THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA
AND
THE HON'BLE SRI JUSTICE SANJAY KUMAR

<u>ITTA No. 245 OF 2014</u>

Dated 09-04-2014

Potla Nageswara Rao. Appellant

VERSUS

The Deputy Commissioner of Income Tax, Central Circle-4, Hyderabad. Respondent

Counsel for Petitioner : Sri K. Vasanth Kumar
Counsel for the respondent : None appeared

<u>JUDGMENT:</u> (Per the Hon'ble The Chief Justice Sri Kalyan Jyoti Sengupta)

This appeal is directed against a portion of the judgment and order of the learned Tribunal dated 22.03.2012 in relation to the assessment year 2003-04 on the following suggested questions of law.

> "1. On the facts and in the circumstances of the case, whether the Income Tax Tribunal is legally correct in relying on the decision of Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia reported in 260 ITR 491 to hold that the capital gains arise in the year of entering into development agreement, though the facts are distinguishable?
>
> 2. On the facts and in the circumstances of the case, whether the Income Tax Tribunal is legally correct in relying on its own decision in the case of Maya Chenoy reported in 124 TTJ (Hyd) 692 though such decision is appealed against by the Department, to hold that the capital gains arise in the year of entering into development agreement?
>
> 3. On the facts and in the circumstances of the case, whether the order of the Income Tax Appellate Tribunal is perverse in not following its own decision in the case of Smt. K. Radhika in ITA No.208/h/2011 wherein it is held that capital gains arise in the year in which there is some performance by the developer and stating in one sentence that it does not support the case?
>
> 4. On the facts and in the circumstances of the case, whether the Income Tax Appellate Tribunal is right in law in not considering the decision of the Madras High Court in the case of R. Vijayalakshmi reported in 257 ITR 4?

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5. On the facts and in the circumstances of the case, whether the Income Tax Appellate Tribunal is correct in law in ignoring the fact that at best capital gains could be assessed only to the extent of land that is developed before the agreement is cancelled and holding that capital gains arises on the whole of the land that is involved in the development agreement?

Mr. Vasant Kumar, learned counsel appearing for the appellant, submits that almost on identical issue this Court admitted an appeal, therefore, this appeal should also be admitted.

We are of the view that each and every individual case stands on its own footing. Before we admit this appeal we must examine the issue before us on its own merit. Therefore, pendency of another matter cannot be a ground to proceed with the matter.

Mr. Vasant Kumar further submits that in this case the learned Tribunal went wrong while holding that the transfer has taken place the moment agreement is entered into followed by possession for the purpose of computing capital gain, as, admittedly, in this case there was no payment of consideration and there has been only an agreement. He submits that the learned Tribunal has misread the judgment relied on by it.

In the context of the above submission, we have to see whether in this case any substantial question of law is involved or not. The learned Tribunal on fact found as follows:

> "In the instant case, on 07.03.2003 an agreement was entered into by the assessee with M/s. Bhavya Constructions Pvt., Ltd., and the plan of the building was approved on 31.03.2003. These dates fall in the previous year 2002-03, relevant to assessment year 2003-04. Thus, in this case, the land being capital asset was transferred by the assessee to the developer during the assessment year under consideration, viz., 2003-04, for construction and it is enough if the assessee has received the right to receive consideration on a later date, so as to attract eligibility to tax on capital gains during the year under appeal."

The definition of 'transfer' under Section 2(47) of the Income Tax Act, 1961, reads as follows:

"transfer", in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset; or
(ii) the extinguishment of any rights therein; or
(iii) the compulsory acquisition thereof under any law; or
(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or

(iva) the maturity or redemption of a zero coupon bond; or

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(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; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a cooperative 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."

While dealing with the submission of Mr. Vasant Kumar transfer is deemed to have taken place in the year when the consideration has been actually paid, we are of the view that the language of Section 53-A of the Transfer of Property Act, 1882, which has been engrafted in the aforesaid definition of Section 2(47) of the Income Tax Act, 1961, does not contemplate any payment of consideration. We set out Section 53-A, which reads as under:

> "**Part performance –** 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 where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

Therefore, we are of the view, while upholding the learned Tribunal's application of law on this fact, that payment of consideration on the date of agreement of sale is not required, it may be deferred for future date.

The element of factual possession and agreement are contemplated as transfer within the meaning of the aforesaid section. When the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the assessment year when the agreement was entered into and possession was given. Here, factually it was found that both the aforesaid aspects took place in the previous year relevant to the assessment year 2003-04. Hence, the learned Tribunal has

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rightly held that the appellant is liable to pay tax on the capital gain for the assessment year. Accordingly, we do not find any element of law to admit this appeal.

The appeal is therefore dismissed. No order as to costs.

K.J. SENGUPTA, CJ

SANJAY KUMAR, J

Date: 09.04.2014
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IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD “ B ” BENCH, HYDERABAD

BEFORE CHANDRA POOJARI, ACCOUNTANT MEMBER & SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No. / C.O.(in ITA No.)	**Assess-ment year**	**Appellant/ Cross Objector**	**Respondent**
No.1519/H/2011	2003-04	Sri Potla Nageswara Rao, Khammam **(PAN AGOPP 4882 H)**	The DCIT, CC-4, Hyd.
No.1520/H/2011	2004-05	Sri Potla Nageswara Rao, Khammam	The DCIT, CC-4, Hyd.
No.1528/H/2011	2004-05	The DCIT, CC-4, Hyd.	SriPotla Nageswara Rao, Khammam
Co.75/H/2011 (1528/H/2011)	2004-05	Sri Potla Nageswara Rao, Khammam	The DCIT, CC-4, Hyd.
No.1567/Hy/11	2008-09	The DCIT, CC-4, Hyd	SriPotla Nageswara Rao, Khammam
CO.79/H/2011 (1567/H/11)	2008-09	Sri Potla Nageswara Rao, Hyd	The DCIT, CC-4, Hyd
No.1521/H/2011	2008-09	Sri Potla Nageswara Rao, Khammam	The DCIT, CC-4, Hyd.
No.1529/H/2011	2007-08	The DCIT, CC-4, Hyd.	Kum Potla Shanthi, Khammam **(PAN – APEPP 2329 E)**
CO.76/H/2011 (1529/H/2011)	2007-08	Potla Shanthi **(PAN – APEPP 2329 E)**	The DCIT, CC-4, Hyd
No.1530/H/2011	2008-09	The DCIT, CC-4, Hyderabad	Kum. Potla Shanthi, Khammam
CO.77/H/2011 (1530/H/2011)	2008-09	Potla Shanthi, Khammam	The DCIT, CC-4, Hyd.
ITA.1523/H/2011	2008-09	Kum. Potla Shanthi, Bangalore	The DCIT, CC-4, Hyderabad

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No.1568/H/2011	2007-08	The DCIT, Circle 4, Hyd	Sri Potla Nishanth, Khammam
CO.80/H/2011 (1568/H/2011)	2007-08	Sri Potla Nishanth, Khammam **(PAN – APEPP 2330 R)**	The DCIT, CC-4, Hyderabad
1531/H/2011	2008-09	The DCIT, CC-4, Hyderabad	Sri Potla Nishanth, Khammam
CO.78/H/2011 (1531/H/2011)	2008-09	Sri Potla Nishanth, Khammam	The DCIT, CC-4, Hyderabad
No.1522/H/2011	2008-09	Sri Potla Nishanth	The DCIT, CC-4, Hyd.

Revenue by : Smt. K. Mythili Rani (DR)
Assessee by : Shri T. Gandhi (AR)

Date of hearing : 18.1.2012
Date of Pronouncement : 22.3.2012

ORDER

PER ASHA VIJAYARAGHAVAN, JM .

These appeals and Cross Objections preferred by the assessee as well as the Revenue are directed against the order passed by the Learned CIT(A)–VII, Hyderabad and they are pertaining to the assessment years 2003-04, 2004-05 & 2008-09. Since issued involved in these appeals are common in nature, they are clubbed, heard and disposed off together for the sake of convenience.

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Sri. Potla Nageswara Rao ITA No. 1519/H/2011 Asst. Year: 2003-04 (Assessee's Appeal):

2. This is an appeal filed against the order of the Assessing Officer which is passed under sec 143(3) r.w.s. 153A of the IT Act 1961 by determining the total income at Rs.22,62,230/- against the income returned at Rs 1,54,000/- by making certain additions. The only issue in appeal by the Assessee is against the order of the CIT(A) confirming the addition of Rs 18,51,300/- towards long term capital gains.

3. There was a search and seizure operation u/s 132 of the IT Act 1961 conducted in the case of assessee on 6.1.2009 wherein certain documents were found and seized. Consequent to the search operation the assessee's case is notified with DCIT Central Circle 4 Hyderabad. The assessee also happened to be a Director of M/s Crown Beer International Limited for the previous year relevant to the assessment year under consideration. The assessment was completed assessing officer based on the material available on record.

4. The assessee had entered into an agreement with M/s Bhavya Constructions Pvt. Ltd on 7.3.2003. The sanction for the building plan was obtained from the municipality only on 31.3.2003. The assessee had received only security deposit of Rs 25,000 in the year. Under the agreement the assessee is to transfer 590 sq.yds of land to M/s Bhavya Constructions Pvt. Ltd for development purpose. In return the assessee would be receiving 40% of the built up area in all the floors as consideration. The assessee himself had offered 40% of the built up area of developed property at Rs 8,85,000. After deducting the indexed cost of acquisition of Rs 13,753 a net long term

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capital gains the assessee offered at Rs 8,71,247 in the AY 2004-05.

5. The Assessing Officer however is seen to have noticed the value in the capital account at about Rs. 24,68,400 towards 40% of share value to be received in the form of four flats. The Assessing Officer has allowed one flat as exemption u/s 54F of the IT Act 1961 amounting to Rs 617,100 and the balance amount of Rs 18,51,300 (Rs 24,68,400 –Rs 6,17,100) is treated as long term capital gains.

6. It is the contention of the Authorized Representative that the assessing officer has treated the property which has been developed and handed over to the assessee and thereby he has assessed the capital gains for the assessment year under consideration. The Assessing Officer has also made a similar addition for assessment year 2004-05, therefore the assessing officer is not justified to assess the capital gains in assessee's hand for the assessment year 2003-04 which is relevant assessment year and also for the assessment year 2004-05.

7. The CIT(A) dismissed the Assessee's appeal on this issue observing as under:

" The submission made by the authorized representative has been considered. The details furnished in this regard are also perused. Having verified the facts and circumstances of the case, it appears to me that the assessing officer is justified to assess the property transferred to M/s Bhavya Constructions Pvt. Ltd for the assessment year under consideration. It may be further seen that the deed for the development of property was entered on 7.3.2003 and assessee also had received token advance and the said transfer of property was taken up

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by the developers for further action including getting the approval of the plan for construction from the municipality. Therefore the assessee almost has completed the transfer of the property to M/s Bhavya Constructions Pvt. Ltd., for a consideration of getting four flats equivalent to 40% of value of property to be constructed. Hence I am of the view that the Assessing Officer is justified to assess the assessee's long term capital gains for the assessment year under consideration. It is also seen that the assessee has not made any disclosure of long term capital gains for the assessment year 2004-05. Therefore it is justified on the part of the assessing officer to assess the capital gains for the assessment year under consideration.

The assessee also has raised the objection that the assessment officer has valued the property as per the Sub Registrar's valuation. However it is seen from the observation of the Assessing Officer that he had adopted the consideration received by the assessee as per the capital account of the assessee wherein the value of the sales appears to have been shown at Rs 24,68,400 therefore the objection raised by the assessee cannot be accepted.

In view of the discussion made as above, the addition made by the assessing officer is confirmed. Therefore this ground of appeal is treated as dismissed."

8. Aggrieved the Assessee is on appeal. Firstly we find that the Assessee had contended that they have offered the capital gains on the transaction for the AY 2004-05. In the Assessment order for AY 2004-05 in the case of the Assessee (submitted as part of the appeal for that year in 1528/H/11), the Assessment order reads as under:

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Returned income 9,33,747/-

(including capital gains Rs. 8,47,247/-)

9. In the instant case, on 7.3.2003 an agreement was entered into by the assessee with M/s. Bhavya Constructions Pvt. Ltd., and the plan of the building was approved on 31.3.2003. These dates fall in the previous year 2002-03, relevant to assessment year 2003-04. Thus, in this case, the land being capital asset was transferred by the assessee to the developer during the assessment year under consideration, viz. 2003-04, for construction and it is enough if the assessee has received the right to receive consideration on a later date, so as to attract exigibility to tax on capital gains during the year under appeal. Mere accrual of the consideration, as it is to be received in the subsequent years does not defer the taxability of the capital gains. The assessee being owner of the capital asst, having parted with the possession of the land under a joint development agreement, for construction of residential flats/villas and having handed over the possession of the vacant land to the developer on promise to be handed over four flats equivalent to 40% of the value of the property to be constructed, it was a clear case of transfer by exchange within the meaning of S.2(47)(i) of the Act. Property was handed over in part performance under S.53A of the Transfer of Property Act, and it could not be said that the transaction was without consideration. The possession of the land having been handed over to the developer in the assessment year under consideration, the transfer takes place in the assessment year under consideration only, and consequently the assessee is liable to be assessed to tax in relation to the capital gains in the year under consideration itself. For this purpose, we place

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reliance on the decision of the coordinate Benches of this Tribunal in Smt. Maya Shenoy V/s. ACIT (2009)124 TTJ(Hyd) 692). We also find support in this behalf, from the judgment of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkaddas Kapadia V/s. CIT (260 ITR 491), wherein it has been held that S.2(47)(v) read with S.45 indicates that capital gains was taxable in the year in which such transactions were entered into even if the transfer of immovable property is not effective or complete under the general law. We also place reliance in this behalf on the ruling of Authority for Advance Rulings in Jasbir Singh Sarkaria In Re (294 ITR 196(AAR), to the following effect -

> In order to be 'transfer' within the meaning of cl. (v) ofs.2(47), there must be a transaction under which the possession of immovable property is allowed to be taken or allowed to be retained. Secondly, such taking or retention of possession as is well known is a facet of the equitable doctrine of part performance of contract falling within the scope of S.53A of the Transfer of Property Act. The legislature advisedly referred to "any transaction" with a view to emphasize that it is not the factum of entering into agreement or formation of contract that maters, but it is the distinct transaction that gives rise to the event of allowing the contractee to enter into possession that maters. That transaction is identifiable by the terms of the agreement itself and it takes place within the framework of the agreement.

We may also refer in this behalf to the decision of the Hon'ble Karnataka High Court in the case of CIT V/s. Dr.T.K.Dayalu (202 Taxman 531), wherein it has been held that it is well settled

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position by now that the date on which possession was handed over to the developer is relevant for determination of the year in which the capital gains are assessable to tax. In this view of the matter, we find no merit in the contentions of the assessee that there is no taxability of capital gains in the year under appeal.. We accordingly reject the grounds of the assessee on this issue.

10. In the result the appeal of the Assessee in ITA No 1519/H/11 for Assessment Year 2003-04 is dismissed.

Sri Potla Nageswara Rao, Assessee's appeal ITA No. 1520/H/2011 Asst. Year: 2004-05

11. This is an appeal filed against the order of the assessing officer which is passed under sec 143(3) r.w.s.153A of the IT Act 1961 by determining the total income at Rs 44,23,747 against the income returned at Rs 9,33,747 which includes capital gains of Rs 847,247. Aggrieved with the order of the assessing officer this appeal has been filed before the learned CIT(A). The Assessing officer had held that Rs. 15,90,000/- being gifts received by son Sri. Potal Nishanth and Rs. 19,00,000/- received by the daughter Kum. Potla Shanthi as not being proved and therefore added the same as undisclosed income of the father, the Assessee herein.

12. There was a search and seizure operation u/s 132 of the IT Act 1961 conducted in the case of assessee on 6.1.2009 wherein certain documents were found and seized. Consequent to the search operation the assessee's case is notified with DCIT Central Circle 4 Hyderabad. The assessee also happened to be a Director of M/s Crown Beer International Limited for the previous year relevant to the assessment year under consideration. The assessment was completed by the assessing officer based on the material available on record.

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13. With regard to first ground of appeal it is the submission of the authorized representative that the assessing officer has wrongly made an addition of Rs 15,90,000 towards unexplained gifts which is actually received by the assessee's minor son P. Nishanth. The assessing officer also is seen to have added Rs 19,00,000 towards unexplained gifts received by the assessee's minor daughter P. Shanthi. The assessing officer has treated the above said gifts received by the assessee's minor children as unexplained and treated as unexplained income in assessee's hand u/s 64(1) of the IT Act 1961.

14. The observation of the assessing officer is that the gifts received by P. Nishanth and P. Shanthi are not routed through their bank accounts. The assessing officer also has observed that the financial transactions pertaining to minor children are not reflected in the capital accounts of the assessee enclosed along with the return of income and no financial transactions pertaining to assessee's minor children are appearing in the assessee's return of income.

15. It is also the observation of assessing officer that the money received by the assessee's minor children as gifts from blood relation of minor children are invested in purchase of lands is only an afterthought. Therefore the assessing officer has disbelieved the explanation offered by the assessee with regard to the alleged gifts said to have been received by assessee's minor children.

16. It is the contention of the authorized representative that the assessee's children have received gifts from Sri. Y. Venkateswar Rao who is a software engineer and who is well settled in USA. It is also contended that Sri. Y. venkateswarar Rao had sent 57,151.23 US$ which was more than Rs 26 lakhs,

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therefore the assessing officer should have accepted assessee's investment in purchase of lands in the name of his minor children Sri.P. Nishanth and P. Shanthi. Further it is also submitted that Smt.Y. Vimala has gifted Rs 4,90,000 to P.Nishanth and Rs 90,000 to P.Shanthi which has been utilized for the purpose of purchasing lands in minor children's name, therefore the assessing officer should have believed that the gifts given by Smt. Y.Vimala who was is blood relation (aunt) of the minor children are genuine.

17. In the light of above explanation it is submitted by the authorized representative that Sri Y. venkateswara Rao NRI settled in USA and Smt. Y. Vimala from Khammam are related to assessee and therefore the amounts received from above two persons amounting to Rs 34,90,000 has been invested in purchase of lands in the name of minor children which is situated at Dundigal and Bowrampet in Ranga Reddy District.

18. The AO did not accept the assessee's explanation on the ground that the assessee himself is well to do person therefore the investment made by the assessee himself in his children's name by purchasing property has been explained as out of the gifts received from Sri Y. Venkateswar Rao and Smt.Y. Vimala assessee's blood relatives cannot be believed to be genuine. The authorized representative also has furnished certain bank accounts for having received the money from Sri. Y.Venkateswara Rao wherein it is shown that the remittances from Sri.Y.Venkateswar Rao is at Rs.29,15,172 and out of which it is claimed that Rs 26 lakhs is utilized for purchase of property. Further it is submitted that the gift given by Smt. Y.Vimala at Rs 90,000 to P. Shanthi and Rs. 4,90,000 to P.

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Nishanth are reflected in the bank statement of Smt.Y.Vimala therefore the assessing officer should have believed that assessee's children have received gifts from Sri. Y.Venkateswar Rao and Smt.Y. Vimala as gifts which has been utilized for purchase of lands in children's name.

19. The Ld. CIT(A) observed that having verified the facts and circumstances of the case it appears that the assessee has not disclosed the financial gifts received by his minor children in any return of income filed by the assessee since they were not income receipt. The Ld. CIT(A) therefore pointed out that as observed by the assessing officer the gifts received by the minor children are not reflected in his statement of accounts. However with regard to the other facts of the case the Ld. CIT(A) that Sri.Y. Venkateswar Rao, NRI is seen to have been maintaining account with ICICI Bank and he has remitted US $ of 64347.53 equivalent of Rs 29,15,172. and it is the claim of the assessee that the said amount had been withdrawn and given as gifts to P. Nishanth and P. Shanthi children of Sri Potla Nageswara Rao. Further the CIT(A) held that out of the said amounts only Rs 26,00,000 is actually withdrawn even though it is claimed that Rs. 29,10,000 was withdrawn and given to the assessee's children. The Ld. CIT(A) also pointed out that nowhere it is established by the assessing officer that the donor had no capacity to give gifts and very remittance of the money is a bogus claim. The Ld. CIT(A) also observed, that the only link missing attributed is that the said money is not routed through the bank accounts of the donees or the parents of the donees and it appears the money is claimed to have been withdrawn from the accounts of Sri. Y. Venkateswara Rao and given to the assessee, which amount is stated to have been invested in purchase of lands in the name of minor children of the assessee.

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20. The Ld. CIT(A) concluded that considering the facts and circumstances of the case it appears that the gifts received by the assessee's children cannot be disbelieved in total. However , the Ld. CIT(A) pointed out that the claim is made for Rs 29,10,000 but actual withdrawals are seen only at Rs. 26,00,000 and therefore at most it can be believed that there is a receipt of Rs 26,00,000 only because there are withdrawals of Rs 26,00,000 from the accounts of Sri. Y. Venkateswar Rao. The CIT(A) for held that since donor has confirmed about giving gifts and donees also claim to have received gifts and there are certain circumstantial facts like receipt of money and withdrawals in the account of donor, CIT(A) was inclined to accept that the donees have received gifts of Rs 26,00,000 only and therefore the balance of Rs 3,10,000 for which no evidences like money having been withdrawn and given to the minors is proved. Hence out of gifts claims of Rs 29,10,000 only Rs. 26,00,000 was treated as explained and the balance Rs 3,10,000 was confirmed by the Ld. CIT(A) as unexplained.

21. With regard to gifts said to have been received from Smt. Y. Vimala by P, Nishanth and P. Shanthi , the Ld. CIT(A) held that the explanation offered is not satisfactory, though there are some withdrawals from the accounts of Smt. Y. Vimala it cannot be strictly related with the issue of gifts. Therefore the addition of gifts off Rs 5,80,000 (Rs. 4,90,000 + Rs 90,000) were confirmed by the CIT(A).

22. Aggrieved the Assessee is in appeal before us.

23. The learned counsel for the assessee Shri T. Gandhi relied on the decision of the CIT Vs. Mayavati (338 ITR 0563) & Hon'ble Rajasthan High Court in the case of CIT Vs. Ram Dev Kumar Chitlangia (315 ITR 0435).

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24. The Ld. Counsel for the assessee Shri. T. Gandhi submitted before us that the CIT(A) erred in confirming the gifts shown in the accounts of the minors to the extent of Rs. 8,90,000/- as unproved and adding it as income of the father viz., the assessee herein.

25. We heard the parties on this issue and perused the material available on record. We find that the Ld. CIT(A) concluded that considering the facts and circumstances of the case it appears that the gifts received by the assessee's children cannot be disbelieved in total. He noted that even though the claim of the assessee is in relation to gifts aggregating to Rs 29,10,000, actual withdrawals are seen only at Rs. 26,00,000. He therefore, held that at the most it can be believed that there was a receipt of gifts only to the extent of Rs 26,00,000 only because there are withdrawals only to the extent of Rs 26,00,000 from the accounts of Sri. Y. Venkateswar Rao. Since donor has confirmed having given gifts and donees also claim to have received gifts and there are certain circumstantial facts, which are not in dispute like receipt of money and withdrawals in the account of donor, the CIT(A) accepted that the donees have received gifts of Rs 26,00,000 only and accordingly confirmed the view taken by the assessing officer with regard to balance amount of Rs 3,10,000, for which no corroborative evidence was found. In the absence of any material brought on record by the assessee to substantiate the claim with regard to the balance addition on account of gifts of Rs.3,10,000, we find no infirmity in the action of the CIT(A) on this issue. We accordingly confirm the order of the CIT(A) and reject the grounds of the assessee on this aspect.

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26. As regards the balance amount of Rs. 5,80,000/- said to have been received from Smt. Y. Vimala by P, Nishanth and P. Shanthi we concur with the CIT(A) that the explanation offered is not satisfactory. The CIT(A) has held that though there are some withdrawals from the accounts of Smt. Y. Vimala, it cannot be strictly related with the issue of gifts. In the circumstances we confirm the order of the CIT(A) treating the gifts off Rs 5,80,000 (Rs. 4,90,000 + Rs 90,000) as not proved and adding it as income of the Assessee. Assessee's grounds on this aspect are rejected.

27. In the result the appeal in ITA No.1520/H/2011 of the Assessee is dismissed.

ITA No 1528/H/11: Appeal of the Revenue for AY 2004-05:

28. The Appeal of the revenue is against the order of the CIT(A) accepting the gifts made by Sri. Y. Venkateswar Rao to Sri. Potal Nishanth and Ms. Potla Shanthi to the extent of Rs. 26,00,000/- The donor, a relative of the donees, is employed in USA. The Gifts were through banking channel. The donee has confirmed the gift. The donor has gifted actually Rs. 29,10,000/-. In the assessee's appeal in ITA No 1520/H/11, supra, we have accepted the entire gift of Rs. 26,00,000/- made by Sri. Y.Venkateswara Rao as genuine. In the circumstances the appeal of the revenue against the confirmation of the CIT(A) accepting the gift of Rs. 26,00,000/- is rejected.

29. In the result the appeal of the revenue in ITA No.1528/Hyd/2011 is dismissed.

CO.75/Hyd/2011(in ITA No.1528/Hyd/2011) raised by the assessee :

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30. This cross objection filed by the assessee against Shri Nageswara Rao is in support of the CIT(A) order deciding the issue in his favour. As we have disposed off the appeal by the revenue in 1528/H/11 for this year considering all the arguments, the CO filed by the assessee has become infructuous.

31. In the result CO No 75/H/2011 filed by the assessee in the revenue's appeal ITA No 1528/H/11 is dismissed.

ITA NO 1521/H/11- Potla Ngeswara Rao- Assessee's appeal for 2008-09-

32. The only ground in the Assessee's appeal is against the order of the CIT(A) determining the capital gains arising from development agreement between the Assessee herein along with his son and daughter, the other co-owners of the land, with M/s Adithya Constructions, they are disposed of together. The facts of the case are as under:

33. During the year under consideration, the assessee along with his daughter P Shanthi and son Sri Potla Nishant, entered into a development agreement on 11th April, 2007 with M/s Aditya constructions, Khammam, which is a partnership firm, represented by its managing partner Sri P Nageswara Rao, Khammam, to develop a project in the name and style of PNR Colony in survey No.480, 491, 491/A, 491/AA in Khammam.

34. As per the development agreement, in the individual capacity, Sri P Nageswara Rao, Sri P. Nishant and Kum. P. Shanthi, will be each having 10% share of the constructed area. The combined share of 30% constructed area works out to 57,000 sq. Feet approximately and the developer having the

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balance 70% share, which works out to 1,33,000 sq. Feet approximately.

35. Total value of the said proposed PNR colony, taken as per market value adopted by sub register while registering the said document, amounted to Rs.8,62,58,075/-. The above said landowners combined share of 30% worked out to Rs.2,58,77,422/- and each one's share is worked out to Rs.86,25,807/-. However, it is seen that the assessee has not offered any capital gain in the return of income filed arising out of this transaction.

36. The assessee was asked to explain the same. In response to the same, the assessee, in his reply has stated that the agreement with M/s Aditya constructions has conditions of time frame to complete the project and lapsed due to non performance. Further, the assessee has stated that M/s Aditya constructions has utilised some portion of the land and sold 13 independent houses, which were registered in the name of the buyers and two houses are yet to be registered. Further, the assessee has stated that, due to non compliance of the terms and conditions of the Development Agreement dated 11th April, 2007, the assessee and Sri P. Shanthi and P Nishanth decided to cancel the development agreement entered with M/s Aditya Constructions, and accordingly cancellation deed was signed on 1st October, 2010. The assessee has stated that, he has not offered any capital gain for this year and he will offer capital gain tax for the assessment year 2001-12.

37. The AO assessed Rs. 86,25,807/- as Assessee's share of the capital gains arising from this development agreement for the following reasons:

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38. After considering the assessee's explanation, on the capital gain, the issue was concluded as under by AO:

i) The said agreement between the two parties was duly fulfilled and M/s Aditya Constructions has already completed construction and sold some houses.

ii) As per section 2(47) (v) of the Act, transfer includes 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).

In the present case transfer of the capital asset has taken place and possession of the property was handed over to M/s Aditya Constructions on 11.4.2007 hence capital gain will arise on the date of transfer.

Accordingly, the assessee's share worked out for the year under consideration amounting to Rs.86,25,807/- is to be treated as long term capital gains and accordingly brought to tax. Penalty u/s 271(1) (c) and 271AAA of the IT Act initiated separately.

39. On appeal before the CIT(A) the Assessee contended that there was not even a part performance of the contract as referred in section 53A of Transfer of Property Act as such the said unfinished transaction cannot come under section 2 (47)(v) of the Act, 1961 and therefore, the Assessing Officer cannot treat the said unfinished transaction a transfer of property. Therefore, it is contended by the AR that the Assessing Officer is not justified to come to conclusion that the property was transferred and thereby share of the assessee is liable for capital gains purpose.

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40. The CIT(A) has given partial relief to the Assessee by observing as under:

> *Looking into the facts and circumstances of the case, i find that the agreement entered into by the assessee with M/s Aditya Constructions is not complete and by cancellation of agreement, the development work is abandoned. Hence, i find that there is a part transfer of property to attract capital gains for the assessment year under consideration. Therefore, after perusing the facts of the case, i find that there is a part performance of the agreement as per section 2 (47) (v) of the IT Act r.w.s. 53A of Transfer of Property Act, 1882, hence the Assessing Officer is justified to levy capital gains tax. It is also seen that the Assessing Officer has not computed the capital gains correctly. The proposed construction value is Rs.7.79 crores and the site value is at Rs.83,58,075/- The assessee and the other two owners are having the stake in the above site. For transferring 70% of value of site, the assessee and the other two owners get 30% of the constructed value and the assessee is entitled for 1/3rd of the said constructed value.*

41. The Assessing Officer has added site value of Rs.83,58,075/- to the proposed construction value of Rs.7.79 crores. Accordingly, he has taken total value as Rs.8,69,58,075 out of which 30% is worked out at Rs.2,58,77,422 and assessee's share of constructed property to be received is taken at Rs.86,25,807/- which is not correct.

42. Therefore, the assessee and others are surrendering 70% of the site value of Rs.83,58,075/- to receive 30% of the construction value of Rs.7.79 crores. In other words for surrendering the 70% of the land value of Rs.58,50,625/-. The

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assessee and others would receive 30% of the construction area which is worth of Rs.2,33,70,000. Hence the capital gains has to be at Rs.1,75,19,375/- among the three persons including the assessee. Therefore the assessee's share of capital gain works out to be Rs.58,39,792/-.

43. It is the argument of the AR that the transferee has not adhered to the original plan of construction and returning 30% of the construction area to the assessee, therefore, it is not fair to assume that the transferee has completed the contract and returned 30% of the construction area. It is further submitted that the assessee and others only would be entitled to 30% of the 13 houses constructed by the transferee, therefore, it is not justified to assume that assessee and other two partners have received 30% of the constructed area.

44. As it could be seen from the facts of the case that the assessee and others have transferred the property for construction of the independent house in lieu of receiving 30% of constructed area, therefore, there is a transfer of property, hence, the capital gains has to be charged in case of the assessee and other partners. Therefore, the assessee has to be charged for capital gains of Rs.58,39,972/- instead of Rs.86,25,807/-. Hence the assessee gets a relief of Rs.27,86,015. Therefore, this ground of appeal is partly allowed.

45. Aggrieved both the assessee as well as the Department are in appeal. The main contention of the Assessee is that as the development agreement was cancelled there was no transfer of property as contemplated u/s 2(47) of the IT Act read with sec 53A of the transfer of property Act. They had also objected to the adoption of Rs. 7,79,00,000/- as consideration to be received by the Assessee being the value of the built up area.

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46. We heard the parties. In this case, the agreement for development with M/s Adithya Constructions envisaged the Assessee and other co-owners to transfer 70% interest in the land for 30% of constructed area. According to the learned counsel, the agreement was not fully given effect to and it was subsequently cancelled. However, we find that at the same time, some land was utilised by the developer who had constructed 13 houses on the land. Therefore the Assessee is liable for tax on capital gains as if the entire development agreement was given effect to, in view of the judgment of the Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra). The learned counsel for the assessee relied on the following decisions, which, however, do not support the case of the assessee.

1. K Radhika Vs. DCIT in ITA No.208/Hyd/2011
2. ACIT Vs. Hotel Harbour View (2 ITR (AT) 178)
3. General Gas Company Vs. DCIT (108 TTJ Mum) 854)
4. R. Vijayalakshmi Vs. Appu Hotels P Ltd. (257 ITR 4)

Similar issue we have decided while dealing with the corresponding grounds of the assessee in its appeal for assessment year 2003-04. For the detailed reasons discussed in para 9 of this order while dealing the appeal of the assessee for that year, we do not find merit in the grounds of the assessee on the issue of assessability of capital gains in the year under appeal. However, on the aspect of assessee's claim for allowability of exemption under S.54F of the Act, we set aside the orders of the lower authorities and restore the matter to the

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file of the assessing officer, with a direction to re-examine the same afresh in accordance with law and after giving reasonable opportunity of hearing to the assessee. The assessing officer may allow the claim of the assessee for relief under S.54F of the Act, if the requisite conditions for the same have been complied with by the assessee. For this limited purpose, assessee's appeal is allowed for statistical purposes.

47. In the result the appeal of the Assessee in ITA No 1521/H/11 is allowed for statistical purposes.

ITA NO 1567/H/11- Potla Nageswara Rao- Revenue's appeal for assessment year 2008-09-

48. The first ground in revenue's appeal is against the recomputation of capital gains arising from the development agreement between the Assessee and M/s Adarsh Construction. The main grievance of the revenue is that the CIT(A) had not made similar adjustments in the case of the other coowner viz., Kum. Potla Shanthi. As we have set aside this issue to the files of the AO in the Assessee's appeal in ITA No 1521/H/11 supra, the revenue's appeal on this issue is also set aside to the files with the same directions as in the Assessee's appeal.

49. The second ground in the revenue's appeal is against the allowance of Rs. 1.00 lakh claimed by the Assessee.

50. The Assessing Officer observed that the assessee had contested for MLC from local body segment of Khammam District which covers the entire local bodies in the district. He also noted that the assessee's expenditure on election is not reasonable. It is also observed by the Assessing Officer that since the assessee would have travelled through out the district and had to spend money for canvassing, therefore, the

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expenditure claimed by the assessee at Rs.25,000 is very meagre, hence he has made an addition of Rs.1 lakh towards alleged election expenditure.

51. On appeal before the CIT(A), it was the argument of the Authorised Representative of the assessee that the Assessing Officer had no valid reason to estimate the assessee's election expenditure more than what is admitted by him. Therefore, without bringing proper evidences, the Assessing Officer could not have attributed the assessee to have spent more than what is admitted in respect of election.

52. The CIT(A) held that having verified the fact and circumstances of the case, that the Assessing Officer had no material to guess election expenditure of the assessee, therefore, the addition made by the Assessing Officer, observing that addition made on estimation and presumption basis cannot be sustained. Therefore, this ground of appeal was allowed by the CIT(A).

53. Aggrieved the revenue is on appeal.

54. We heard the parties. As observed by the CIT(A) there is no basis for the estimation made by the AO. The Assessee has stood for election as MLC and certain expenses have to be necessarily incurred for canvassing purposes. In the circumstances we give the benefit of doubt to the Assessee and uphold the order of the CIT(A) deleting the addition of Rs. 1,00,000/- made on estimate basis towards unexplained expenditure.

55. In the result the revenue's appeal in ITA No 1567/H/11 is partly allowed for statistical purposes.

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CO No 79/H/11 in ITA NO 1567/H/11 for AY 2008-09-cross objection by assessee :

56. This cross objection has been filed by the assessee in the revenue's appeal in ITA No 1567/H/11 and it is merely supporting the order of the CIT(A). As we have disposed off the revenue's appeal, we dismiss this CO of the assessee as infructuous.

57. In the result the CO No 79/H/11 for AY 2008-09 is raised by the assessee is dismissed.

ITA No. 1529/H/2011 Revenue's appeal for Asst. Year: 2007-08 in the case Kum Potla Shanthi.

58. The Appeal of the revenue is against the order of the CIT(A) holding that the land sold by the Assessee is agricultural land which is not situate within the prescribed limits of any Municipality and hence is not a capital asset u/s 2(14) and therefore the profit on sale of the lands are in the nature of agricultural income and hence is not subject to capital gains tax.

59. Brief facts of the case as found in the Assessment order are: The father of assessee Sri Potla Nageswara Rao had purchased 21.27 acres of land at Bowrampet Dundigal villages of Qutbullapur municipality during the FY 2003-04 in the name of his son Potla Nishanth and daughter Potla Shanthi. Out of this land 13 acres was given for development to M/s Amsri Developers in the year 2007 against consideration of 35% of constructed area. Sri Potla Nageswara Rao father of the assessee has sold 6.25 acres of land to M/s Varun constructions.

60. The AO observed as follows:

It is seen that the assessee has shown profit on sale of 1.25 acres of this land at Rs. 15591203 in the capital account.

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> *However, no capital gains was offered claiming it to be an agricultural land. Since the transactions of handing over the land for development and sale of land took place in the same year, and out of the same stretch of 21.27 acres of land, the assessee's argument that the land is partly agricultural and partly exploited for development of residential purpose is not at all tenable.*

61. There was a search and seizure operation u/s 132 of the IT Act 1961 conducted in the case of Sri Potla Nageswara Rao wherein certain documents were found and seized. Consequent to the search operation the assessee's case is also notified with DCIT Central Circle 4 Hyderabad since the assessee happened to be a daughter of Sri Potla Nageswara Rao. The assessment was completed by the Assessing Officer based on the material available on record.

62. AO held that since for a part of the land assessee has already entered into development agreement for residential use, she cannot claim agricultural status for the adjacent chunk of land. Hence AO did not accept the assessee's argument and subjected the transaction to capital gains tax. AO held that on a complete analysis of all the facts of the case and conduct of the assessee from the time of purchase of land to its sale, in the light of the economic scenario of the Hyderabad City during the period it is clear that the assessee had not purchased the land with an intention to do agriculture on it. Instead the land was purchased with the ony intention of selling it at profit in the booming economy of Hyderabad. The AO took the sale proceeds at Rs 1.62 Crores and reduced the cost of acquisition of Rs 4.80 lakhs and balance amount of Rs 1,57,20,000 treated as STCG for the relevant assessment year.

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63. Aggrieved the Assessee filed an appeal before the CIT(A).

64. The Assessee submitted before the CIT(A) that the Assessee's father Sri Potla Nageswara Rao had purchased 21.27 acres of land at Bowrampet, Dundigal village of Qutbullahpur Municipality during the FY 2003-04 in the name of his son Potla Nishanth and daughter Potla Shanti. The Assessee had sold 1.25 acres of land at Bowrampet, Qutbullahur Mandal, Ranga Reddy District for a consideration of Rs 1.62 crores to M/s Varun Constructions, Secunderabad. Before the CIT(A), the Authorised Representative of the Assessee also submitted that the land sold by the Assesseeis an agricultural land therefore the Assessing Officer had no ground to make the additions. The Authorized Representative also has furnished certificate from revenue authority dated 4.2.2009 explaining that the land situated at Bowrampet, Qutbullahpur Mandal, Ranga Reddy District is 12 kms away from Qutbullahpur Municipality limits. Therefore it is contended that the Assessing Officer is not justified to treat the lands sold by the assessee for short term capital gains purpose hence pleaded to be allowed. The authorised representative also has furnished the following submission before the CIT(A).

65. Before the CIT(A), in support of the assessee claim. reference was made to the Honourable Punjab and Haryana High Court Judgment in the case of Commissioner of Income tax vs Lal Singh (2010) 325 ITR 0588 and Honourable Income Tax Appellate Tribunal Amritsar in the case of Deputy Commisioner of Income tax vs Capital Local Area Bank Ltd (2010) 006 ITR (Trib) 0314 where it was held that land classified in revenue records as agriculture and is situated beyond 8 kms of local

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limits of the municipality shall not be considered capital asset as land down in sec 2(14) of the Income Tax Act 1961.

66. Further the learned counsel for the assessee submitted that the Assessing Officer ought to have considered all facts as a whole and not piece meal and he relied upon the judgment of Honourable Cochin High Court in the case of Assistant Commissioner of income Tax vis Hotel Harbour View (2010) 002 ITR (Tribunal) 0178.

67. He submitted that at the relevant time the land in question had not ceased to be put to use other than for agricultural purpose. The land was agricultural land when it had been purchased by the assessee and it was not put to any alternative use. The land as proved on record was actually being used for agriculture involving ploughing as well as tilling. The assessee owner meant and intended to use it and in fact actually used it for agricultural purposes. Besides in CIT vs Borhat Tea Co. Ltd (1982) 138 ITR 783 (Cal) it has been held that for the purpose of land being agricultural land actual agricultural operations or cultivation or tilling thereon is not necessary if the land is otherwise capable of agricultural operations being carried on thereat.

68. It was pointed out that nowhere the AO has concluded that the subject land is not Agricultural land. All along the AO has taken stand that the investment was made keeping in mind the future bone of Hyderabad which are irrelevant and out of context since presumptions and assumptions cannot be basis for taxing the gain on sale of Agricultural land. Further the proposed ring road was decided upon by the Govt. authorities long after purchase of land and hence the idea of future growth cannot be imputed to the assessee. An identical view was

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expressed in the case of CIT vs E. Udayakumar (2006) 284 ITR 0511 Hon'ble High Court of Madras.

69. It was submitted that there was no previous sale of any portion of the land for non agricultural use. The lands surrounding the land in question were agricultural lands. In such a situation it has been held in Addl. CIT vs Tarachand Jain 91980) 123 ITR 567 (patna) that the presumption is in favour of the assessee of his land also being of agricultural nature.In CIT v O.RM. M.SP.SV.A. Annamalai Chettiar (2005) 273 ITR 404(Mad) it has been held that the fact that the land was located in a locality where development had taken place was not sufficient to hold the land to be non agricultural, even if the land was used for agriculture in the past but was lying fallow in the relevant assessment year. A similar view is also taken in M.S. Srinivasa Naioter v ITO (2007) 297 ITR 481(Mad) And CWT vs E. Udayakumar (2006) 284 ITR 0511 (Mad) held that the fact that there was a hospital in the adjacent land (in your assessee case Ring Road) was totally irrelevant.

70. Therefore in the light of above submissions it is the contention of the authorized representative that the assessing officer had no reason to treat the land situated at Bowrampet for short term capital gains purpose. It is also submitted by the authorized representative that the said land was agricultural land cultivated for agricultural purpose as appearing in the revenue records/ Therefore the same could not have been treated for short term capital gains purpose.

71. The Authorized Representative also relied upon the decision of Hon'ble Punjab and Haryana High Court in the case of CIT Lal Singh (2010) 325 ITR 588 wherein the assessee produced a certificate from the Tasildar to the effect that the land which the

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assessee had sold was situated beyond 8 kilometers from the Gurgaon municipal limits. The Assessing Officer not accepting the report of the Tasildar and instead relying upon the report given by the inspector denied the assessee exemption under section 548 of the Income Tax Act 1961. The Commissioner (A) set aside the order and this was confirmed by the Tribunal. On appeal to the High Court, it was held, dismissing the appeal of the revenue, that the Commissioner (A) had rightly not accepted the report of the inspector. In the report neither the khasra number of the land of the assessee was given nor had it been explained how the distance of the land from the municipal limits was measured. On the other hand the Commissioner (A) has rightly relied upon the report given by the Tashildar on the application of the assessing Officer himself and it could not be discarded. Therefore there was no justification for ignoring the report. Further except the report given by the Tashildar which was relied upon by the revenue to show that the distance of the land of the assessee from the municipal limits was less than 8 kms there was no other material on record contractdict to the report. Thus a pure finding of fact had been recorded by the Commissioner (A) and the Tribunal on the issue of distance after considering the evidence available on record. The finding could not be said to be perverse illegal or contrary to the evidence available on record. The amount was not assessable as capital gains.

72. The assessee also has furnished the certificate from Deputy Collector of Tahsildar of Quthbullapur Mandal who had certified that the Dundigal village situated in Quthbullapur Mandal, Ranga Reddy District and nearest municipality is Quthbullapur. The distance from Dundigal village to Quthbullpur municipality limits is 13 kms. Therefore in the light

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of above certificate furnished it was submitted before the CIT(A) that the assessee's lands are situated at Dundigal which is away from 13 kms of Quthbullapur municipal limits and the sale of said land is only sale of agricultural land hence no capital gains are attracted under Income Tax Act 1961.

73. The CIT(A) allowed the appeal of the Assessee holding as under:

> *"The submission made by the authorized representative has been taken into consideration. The case laws relied upon by the authorized representative are perused. The observation of the assessing officer also has been verified. Having verified the facts and circumstances of the case and also the copy of revenue records and reports furnished by the assessee I am of the view that the addition made by the assessing officer treating the sale of agricultural land for short term capital gain purpose cannot be sustained, Therefore this ground of appeal of is allowed."*

74. Aggrieved, the Revenue is in appeal before us.

75. The contention of the Revenue is that when the Assessee had given the land for developing an integrated residential township on an area of 19.9 acres, the land cannot be said to be held for agricultural purposes.

76. The Revenue has also raised an issue that from 16.4.2007, the area has merged with greater Hyderabad Municipal Corporation.

77. The learned DR Shri Smt. Mythili Rani, relied on the decision of the Hon'ble Supreme Court in the case of Sarifabibi Mohammed Ibrahim & Others Vs. CIT (204 ITR 631) (SC).

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78. The Ld. Counsel for the assessee Shri Gandhi, strongly supporting the order of the CIT(A), relied on the decision of the Hyderabad B Bench in the case of Srinivas Pandit (HUF) Vs. ITO in ITA No.56/H/2007, besides the following other decisions-

1. The Tribunal, Amrister Bench in the case of DCIT Vs. Capital Local Area Bank Ltd. (6 ITR (Trib.) 314)

2. The Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Lal Singh (325 ITR 588).

79. he learned counsel also reiterated the written submissions furnished before the CIT(A) as under:

Addition of short term capital gain (agriculture Lands) of Rs.2,26,93,975/-

1. Your assessee submitted that the Assessing Officer has erred by estimating notional Short term capital gain on the basis of development agreement for agriculture lands situated at Ranga Reddy Distt. Away by 13 kms. From the nearest municipality limits at Rs.2,26,93,795/-. In total violation of the law and against the facts and the addition is erroneous.

2. The Assessing Officer has not disputed with regard to basic character of agriculture land.

3. The land referred in the development agreement area agriculture lands acquired by way of sale deed dated 8th February 2005, and your assessee herewith enclosed land Pass Book No.444079 under Patta No.1973 and Pass Book No.44063, Patta No.1132 issued by the Deputy Collection RR District dated 10.5.2005

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In support of the above the copy of sale deed and land pass books enclosed by the assessee in Annexure 1

i) The assessee enclosed herewith copy of land revenue records in form No.3 wherein the nature of the land i.e. metta land and the assessee name both under the khatadaar and anubhodar columns which shows that the land is agriculture land and cultivated by the assessee.

Copy of the documents enclosed in Annexure 2

The assessee also enclosed the certificate issued by the village revenue office for having carried on agriculture activity after duly enquiry conduct by the officer and details of the crops raised during the year 2006-07.

Copy of certificate was enclosed by the assessee in Annexure-3:

The assessee also enclosed a certificate that the land is situated beyond 8 kms. From the nearest municipality limits (13 kms.) in Annexure 4

4. There is no transfer involved as contemplated by the Assessing Officer on page 4 of the assessment order since:

i) it is only a 'development agreement' and not and 'agreement to sale'.

ii)No moneys were exchanged as on the date of development agreement or any performance is carried out by the developer.

iii) It is only an agreement to do certain works within period of 36 months after obtaining requisite permission for

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construction by the developer as such no consideration was passed in part performance of said agreement.

iv) Obtaining requisite permissions is a pre requisite for putting the development agreement in to force and hence cannot be an operative transfer.

v) The quantification of consideration is a prime quo non for any contract effecting transfer of property. The present quantification of future consideration cannot be comprehended as the very execution of the development agreement by the developer is very much in doubt. To date even the customary bhumik pooja was not conducted and not even a grain of sand was shovelled.

vi) The value of Sub registrar as on the date of Development Agreement is the value of agriculture land and that is referred on annexure 1A of the said Development Agreement.

80. It has been brought to our notice by the learned counsel that a capital gain on sale of agriculture land is exempt. The jurisdictional Tribunal in the case of Srinivas Pandit (HUF) has held as follows:

In this case also admittedly, the entire transactions was made through Rajendra Nagar Revenue Authorities and not through Hyderabad Revenue Authorities. Therefore, as found by the Coordinate Bench of the Tribunal in the case of Capital Local Area Bank Ltd. (supra) , the jurisdictional Municipality is Rajendra Nagar Municipality and not the Hyderabad Municipality. Since Rajendra Nagar Municipality is not admittedly notified by the Central Government, the agricultural land in question cannot be treated as capital

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asset by taking the distance from the limits of Hyderabad Municipality. By respectfully following decisions of the Coordinate Bench cited supra, we hold that the land in question cannot be treated as capital asset within the meaning of Sec. 2(14)(iii)(b) of the IT Act. Accordingly, Orders of the lower authorities are set aside.

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

81. However, in the present case, it is not clear as to whether the assessee has converted the land for non agriculture purposes . The AO has observed that originally the intention of the assessee was to develop the land for commercial purposes as the outer ring road was passing near to the land. It is also pertinent to point out that a part of the same land was given for development for construction of houses and the other part of land which has been entered into agreement with M/.s Amsri Developers P Ltd. has to be proved beyond doubt to be agriculture in nature.

82. The Co-ordinate Bench of the Tribunal in the case of Smt. Gousia Begum and others, has held, vide its order dated 16.1.2012 in ITA No. 1024/Hyd/201 and others, as follows:

"11. We heard both sides. The contention of the authorised representative of the assessee is that the agricultural operations were carried out in the ay under consideration. During the course of proceedings before the assessing officer, the assessee requested the assessing officer to inspect the lands at that stage. The assessee also filed pahani patrika for the financial year 2006-07, the slab pass-book issued by the Electricity Board before the lower authorities. It was also submitted that there was an open well in the land and water was supplied to the crop through

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electric motor pumping. Even after the request of the assessee the assessing officer not carried out any enquiry and drew adverse inference against the assessee. Further, the learned AR of the assessee stated before us that the assessee being an agriculturist and not carrying out any business activity and not maintained any books of account. Thus, the assessee failed to maintain sale-bills, purchase bills and bills towards purchase of fertilizers. Further, it was observed that the assessee in the course of statement recorded under section 132(4) of the Act stated that the paddy and the vegetables were grown and the same was used for self consumption. The assessing officer without bringing any evidence against the assessee, disallowed the claim of the assessee. Further, for disbelieving the contention of the assessed, the lower authorities relied on the pahani patrika obtained from Dy. Collector and Tahsildar. It was mentioned therein that there was no cultivation during the financial year 2005-06. Later, there was an affidavit filed from the Village Revenue Officer, Narsing Village who mentioned that due to pressure of work, he did not fill the columns of "cultivation" in the pahani patrika during the financial year 2005-06 for all the lands in the entire village. This fact also brought to the knowledge of the lower authorities. However, no enquiries were carried out in this regard. On the other hand, there was information from the Dy. Collector that the land was under cultivation for the financial year 2006-07 and 2004-05 and in earlier years. However, the affidavit filed by the VRO shows that the land was under cultivation in the asst. year under consideration also. Further, the lower authorities observed that there was a dispute regarding the ownership of the agricultural land and there cannot be any agricultural operations. This finding of the lower authorities goes against the revenue records

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which show that the land was under cultivation during the financial year 2006-07 and for 2004-05 and also against VRO's Certificate. Being so, in our opinion, the certificate issued by the VRO, who is concerned revenue authority to issue the said certificate has to be relied upon and it is not possible to reject the same without examining the deponent. In this behalf, we place reliance on the decision of the Supreme Court in the case of Mehta Parikh & Company vs. CIT (30 ITR 181) (SC) wherein held that when the persons who gave the affidavits were not cross-examined, it was not open to the revenue to challenge the correctness of the statement made in the affidavits. In view of this, we are inclined to hold that the agricultural income declared by the assessee is to be accepted as agricultural income only.

....

12. The next effective grievance of the assessee in this appeal relates to computation of capital gains, treating the land sold by the assessee as non-agricultural land.

....

15. We have considered the rival submissions. We do not find merit in the contention of the assessee. The land in question giving rise to capital gain was, in fact, urban land though agricultural operations have been carried out on them. The assessee placed before the lower authorities pahani patrika, VRO's Certificate and details of electricity Bill/slab pass Book etc. We have held on that basis in earlier paras that the assessee derived agricultural income. But, the question still remains whether the impugned land come within the meaning of "capital asset". The land is situated at Narsing Village of Rajendra Nagar Mandal, R.R. District which is within the municipal limits of Rajendra Nagar. According

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to the learned counsel for the assessee, Rajendra Municipality is not notified by the Central Government and therefore the agricultural lands which fall under the jurisdiction of the Rajendra Nagar Mandal cannot be considered as capital asset within the meaning of section 2(14) of the Income-tax Act. But, the fact is that this is urban land akin to the Hyderabad Municipality situated within 8 KM from the local limits of Hyderabad Municipal Corporation. In similar circumstances, the jurisdictional High Court in the case of CIT vs. Bola Ramaiah (174 ITR 154) held that the capital gains arising out of sale of land situated within 8 KM of local limits of Hyderabad Municipality, is liable for tax on capital gains irrespective of the fact whether it falls under the limits of Rajendra Nagar Mandal or otherwise. Further, mere fact that the land in question was agricultural land cannot be a ground to claim for exemption under section 2(14) of the Act as the land is situated within the local limits of Hyderabad Municipal Corporation. Further, it was held recently by the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Smt. Anjana Sehgal (supra) that the expression *"from the local limits of any municipality"* used in section 2(14)(iii)(b) of the Income-tax Act denotes *"any municipality or municipality of the District in which the land is situated"*. Further, capital gains arising from the transfer of agricultural land situated in municipal or other urban areas or notified adjoining areas will be liable to income-tax. In this view of the matter, and considering the facts and the circumstances of the present case, in our considered view, the lower authorities are justified in determining the land in question, as capital asset liable for income-tax. With regard to determination of cost of acquisition of the land disposed of, we are of the opinion that considering the proximity of the land to the city, it is

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reasonable to fix the value of as on 1.4.1981 at Rs.30,000 per acre, instead of Rs.10,000 determined by the Assessing Officer, as against Rs.1,40,000 claimed by the assessee. One of the reasons for which the claim of the assessee for relief under S.54B was rejected by the assessing officer was that what was paid by the assessee was only an advance for purchase, and unless it is actual purchase of land, assessee would not be entitled for relief under S.54B. There is some merit in this reasoning of the assessing officer. However, in terms of S.54B of the Act, assessee has to purchase the agricultural land within a period of two years. Hence, though mere payment of advance does not entitle the assessee for relief under S.54B of the Act, if ultimately whole transaction of purchase of land was completed within a period of two years as contemplated under S.54B of the Act, assessee is entitled for relief under S.54B of the Act. In this view of the matter, we set aside the orders of the lower authorities, and restore this issue to the file of the assessing officer for verifying whether the assessee has purchased the agricultural lands within a period of two years, so as to qualify for relief under S.54B of the Act, and accordingly re-decide this issue in accordance with law and after giving reasonable opportunity of hearing to the assessee. Grounds of the assessee on this issue are allowed for statistical purpose. "

83. In these circumstances, we deem it fit to restore the issue to the file of the AO for re-examination of the entire issue afresh, in the light of the findings given in the case of Smt. Ghousia Begum cited supra, and after giving reasonable opportunity of hearing to the assessee, duly verifying the nature of land i.e.,

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whether the land can be classified as agriculture land and also beyond 8 kms. of any municipality.

84. In the result the appeal of the revenue in ITA No 1529/H/2011 for AY 2007-08 is allowed for statistical purposes.

CO No 76/H/2011 in ITA 1529/H/11 for AY 2007-08

85. This cross objection filed by the Assessee Ms. Potla Shanthi is in support of the CIT(A) order deciding the issue in her favour. As we have set aside the appeal by the revenue, in 1529/H/11 for this year, to the file of the assessing officer for fresh consideration, this CO filed by the Assessee has become infructuous and dismissed accordingly.

86. In the result CO No 76/H/2011 filed by the Assessee in the revenue's appeal ITA No 1529/H/11 is dismissed.

ITA No 1530/H/11 Kum Potla Shanthi- Revenue's appeal for AY 2008-09

87. The only ground of appeal by the revenue is against the order CIT(A) deleting the capital gains arising from sale of land to M/s Amsri developers P Ltd. It is the contention of the Assessee that the lands sold were agricultural lands, not falling within the notified limits of Municipality and hence is not exigible to capital gains. The issue involved in this appeal is similar to the one, we have already considered in the case of this very issue in ITA No.1529/H/2011 for the assessment year 2007-08. Facts and circumstances being identical in this year as well, we set aside the order of the CIT(A) and restore the matter to the file of the assessing officer for fresh examination with directions similar to the ones given for the preceding year hereinabove.

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88. In the result the revenue's appeal in ITA 1530/H/11 is allowed for statistical purposes.

CO No 77/H/11 in ITA 1530/H/11 for AY 2008-09: Cross Objection by Assessee:

89. This cross objection filed by the Assessee Ms. Potla Shanthi is in support of the CIT(A) order deciding the issue in her favour. As we have set aside the appeal by the revenue, in 1530/H/11 for this year, to the file of the assessing officer for fresh consideration, this CO filed by the Assessee has become infructuous and dismissed accordingly.

90. In the CO field by the assessee is dismissed.

ITA No 1523/H/11 Kum Potla Shanthi- Assessee's appeal for AY 2008-09:

91. The only issue involved in this appeal relates to the assessability of capital gains. The facts involved in the Appeal of the Assessee are identical with those in the appeal of her father Sri. Potla Nageswara Rao in ITA No 1521/H/11. We have dealt with the corresponding grounds of the assessee's father in that case in para 9 of this order here inabove For the detailed reasons discussed in para 9 of this order while dealing the appeal of the assessee's father for that year, we do not find merit in the grounds of the assessee on the issue of assessability of capital gains in the year under appeal. However, on the aspect of assessee's claim for allowability of exemption under S.54F of the Act, we set aside the orders of the lower authorities and restore the matter to the file of the assessing officer, with a direction to re-examine the same afresh in accordance with law and after giving reasonable opportunity of hearing to the assessee. The assessing officer may allow the claim of the

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assessee for relief under S.54F of the Act, if the requisite conditions for the same have been complied with by the assessee. For this limited purpose, assessee's appeal is allowed for statistical purposes.

92. In the result the Assessee's appeal in ITA No 1523/H/11 is allowed for statistical purposes.

I**TA No 1568/H/11 Revenue's appeal for AY 2007-08 in the case of Shri. Potla Nishanth:**

93. The facts of this case are identical with the facts of the case of Assessee's sister Ms. Potla Shanthi in the revenues appea'l in ITA No 1529/H/11 for the same Assessment year 2007-08. The Assessee's father Sri Potla Nageswara Rao had purchased 21.27 acres of land at Bowrampet, Dundigal village of Qutbullahpur Municipality during the FY 2003-04 in the name of his son Potla Nishanth and daughter Potla Shanti. The Assessee had sold 5 acres of land at Bowrampet, Qutbullahur Mandal, Ranga Reddy District for a consideration of Rs 5 crores to M/s Varun Constructions, Secunderabad. The Assessee did not offer the gain on sale of the land to tax on the ground that it is agricultural land beyond the prescribed limits of any Municipality and hence is not `capital asset'u/s 2(14) and therefore the profit on sale of the land is agricultural income and hence not assessable as capital gains. The AO did not accept the contention of the Assessee and after deducting cost of acquisition of Rs. 15 lakhs assessed the balance Rs. 4.85 Crores as Short term capital gains.

94. On appeal the CIT(A) accepted the contention of the Assessee that the lands were agricultural lands and hence the sale of the same were not subject to capital gains, for the same

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reasons as has been stated in the case of Ms. Potla Shanthi referred to above.

95. Aggrieved the revenue is on appeal and raised the same grounds as has been raised in the case of Ms. Potla Shanthi in ITA 1529/H/11 supra. In that case we have set aside the issue to the file of the AO with certain observations:

96. The facts of this case are identical with those of Assessee's sister Kum. Potla Shanthi and the assessee has sold the lands from the same area as his sister. Hence following our decision in the case of Ms. Potla Shanthi for this very assessment year in ITA No 1529/H/11, we set aside the issue with regard to determination of the nature of land, viz. agricultural land or not and assessable as capital gains or not, to the files of the Assessing officer with similar directions, for deciding the same afresh after giving reasonable opportunity to the Assessee.

97. In the result the appeal of the revenue in ITA No 1568/H/11 for Assessment Year 2007-08 is allowed for statistical purposes.

CO No 80/H/2011 in ITA 1568/H/11 for AY 2007-08

98. This cross objection filed by the Assessee, Shri Potla Nishanth, is merely in support of the CIT(A) order deciding the issue in his favour. As we have set aside the appeal by the revenue, in 1568/H/11 for this year, to the file of the assessing officer for fresh consideration, this CO filed by the Assessee has become infructuous and dismissed accordingly.

99. In the result CO No 80/H/2011 filed by the Assessee in the revenue's appeal ITA No 1568/H/11 is dismissed.

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ITA No 1531/H/11: Sri. Potal Nishanth- Departmental appeal for AY 2008-09:

100. The first ground in revenue's appeal is against the re-computation of capital gains arising from the development agreement between the Assessee and M/s Aditya Construction. As we have set aside this issue to the files of the AO in the Assessee's appeal in ITA No 1522/H/11 supra, the revenue' s appeal on this issue is also set aside to the files with the same directions as in the Assessee's appeal.

101. The second ground of appeal by the revenue is against the deletion of capital gains in respect land sold to M/s Amsri Developers (wrongly mentioned as M/s Adithya Developers by the CIT(A) in para 5 of his order).

102. Aggrieved the revenue is in appeal. The contention of the Revenue is that when the Assessee had given the land for developing an integrated residential township on an area of 19.9 acres, the land cannot be said to be held for agricultural purposes.

103. We heard the parties. We find that the issue involved in this appeal is similar to the one we have considered, hereinabove, while dealing with the appeal of the assessee's sister, Kum. Potla Shanthi in ITA 1529/H/11. Therefore, following our order in the case of Assessee's sister Kum. Potla Shanthi in ITA 1529/H/11 hereinabove, we set aside this issue to the files of the Assessing Officer, with directions similar to the ones we have given in the context of appeal ITA No.1529/Hyd/11 hereinabove, for redeciding the matter afresh the in accordance with law.

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104. In the result the revenue's appeal in ITA 1531/H/11 is allowed for statistical purposes.

CO no 78/H/11 in ITA No 1531/H/11 for AY 2008-09-cross objection by Assessee

105. This cross objection filed by the Assessee Shri Potla Nishanth is merely in support of the CIT(A) order deciding the issue in his favour. As we have set aside the appeal by the revenue, in 1531/H/11 for this year, to the file of the assessing officer for fresh consideration, this CO filed by the Assessee has become infructuous and dismissed accordingly.

107. In the result the Assessee's CO No 78/H/11 for AY 2008-09 is dismissed.

ITA No1522/H/11: Sri. Potla Nishanth- Assessee's appeal for AY 2008-09:

108. The facts in the Appeal of the Assessee are identical with the appeal of his father Sri. Potla Nageswara Rao in ITA No 1521/H/11. In that case we have set aside the appeal to the files of the AO with certain observations.

109. Facts and circumstances of the case being identical with the ones we have considered in the context of appeal of assessee's father, in ITA No.1522/Hyd/2011, following the same we set aside the appeal of the Assessee in ITA No 1522/H/11 to the files of the AO for recomputing the capital gains as per our observations in the case of Sri Potla Nageswar Rao in ITA No 1521/H/11.

110. In the result the Assessee's appeal in ITA No 1522/H/11 is allowed for statistical purposes.

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112. To sum up-

(a) In the case of Shri P.Nageswara Rao-

(i) Out of three assessee's appeals, ITA Nos.1519 and 1520/Hyd/2011 are dismissed; and 1521/Hyd/2011 is partly allowed for statistical purposes.

(ii) Out of the two appeals of the Revenue, ITA No.1528/Hyd/2011 is dismissed, whereas ITA No.1567/Hyd/2011 is partly allowed for statistical purposes; and

(iii) Both the Cross Objections of the assessee in the appeals of the Revenue are dismissed as infructuous.

(b) In the case of Kum Potla Shanti -

(i) Assessee's appeal, ITA Nos.1523/Hyd/2011 as well as the revenue's appeals, ITA Nos.1529 and 1530/Hyd/2011 are allowed for statistical purposes; and

(ii) Both the Cross Objections of the assessee in the appeals of the Revenue are dismissed as infructuous.

(c) In the case of Sri Potla Nishanth -

(i) Assessee's appeal, ITA Nos.1522/Hyd/2011 as well as the revenue's appeals, ITA Nos.1568 and 1531/Hyd/2011 are allowed for statistical purposes; and

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(ii) Both the Cross Objections of the assessee in the appeals of the Revenue are dismissed as infructuous.

Order pronounced in the open court on: 22.3.2012

Sd/-	**Sd/-**
(CHANDRA POOJARI)	**(ASHA VIJAYARAGHAVAN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 22nd March, 2012

Copy forwarded to:

1. The DCIT, Central Circle -4, Hyderabad

2. Shri Potla Nageswara Rao, (11-3-119, Nehru Nagar, Khammam) c/o Shri T. Gandhi & Co., Companies Act, 1956 (1 of 1956), No.4916, 10th Floor, High Point, IV, 45 Palace Road, Bangalore-560 001.

3. Kum. Potla Shanti, (11-3-119, Nehru Nagar, Khammam) c/o Shri T. Gandhi & Co., Companies Act, 1956 (1 of 1956), No.4916, 10th Floor, High Point, IV, 45 Palace Road, Bangalore-560 001.

4. Shri Potla Nishanti, (11-3-119, Nehru Nagar, Khammam) c/o Shri T. Gandhi & Co., Companies Act, 1956 (1 of 1956), No.4916, 10th Floor, High Point, IV, 45 Palace Road, Bangalore-560 001.

5. The CIT(A)-VII, Hyderabad
6. The CIT, Hyderabad
7. The DR, ITAT, Hyderabad

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