**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।**

# IN THE INCOME TAX APPELLATE TRIBUNAL
# "B" BENCH, AHMEDABAD

## BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
## AND
## SHRI MANISH BORAD, ACCOUNTANT MEMBER

**आयकर अपील सं./ ITA.No.2414/Ahd/2013**
**निर्धारण वर्ष/Block Asstt. Year: 2010-2011**

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| Smt.Sapnaben Dipakbhai Patel<br>Ganesh House<br>Nr. Dharnidhar Derasar<br>Nr.Vikas Gruh, Vasna<br>Ahmedabad 380 007.<br><br>PAN : APUPP 1186 M | Vs | ITO, Ward-10(1)<br>Ahmedabad. |

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| **अपीलार्थी/** (Appellant) | | **प्रत्यर्थी/** (Respondent) |

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| Assessee by : | Shri Dhiren Shah, AR |
| Revenue by : | Shri Jagdish CIT-DR |

सुनवाई की तारीख/**Date of Hearing : 01/12/2015**
घोषणा की तारीख /**Date of Pronouncement: 13/01/2016**

## आदेश/O R D E R

**PER RAJPAL YADAV, JUDICIAL MEMBER:**

The assessee is in appeal before us against the order of ld.Commissioner Income-Tax (Appeals)-XVI, Ahmedabad dated 29.7.2013 passed for the Asstt.Year 2010-11.

3. The grounds of appeal taken by the assessee are not in consonance with the Rule 8 of the Income Tax (Appellate Tribunal) Rules, 1963 - they are descriptive and argumentative in nature. In brief, her grievance is that the

ld.CIT(A) has erred in confirming the addition of Rs.6,83,09,792/- which was added by the AO on the ground that the assessee has sold land i.e. "capital asset" in this year and failed to offer gain for taxation on actual sale consideration in her return of income for this assessment year.

4. Brief facts of the case are that the assessee is an individual. She has filed her return of income on 30.6.2011 declaring total income at Rs.17,95,620/-. This return was duly processed under section 143(1) of the Income Tax Act. The case of the assessee was selected for scrutiny assessment on 8.9.2012 and notice under section 143(2) was issued which was duly served upon the assessee on 14.9.2012. In the return of income, the assessee has shown income from short term capital gain (STCG) and interest income. According to the AO, the Annual Information Report Wing has given an information that immovable property valued at Rs.7,41,64,205/- and of Rs.5,87,360/- have been transacted by the assessee, but in the return of income, she has shown STCG at Rs.17,92,042/- on sale consideration of Rs.66,32,100/-. The AO has called for information from Sub-registrar, Sanand on 9.11.2012 along with copy of sale deed. The AO, thereafter, confronted the assessee to disclose complete details of transfer of capital asset by her during the year. It emerges out from the record that the ld.AO has made a detailed analysis of the survey numbers, which were purchased by the assessee and alleged to have been sold in this year. The AO has made addition of Rs.6,83,09,792/- which comprises of two amounts viz. Rs.6,64,88,792/- and Rs.18,21,000/- pertaining to the transaction undertaken by the assessee in respect of two different chunks of agriculture land which were purchased by her and sold. In brief, the assessee has purchased a piece of land measuring 123731 sq.mters having different survey numbers from Shri Bhikhubhai N. Padshala and Shri Sandipbhai B. Padshala for total sum of Rs.67,96,432/- vide purchase deeds dated 18.12.2007, 28.02.2008 and

4.3.2008. The assessee, thereafter, entered into an agreement to sell (*Banakhat)* with Shri Sanjeev D. Shah, proprietor of Capital Consultancy (hereinafter referred as "SDS") and agreed to sell the said agriculture land for a consideration of Rs.76,75,413/-. According to the AO, possession of the impugned land was not transferred by the assessee to the prospective buyers at this stage. She had received a sum of Rs.3,00,000/- as advance against the proposed agreed consideration of Rs.76,75,413/-. Subsequently, by another agreement to sell/*banakhat* dated 2.3.2009, the said land was agreed to be sold to one Gatil Properties P.Ltd. (hereinafter referred to as "GPPL") for a sum of Rs.10,64,08,660/-. In this agreement, the assessee was the selling party, GPPL was the purchasing party and SDS was a confirming party. By this agreement, the assessee was paid Rs.10,00,000/- and SDS was paid Rs.25,00,000/-. The agreement further stated that the possession of the land would be given upon full payment being made to the assessee and total Rs.50,00,000/- to the SDS. On the same date i.e. 2.3.2009 another agreement/*kabja karar* agreement was signed between the assessee, GPPL and the SDS by which Rs.63,75,413/- was paid to the assessee and Rs.25,00,000/- to the SDS and the possession of the land was transferred from the assessee to the prospective buyer i.e. GPPL. Thereafter, a registered sale deed was executed on 27.1.2010 wherein M/s.GPPL was shown as vendee. The assessee was shown as vendor and SDS as confirming party. Vide this sale deed, the land measuring 85,995 sq.meters out of the total land of 1,23,731 sq.meters agreed in the *banakhat* was transferred. The consideration in the sale deed was shown at Rs.7,41,64,205/- for the area admeasuring 85,995 sq.meters. It also emerges out that second sale deed was executed on 6.9.2010 between the same parties and land admeasuring 8498 sq.meters was sold. Thereafter, various other sale deeds were registered and the total land agreed to be sold has been sold. For the purpose of controversy involved in this year, we are concerned with regard to the sale of land

measuring 85,995 sq.meters which was alleged to have been sold at Rs.7,41,64,205/-. The ld.AO on detailed analysis of the evidence produced by the assessee arrived at a conclusion that the first two agreements i.e. 4.4.2008 and 2.3.2009 are to be ignored. The assessee has sold land only by way of registered sale deed executed on 27.1.2010 and therefore, the capital gain resulted on transfer of land is to be assessed in the hands of the assessee in the Asstt.Year 2010-2011. The ld.AO has made an addition of Rs.6,64,88,792/- [Rs.7,41,64,205/- (being the value shown in the sale deed) minus Rs.76,75,413/- (being the value offered for taxation by the assessee)]. The ld.AO has reproduced all these agreements in the assessment order i.e. agreement dated 4.4.2008 and agreement dated 2.3.2009.

