

Real Estate Developers & Contractors - Some issues in Taxation

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ISSUE 1 : Percentage Completion or Complete Contract Method

An important issue which has recently been a subject matter of litigation in Real Estate Transactions is when to recognize the revenue in a project which takes more than a year for its completion— Proportionately over the period of contract or on completion of contract.

The Accounting Standards issued by The Institute of Chartered Accountants of India (ICAI) and Companies (Accounting Standards) Rules, 2006 have dealt this issue vide AS-7 (Construction Contracts, revised 2002) and AS-9 (Revenue Recognition), read with other Accounting Standards, such as AS-2(Valuation of Inventories), AS-16(Borrowing Costs), AS-13 (Accounting for Investments) etc. The ICAI has also issued 'Guidance Note on Real Estate Developers' in 2006. In this article I have tried to analyze the accounting and taxation aspects.

However, the Income Tax Act is silent on the issue. The issue has arisen controversies not only as taxation side but also as accounts perspective. In this article, an attempt has been made to highlight the recent controversies and trends.

Before discussions on the issue, I would like to refer to recent Apex Court judgment in *J.K. Industries Vs. UOI [297 ITR 176 (SC)]* which has laid special emphasis on Accounting Standards even for tax purposes. In the said judgment, it has been inter-alia observed:

- *In its origin, an accounting standard is the policy document*
- *Today under advanced accountancy, matching principles recognizes not only costs against revenue but also against the relevant time period to determine the periodic income. Therefore, the matching principle today forms an important component of accrual basis of accounting.*
- *The adoption of Accounting Standard and of accounting income as taxable income will avoid distortion of accounting income which is the real income.*

Thus, if Income Tax Act is silent on the issue, the Accounting Standards shall be taken as important basis for deriving taxable income, subject to specific exemptions, allowances and disallowances under Income Tax Act.

Now let us analyze the Accounting standards with respect to real estate developers and contractors.

AS-7 (Construction Contracts)

The AS-7 was revised in 2002. Prior to revision, this AS was applicable to enterprises, who were undertaking construction activities as contractors and also on enterprises who were undertaking construction activities on their own account. Thus real estate developers were treated at par with other construction contractors. In AS-7(old), both Percentage Completion Method (PCM) and Complete Contract Method (CCM) were recognized. Thus, both real estate developers and contractors had the option to follow either PCM Method or CCM Method.

In 2002 (w.e.f F.Y 2003-04), AS-7 was revised in line with International Accounting Standards (IAS). The revised AS-7 was made applicable on Construction contractors only, and not on real estate developers. The salient features of revised AS-7 can be summarized as under:

- Revised AS-7 ceased to apply on Real Estate Developers and was thus applicable for Construction Contractors only.
- The Revised AS-7 allowed accounting on Percentage Completion Method only. Thus, as per AS-7(Revised), Construction Contractors have to compulsorily account on Percentage Completion Method, subject to the condition that outcome of the contract can be reliably estimated. The outcome of the contract can be reliably estimated when the following conditions are fulfilled:
 - Total contract revenue can be measured
 - Expected profits can be measured
 - Costs and stage of completion can be measured.

Thus, with the revision of AS-7, Real Estate Developers were required to follow AS-9.

AS-9 (Revenue Recognition)

After revision of AS-7, real estate developers (and not contractors) were governed by AS-9, which is applicable in general for enterprises engaged in sale of goods, rendering of services etc. As per Para 6.1 of AS-9, the key criteria to determine recognition of revenue are *when the seller has transferred the property in the goods to the buyer for a consideration. The transfer of property in goods, in most cases, results in or coincides with the **transfer of significant risks and rewards of ownership** to the buyer. However, there may be situations where transfer of property in goods does not coincide with the transfer of significant risks and rewards of ownership. Revenue in such situations is recognized at the time of transfer of significant risks and rewards of ownership to the buyer.*

It was widely believed after revision of AS-7, real estate developers have to compulsorily follow Percentage Completion Method (PCM) as per AS-9 in sharp contrast with real estate contractors who have to follow Complete Contract Method (CCM) as per AS-7(revised).

