

IN THE HIGH COURT OF KARNATAKA

AT BANGALORE

ITA No.3209 of 2005

ITA No.3165 of 2005

ITA No.3209 of 2005

**1) COMMISSIONER OF INCOME TAX
C R BUILDING, QUEENS ROAD
BANGALORE**

**2) JOINT COMMISSIONER OF INCOME TAX
SPECIAL RANGE-6, C R BUILDING
QUEENS ROAD, BANGALORE**

Vs

**DR T K DAYALU
NO 13, ANDREW ROAD
SHANTHINAGAR
BANGALORE-560027**

Appellant Rep by: Smt C Shyamala, Adv.

Respondents Rep by: Sri K R Prasad, Sri Ashok Kulkarni, Adv.

ITA No.3165 of 2005

**ESTATE OF DR T K DAYALU
NO 13, ANDREE ROAD
SHANTHINAGAR
BANGALORE-560027
REP BY ITS LR
SMT AMBUJA NARAYAN**

Vs

**1) COMMISSIONER OF INCOME TAX
BANGALORE-II, C R BUILDING
QUEENS ROAD, BANGALORE-560001**

**2) JOINT COMMISSIONER OF INCOME TAX
WARD-5(4), UNITY BUILDING ANNEXE
MISSION ROAD, BANGALORE-560027**

V G Sabhahit and Ravi Malimath, JJ

Dated: June 20, 2011

Appellant Rep by: Sri K R Prasad, Adv.
Respondent Rep by: Smt Veena Jadhav, Adv.

Income Tax - Section 2(47)(v), 45, 143(2) – Whether, in respect of development agreement, the relevant date for attracting capital gain is the date on which possession is handed over to the developer or the date of completion of the project.

The assessee-medical practitioner filed his return declaring total income of Rs.33,57,990/-. In response to notice u/s 143(2) the assessee contended that assessee was an owner of an immovable property. On 26.1.1996, the assessee entered into a joint venture agreement with M/s Venus for developing the property. The agreement provides that a sum of Rs.45 lakhs to be paid to the assessee as a non-refundable advance and in addition to the same, he was also entitled to total built up area of 5500 sq.ft to be constructed by the developers which will be made available to the assessee free of cost. On the basis of the said agreement, assessee returned a long term capital gain of Rs 29,19,570/-. The AO by order imposed tax on the capital gain as per the terms of the agreement after giving proper deductions. The CIT(A) Appeal held that it cannot be stated that there is no transfer of the immovable property in the year ending 31.3.1997 in terms of Section 2(47) and there has been transfer of land in consideration of having received Rs.45 lakhs from the owner and also having handed over the possession of land to the developer for construction and therefore, there has been a transfer within the meaning of Section 2(47) between the owner and the developer for the year ended 31.3.1997 is correct and the capital gains thereon is taxable for the year 1997-98. The Tribunal, dismissed the appeal filed by the revenue and allowed the cross objection partly by holding that assessee is not liable to capital gain for the A.Y 1997-98 and the contention of the assessee that the capital gain was assessable for the year 2003 was accepted.

On Appeal before the HC the revenue counsel submitted that on the date of original agreement the clause in the agreement show that possession has been handed over and a sum of Rs.45 crores is to be paid in addition to the structure which the assessee was entitled at free of cost.

On appeal, the HC held that,

++ the contents of the agreement, the second supplementary agreement, the third supplementary agreement and also the affidavit filed by the assessee stating that the actual possession of the schedule property was handed over on 30.5.1996, the said finding on the question of fact that the possession was handed over on 30.5.1996 is based upon the material on record and cannot be said to be perverse or illegal;

++ it is not disputed that the assessee had received capital gain in the year 1997-98 and having regard to the finding of fact that the possession of the property has been handed over on 30.5.1996, the appropriate A.Y in which the capital gain is to be taxed is 1997-98. There is no merit in the contention of the assessee Counsel that since the entire project has been completed in the year 2003-04, the tax on capital gain has to be made in that year. It is now well settled that the date on which possession was handed over to the developer is relevant and in the present case, it is no disputed that assessee has already received a sum of Rs.45 lakhs in addition to the structures which would enable to put up construction. The capital gain is to be taxed in the year 1997-98 and not in the year 2003-04.

Revenue's appeal allowed

JUDGEMENT

ITA No.3209/2005 is filed by the revenue which has been admitted on 26.9.2006 for consideration of the following substantial questions of law:

(1) Whether the Tribunal was correct in holding that the assessee was not liable to pay capital gains tax despite the assessee declaring taxable income under this head by filing a return of income?

(2) Whether the Tribunal was correct in proceeding to decide the issue regarding the chargeability of capital gains for the first time before it, without properly affording opportunity to the Assessing Officer to rebut this contention or remitting the matter back for fresh consideration?

(3) Whether the Tribunal was correct in holding that there was no transfer during the current assessment year despite the assessee handing over the possession of the immovable property to the builder who had in turn handed over the part of the consideration amount which would amount to transfer attracting capital gains tax?

(4) Whether the Tribunal was correct in holding that the capital gains tax should be levied only on completion of the entire transaction when the super built up area is handed over to the assessee as per the agreement?"

2. ITA No.3165/2005 is filed by the assessee which has been admitted on 21.1.2006 for consideration of the following substantial questions of law:

(1) Whether on the facts and circumstances of the case the capital gains in respect of the property in question liable under the Act for the assessment year 1996-97?

(2) Whether on the facts and circumstances of the case the amounts aggregating to Rs.26,50,000 as allowed by the CIT(A) were permissible deductions in computing capital gains?

3. The material facts giving rise to the above said questions of law are as follows:

The assessee-medical practitioner by profession filed his return of income on 18.9.1997 which was processed under Section 143(1) of the Income Tax Act, 1961 (hereinafter called the 'Act'). According to him, total income was computed at Rs.33,57,990/-. A notice was issued to the assessee under Section 143(2) of the Act and in response to the same, assessee's representative appeared before the assessee. It was contended that assessee was an owner of an immovable property at No.15, I Main Road, Gandhinagar, Bangalore. On 26.1.1996, the assessee entered into a joint venture agreement with M/s Venus Udyog Limited for developing the property. The agreement provides that a sum of Rs.45 lakhs to be paid to the assessee as a non-refundable advance and in addition to the same, he was also entitled to total built up area of 5500 sq.ft to be constructed by the developers which will be made available to the assessee free of cost. On the basis of the said agreement, assessee returned a long term capital gain of Rs.29,19,570/-. The Assessing Officer by order dated 30.3.2000 imposed tax on the capital gain as per the terms of the agreement after giving proper deductions. Being aggrieved by the same the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-V, Bangalore and the first appellate authority by order dated 14.2.2001 holding that it cannot be stated that there is

no transfer of the immovable property in the year ending 31.3.1997 in terms of Section 2(47) of the Act and there has been transfer of land in consideration of having received Rs.45 lakhs from the owner and also having handed over the possession of land to the developer for construction and therefore, there has been a transfer within the meaning of Section 2(47) between the owner i.e., the appellant and the developer for the year ended 31.3.1997 is correct and the capital gains thereon is taxable for the year 1997-98. Being aggrieved by the said order, and appeal was filed before the Income Tax Appellate Tribunal, Bangalore (hereinafter called the 'Tribunal') by the revenue. The assessee filed cross objections regarding assessment year during which capital gain is to be taxed. The Income Tax Appellate Tribunal, by order dated 23.6.2005 dismissed the appeal filed by the revenue and allowed the cross objection partly by holding that assessee is not liable to capital gain for the assessment year 1997-98 and the contention of the assessee that the capital gain was assessable for the year 2003 was accepted. Being aggrieved by the same, these two appeals are filed for consideration of the aforesaid substantial questions of law.

4. We have heard the learned counsel appearing for the appellants and learned counsel appearing for the respondent.

5. The learned counsel appearing for the appellants - revenue submitted that on the date of original agreement dated 26.1.1996 the clause in the agreement show that possession has been handed over and a sum of Rs.45 crores is to be paid in addition to the structure which the assessee was entitled at free of cost. The learned counsel further submitted that as per the agreement, actual possession of the property was handed over on 30.5.1996 and affidavit is also filed to that effect by the assessee and despite the same, the Tribunal has held that assessment of capital gain cannot be done in the year 1997-98 and is liable to be taxed in the year 2003-04 when the entire construction was completed. Therefore, finding of the Tribunal is erroneous and substantial questions of law may be answered in favour of the revenue.

6. It may be noted at the outset that so far as question of substantial question of law No.2 in ITA No.3209/2005 is concerned, a rectification order has been passed by the Tribunal in M.P.No.145/Bang/2005 by order dated 24.8.2005 wherein the fact that the said issue regarding chargeability of the capital gain was raised for the first time has been modified and therefore, the said question of law does not survive for consideration.

7. So far as other substantial questions of law are concerned, it is clear that the finding of fact arrived at by the Tribunal is based upon the material on record. The contents of the agreement dated 26.1.1996, the second supplementary agreement dated 14.10.1998, the third supplementary agreement dated 26.11.1999 and also the affidavit filed by the assessee stating that the actual possession of the schedule property was handed over on 30.5.1996, the said finding on the question of fact that the possession was handed over on 30.5.1996 is based upon the material on record and cannot be said to be perverse or illegal. The question to be decided is the year in which Rs.45 lakhs received by the assessee under the agreement dated 26.1.2006 as modified by the subsequent agreements to be taxed. It is not disputed that the assessee had received capital gain in the year 1897-98 and having regard to the finding of fact that the possession of the property has been handed over on 30.5.1996, we hold that appropriate assessment year in which the capital gain is to be taxed is 1997-98. There is no merit in the contention of learned counsel appearing for the assessee that since the entire project has been completed in the year 2003-04, the tax on capital gain has to be made in that year. It is now well settled that the date on which possession was handed over to the developer is relevant and in the present case, it is no

disputed that assessee has already received a sum of Rs.45 lakhs in addition to the structures which would enable to put up construction.

8. The Hon'ble Supreme Court in *Chaturbhuj Dwarkadas Kapadia Vs Commissioner of Income Tax (2003 (260) ITR 491)* held that the date relevant for attracting capital gain having regard to the definition under Section 4(47) of the Act is the date on which possession is handed over by the developer and has observed as follows:

"Under Section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act would come within the ambit of section 2(47)(v). That, in order to attract section 53A, the following conditions need to be fulfilled. There should be a contract for consideration; it should be in writing; it should be signed by the transferor; it should pertain to transfer of immovable property; the transferee should have taken possession of the property; lastly, the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall under Section 2(47)(v). Section 2(47)(v) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessee used to enter into agreements for developing properties with the builders and under the agreement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, section 2(47)(v) came to be introduced in the Act."

The Hon'ble Supreme Court has referred to the contention of the assessee and the earlier judgments of the Supreme Court cited by him and held that those judgments were prior to introduction of the concept of deemed transfer under Section 2(47)(v) of the Act and 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. Therefore, in these appeal, we hold that capital gain is to be taxed in the year 1997-98 and not in the year 2003-04 as contended by the assessee. Accordingly, we answer the substantial questions of law framed in ITA No.3209/2005 in favour of the revenue and substantial questions of law framed in ITA No.3105/2005 against the assessee and pass the following:

ORDER

ITA No.3209/2005 is allowed. ITA No.3165/2005 is dismissed.