5. The ld.AO, thereafter, reproduced the submission of the assessee and rejected the contentions. His finding from para 24 to 27 read as under:

> *"24. Not being satisfied by the contention of the assessee, the undersigned is bound to assess the issue as per section 2(47)(v) of the Act which narrates:*
>
> > *"any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a ontract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882)"*
> >
> > *Section 53A of the Transfer of Property Act narrates as following:*
> >
> > *"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, of, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore 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 person 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 who has no notice of the contract or of the part performance thereof."*

*For the transfer u/s 2(47)(v) of the Act if the following conditions are satisfied, the transaction treated as transfer:*

*i) there must be a transaction involving the allowing of the possession of immovable property to be taken or retained in part performance of a contract and*

*ii) the transferee has performed or is willing to perform his part of the contract, has done some act in furtherance of the contract*

*25. But here the possession of property is given directly with the purchaser i.e. Gatil Properties Pvt. Ltd. by possession agreement dtd.02/03/2009 and the confirming party has not taken or retained the possession of the property or any part thereof, for part performance of the contract and has not done some act in furtherance of the contract. Therefore, provision of section 53 A of the Transfer of property Act r.w.s. 2(47(v) of the Act has not been fulfilled by the assessee or confirming party, as the confirming party i.e. Capital consultancy has not taken or retained possession or not performed any act on the said land and as regards Ganesh Plantation Ltd, the assessee's spouse Shri*

*Dipakbhai G Patel, is a director & signed the balance sheet as a director having substantial interest in the company, and also Shri Govindbhai C Patel, father of the spouse of assessee is a chairman in Ganesh Plantation Ltd, sale consideration received from the Gatil properties Pvt Ltd and transferred to M/s Ganesh Investors and Financiers i.e money transferred from her spouse's one company to another company. The possession of property is given directly with the purchaser i.e. Gatil Properties Pvt Ltd by possession agreement dtd.25/01/2010 and the confirming party has not taken or retained the possession of the property or any part thereof, for part performance of the contract and has not done some act in furtherance of the contract. Therefore, provision of section 53 A of the Transfer of property Act r.w.s. 2(47(v) of the Act has not been fulfilled by the assessee or the confirming party, as the confirming party i.e. Ganesh Plantation Ltd has not taken possession or not performed any act on the said land. The benefit is ultimately received to the assessee's family and by showing loss on sale of shares no tax has been paid by both the confirming party. As well as the assessee and both the confirming party has not fulfilled the conditions/ provisions of section 53 A of the Transfer of property Act r.w.s. 2(47)(v) of the Act, hence, an agreement for sale between the assessee and both the confirming parties, cannot be considered as according to the of provisions section 53 A of the Transfer of property Act r.w.s. 2(47)(v) of the Act and therefore, the income by way of sale consideration should be taxed in the hands of the assessee.*

*26. In this regards, The legendary decision delivered by Hon'ble Supreme Court Of India in [2011] 202 TAXMAN 607 (SC)/[2011] 14 :axman.l03(SC) in Suraj Lamp & Industries Pvt. Ltd. v State of iaryana, R.V. Raveendran, A.K. Patnaik and H.L. Gokhale , JJ. Special eave petition (C) No. 13917 of 2009 that section 54 of the transfer-of property Act, 1882 - Sale - Whether immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance - Held, yes- Whether transactions of nature of General Power of Attorney Sales or Sale agreement/General Power of Attorney/ Will transfers do not convey the title and do not amount to transfer, nor can be recognized as valid mode of transfer of immovable property- Held, yes- Whether such transactions cannot be relied upon or made basis for imitations in municipal or revenue records - Held, yes.*

*Section 54 of Transfer of Property Act makes it clear that a contract of sale does not of itself create any interest in, or charge on, such property. Supreme Court of India in Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [2004(8) SCC 614 this Court held: "Protection provided under Section 53 A of the Act to the proposed transfer is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing by registered sale deed in favour of the transferee. Such a right to protect possession agaist the proposed vendor cannot be pressed in service against a third party." It is thus; clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (deed of sale). In the absence of deed of conveyance (duly, stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.*

*Any contract of sale (agreement to sell) which not a registered deed of conveyance (deed of sale) would fall short of the requirements of section 54 and section 55 of Transfer of Properly Act and will confer any title nor transfer any interest in an immovable property (except to the limited right granted under sectipn 53A of TP Act). According to TP Act, an agreement of sale, whether with possession of without possession is not a conveyance. Section 54 of TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.*

*27. In view of above mentioned facts of the case and in view of the law point i.e. Provisions Section 53A of the Transfer of property Act r.w.s. 2(47(v) of the Act, Section 54 and section 55 of the Transfer of Property Act, an agreement for sale between the assessee and both the confirming parties, cannot be considered as legal and valid transaction, such sale transaction can be recognized as valid and legal only be by a deed of sale (Conveyance). In this case, the property is legally registered on 27/01/2010 to the office of the Sub registrar by paying stamp duly and registration charges on deed of sale, as the issue has came to light only by AIR information for sale transaction of*

*Rs.7,41,64,205/-. Hence, the sale consideration received is treated as payment received in advance towards the legal and valid sale transaction registered on 27/01/2010 and the income by way of sale consideration is taxed in the sale consideration received is treated as payment received in advance towards the legal and valid sale transaction registered on 27/01/2010 and the income by way of sale consideration is taxed in the hands of the assessee in the year under the consideration. Therefore, the difference of Rs.6,64,88,792/- (Rs.7,41,64,205/- - Rs.76,75,413/-) i.e. difference of market value of Rs.7,41,64,205/- as per sale transaction registered in office of the Sub Registrar, Ahmedabad and sale consideration of Rs.76,75,413/- Shown by the assessee in return of income towards the property bearing Survey No.260/1,286/2, 286/3, 292/1, /292/2 paiki, 293/1, 293/2, 293/3 371,372,377,378,379, 381- ni anukrame-8296, 2630, 5362, 5362, 3642,11331, 4047, 5564, 7993; 4047, 6374, 3642, 6374 of Godhavi, of Ta. Sanand and difference of Rs.18,21,000/- (Rs.27,31,500/- - Rs. 9,10,500/-) for the property bearing survey No. 405/1 of Godhavi, of Ta. Sanand valuation of Rs.27,31,500/- as per Sub Registrar office and Rs. 9,10,500/- shown by you as sale consideration in return of income, is added to the total income of the assessee. The total amount of Rs.6,83,09,792/- (Rs.6,64,88,792/- + Rs.18,21,000/-) is considered as Short Term Capital Gain and added to the total income of the assessee. Penalty proceedings u/s 271(l)(c) of the Act are initiated for concealment the particulars of income and furnishing inaccurate particulars of income."*

6. Appeal to the CIT(A) did not bring any relief to the assessee.

7. With the assistance of the ld. representatives, we have gone through the record carefully. On due consideration of the record and analysis of the impugned orders, we are of the view that the following issues are required to be addressed by us –

(i) Whether by way of agreement dated 4.4.008 executed with SDS by the assessee, rights of capital nature (within the meaning of

section 2(14) of the Income Tax Act have been assigned by the assessee or not ?

(ii) Whether on execution of the agreement dated 2.3.2009 between the assessee, GPPL and SDS (as confirming party) along with agreement to hand over the possession, transaction can be termed as a transfer giving rise to short term capital gain/long term capital gain by referring to section 2(47) of the Income Tax Act r.w.s. 53 of the Transfer of Property Act, 1882 ?

(iii) Whether cumulative setting of the circumstances referred by the ld.AO would goad the adjudicating authority to ignore all these agreements and envisage the transfer of land by the assessee directly to the GPPL only when alleged sale deed dated 27.1.2010 was executed and short term capital gain is to be construed to have been arisen to the assessee only in Asstt.Year 2010-2011?

