken by the developer during the year. It was further argued that mere agreement for development of the property does not amount to a transfer u/s.2(47) of the I.T. Act unless the requirements of section 53A of the Transfer of Property Act are satisfied. In this regard, it has been observed that in the redevelopment of land, generally the consideration received is two - fold i.e. partly in cash and partly in kind i.e. by way of allotment of property in the*

redeveloped property. Hence, it becomes important to ascertain the full value of consideration. Such transactions are thus a combination of sale and exchange. In the light of above context, the issues raised in the case of appellant are dealt as under:

II. Receipt/accrual of consideration and quantum thereof

(a) In order to hold that there is a transfer of a capital asset and capital gain is chargeable to tax it is necessary that consideration should be either received or accrued. Consideration should also be properly determinable for the purpose of computation of capital gain. In terms of section 48 of the Act Capital Gain can be determined w.r.t. "full value of consideration received or accruing" it has been held by the Supreme Court in the cases of CIT v. George Henderson and Co. Ltd., 66 ITR 622 and CIT v. Gillanders Arbuthnot and Co. 87 hR 407 that full value of consideration has been used in the law for the reasons that law does not deal only with the case of sale in which case consideration in money would be available. In the case of development agreement the land owner would transfer the land rights in exchange of built-up- area and, therefore, value of built-up-area which will be received by the land owner from the developer after completion of construction would be 'lull value of consideration'.

(b) Since in most of the cases the consideration is not passed on in money terms and consideration is paid either partly or wholly in the form of built-up-area subsequently, both the issues i.e. the stage of accrual of consideration and determination of quantum of consideration are important.

(c) In this regard, it is pertinent to mention here that the Hon'ble Supreme court in CIT vs. George Henderson & Co. Ltd. (1967) 66 ITR 622 (SC) held that even in case of exchange, the money's worth of the property received in exchange constitutes the consideration for the property parted in exchange. Thus, in view of the decision of Hon'ble Supreme Court mentioned supra, the contention of the appellant that they had not received any monetary consideration is not found acceptable. As per the development agreement it has categorically been specified as per clause 4 pg. 10 of the Agreement for Development dtd. 27.12.2007, the Developers shall provide the landowners three shops in the Rehabilitation Component on the ground floor each of 150 sq. Carpet to the landowners free of cost and 5500 sq. Ft. Incentive FSI in the sale component building free of cost (in terms of ready flats) to the owners to be retained by them on ownership basis. Beside the above, in consideration of land and increased incentives FSI, the developer shall construct and provide to the owners free of cost an independent

Bungalow measuring 1500 sq. Ft. of carpet area. Therefore, in view of the above facts and decision referred above, the contention of the appellant that there is no monetary consideration received by them is not acceptable because even on the basis of accrual, the consideration is deemed to have been received.

III. Deemed transfer under section 2(47)(v) r/w section 53A of T.P. Act

(a) In the cases of development agreements it is observed that notwithstanding that documents have not been registered, there is transfer in terms of section 2(47)(v) and transaction will be deemed to be transfer where possession has been taken or retained in part performance of a contract of the nature referred to in section 53A of Transfer of Properly Act. "To qualify for the protection of the doctrine of part performance it must be shown that there is a contract to transfer for consideration immovable property and the contract is evidence by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. These are prerequisites to invoke the equitable doctrine of part performance. Alter establishing the aforementioned circumstances it must be further shown

that a transferee had in part performance of the contract either 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. The acts claimed to be in part performance must be unequivocally referable to the preexisting contract and the acts of part performance must unequivocally point in the direction of the existence of contract and evidencing implementation or performance of contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in furtherance of the contract and must be unequivocally referable to the contract." In view of above legal position, wherever the department claims it to be transfer under section 2(47)(v) of the Act, it has to satisfy the conditions of section 53A of TPA. Accordingly, it has been a point for discussion and decision by the Tribunal or the Courts in the light of facts of each case, whether conditions of section 53A of the TP Act have been fulfilled and consequentially. Thus there is a transfer under section 2(47)(v) of the IT Act notwithstanding that relevant documents have not yet been registered in favour of the developer or the buyer conferring

legal rights in the property. Reference can be made to following decisions wherein the issue has come up before the courts / Tribunal and has been decided in the light of facts of each case. For the first time the issue regarding scope of clause (v) section 2(47) came up for consideration and discussion before Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia v. CIT, (2003) 260 ITR 491 (Born.) wherein the Hon'ble Court observed that the development agreement does not transfer the interest in the property to the developer in general law and therefore, section 2(47)(v) has been enacted and in such cases, even entering into such a contract could amount to transfer from the date of agreement itself. Further, it was observed that if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of the chargeability.