Guidance Note on Real Estate Developers

In order to clarify the issue as to whether real estate developers shall account income on Project Completion Method or proportionately over the period of the project, the ICAI came out with a Guidance Note on Real Estate Developers in 2006.

Para 3 to 5 of the Guidance Note has clarified the point of time when significant risks and rewards of ownership can be considered as transferred in a real estate transaction. It has been mentioned inter-alia in this Guidance Note:-

*“3. The point of time at which all significant risks and rewards of ownership can be considered as transferred, is required to be determined on the basis of the terms and conditions of the agreement for sale. It may, however, be noted that in case of real estate sales, the seller usually enters into an agreement for sale with the buyer at initial stages of construction. **This agreement for sale is also considered to have the effect of transferring all significant risks and rewards of ownership to the buyer provided the agreement is legally enforceable and subject to the satisfaction of all the following conditions which signify transferring of significant risks and rewards even though the legal title is not transferred or the possession of the real estate is not given to the buyer:***

a) The significant risks related to the real estate have been transferred to the buyer; in case of real estate sales, price risk is considered to be one of the most significant risks.

b) The buyer has a legal right to sell or transfer his interest in the property, without any condition or subject to only such conditions which do not materially affect his right to benefits in the property.

4. Once the seller has transferred all the significant risks and rewards of ownership to the buyer and other conditions for recognition of revenue specified in paragraphs 10 and 11 of AS-9 are satisfied, any further acts on the real estate performed by the seller are, in substance, performed on behalf of the buyer in the manner similar to a contractor. Accordingly, in case the seller is obliged to perform any substantial acts after the transfer of all significant risks and rewards of ownership, revenue is recognized by applying the percentage of completion method in the manner explained in AS-7.

5. Paragraph 9.2 of AS-9 provides as follows:

“9.2 Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved. In such cases, it may be appropriate to recognize revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection, revenue is recognized at the time of sale or rendering of service even though payments are made by installments.”

Accordingly, in case, it is unreasonable to expect ultimate collection, the revenue recognition is postponed to the extent of uncertainty involved.”

Thus, to sum up, the Guidance Note issued by ICAI recommend that Revenue in case of real estate sales should be recognized when all the following conditions are satisfied:

- The seller has transferred to the buyer all significant risks and rewards and the seller retains no effective control of the real estate to a degree usually associated with ownership;
- No significant uncertainty exists regarding the amount of the consideration that will be derived from the real estate sales ; and
- It is not unreasonable to expect ultimate collection.

Further, as per the Guidance Note, ‘significant risk and reward of ownership’ is transferred, even when the seller has entered into a legally enforceable agreement (and not necessarily registration for transfer of title or possession) for sale with the buyer, subject to:

- The significant risks related to real estate have been transferred to the buyer. In case of real estate, price risk is generally considered to be one of the most significant risks.
- The buyer has a legal right to sell or transfer his interest in the property, without any condition or subject to only such conditions which do not materially affect his right to benefits in the property.

Thus, going by the Guidance note, even an allotment letter or unregistered agreement for sale may also be considered as transfer of significant risk and reward of ownership for real estate developers.

To sum up, with the introduction of this Guidance Note, the real estate developers were recommended to follow Percentage Completion Method. Subsequent to the issuance of this Guidance Note, most of the large real estate entities have changed their method of accounting to Percentage Completion Method and have been following the same.

Extracts of Accounting Policies of some Real Estate Companies

Extracts of some of the notes forming part of Prospectus or Annual Report are reproduced below:

DLF Limited – Annual Report 2011

*Revenue from constructed properties, other than SEZ projects, is **recognized on the “percentage of completion method”**. Total sale consideration as per the duly executed, agreements to sell/ application forms (containing salient terms of agreement to sell), is recognized **subject to such actual cost incurred being 30 percent or more of the***

total estimated project cost. Estimated project cost includes cost of land / development rights, borrowing costs, overheads, estimated construction and development cost of such properties.