**Issue No.(i)**

8. Section 2(14) of the Income Tax Act provides definition of expression "capital asset". According to this definition, capital asset means property of any kind held by an assessee, whether or not connected with his business or profession but does not include any stock-in-trade, personal effects ……. For the purpose of controversy in hand, we need not to devolve upon the meaning of "capital asset" elaborately, because in the present case the area of our inquiry would be whether the right accrued to SDS falls within the ambit of expression "property of any kind" held by an assessee employed in section 2(14) while explaining the meaning of "capital asset". According to the assessee, SDS has acquired enforceable right at law by virtue of this agreement. He could file suit for specific performance of contract under Specific Relief Act and persuade the assessee to register sale deed in his

favour. Thus, the right with the assessee in the "capital asset" stands extinguished on the date when she had entered into an agreement for sale of property on 4.4.2008. For buttressing her contention, ld. counsel had made reference to various decisions. The AO has ignored the existence of this agreement by referring to surrounding circumstances and held that the agreements dated 4.4.2008 as well as 2.3.2009 are sham and deserved to be ignored. At this stage, without going into that controversy, whether agreements are sham or not, for the sake of arguments, if the agreements are to be assumed genuine, then, what rights should be devolved upon the vendee on execution of such agreement. Therefore, under issue no.(i) we embark upon an inquiry about the scope of rights acquired by an assessee on execution of such agreement. The impact of such surrounding circumstances for ignoring the agreement, we will be looking while recording the finding under issue no.(iii). This controversy has come up in number cases before the Tribunal as well as before the Hon'ble High Courts.

9. The first order referred by the assessee is the order of the ITAT, Madras Bench in the case of K.R. Srinath Vs. ACIT, (2002) 80 ITD 193 (Madras). The facts in this case are that the assessee had entered into an agreement with Shri K.G. Krishnamurthy, Bangalore for purchase of property situated at Survey No.35/3 of Geddadahalli Village, Bangalore. As per the agreement entered into on 3.4.1986, the purchase consideration was Rs.2,00,000/-. A sum of Rs.40,000/- was paid in advance and the balance of Rs.1,60,000/- was to be paid at the time of execution and registration of the sale deed. It appears that though the assessee was awaiting specific performance of the contract by the seller, the vendor was avoiding the same. Later the seller sought cancellation of the agreement and agreed to pay compensation of Rs.6,00,000/- to the assessee. A deed of cancellation was entered into between the parties on 21.3.1990. In terms of the deed of

cancellation, the assessee received a sum of Rs.6,40,000/- from Shri Krishnamurthy which included the advance of Rs.40,000/- given earlier. The assessee had filed his return for the Asstt.Year 1990-91 admitting total income at Rs.2,59,000/- after allowing deduction of Rs.5,000/-. The assessee then took up the matter in appeal with the plea that the amount received as compensation for breach of contract was not liable to assessment as capital gains. The Tribunal while dealing with the controversy held that the assessee has a right to obtain a sale deed. That right was capital asset and by virtue of deed executed on 21.3.1990, the assessee has relinquished his right to obtain sale deed. This relinquishment is a 'transfer' within the meaning of section 2(47) of the Act. The observation of the Tribunal read as under:

> *" In the present case, it is not the claim of the Revenue that there was extinguishment of any rights of the assessee. The case made out by the Revenue is that by the deed of cancellation executed on 21st March, 1990, the assessee relinquished his right to obtain a sale deed, and that relinquishment would be a 'transfer' within the meaning of Section 2(47). As already stated, the capital asset considered for assessment is the right to obtain the sale deed. We have already seen that the right acquired by the assessee under the agreement dt. 3rd April, 1986, fell within the definition of 'capital asset' in Section 2(14). It is that capital asset, i.e. the right acquired under the agreement of sale that the assessee relinquished in terms of the deed of cancellation dt. 21st March, 1990. That capital asset was not extinguished on account of destruction or loss. It was only given up or relinquished by the assessee. It is our considered view that the decision of the apex Court in regard to a case of extinguishment of a capital asset, has no application to the facts of the present case. The argument of the learned counsel V.D. Gopal based on the decision in the case of Vania Silk Mills (P) Ltd. (supra) is to be therefore, rejected.*
>
> *13. In the above circumstances, we hold that the CIT(A) was correct in confirming the present assessment of capital gains on the sum of Rs. 6 lakhs received by the assessee for relinquishing his rights under the agreement of sale dt. 3rd April, 1986. We accordingly uphold the order of the CIT(A). This appeal by the assessee is, therefore, dismissed."*

10. Next judgment referred by the assessee is of Hon'ble Bombay High Court in the case of CIT Vs. Tata Services Ltd., reported in 122 ITR 0594 (Bom). In this case, the facts are that the assessee had entered into an agreement with one Seth Anandji Haridas to purchase a residential plot at 29D, Doongarsey Road, Malabar Hill, Bombay and paid Rs.90,000/- as earnest money. The agreement was in respect of 5,000 sq.yards out of a larger plot and price fixed was at the rate of Rs.175 per sq.yard. The balance of the purchase price was to be paid on the completion of purchase. The purchase was to be completed within six months from the date of the agreement and after expiration of the said period of six months by a 15 days' notice to be given in writing. The time could be made the essence of the contract. The agreement was executed on July 31, 1961. It was the responsibility of vendor to obtain necessary permission from the municipal and other authorities, for the subdivision of the main plot, admeasuring 7,012. Ultimately he entered into an agreement to sell the property to M/s.Advani and Batra. The assessee threatened to file a suit for specific performance. A settlement was arrived vide which the vendor has returned Rs.90,000/- paid by the assessee as advance and compensation of Rs.5,00,000/-. Thus, the assessee got a sum of Rs.5,90,000/-. In the cancellation deed a sum of Rs.5,00,000/- was mentioned as amount of consideration for transfer and assign the assessee's right, title and interest under the agreement entered into with Anandji Haridas for purchase of this property and Rs.90,000/- being the amount of money deposited with M/s.Kanga and Co., which was received as return of the advance money. The dispute arose whether the sum of Rs.5,00,000/- received by the assessee represents the money received on transfer of a capital asset and required to be assessed under the head "capital gains". The Hon'ble Bombay High Court has made an elaborate discussion on the issue and ultimately held that the money received by the assessee for assigning of its rights acquired under the agreement for obtaining a sale deed

is for transfer of capital asset and assessable under the head capital gain. The following observations of the Hon'ble Bombay High Court are worth to note:

> *"Whatever may have been the controversy between Anandji Haridas and the assessee prior to September 23, 1963, when the assessee executed the receipt for Rs. 5,90,000, the position on that day was not only that the original agreement of said between the assessee and Anandji Haridas was to be treated as subsisting but also that the tripartite agreement between the assessee, Anandji Haridas and M/s. Advani and Batra that the money paid by the assessee to Anandji Haridas was to be returned by M/s. Advani and Batra and an additional sum of Rs. 5,00,000 was also to be paid to the assessee by M/s. Advani and Batra was given effect to. Under this tripartite agreement, the assessee was to transfer and assign in favour of M/s. Advani and Batra the right, title and interest which the assessee had under the agreement entered into with Anandji Haridas. Once the parties had decided that the rights under the agreement of sale were to be assigned in favour of Messrs. Advani and Batra, if is difficult to see how the sum of Rs. 5,00,000 received by the assessee from M/s. Advani and Batra could be claimed to have been received by was of compensation or damages for breach of the agreement of sale. The position on September 23, 1963, when the receipt (annex. "H") was executed by the assessee was that Rs. 5,90,000 were received by the assessee as consideration for assigning its rights under the agreement with Anandji Haridas in favour of M/s. Advani and Batra. These rights, which had been assigned in favour of M/s. Advani and Batra, clearly fell within the wide definition of capital asset in clause (14) of s. 2 of the I.T. Act, 1961."*

11. Next decision referred by the assessee is of Hon'ble Bombay High Court in the case of CIT Vs. Vijay Flexible Containers, 186 ITR 0693 (Bom). In this case, the facts are that the assessee-firm entered into an agreement with Captain B.V. Dhuru on 10.11.1959 whereunder, the assessee has agreed to purchase from the said Dhuru and others immovable property described in Schedule thereto at the rate of Rs.35 per sq.yard to be paid in the manner set out. Upon execution of the said agreement for sale, the assessee paid to the

vendor. As required by the said agreement for sale, a sum of Rs.17,500 as earnest money. The assessee was persuaded to file suit for specific performance of the said agreement for sale or, in the alternative, for damages for its breach. The dispute was settled and a sum of Rs.1,17,500/- was paid to the assessee. This sum was received by the assessee in accounting year relevant to the asstt.year 1972-73. The ITO held that the assessee has acquired under the said agreement for sale was capital asset. Upon extinguishment of that right, the assessee has received a sum of Rs.1,17,500/-. After deducting the cost of acquisition of the capital asset in the amount of Rs.17,5000/- and expenses and legal charges in the sum of Rs.17,904/-, the ITO found the capital gain to be Rs.82,086/-. The Hon'ble Bombay High Court upheld the conclusion of the AO and held that the assessee had acquired right of that capital asset nature, under the agreement for purchase of property. On extinguishment of such rights, gain arisen to the assessee is to be assessed as a capital gain. The Hon'ble Court has upheld the conclusion of the AO that the assessee had earned capital gain of Rs.82,086/-.

12. The next decision referred by the assessee is of Hon'ble Madhya Pradesh High Court in the case of CIT Vs. Smt. Laxmidevi Ratani, 17 TAXMAN 642 (MP). In this case, Smt. Laxmidevi Ratani and one Shri Murlidhar Totla were partners of one firm M/s.Indian Pharmaceuticals. The firm had entered into a contract to purchase certain immovable property from Smt.Ratan Bai Tongia for Rs.1,05,000/-. An agreement to that effect was entered into between the parties on 25.9.1970. The agreement was not carried out by the seller and hence, the assessee-firm was compelled to file a suit for specific performance of the contract against the owner of the property in civil court. Ultimately, the dispute was resolved by a compromise when the litigation was pending before the Hon'ble High Court. The vendee received a sum of Rs.14,85,000/-. This amount was received in the accounting year

relevant to the Asstt.Year 1987-88. The AO has treated the receipt of Rs.14,85,001/- to be in the nature of capital gains in the hands of the assessee, and accordingly taxed it.

13. The assessee challenged the assessment order in appeal before the CIT(A) who upheld the conclusion of the AO. However, the Tribunal after putting reliance upon the decision of the Hon'ble Supreme Court in the case of Vania Silk Mills P. Ltd., 191 ITR 647 has held that receipt in question cannot be regarded as and/or taxed as capital gain as defined in section 2(47) of the Act. The Hon'ble Madhya Pradesh High Court has reversed the decision of the Tribunal and held that the gain arisen to the assessee for relinquishment of its rights obtained under the agreement is a capital gain.

14. Thus, on an analysis of the record, we are of the view that the rights acquired by SDS under the agreement dated 4.4.2008 are of capital nature. In other words, the rights assigned by the assessee by virtue of this agreement are of capital nature and this agreement was enforceable in law under the Specific Relief Act. The time limit for filing of the suit for specific performance of the contract has been provided in Schedule-II of the Indian Limitation Act, 1905. This time is three years from the date of execution of the agreement. The assessee was bound by this agreement, and if she violates this agreement, she could be exposed to civil as well as criminal proceedings. Her right in the property after the execution of this agreement has been curtailed or encumbrance has been created.

**Issue No.(ii)**

15. Under issue no.(ii) focus of our inquiry is as to what would envisage transfer of a capital asset under section 2(47) of the Income Tax Act r.w.s

section 53A of the Transfer of Property Act, 1882. It is pertinent to take note of the relevant part of the section 2(47) of the Act. It reads as under:

> *"Section 2(47) of Income Tax Act, 1961 – Definition of transfer in this Act, unless the context otherwise requires -*
>
> *"transfer", in relation to a capital asset, includes - …*
>
> *(ii) the extinguishment of any rights therein; or ….*
>
> *(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 section 53A of the Transfer of Property Act, 1882 (4 of 1882); or*
>
> *(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.*
>
> ***Explanation – 1 -** For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.*
>
> *Explanation - 2. For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India."*

16. Clause (v) and (vi) have been introduced in section 2(47) of the Income Tax Act by Finance Act, 1987 w.e.f. April 1, 1988. The Board has issued a circular bearing no.495 dated Sept. 22, 1987 explaining the objectives and the background for inclusion of this clause in order to widen the scope of

expression "transfer" for the purpose of taxation. We deem it appropriate to take note of relevant part of this circular in order to construe the meaning of expression "transfer" contemplated in section 2(47) of the Act. The relevant part of this circular reads as under:

> *"Definition of 'transfer' widened to include certain transactions—*
>
> *11.1 The existing definition of the word 'transfer' in section 2(47) :ces not include transfer of certain rights accruing to a purchaser, by ay of becoming a member of or acquiring shares in a co-operative dety, company or association of persons or by way of any agreement or any arrangement whereby such person acquires any right in any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are a common mode of acquiring flats particularly in multistoreyed constructions in big cities. The definition also does not cover cases where possession is allowed to be taken or retained in part performance of a contract, of the nature referred to in section 53A of the Transfer of Property Act, 1882. New sub-clauses (v) and (vi) have been inserted in section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above.*
>
> *11.2 The newly inserted sub-clause (vi) of section 2(47) has brought into the ambit of 'transfer7, the practice of enjoyment of property rights through what is commonly known as power of attorney arrangements. The practice in such cases is adopted normally where transfer of ownership is legally not permitted. A person holding the power of attorney is authorised the powers of owner, including that of making construction. The legal ownership in such cases continues to be with the transferor.*
>
> *11.3 These amendments shall come into force with effect from April 1, 1988, and will, accordingly, apply to the assessment year 1988-89 and subsequent years (section 3(g) of the Finance Act, 1987)."*

17. Section 2(47) as well as the circular issued by the Board has fallen for consideration before the Hon'ble High Courts. The judgment of the Hon'ble