(b) As far as the question of transfer u/s. 2(47) of the Act r.w.s. 53 of TPA is concerned in the instant case it is observed that if the agreement of development enables the passing of domain and control of the immovable property by grant of an irrevocable authority or licence, then even the date of agreement of development will

constitute the date of transfer of the Capital asset as held by the jurisdictional Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT (2003) 260 ITR 491 (Born). Thus it is held to be transfer in the case of such Development Agreements as per section 2(47) (v) and section 45 r.w.s. 53 of TPA which was also affirmed by Bombay High Court in the case of ACIT vs. Geeta Devi Pasari 17 DIR 280 (BOM).

(c) In the case of CIT v. Ashok Kapoor (HUF)(2007) 165 Taxman 569 (Del.) a question regarding transfer of rights in property and chargeability of capital gain had come up for consideration before the Hon'ble Delhi High Court. In the above case, the Hon'ble High Court has taken a view that transfer has taken place at the time of entering into the agreement with the developer for the reason that as per the agreement the dealer had agreed to allocate 50% of share in the property to be built and the builder was allowed to srll the area comprised in the builder's allocation. On the basis of clauses of the agreement the Hon'ble High Court had held that clause of agreement has all the elements of transfer at the stage of entering into the agreement and, therefore, there was Inescapable conclusion that there was transfer of property by the owner to the developer.

iv. Reliance is also placed on the following judicial pronouncements

wherein such development agreements have been considered to be transfer as per section 2(47) r.w.s 53A upon which Capital Gain was applicable.

1. K. Radhika (Mrs.) & Ors. Vs. Dy.CIT (2012) 65 DTR 250 (I lyd)(Trib.)

2. By. Khodre (HUF) vs. ITO ITA No. 834/PN/2008 dt. 4/10/2011 Bench B'.

V. It is further to be noted that the appellant and others had agreed to allow the developer to start construction on the aforesaid property / land subject to obtaining all the requisite permissions and sanction

of the plans from the local authorities and subject to approval of land owners which show that he has transferred the development rights to the developer.

vi. Further, on perusal of the Development Agreement, it is observed that as per clause 2 at pg.8 it has been clearly specified that the landowners have agreed to grant the development rights in respect of the aforesaid property to be developers to develop the said property under DCR 33(10) of the DCR 1991 and under SRA Scheme with the absolute authority to carry out such development at their cost and the developers agreed to develop the same.

vii. It was also observed that the landowners shall convey the property excluding their independent building and the land occupied by the building with all rights and entitlement of future benefits of additional FSI as mentioned in sub-clause (ii) of clause 2 to 10 of the agreement. Thus it fulfils the condition envisaged in section 2(47) r.w.s. 53A of TPA.

viii. As per clause of the development agreement, the developer has to take full responsibility of slum dwellers and ensure acceptance of atleast 70% of the slum dwellers and construct the new buildings for them. The aforesaid property was sold by the appellant and his co- owners with liability of the slum dwellers which were regularised by the State Govt. of Maharashtra in 1994 under the Slum Redevelopment Scheme whereby the Slum Dwellers of regularized slum were to be rehabilitated and the owners I developers of such lands were to be compensated with increase in FSI.

ix. Thus it has to be understood in such factual matrix that the physical transfer of property was not necessary. The possession of property could be only after fulfilling the conditions laid down in the agreement and the fact that there has been a delay on the part of the Developer to start the project cannot in any way negate the transfer of the aforesaid property.

X. Thus, once the development agreement has been signed and the control of the immovable property has been passed by grant of an irrevocable authority, then even the date of agreement of development will constitute the date of transfer of capital asset.

xi. Thus it is crystal clear that the domain and control of the property in question has passed to the Developer by grant of irrevocable authority and thus the date of agreement of development which in this case is 27.12.2007, will constitute the date of transfer of capital asset as held by jurisdictional High Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT as mentioned supra.

xii. In the instant case, it is observed that the agreement for development was made on 27.12.2007 and the deed of confirmation has been registered on 7.1.2010 upon which the stamp duty authorities adopted the fair market value at Rs.5,78,30,500/-. In view of the above discussions and decision of Bombay High Court mentioned supra, the date of agreement i.e. 27.12.07 will be treated as date of transfer relevant to A.Y. 2010-11.

xiii. As far as the question of applicability of Capital Gain and SOC is concerned, it is stated that, FSI /TDR are benefits arising from the land consequently and must be held as immovable property as held by Hon'ble