Sobha Developers Limited- Annual Report 2011

*Revenue from real estate under development is recognized upon transfer of all significant risks and rewards of ownership of such real estate/ property, as per the terms of contracts entered into with buyers, which generally coincides with the firming of the sales contracts/ agreements..... In such cases, **the revenue is recognized on percentage of completion method**, when the stage of completion of each project reaches a reasonable level of progress. Revenue is recognized in proportion that the contract costs incurred for work performed up to the reporting date bear to the estimated total contract costs. **Land costs are not included for the purpose of computing the percentage of completion.***

On looking at the above, it can be seen that most of the listed real estate developers have started accounting income on real estate sales on Percentage Completion Method basis and if they were earlier following Complete Contract Method, they had changed their accounting method subsequent to issuance of Guidance Note by the Institute of Chartered Accountants of India. However, different companies are following different parameters to recognize the revenue on Percentage Completion Method basis. For e.g. DLF Limited is recognizing revenue when actual cost incurred for a real estate project is 30% or more of the total project cost and they are considering land as a part of project cost. On the other hand, Sobha Developers Ltd is recognizing revenue when 40% of the total project cost have been incurred by them and land cost is not considered by them for the purpose of computation of percentage of completion of a project.

Thus, by looking at the above two instances, we find there is a sharp contrast even in the computation of percentage of completion method by the two listed entities. However, not only these two companies but most of the listed companies are following Percentage Completion Method though the method of recognizing revenue on Percentage Completion Method basis may be different.

Income Tax Litigations and Judgements

Champion Construction Co [5 ITD 495 (Mumbai ITAT)] – PCM applied

'We hold that it is not a correct proposition to say that profits of the assessee from a singly venture/project in the nature of trade cannot be ascertained until the venture/project has come to an end. Under the Act each year is a self-contained unit and unless it is impossible to compute the profits or losses of each year reasonably if necessary by estimating the value of the liabilities to be incurred, valuing the work-in-progress, stock-in-trade, etc., the profits should be computed year-wise and taxed. The

acceptance of proposition put forward by assessee would amount to giving a licence to put off his tax liabilities for a unlimited period by seeing to it that the venture/project never comes to an end in the sense something or the other always remains to be done. That will be a very unsatisfactory state of affairs. Moreover, when the entire cost/expenditure to the assessee is recouped and/or major portion of the venture/project is complete, there is really no justification in not taxing the income from project which quite often may represent excess of receipts over expenditure unless there is a risk/chances of the assessee's suffering heavy liabilities, subsequently, for some reasons or the other.'

Bhagyanagar Constructions Private Limited vs. ITO [46 ITD 236 (Hyd)] – PCM applied

' We have heard both the parties at length. The issue for adjudication before us is to see whether in a contract work the profit accrues from year to year or it accrues only after the completion of the contract. In this regard, we have taken assistance of certain accounting methods of long-term contracts and have perused certain books like Batliboi's Advanced Accounting, to arrive at the conclusion. After due consideration of all the facts of the case, we are to the view that the profit in a long-term contract should be taxed on year to year basis. It is a dangerous proposition to recognise, that the profit accrues only after the completion of a contract. Such a proposition is liable to be abused by dishonest tax-payers. We have also gone through certain judicial authorities to which we will advert later, and find that it is a judicially recognised proposition that in the case of a contract, in order to ascertain the income, one need not wait till the contract is completed and that it is open to the Revenue to estimate the profit on the basis of receipts in each year of construction, although the contract is not complete. It is therefore, not necessary for the Assessing Officer to wait till the completion of the contract to tax the business profit in the case of an assessee.