Madras High Court in the case of CIT Vs. K. Jeelani Basha, 256 ITR 282 can be referred at this stage. The facts in this case are that the assessee has entered into an agreement on November 10, 1990 with one Reliance Developments, Coimbatore for the sale of property at No.13, VOC Road, Cantonment, Trichy. The property was vacant land within the municipal limits. The whole idea was to develop the property and it comprises an area of about 36,873 sq. feets. The total consideration agreed was Rs.57 lakhs. The vendee paid a sum of Rs.2 lakhs as an advance on the date of agreement and agreed to pay a sum of Rs.15 lakhs within two months from the date of agreement and further sum of Rs.10 lakhs within a period of six months. The vendee could not keep the schedule. Therefore, some modifications were effected with the mutual understanding in the terms of the agreement. As per the modified agreement, the assessee parted with the possession of approximately 1/3$^{rd}$ of the property on or about June 15, 1991. He also agreed that he would purchase a residential apartment bearing the area of 4,400 sq.feets, which would be eventually put up on the sale property at the consideration of Rs.15,47,000/-. The assessee has also agreed that the vendee/ developer would construct a separate building in area of 5,600 sq.feets at the cost of Rs.8 lakhs and this sum of Rs.15,40,000/- plus Rs.8 lakhs totaling to Rs.23,40,000/- was to be adjusted out of the total consideration. But this adjustment was to be from the last installment of the consideration payable by the vendee. The assessee had received a sum of Rs.22 lakhs out of the consideration on his having parted with approximately 1/3$^{rd}$ of the total property. He also added in this Rs.22 lakhs the cost of the building of Rs.8 lakhs, which the developer agreed to construct over an area of 5,600 sq.feets. Thus, the capital gain for the Asstt.Year 1992-93 were initially calculated on the basis of this Rs.30 lakhs. However, the assessing authority calculated the whole capital gain on the basis of total consideration and not on Rs.22 lakhs received by the assessee and after making the

adjustments the total capital gains were assessed at Rs.4,74,765/-. The dispute between the assessee and the department was whether the capital gain is to be calculated with regard to the sale consideration received by the assessee on transfer of 1/3rd of the property whose possession was handed over during this year. The AO was of the view that once in a part performance of the contract, the assessee has handed over the possession of the part of the property, the transaction of the transfer of property is complete and the capital gain is to be calculated on the whole of the property. The ld.Commissioner upheld the order of the AO, however, the Tribunal accepted the contentions of the assessee and directed that the capital gain would be chargeable during the year only for the immovable property handed over to the purchaser. The Tribunal further directed that appropriate sale proceeds be allocated *pro-rata* for the possession handed over, and the capital gains be computed. The Hon'ble Madras High Court has upheld this order of the Tribunal. The relevant finding of the Hon'ble Madras High Court reads as under:

> *"In this case, the possession was parted with whereas the assessee/vendor received the consideration therefor. Once the possession, even a part of the property was handed over to the transferee for the purpose of Section 2(47)(v) read with Section 45, the transfer was complete and therefore the tax authorities and more particularly, the Tribunal was justified to calculate the consideration received in that particular year for that part of the property which was parted with. In fact, a reference can be made to the judgment of the Supreme Court in ALAPATI VENKATARAMAIAH VS. COMMISSIONER, INCOME TAX reported in 57 I.T.R. 185, which Mr.Rajan relied upon and pointed out that before the amendment, the transfer was very strictly construed. In the said decision, the Supreme Court refused to accept the agreement to sell or the entries made in the account for the receipt of the consideration by the transferor as a completed transfer for the purpose of then Section 12(b). The Supreme Court observed that the transfer means effective conveyance of capital asset to the transferee and delivery of possession of immovable could not by itself be treated as equivalent to conveyance of the immovable*

*property. Relying on this judgment, the learned counsel pointed out that the amendment has effected a sea change in law, inasmuch as under Section 2(47), the delivery of possession provided it is in the nature as contemplated in Section 53 A of the Transfer of Property Act, would be enough to bring the transaction into the mischief of the word "transfer". The argument is undoubtedly correct.*

*Section 2(47)(v) has probably been introduced to meet the law laid down in this Judgment, wherein there used to be a transfer for all the practical purposes, but the tax could be avoided only on the sole ground that the transaction was not completed by way of a sale deed. Now, the law having undergone the change, it would be clear that where there would be a transfer of possession in the nature as contemplated under Section 53A of the Transfer of Property Act, the transaction would be covered as a transfer. By the necessary logic then, that transaction would be coverable in that particular assessment year as has been done by the Delhi High Court. The only question was as to whether a transaction could be considered for the purpose of calculation of capital gains in parts. The position in law has been indicated by the Delhi High Court that it can be so treated in parts, we respectfully agree with the Delhi High Court judgment. However, the only conditions would be that (1) such a delivery of possession should be in the nature of a doctrine of part performance under Section 53A for which there should be an agreement between the parties, (2) such agreement should be in writing, (3) a completed contract has to be spelt out from that agreement, and the most important (4) the transfer of possession of the property in pursuance of the said agreement. All these conditions undoubtedly and admittedly are completed here. If that is so, then there would be no question of interfering with the Tribunal's judgment. In our opinion, the Tribunal has correctly held that the assessee would have to be assessed on the basis of the transfer of the possession in proportionate to the consideration.*

*Accordingly, the question is answered against the revenue."*

18. The Hon'ble Bombay High Court has also considered similar issue in the case of Chaturbhuj Dwarkadas Kapadia Vs. CIT, 260 ITR 491. The following questions were formulated by the Hon'ble Bombay High Court:

"(*i) Whether on the facts and in the circumstances of the case, the Tribunal was justified in concluding that the appellant had transferred*

*the property situated at Gamdevi during the previous year relevant to the assessment year 1996-97 ?*

*(ii) Whether the Tribunal's conclusion that the appellant had transferred the property situated at Gamdevi during the previous year relevant to the assessment year 1996-97 was so unreasonable that no person properly instructed could ever have arrived at the same ?*

*(iii) Whether, the Tribunal's conclusion that the appellant transferred the property situated in Gamdevi in the previous year relevant to the assessment year 1996-97 was arrived at by considering irrelevant circumstances and without appreciating and considering the relevant factual material and was contrary to the material and the evidence of record was thereby vitiated ?"*

19. The relevant observations read as under:

*"…. In this case, the agreement is a development agreement and in our view, the test to be applied to decide the year of chargeability is the year in which the transaction was entered into. We have taken this view for the reason 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 the agreement itself. We have taken this view for a precise reason. Firstly, we find in numerous matters where the Assessing Officer and the Department generally proceed on the basis of substantial compliance of the contract. For example, in this very case, the Department has contended that because of substantial compliance of the contract during the financial year ending March 31, 1996, the transfer is deemed to have taken place in that year. Such interpretation would result in anomaly because what is substantial compliance would differ from officer to officer. Therefore, if on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of the agreement for sale, a development agreement is contemplated, under which the developer applies for permissions from various authorities, either under power of attorney or otherwise and in the name of the assessee, then the Assessing Officer is entitled to take the date of the contract as the date of transfer in view of Section 2(47)(v). In this very case, the date on which the developer obtained a commencement certificate is not within the accounting year ending March 31, 1996. At the same time, if one reads the contract as a whole, it is clear that a dichotomy is contemplated between the limited power*