Bombay High court in the case of Chheda Housing Development Corporation, a partnership firm vs. Bibijan Shaikh Farid and Ors. (2007) (3) MHLJ 402 (BOM).

xiv. Further, the right to obtain conveyance of immovable property is a capital asset as held by Bombay High Court in the case of CIT Vs. Tata Services Ltd. (1980) 122 ITR 594 (Born), CIT Vs. Sterling Investment Co. Ltd. (1980) 123 ITR 441 (Born) and CIT vs. Vijay Flexible Containers (1990) 186 ITR 693 (Born). Thus, the development rights are capital asset as far as the question of applicability of Capital Gain Is concerned.

xv. In view of Mumbai Tribunal's decision in the case of Arif Akhtar Hussain vs. ITO (2011) 59 DTR 307 (Mum) (Trib.) & Chiranjeev Lal Khanna vs. ITO (2011) 132 lTD 474 (Mum)(Trib.), section 50C is applicable on development rights. In Chiranjeev La! Khanna vs. ITO as mentioned supra, it was held that where there is transfer of existing land and building which was demolished by builder for fresh construction and documents were registered in such cases there involve a 'transfer of land / FSI' in case of grant of development right. Thus, it does include cost of acquisition and section 50c is applicable.

xvi. Since the appellant alongwith his 7 co-owners have transferred the development rights to the developer M/s. Jiva Builders and

Developers, therefore Capital Gain is applicable on such transfer.

xvii. Registration under TP Act not necessary for taxability of income

(a) In the case of development agreement though possession is given to developer immediately for the purpose of construction on entering into agreement legal ownership of land continues to be with owner.

(b) It has, been held by the Courts that date of registration of such document is not relevant for the purpose of transfer under Section 2(47) of the Act.

(c) In regard to the matter as to the importance of registration of documents under the Transfer of Property Act conferring rights in the immovable property, reference can be made to certain court decisions wherein a view has been taken that notwithstanding that the documents have not been registered the rights will be deemed to be transferred to the person having the possession of the property for the purpose of taxability of income. Reference in this regard can be made to the decision of Hon'ble Supreme Court in CIT v. Podar Cement (P.) Ltd. (1997) 226 ITR 625 (SC).

(d) The Hon'ble Supreme Court has taken a view that registration for the purpose of conferring ownership right was not necessary as regards taxability of income received in

respect of the property. Following the view taken by the Supreme Court in above case Full Bench of the Gujarat High court in CIT V. Mormasjl Mancharji Vaid (2001) 250 ITR 542 has held that capital gain on the transfer has to be assessed to tax in the assessment year relevant to previous year within which the date of execution of deed of transfer falls and not in the subsequent assessment year in which the deed is registered.

xviii. Since, the AO considered the date of agreement i.e. 27.12.2007 as date of transfer relevant to A.Y. 2008-09, therefore, substantive addition was made by the AO in the case of the appellant in AY 2008-09 which seems to be justified in view of the above discussion and judicial pronouncements and therefore the addition so made by the AO is sustained in A.Y. 2008-09 as the correct year for taxing the Capital Gain, being 2008-09.

xix. As per the assessment order dt. 24.03.14 for A.Y. 2008-09, the appellant's share of Fair Market Value as on 27.12.2007 in the aforesaid property was worked out by the AO at Rs.52,76,785/- on the basis of the Development Agreement dtd.27.12.2007, considered being the date of transfer. Thereafter the AO has worked out the Capital Gain in the case of the appellant at Rs.48,27,410/- after giving the benefit of indexed cost of acquisition. Accordingly,

Rs.48,27,410/- was added back to the total income of the appellant as Long Term Capital Gain.

xx. During the course of appellate proceedings, the Valuation Report of DVO-1, Mumbai dtd. 29.10.14 was received, a certified copy of which was obtained from the concerned AO, which is placed on record.

xxi. As per the above Valuation Report of DVO-1, Mumbai dtd. 29.10.14, the Fair Market Value of the aforesaid property has been valued at Rs.2,14,30,000/-. Therefore, the appellant's 1/8th share in the impugned property is worked out at Rs.26,78,750/- upon which the Capital Gain is worked out at Rs.22,29,875/-, as against Rs.48,27,4 10/- assessed by the AO, after allowing him indexed cost of acquisition at Rs.4,48,875/-. Accordingly, the appellant gets a relief of Rs.25.97.535/ -(Rs.48,27.4 10 - Rs.22,29,875). In view of the above, the addition to the extent of Rs.22,29,875/-is confirmed."