In this view, we are supported by the decision of the Delhi High Court in the case of Tirath Ram Ahuja (P.) Ltd. v. CIT [1976] 103 ITR 15. On the facts of that case, the High Court held that "in the case of a contract, one need not wait till the contract was completed in order to ascertain the income and it was open to the Revenue to estimate the profit on the basis of the receipts in each year of the construction although the contract was not complete.....". Our view is also strengthened by the finding of the Patna High Court in the case of Sukhdeodas Jalan v. CIT [1954] 26 ITR 617.'

Awadhesh Builders Vs. ITD [37 SOT 122 (Mum)] – CCM Applied

Held: It was held that with revised AS-7 was not applicable on real estate developers and AS-9 allows assessee to recognize revenue on complete contract method

Comments : In this judgement, Revised AS-7 was referred and it was argued that after revision of AS-7, real estate developers have to follow CCM Method as per AS-9.

Interestingly, in this judgment, Guidance Note on Real Estate Developers was not at all referred.

Prestige Estate Projects Private Limited Vs. DCIT [129 TTJ 680 (Bangalore)]

Held: It was held that there is no notification under section 145(2) vide which AS-7 has been made applicable to builders. As per Guidance note issued by ICAI on real estate developers, only when the seller has transferred significant risks and rewards of ownership to the buyer, and other conditions in para 10 and 11 of AS-11 and para 11 of AS-9 are satisfied, income can be recognized.

Comments: This judgment was passed very recently on 11.09.2009 and discussed the impact of Guidance Note. In this case the interpretation of “significant risk and reward of ownership” was not properly argued . As mentioned earlier price risk is important risk, and if the contract is irrevocable and the buyer is to get the benefit of price appreciation, then significant risk and reward of ownership is deemed to be transferred.

Exposure draft on Tax Accounting Standards

As the readers may be aware, the Central Government has power to notify Tax Accounting Standards which are compulsorily required to be followed for specified assesses for computing business income. Till date, only two such accounting standards have been notified. However, in December 2010, the CG constituted Accounting Standards Committee to suggest Accounting Standards issued by ICAI with suitable amendments, which could be notified as Tax Accounting Standards. I have considered it necessary to discuss some issues covered in Exposure Draft, which are relevant to the present presentation

- Proposed Exposure Draft on Construction Contracts Vs. AS-7.
 - The Exposure Draft has proposed that Retention money shall be recognized based on percentage completion method. This has been done perhaps to nullify the judgment passed by Cochin TM Bench in ACIT Vs. Chandragiri Construction Co (2012) 147 TTJ 249, wherein it has been held that retention money may not be treated as income in view of prudence.
 - Once a contract crosses 25% of the completion stage, the revenue in respect of such contract shall be recognized. I
 - Losses incurred on a contract allowed proportion to stage of completion – Future or anticipated loss not allowable
 - Before reversal of revenue already recognized, the sum to be written off in books.

- Contract costs relating to future activity shall be recognized as an asset and if such costs are not realizable, then to claim in subsequent years.
- Pre-construction income like interest, capital gains etc. shall not be reduced from cost of construction

Finally – PCM or CCM

To conclude, real estate contractors are to follow Percentage Completion Method (PCM) as per AS – 7 revised. Real estate developers may follow PCM or CCM Method. However, once a method is adopted in accounts, the same should ideally be adopted for computation purposes.

ISSUE 2 : When transfer takes place as per I.T.Act

An issue always debated is in case of joint development agreements, when the transfer takes place- on signing of JDA, or on execution of power of attorney, or on receipt of approval from municipalities, or on payments, or on Possession – partial or complete, or on registry.

Section 2(47)(v) introduced w.e.f 01-04-1988 lays down – ‘transfer’, *in relation to a capital asset, includes “any transaction involving allowing of, the possession of, any immoveable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of Transfer of Property Act.”*

Thus, it is important to refer to Section 53A of Transfer or Property Act. The important ingredients of transfer as per the said Act are

- Contract is to transfer for consideration - any immoveable property
- Contract is in writing signed by him or on his behalf
- There should not be any uncertainty.
- Transferee has in part performance of contract has taken possession or part possession of property or is already in possession and continues to do
- Transferee has performed or willing to perform his part of the contract i.e. he has paid or ready to pay the consideration
- Then - *Notwithstanding that the contract, registered or not ,or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed by the law for the time being in force-the transferor shall be debarred from enforcing against the transferee any right in respect of property, other than the right specifically provided by the terms of contract*

Thus, the purpose of making reference to Section 53A of Transfer of Property Act in the definition of transfer in s. 2(47) of I.T.Act was to plug the loophole as it was generally

argued on behalf of assessee that no transfer took place till execution of conveyance deed. Thus, the ultimate purpose was to avoid deferment of tax.