*of attorney authorising the developer to deal with the property vide para. 8 and an irrevocable licence to enter upon the property after the developer obtains the requisite approvals of various authorities. In fact, the limited power of attorney may not be actually given, but once under Clause 8 of the agreement a limited power of attorney is intended to be given to the developer to deal with the property, then we are of the view that the date of the contract, viz., August 18, 1994, would be the relevant date to decide the date of transfer under Section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter does not arise. This point has not been considered by any of the authorities below. No judgment has been shown to us on this point. Therefore, although there is a concurrent finding of fact in this case, we have enunciated the principles for applicability of Section 2(47)(v). We do not find merit in the argument of the assessee that the court should go only by the date of actual possession and that in this particular case, the court should go by the date on which irrevocable licence was given. 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 chargeability."*

20. Thus, on an analysis of various case laws, it emerges out that clause (v) and (vi) were included in section 2(47) with an intention to cover those cases of transfer of ownership where the prospective buyers becomes owner of the property by becoming a member of company, cooperative society or to include those transactions that closely resembles transfer, but are not treated as such under general law. Under section 2(47)(v) of the Act any transaction involving allowing of possession referred to section 53A of the Transfer of Property Act would come within the ambit of transfer. Even arrangement conferring privileges of ownerships without transfer of title would come within the ambit of section 2(47)(v) of the Act. The whole scheme for introduction of clauses (v) and (v) in section 2(47) of the Act was that the capital gain is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law.

21. Thus, in the present cases, without prejudice to our finding to be recorded on issue no.(iii) in subsequent part of this order, we are of the view that on execution of agreement dated 2.3.2009, when the possession was also handed over, the transfer within the meaning of section 2(47)(v) and (vi) was complete. The parties to the agreement are not challenging the genuineness of the agreements.

22. **Issue No.(iii).**

23. The first reason assigned by the ld.First Appellate Authority for ignoring the agreement dated 4.4.2008 and 2.3.2009 for holding them invalid and non-genuine is that for harbouring any "transfer" within the meaning of clause (v) of section 2(47), there must be a transaction under which the possession of immovable property is allowed to be taken or allowed to be retained. There is no dispute with regard to the above finding of the ld.CIT(A). We also concur with regard to the observation of the ld.First Appellate Authority that Section 53A of the Transfer of Property Act (TPA), 1982 is not source by which the title to the immovable property can be acquired, but it only served as a shield to defend one's lawful possession obtained in pursuance to a contract. According to the ld.First Appellate Authority, sections 17 and 49 of the Indian Registration Act have been amended by Act No.2001 whereby it has been laid down that the registration of sale agreement/contract for the purpose of section 53A is mandatory. The ld.DR while putting reliance upon the order of the ld.CIT(A) also brought to our notice copy of the Govt. of Gujarat Extraordinary Gazette Notification published on Saturday, February, 2002 whereby amendment of the Indian Registration Act in section 17 of the Registration Act has been published. The ld.CIT(A), while construing the impact of sections 17 and 49 of Indian Registration Act along with section 53A of TPA within the meaning of

section 2(47) of the Income Tax Act has concluded that the "transfer" within the section 2(47) of the Income Tax Act can only be completed, if in part performance of the contract, possession has been handed over as per section 53A of the TPA. Once the agreement was not registered then it will lose its evidentiary value within the meaning of Section 53A of the TPA. In other words, the rights flowing from an agreement can only be recognized if it was duly registered. If the agreement was not registered, then the rights would not accrue to the parties to the agreement. If no rights would accrue, then it will be construed that the possession was not delivered by the assessee vide agreement dated 4.4.2008 and 2.3.2009, meaning thereby, no transfer has taken place. The ld.First Appellate Authority further put reliance upon the judgment of the Hon'ble Supreme Court in the case of Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana, 14 taxmann.com 103.

24. On due consideration of the above reasoning, we are of the view that as far as the judgment of the Hon'ble Supreme Court in the case of Suraj Lamp & Industries (supra) is concerned, it is altogether in different context. There is no dispute with regard to the proposition that transfer of an immovable property having value of more than Rs.100/- can only be completed by way of registered sale deed, as contemplated in section 17 of the Registration Act. This judgment deals with the concept of power of attorney, lease, licence etc. Definition of expression "transfer" provided in section 2(47) is more wider than in the general law. As observed earlier, while dealing with the issue no.(ii), the expression "transfer" employed in section 2(47) includes (a) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in section 53A of the TPA, and (b) any transaction entered into in any manner which has the effect of transferring, or enabling the enjoyment of, any immovable property. In these two eventualities, profits on account of capital gains would be taxable in the year

in which such transactions are entered into, even if a transfer of immovable property is not effective or completed under the general law. In the present case, there is a fine distinction which remained un-noticed at the end of the ld. CIT(A). According to the assessee, the rights which have been alienated by her by virtue of agreement dated 4.4.2008 are the rights of capital nature. These rights have been alienated in favour of SDS. The ld.CIT(A) has referred to sections 17 and 49 of the Indian Registration Act, but, failed to notice the proviso appended to section 49 which has been incorporated by way of amendment subsequently. Thus, it is pertinent to take note of section 49 along with proviso which reads as under:

> *"49. Effect of non-registration of documents required to be registered.—No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—*
>
> *(a) affect any immovable property comprised therein, or*
> *(b) confer any power to adopt, or*
> *(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered :*
>
> *Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882 (4 of 1882) or as evidence of any collateral transaction not required to be effected by registered instrument."*

25. Section 53A of the T.P. Act provide a shield to defend the possession taken by virtue of the agreement. The vendee can claim protection of the possession even against the owner i.e. vendor, during the period sale deed was not registered. The person who has acquired the possession on execution of agreement as referred to in section 53A may not be able to protect his possession on account of non-registration of the agreement, but for all other

collateral purposes, i.e. for tendering the agreement into evidence for suit for specific performance, etc. it is to be treated as valid agreement. A controversy in this aspect had arisen whether such non-registered agreement can be entertained in evidence or not in a suit for specific performance. A reference was made before the Division Bench of Punjab & Haryana High Court in regular Second appeal No.4946 of 2011 in the case of Ram Kishan Vs. Bijeder Mann. The Hon'ble High Court has resolved the controversy and held that such unregistered agreement can be produced as evidence in suit for specific performance. It can be made basis of suit for specific performance. The finding recorded by the Hon'ble Punjab & Haryana High Court in this case reported in (2013) 1 PLR 195 as under:

> *"11. A conjoint appraisal of sections 53A of the Transfer of Property Act, 1882, sections 17(1A) and 49 of the Indian Registration Act, 1908, particularly the proviso to section 49 of the Indian Registration Act, in our considered opinion, leaves no ambiguity that, though, a contract accompanied by delivery of possession or executed in favour of a person in possession, is compulsorily registrable under section 17(1A) of the Registration Act, 1908, but the failure to register such a contract would only deprive the person in possession of any benefit conferred by section 53A of the 1882 Act. The proviso to section 49 of the Indian Registration Act clearly postulates that non-registration of such a contract would not prohibit the filing of a suit for specific performance based upon such an agreement or the leading of such an unregistered agreement into evidence.*
>
> *12. A suit for specific performance based upon an unregistered agreement to sell accompanied by delivery of possession or executed in favour of a person who is already in possession, cannot, therefore, be said to be barred by section 17(1A) of the Registration Act, 1908.*
>
> *13. Section 17(1A) merely declares that such an unregistered contract shall not be pressed into service for the purpose of section 53A of the Transfer of Property Act, 1882. Section 17(1A) of the Registration Act, 1908, does not, whether in specific terms or by necessary intent, prohibit the filing of a suit for specific performance based upon an unregistered agreement to sell, that records delivery of possession or is executed in favour of a person to whom possession is delivered and the*

*proviso to section 49 of the Indian Registration Act, 1908, put paid to any argument to the contrary.*

*14. We, therefore, hold that :*

*(a) a suit for specific performance, based upon an unregistered contract/agreement to sell that contains a clause recording part performance of the contract by delivery of possession or has been executed with a person, who is already in possession shall not be dismissed for want of registration of the contract/agreement;*

*(b) the proviso to section 49 of the Registration Act, legitimises such a contract to the extent that, even though unregistered, it can form the basis of a suit for specific performance and be led into evidence as proof of the agreement or part performance of a contract."*

26. Thus, if the assessee refused to honour her agreement dated 4.4.2008, SDS has a right to get this agreement enforced by way of suit for specific performance and the assessee could be persuaded to execute the sale deed in favour of SDS by virtue of this agreement. The validity of this agreement under general law viz. Specific Relief Act as well as Indian Registration Act has not been effected. This aspect has not been appreciated by the ld.CIT(A) while holding that since the agreements are unregistered, therefore, they are non-genuine.

27. Let us examine the issue with different angles. For example, the assessee refuses to honour her agreement dated 4.4.2008 and SDS/Capital Consultancy files a suit for specific performance. A decree for performance of the contract is being granted in favour of the SDS. In that situation, the assessee has to register sale deed in favour of SDS. On such registration she would get the amounts only agreed upon by way of agreement dated 4.4.2008. She could be charged for capital gain on this amount only. Even for argument's sake, the reasons of the Revenue authorities are being accepted that the agreements dated 4.4.2008 and 2.3.2009 are unregistered, therefore,

they shall not goad the adjudicator to construe part performance of the contract u/s.53A of T.P. Act and no transfer of the land could be construed within the meaning of section2(47)(v) of the Act. In that situation, only the year of taxability could be shifted i.e. effective date for transfer of capital asset could be taken to 27.1.2010. How the AO can bring the amount for taxation in the hands of the assessee ? Under issue No.(i), we have discussed the nature of right acquired by SDS by virtue of agreement dated 4.4.2008. Suppose the agreement was not honored and suit for specific performance was filed by the assessee for persuading the SDS to purchase the land in dispute. During the pendency of the Civil Suit SDS assigned his right to a third party and ultimately that third party agreed for purchase of suit land. A settlement is arrived. The assessee would get only a consideration agreed upon by virtue of agreement dated 4.4.2008, and other consideration will go to SDS for assigning his right accrued under this agreement. The right to obtain registration of sale deed acquired by him by virtue of agreement dated 4.4.2008, is a capital right, therefore, the transfer would result capital gain. It will be taxed in the hands of SDS. This aspect has been dealt with in a large number judgment discussed by us in issue no.(i). Thus, the ld. Revenue Authorities have failed to notice distinction between a valid and genuine contract under the general law vis-à-vis a contract having effected for the purpose of section 53A of TP Act.

28. Next reason assigned by the ld.First Appellate Authority in the impugned order is section 63 of Gujarat/Bombay Tenancy and Agriculture Land Act, 1948 which prohibits non-agriculturists to purchase the agriculture land. As per ld. CIT(A), since SDS was not proved to be an agriculturist, therefore, he was not competent to purchase the agriculture land. Once he was prohibited by the provisions of Tenancy Act, then he cannot purchase agriculture land, meaning thereby, he will be disqualified even to enter into an

agreement for purchase of the land. On consideration of all these reasons, we are of the view that the assessee and the SDS are duly eligible to enter into any contract as per the Indian Contract Act. The effect of the contract may not be given by virtue of Gujarat/Bombay Tenancy and Agriculture Land Act, as per clause (c) of Section 63 referred by the ld.CIT(A). But the ld.CIT(A) failed to note proviso appended to his section. The proviso authorizes the Controling Officer to grant permission for such sales. The sale could be executed after the agreement and after getting approval. As far as this section is concerned, it does not create any disqualification for entering into contract – it creates disqualification for enforcing that contract. The contractee can enforce contract in favour of a person who is an agriculturist. It is important to note that the land transacted by the parties was within the vicinity of Ahmedabad City. It was going to be converted into urban land under the Town Planning scheme and ultimately before the agreement dated 2.3.2009, the status of the land was changed from agriculture land. When SDS has assigned his right under the agreement dated 2.3.2009, the land was already converted into a non-agriculture land. Thus, this section has no bearing as a corroborative piece of evidence to goad any authority to conclude that agreements were not genuine.

29. Next reasoning given by the ld.First Appellate Authority is that there is a huge change in the price of land between a short span of time. When the assessee acquired the land, she incurred a cost of Rs.67,96,432/-. She had acquired the land in between 18.12.2007 utpo 4.3.2008. She had agreed to sell this land on 4.4.2008 to SDS for consideration of Rs.76,75,413/-. The rate of land upto this stage was Rs.62.03 per sq.meters, whereas, when the agreement dated 2.9.2009 was executed, it was at the rate of Rs.860/- per sq.meter. According to the ld.CIT(A) appreciation in the price of real estate does take place over a period of time. However, it is also a fact that such

appreciation also happens in slow process, and in any case, it does not happen in such a manner. The ld.CIT(A) further observed that nothing has prevented the assessee from retracting the contract entered into with SDS so as to earn this gain by herself.