Aggrieved, now these five assessees are in appeal before Tribunal.

7. I have heard the rival contentions and gone through the facts and circumstances of the case. Before me, both the parties i.e. the Sr. DR as well as learned counsel for the assessee admitted that the facts narrated are undisputed. The facts are that the assessee along with 7 other co-owners entered into development agreement dated 27-12-2007 with M/s Jiva Builders and Developers for development of Slum i.e. the property of the assessee under Slum redevelopment scheme wherein the developer

was required to obtain all sanctions, consent of payments and of slum dwellers, occupiers etc. as well as permissions, plans and lay out sanctioned from local authorities and government. Unless and until, such plans and layout first approve and signed by the land owners the development rights would not commence. It only intended to transfer the said properties on fulfillment of the said conditions stipulated in the agreement and no transfer has taken place during the year under consideration because terms and conditions of the development agreement were not complied by the builder and neither possession was given by these assessees' nor any consideration was received. Further, M/s Jiva Builders and Developers entered into a confirmation deed of this development agreement registered vide dated 07-01-2010 with sub-registrar Mumbai City, whereby deed of confirmation wherein registration fee and copy fee of Rs. 31,450/- was paid and the market value as per stamp duty Registration Act for the purpose of registration of deed was estimated by sub-registrar at Rs. 5,78,30,500//-. The AO also made assessment for AY 2010-11 on protective basis of this market value as estimated by sub registrar in the hand of one of the co-owner i.e. the assessee Ms. Rukiyabanu Gullam Mohiuddin Ahmedji, whereas she is the only 1/8th of the one of the co-owner of the property. The assessee before AO as well as before CIT(A) filed detailed submissions re-treating that when there is no transfer within the meaning of section 2(47) of the Act r.w.s 53A of the Transfer of Property Act and taxable event has not occurred in this year or in AY 2010-11 giving rise to capital gain. It was claimed by assessee that capital gain is assessed only in the year when consideration is received or when the full value of consideration ascertainable on receipt of constructed area and not otherwise. We find that clause No. 2, 4, 5 and 28 of the Development Agreement are the essence of the contract wherein developer has agreed that the possession of the sale unit shall be given only after accommodating old tenants first and in no case developer will be entitled to possession of self

components unless old tenants / occupants inducted in the respective permanent accommodation on ownership basis. Admittedly, possession of the property was not handed over during AY 2008-09 and mere execution of agreement for the development of the property could not amount to transfer u/s 2(47) of the Act r.w.s 53A of the transfer of property Act are satisfied as such there can no transfer be considered in the year under consideration. This view of mine is supported by the decision of Hon'ble Bombay High Court in the case of CIT vs. Geetadevi Pasari in Income Tax Appeal No. 861/2017 dated 10-07-2008.

8. In the given facts and circumstances, I am of the view that the assessee entered into a new development agreement cum deed of assignment of lease with another developer M/s Jiva Builders and developers dated 27-12-2007 & deed of confirmation was registered with the sub-registrar Mumbai city-3 vide dated 07-01-2010. It is also a fact that the assessee has not parted with the possession of the property till date or has not handed over the possession of the property to the new developer and even the new agreement. According to me, the liability for capital gain would arise only in the year in which possession is given and this view of ours is supported by the decision of Hon'ble Bombay High Court in the case of Geetadevi Pasari (*supra*), wherein Hon'ble Bombay High Court held as under:-

> *"4. In the aforesaid Judgment, this Court had clearly taken a view that in the relevant Assessment year for the purpose of computation of capital gains will be the Assessment year in which the assessee was actually physically put in possession and in the instant case, there is no dispute that though the agreement was entered into on 29th March, 1994, the assessee was put in possession only in the year 10th April, 1998.*

5. In view thereof, the assessee will be liable for being assessed for capital gains only in the assessment year 1999-00. Under these circumstances we do not find any substantial question of law involved in the above Appeal. The Appeal is devoid of merits and the same stands dismissed."

9. In view of the above decision of Hon'ble Bombay High Court in the case of Geetadevi Pasari (supra), and the fact of the case that no transfer of property took place during the FY relevant to the AY 2008-09 and no possession was handed over to the developer and ultimately the agreement between the assessee and the developer, the assessee cannot be held to be liable for capital gain tax liability. Accordingly, all these five appeals of the assessee are allowed.

10. **In the result, the appeals of assessees' are allowed.**

Order pronounced in the open court on 23-08-2017.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 23-08-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//
BY ORDER,
Assistant Registrar
ITAT, MUMBAI