Before discussing further, it is relevant to give extracts of some judgments to have more clarity on the issue.

Champion Construction Company 5 ITD 495 (Mumbai ITAT)

*We hold that it is not a correct proposition to say that profits of the assessee from a singly venture/project in the nature of trade cannot be ascertained until the venture/project has come to an end. Under the Act each year is a self-contained unit and unless it is impossible to compute the profits or losses of each year reasonably if necessary by estimating the value of the liabilities to be incurred, valuing the work-in-progress, stock-in-trade, etc., the profits should be computed year-wise and taxed. **The acceptance of proposition put forward by assessee would amount to giving a licence to put off his tax liabilities for a unlimited period by seeing to it that the venture/project never comes to an end in the sense something or the other always remains to be done.** That will be a very unsatisfactory state of affairs. Moreover, when the entire cost/expenditure to the assessee is recouped and/or major portion of the venture/project is complete, there is really no justification in not taxing the income from project which quite often may represent excess of receipts over expenditure unless there is a risk/chances of the assessee's suffering heavy liabilities, subsequently, for some reasons or the other.*

Bhagyanagar Constructions Private Limited vs. ITO 46 ITD 236 (Hyd)

*We have heard both the parties at length. The issue for adjudication before us is to see whether in a contract work the profit accrues from year to year or it accrues only after the completion of the contract. In this regard, we have taken assistance of certain accounting methods of long-term contracts and have perused certain books like Batliboi's Advanced Accounting, to arrive at the conclusion. After due consideration of all the facts of the case, we are to the view that the profit in a long-term contract should be taxed on year to year basis. **It is a dangerous proposition to recognise, that the profit accrues only after the completion of a contract. Such a proposition is liable to be abused by dishonest tax-payers.** We have also gone through certain judicial authorities to which we will advert later, and find that it is a judicially recognised proposition that in the case of a contract, in order to ascertain the income, one need not wait till the contract is completed and **that it is open to the Revenue to estimate the profit on the basis of receipts in each year of construction, although the contract is not complete. It is therefore, not necessary for the Assessing Officer to wait till the completion of the contract to tax the business profit in the case of an assessee.***

Chaturbhuj Dwarkadas Kapadia vs. CIT 260 ITR 491 (Mum)

This is a landmark judgment, and it is relevant to reproduce some facts of this case:

Facts:

- The assessee is an individual. He had 44/192 undivided share in an immovable property at Gamdevi in Greater Bombay.
- By agreement dated 18-8-1994 the assessee agreed to sell to Floreat his share of immovable property for total consideration of Rs. 1,85,63,220/- with a right to the said Floreat to develop the property in accordance with rule and regulation framed by concerned authorities.
- Under Clause 8 of the agreement, the assessee agreed to execute a limited Power of Attorney, authorising floreat to deal with the property and also obtain permissions and approvals from Urban Land Ceiling Authority, Bombay Municipal Corporation and CRZ Authorities.
- Under clause 9 of the agreement it was, *inter alia*, provided that on Floreat obtaining all necessary permissions and approvals and upon receipt of NOC under Chapter XX-C of I.T.Act, the assessee shall grant an irrevocable licence to enter upon the assessee's share of the property.
- Under clause 11 of the agreement, it was provided that after Floreat was given an irrevocable licence to enter upon assessee's share of the property and after Floreat having obtained all necessary approvals, Floreat was entitled to demolish building Nos. 1 to 3 and building No. 10 and any other buildings on the property, subject to Floreat settling the claims of the tenants.
- Under clause 14 of the agreement, the assessee was entitled to receive proportionate rent till the payment of the last instalment and till that time, the assessee was bound to pay all outgoings.
- Under clause 20 of the agreement it was agreed that the sale shall be completed by execution of conveyance.
- During the financial year relevant to the assessment year 1996-97, Floreat obtained two permissions out of several other permissions. Similarly, by 31-3-1996, Floreat had paid almost entire sale price.
- However, BMC issued a commence certificate permitting construction of building upto plinth level only. In the meantime, plan came to be amended and ultimately the power of attorney was executed on 12-3-1999

Issue

- Whether the liability of the assessee for capital gains accrued to the assessee during assessment year 1996-97 or whether the assessee was liable to pay capital gains tax during the assessment year 1999-2000.

Arguments for Assessee

- Final approval not received
- Power of attorney date
- Full payment not received
- Agreement date
- Full possession not received
- Transfer in AY 2009-10
- Transfer only when entire consideration money received, only then the developer can demand transfer of title to land
- ‘Retained possession’ only when entire consideration recd
- Initial possession only permissive and liable to be cancelled

Arguments for the department

- Most of the permissions and payments were made during the year
- If one reads the agreement as a whole, then the implication..
- Collaboration agreement says that the agreement is non recoverable
- Date of execution is the date of supplementary agreement

Held

- Agreement date relevant
- Substantial payments or approvals irrelevant
- Power of attorney relevant
- Absolute and complete possession not relevant
- Contract as a whole to be seen
- “has performed or is willing to perform”-Scope
 - Willingness to perform in the context of Section 53A has to be absolute and unconditional.
 - If willingness is studded with a condition, it is in fact no more than an offer and cannot be termed as willingness.
 - “Willingness to perform” for purposes of S.53A is unconditional willingness on part of vendee to perform his obligations.
 - So if vendee does not perform or is not willing to perform his obligations, S.53A does not come into operation and as the result, transaction in question cannot fall within the scope of a deemed transfer u/s 2(47)(v) of the Act.

Advance Ruling in the case of Jasbir Singh Sarkaria 164 Taxman 108 (AAR- New Delhi)

This is another landmark ruling and again it is relevant to reproduce facts of the case to have clarity.

Facts

- The applicant , a citizen of USA, is the co-owner of agricultural land of an extent of 27.7 acres. The other co-owners are his brother and sister.

- The applicant is entitled to 4/9th share therein.
- The applicant and other co-owners having decided to develop the land by constructing a residential complex thereon through a 'developer' entered into a 'Collaboration agreement' on 8-6-2005 with M/s. Santur Developers Pvt. Ltd., New Delhi.
- According to terms of the agreement, the developer should obtain the 'Letter of Intent' not later than 8-3-2006 from the concerned Government department and obtain other permissions and sanctions for developing the land at its own risk and cost. In case of failure to do so, the agreement shall stand terminated.
- The developer will have 84 per cent share of the entire built up area and the proportionate land area whereas the owners' share will be 16 per cent.
- The consideration for the agreement is the portion of the built up area to be handed over to the owner free of cost.
- Under clause 18 of the agreement, it was clarified that the ownership would remain exclusively with the owners till it vests with both the parties as per their respective shares on the completion of the project.
- The other clauses and the steps contemplated in the agreement are following:
 - Payment of earnest money of Rs.1 crore at the time of entering into agreement.
 - Execution of Special Power of Attorney in favour of developer to enable it to deal with the statutory authorities etc.
 - On fulfilment of the requirements laid down in the 'Letter of Intent', owners will have to execute irrevocable general Power of Attorney in favour of the developer.
 - After filing application for change of land use (licence), the developer shall take steps to earmark the built up area of the owners in accordance with the tentative building plan and both the parties are entitled to lease out or sell the area falling to their respective shares as per the agreed allocation and to receive payments. [vide clause 26]
 - The owners, on completion of the construction of their built up area, shall grant power in favour of the developer to enable it to transfer rights, title and interest to the extent of its share in favour of buyers of the units.
 - Subject to the fulfilment of the obligations enjoined upon the developer, the owners shall not interfere with the execution of the development and construction work.
- Three months later, an agreement styled as 'Supplementary Agreement' was entered into on 15-9-2005 between the applicant and other co-owners on the one hand and M/s. Santur Developers Pvt. Ltd. on the other to sell the 16 per cent share of the

owners in the built up area to the developer or its nominee for a consideration of Rs. 42 crore.

- Apart from Rs. 2 crores which the owners have received under the collaboration agreement, the balance sum of Rs. 40 crores is payable by the developer to the owners in six instalments starting from 8-3-2006. The entire consideration should be paid within 27 months from the date of Collaboration agreement.
- Under clause 10 it is provided that if the payment is not made within the maximum period of extension, the owners shall be at liberty to terminate the collaboration agreement by giving 30 days' notice and thereupon it is incumbent on the developer to forthwith cease the development activity on the land and remove itself and its agents therefrom.
- On receipt of all payments within the prescribed or extended time, owners shall have to transfer all rights, title and interest in and over owners' developed share along with proportionate land & basement underneath by executing requisite documents and also grant powers to developers enabling them to transfer rights and possession and to execute sale deeds etc. in respect of developer's 84% share together with proportionate land & basement underneath.
- The Supplementary Agreement has substantially altered legal relationship and rights and obligations of the parties. It is an assorted type of arrangement under which the developer builds on the land of the owners and ultimately, in consideration of payment of stipulated price to owners, the developer requires the owner to part with his title in favour of the developer or his nominees.
- The GPA executed earlier in favour of the developer will become inoperative after the title gets transferred to the developer

Issue

- The year of chargeability of income attributable to capital gains

Held:

- Agreement date may not be relevant, contract as a whole to be seen
- Payment date not relevant
- Irrevocable GPA date relevant
- Right to obtain possession is important, and not actual possession date

Contrast between two judgments

We find that there is difference in the decision in Chaturbhuj Dwarkadas case vis-à-vis Jasbir Singh case. In the former case, the date of joint development agreement was not treated as date of transfer while in the later case the date of joint development agreement was treated as date of transfer. It thus becomes very relevant to refer to various clauses and understanding the

agreement as a whole to conclude when the transfer took place. Some more judgments which can offer clarity are

Vemanna Reddy Huf vs. ITO 114 TTJ 246 (Bangalore)

In this case, a Memorandum of agreement was entered into on 4th November, 1994, which inter-alia had a stipulation that the assessee has to have tenant vacated. Subsequently, a joint development agreement was entered into with the builder on 1st March, 1995 – some portion of would be constructed premises to be given in lieu of land. The agreement inter-alia stipulated that developer has to pay interest @21% on advance recd if possession of flat not given before 31.08.95. The assessee agreed to transfer undivided 66% share of property including the super built up area to developer. The developer agreed to construct and deliver to the assessee 34% of SBU Area in apartment building to be constructed for absolute use and benefit free from all encumbrances. On issue as to when transfer took place, it was held that the assessee had transferred 66% undivided share of the schedule property mentioned together with his share for the purpose of constructing a super built multi-storeyed building in the year 1995-96.

Atam Prakash & Sons (Huf) vs. ITO 26 ITD 477

In this case, Collaboration agreement signed for transfer of right in land in lieu of 6000 sft of covered area and garage space. Following issues arose : (a) Whether there is any capital asset which could be transferred; (b) Whether the transfer has taken place during the year under consideration; (c) Whether the absence of registered documents makes the transfer incomplete.

It was held that (a) Permission to builders to raise Multi storeyed building on land – implying licence only and not sale or lease (b) No sale property because there is no registered document. (c) No building has yet been raised on the land implying right not exercised (d) The license remains revocable till the licensee has started construction over the licensed property.