30. We have duly considered this reasoning of the ld.First Appellate authority, but, we find that as per the agreement dated 2.3.2009, the vendor, i.e. SDS has to obtain permission which are necessary under the existing law at his cost for converting the land into non-agriculture land. The land was converted into non-agriculture land authorizing the owners to construct dwelling units on the land. This permission was granted by the District Panchyat and District Development Officer, Ahmedabad by its order no.Masal/Bakhap/SR-131/Vashi-1526 to 1552 dated 12.9.2008. This was a significant change in the character of the land. The moment, it was converted into non-agriculture land, its value increase many folds. It is also pertinent to note that as per section 40jj(i) of the Gujarat Town and Country Planning Act, 1976, the land falling within the scheme of development, would vests upto 40% in the development authorities for utilisation of roads, park, schools, drainage etc. Thus, once the land is being converted into non-agriculture land, the whole nature of the land would change. As far as observation of the ld.CIT(A) is concerned, that nothing prevented the assessee to retract from the agreement is concerned, we fail to understand the basis of making such observation. She entered into a lawful contract, which is of binding nature, and how can she retract ? The moment she retracts, then other party can file suit for specific performance. Even if the court does not grant specific performance of the contract, then, would compensate the contractee for damage ? The damages again would be quantified considering the market value of the land. It is also pertinent to note that the assessee has purchased the land from 18.12.2007 to 4.3.2008. She had purchased the agriculture land

from non-associate vendors. The purchase cost shown by the assessee was at Rs.67,96,432/-. No circumstances have changed, and therefore, she has sold the land on 4.4.2008 at a price of Rs.76,75,413/-. There is no substantial change or appreciation of the value of the land in just short span. The ld.Revenue authorities have failed to compare this figure while evaluating the evidence. The change in the value taken place only at the moment, when, the land was converted into a non-agriculture land. From analysis of the orders, it revealed that approach of the Revenue authorities for appreciating the genuineness and veracity of the agreement is guided by the tax liability. According to the Revenue authorities, since tax liability has been avoided by the parties, therefore, their agreements are not genuine. In our opinion, genuineness of any agreement is not depended upon the actual payment of tax resulted on account of execution of these agreements. It is other way round. First genuineness of the agreements has to be ascertained, and then, in consequence of these agreements, if any tax liability has arisen, it is to be fastened upon the right persons. According to the AO, SDS has shown Rs.9,87,33,247/- on account of profit on sale of land, and against this, he claimed loss of Rs.9,17,78,957/- from his business of trading of shares and securities. These losses have been allowed to SDS in a scrutiny assessment order passed in his case u/s.143(3) of the I.T.Act. The department did not raise any objection in his assessment proceedings and did not doubt the transactions. Now, the stand of the Revenue is, since if it is taxable in the hands of the SDS, then no taxes would be collected on these transactions, because gain would be set off against brought forward loss. Even if transaction is shifted to the assessment year, in which sale deed registered, in that case, SDS will bring his losses of earlier year to A.Y.2010-11. Therefore, the agreement ought to be suspected and ought to be ignored, only then taxes could be fasted upon the assessee. With this angle, when the AO has started

inquiry, obviously he would reach on the conclusion that the agreement are non-genuine.

31. At this stage, for fortifying ourself on our finding, we would like to note the observations of the Hon'ble Supreme Court judgment in the case of Union of India Vs. Azadi Bachao Andola, (2003) 132 taxmann 373 (SC). The Hon'ble Supreme Court while referring to the decision of the Hon'ble Gujarat High Court in the case of Banyan & Berry Vs. CIT, 222 ITR 831 made the following observations.

> *"134. We may also refer to the judgment of Gujarat High Court in Banyan and Berry v. Commissioner of Income-Tax where referring to McDowell , the Court observed:*
>
> > *".....The court nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the act; an inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell case (1985) 154 ITR 148 (SC). The ratio of any decision has to be understood in the context it has been made. The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity."*
>
> *This accords with our own view of the matter.*
>
> *In CWT v. Arvind Narottam , a case under theWealth Tax Act, three trust deeds for the benefit of the assessee, his wife and children in identical terms were prepared under section 21(2) of*

*the Wealth Tax Act. Revenue placed reliance on McDowell . Both the learned Judges of the Bench of this Court gave separate opinions.*

*Chief Justice Pathak, in his opinion said (at p.486):*

*"Reliance was also placed by learned counsel for the Revenue on McDowell and Company Ltd. v. CTO (1985) 154 ITR 148(SC). That decision cannot advance the case of the Revenue because the language of the deeds of settlement is plain and admits of no ambiguity."*

*Justice S. Mukherjee said, after noticing McDowell's case, (at page 487):*

*"Where the true effect on the construction of the deeds is clear, as in this case, the appeal to discourage tax avoidance is not a relevant consideration. But since it was made, it has to be noted and rejected."*

*In Mathuram Agrawal v. State of Madhya Pradesh another Constitution Bench had occasion to consider the issue. The Bench observed:*

*"The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature."*

*The Constitution Bench reiterated the observations in Bank of Chettinad Ltd. v. CIT , quoting with approval the observations of Lord Russell of Killowen in IRC v. Duke of Westminster and the observations of Lord Simonds in Russell v. Scott It thus appears to us that not only is the principle in Duke of Westminster alive and kicking in England, but it also seems to have acquired judicial benediction of the Constitutional*

*Bench in India, notwithstanding the temporary turbulence created in the wake of McDowell .*

*.....*

*144. If the Court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the Court might be justified in overlooking the intermediate steps, but it would not be permissible for the Court to treat the intervening legal steps as non-est based upon some hypothetical assessment of the 'real motive' of the assessee. In our view, the court must deal with what is tangible in an objective manner and cannot afford to chase a will-o'-the-wisp."*

32. Next reasoning assigned by the AO is that funds have been provided by Ganesh plantation to SDS. Husband and father-in-law of the assessee were holding voting power of more than 20% in the Ganesh Plantation Ltd. Therefore, the transactions are arranged in the family itself. The assessee has pointed out that Capital Consultancy is a proprietary concern of SDS. This concern has taken unsecured loan from the company in F.Y.2006-07 relevant to the Asstt.Year 2007-08. In F.Y.2006-07, the interest of Rs.1,77,534/- was charged from SDS by Ganesh Plantation. In F.Y.2007-08 an interest of Rs.61,74,961/- was charged. Thus, according to the assessee, the funds were provided on interest in the ordinary course of business. Similarly, the AO has raised a point that the funds to the assessee were provided by Tarang Reality Pvt. Ltd. which is also family concern. The assessee has contended that she has taken loan from Tarang Reality Pvt. Ltd. of Rs.66,55,000/- and on receipt of sale consideration of Rs.73,75,413/-, she had repaid the loan to Tarang Reality Pvt. Ltd. In the case of the assessee, no phenomenal rise in the value of the land has arisen. She has purchased at Rs.67,96,342/- for the period starting from 18.12.2007 upto 4.3.2008. She had agreed to sell this property on 4.4.2008, just in a span of 3-4 months. She has earned small amount of capital gain which has been offered for taxation. An analysis of all the facts

and circumstances, discussed by the ld.Revenue authorities, we are of the view that setting of surrounding facts and circumstances, even as a whole, does not suggest that agreement dated 4.4.2008 or 2.3.2009 are sham or bogus. Their enforceability in the law cannot be ignored. The alleged gains on sale of property calculated in the hands of the assessee are not sustainable. We allow the appeal of the assessee and delete the addition of Rs.6,83,09,792/- from the hands of the assessee.

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

**Order pronounced in the Court on 13th January, 2016 at Ahmedabad.**

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(MANISH BORAD)** | **(RAJPAL YADAV)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |