

आयकर अपीलीय अधिकरण “D” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.5075/Mum/2010

(निर्धारण वर्ष / Assessment Year : 2007-08)

The ACIT – 25(3), C-11, R. No. 308, Pratyaksh Kar Bhavan, Bandra-Kurla Complex, Bandra (East), Mumbai – 400 051.	<u>बनाम/</u> v.	M/s Dattani Development, 100, Shreeji Darshan, 1st Floor, S.V. Road, Kandivali (West), Mumbai – 400 067.
स्थायी लेखा सं./PAN : AABFD4969Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by :	Shri Mukesh Jain, DR
Assessee by :	Miss Aarti Sathe

सुनवाई की तारीख /Date of Hearing : 09-05-2016

घोषणा की तारीख /Date of Pronouncement : 27-07-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 5075/Mum/2010, is directed against the order dated 29-03-2010 passed by learned Commissioner of Income Tax (Appeals)- 35, Mumbai (hereinafter called “the CIT(A)”), for the assessment year 2007-08, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 29-12-2009 passed by the learned Assessing Officer (hereinafter called “the AO”) u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called “the Act”).

2. The grounds of appeal raised by the Revenue before Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) in the memo of appeal filed with the Tribunal read as under:-

“1. On the facts and in the circumstances of the case and in law, the Id.CIT(A) has erred in deciding that section 50C is not applicable for transfer of development rights and deleting the addition of Rs. 2,49,20,949/- under the head capital gains and accepting the income/loss offered under the head business

2. The Id. CIT(A) deleted the addition without appreciating the fact that development rights are part inalienable of any land or building.

3. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the A.O. be restored.”

3. The brief facts of the case are that assessee is partnership firm engaged in the business of builders and developers. During the course of assessment proceedings u/143(3) read with Section 143(2) of the Act, it was observed by the A.O. that the assessee has purchased and sold land and has incurred loss. The assessee purchased land for Rs. 26,35,000/- and on which the expenses for development of the same was claimed for Rs. 20,29,541/- and the conveyance deed for the said land was executed in the assessment year 2007-08. It was observed by the A.O. from the Balance Sheet as on 31st March, 2006, that the assessee is showing the advance for the land as under:-

INVESTMENT IN PROPERTIES

As per Schedule VI

Property at Borivali

Rita Walter Rebellow	650250.00
Catherine Fonseca	650250.00
Joyce Rebellow	370083.00
Rocky Rebellow	675250.00

Sidney Rebellow	145083.00
Smita Rebellow	145084.00

It was observed by the AO that the assessee had made investment in the land and for this, advances have been paid to the owners of the land and the assessee got the deed of confirmation in its name only vide registered agreement dated 9th January, 2007 in the assessment year 2007-08. The assessee was showing the investment as advance to the owners of the land. However, this investment was taken to P&L account in the assessment year 2007-08 when it is actually sold. Since the assessee has treated the land as investment in the earlier years, It was observed by the AO that the gain/loss should have been treated as capital gain/loss. However, the assessee treated the sale of such land as business transaction and took it into P&L account and there was no trace of conversion of capital asset into stock-in-trade as there was no income/loss shown under the head capital gain. The assessee was show caused as to why u/s 50C of the Act , the market value should not be taken for the purpose of gain on sale of land. In reply, it was submitted by the assessee that the land is held as stock-in-trade. The assessee relied on the decision of Hon'ble Madras High Court in the case of K.R. Palaniamy v. Union of India reported in (2009) 306 ITR 61 (Mad.). The assessee further submitted that the assessee is in the business of development of property of every description of land and other real estate property. The partnership firm is carrying on the above business since 1980 and has been assessed to tax as such and the Revenue has accepted the contentions of the assessee and whenever the assessee has sold land along with development rights, the same has been treated as business income. The assessee submitted that the properties mentioned in Schedule VI to the accounts were business assets though the nomenclature is used as 'investment in properties'. The assessee submitted that the property in question sold during the year ended 31st March 2007 was purchased in the year 1994 and the copies of the agreement

were submitted during the course of assessment proceedings. The assessee submitted that the property consisted of 10 plots out of which three plots were surrendered and remaining seven plots retained. The three plots were surrendered as they were not having marketable title and as such could not be sold/transferred freely. The intention of the assessee was to hold the asset as a current asset and not as investment. The assessee drew the attention of the Revenue to the clause 12(a) of the tax audit report wherein the assessee has shown method of valuation of closing stock employed which clearly indicates that the land was included therein and was valued at cost. The assessee submitted that mere classification or nomenclature does not change character of the asset which was held as business asset. Thus, it was submitted that development rights were held by the assessee as business assets and were consistently valued at cost and the profits arising there-from had been offered as business profits. It was submitted that in the past also the Revenue has accepted the income arising from sale of land and development rights which were assessed as business income. It was submitted that since the land was held as business asset, hence, the said land does not fall within the purview of capital asset as per section 2(14) of the Act. Once the asset is excluded from the definition of capital asset, the provisions of section 50C of the Act were not applicable was the submissions of the assessee. The assessee submitted that, without prejudice to the above, if the Revenue is treating the said property as capital asset, the assessee will challenge the valuation done by the Stamp Duty Authorities as the geographical disadvantage of the land had not been taken into account, hence, the assessee requested the AO to refer the matter to the Departmental Valuation Officer(DVO) for proper valuation. The assessee also submitted the clarificatory letter from the tax auditors in respect of clause 12(a) of the Tax Audit Report for the year ended 31-03-2007 whereby the auditors has certified vide clarification dated 22nd December,2009 which reads as under:-

“RAJU C. JOSHI & ASSOCIATES

Chartered Accountants

G/722, SUNDERDHAM, RAMBAUG LANE, OFF S. V. ROAD, POISAR,
BORIVALI (WEST), MUMBAI - 400 092.

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The Assistant Commissioner of Income Tax

Circle 25(3),
Bandra, Mumbai

Respected Sir,

Re: Tax Audit Report for the year ended March 31, 2007 in the case of
M/s Dattani Developments (PAN: AABFD4969Q)

With reference to the above we like to draw your kind attention to the reply against Clause 12(a) of the above referred Tax Audit Report for the year ended March 31, 2007, wherein it has been stated that the above referred assessee does not have any closing stock and in case of Joint Ventures the closing stock in trade of land is valued at cost.

We wish to clarify that the referred assessee are builders, developers and dealers in real estate and they did not have any closing stock of Finished Goods as on March 31, 2007, hence the remark against the said clause. The referred assessee has always held land for the purposes of development/sale and treated the same as business asset and not as capital asset and valued the same at cost. The above referred Tax Audit Report may be read subject to the correction/clarification as mentioned hereinabove.

We hope you will find the above information in order.

Thanking You,

Yours Faithfully,
FOR RAJU C. JOSHI & ASSOCIATES
CHARTERED ACCOUNTANTS
Sd/-
RAJU C. JOSHI
Place : MUMBAI
Date : December 22, 2009”

While in Tax Audit report dated 09-10-2007 in clause 12-(a), it was mentioned by the same tax-auditors earlier as under:-

(a) Method of valuation of closing stock employed in the previous year.	The assessee does not have any stock. However, the assessee is a co-venturer in Dattani Development# 7 & partner in Dattani Foundation Main. The method of valuation of closing stock in trade followed by the joint venture is as under: 1. Work-in-progress: At cost plus 6% 2. Land: at cost
(b) Details of deviation, if any, from the method of valuation prescribed under section 145A, and the effect thereof on the profit or loss	No deviation.

The A.O. considered the reply of the assessee which was not acceptable to the AO whereby the A.O. observed that the assessee in its books of account had shown the advance paid to the owners of the property as investment only and not as stock-in-trade. The intention of the assessee whether the land is held as ‘investment’ or ‘stock-in-trade’ is reflected from books of accounts of

the assessee. The AO observed that the assessee has not converted investment into stock-in-trade as the assessee has not booked any capital gain on the fair market value u/s 45(2) of the Act. It was observed by the AO from the audit report of the assessee as on 31st March, 2007 in column 12(a) of part B, that there is no stock held with the assessee, the same is reproduced as under:-

“The assessee does not have any stock. However the assessee is a co-venturer in Dattani Development #7 & partner in Dattani Development Main. The method of valuation of closing stock in trade followed by Joint Venture is as under:-

1. Work in progress at cost plus 6%
2. Land at cost”

Thus as per the AO the contention of the assessee is not true as is evident from the audit report. The stock mentioned in the audit report is of joint venture undertaken by the assessee. The A.O. observed the following:-

“On perusal of the partnership deed of the firm, the following is observed:-

The business of partnership is and will be to undertake, execute and to purchase land and to construct the building or buildings thereon and carry on the contract works of construction of building structures, canals, irrigation, bridges, factories, workshop warehouse, industrial estate factory sheds and also the work of sites supervision of construction work on percentage basis etc.”

Thus it was observed by the AO that it was not mentioned in the partnership deed that the assessee was in the business of sale/purchase of land. The assessee is only purchasing land for construction to be undertaken and hence the assessee's submission was not correct as per the observations of the AO. The assessee has not carried out any developmental work as no IOD/CC was taken for the said land to develop any project on it whereas the IOD(Intimation of disapproval) and CC(Commencement Certificate) were the preliminary requirement for developing a project in Mumbai. Thus, no

development has been done to show that the assessee was in the business of developing the building on the land which is the business of the assessee and only legal expenses have been incurred with respect to this land acquired by the assessee and interest was paid. The assessee submitted a letter before the A.O. from their auditor stating as clarificatory letter on audit report which is as follows:-

“We wish to clarify that the referred assessee are builders, developers and dealers in real estate and they did not have closing stock of the finished good as on 31.03.07, hence the remark against the said clause. The referred assessee has always held land for the purpose of development/sale and treated the same as business asset and not as capital asset and valued the same at cost. The above referred tax audit report may be read subject to the correction/clarification as mentioned herein above.”

The A.O. observed from the above statement of the auditors that the audit is an statutory audit and the audit report has a legal sanctity , and hence a post dated clarification/correction by the chartered accountant which has a potential to give the opposite interpretation to what was contained originally in tax-audit report cannot be accepted. The auditors clarification was rejected by the A.O. as the column 12(a) in audit report refers to the method of valuation of the closing stock irrespective of whether it is land or finished goods. It was also observed by the AO that there is a legal mechanism for converting capital asset into stock-in-trade as provided u/s 45(2) of the Act and a mere clarification cannot be accepted to convert the purported capital asset in to stock in trade. The assessee's reliance on the decision of Hon'ble High Court of Madras High Court is also distinguishable whereby the Hon'ble Court held that as per the scheme of the Act, the capital and trading asset are different and in the instant case the assessee had sold the land

which was never kept as stock-in-trade and as such it is a capital asset and hence does not support the contention of the assessee. The assessee's request for referring the matter to the DVO was also rejected by the A.O. as the request was made at the fag-end of the assessment proceedings i.e. on 23rd December, 2009 whereas the assessment proceedings u/s 143(3) read with Section 143(2) were getting time barred on 31st December, 2009 and proper valuation could not be done in such a short period of time. Thus, it was observed by the A.O. that the land which was sold during the year was a capital asset and the tax thereon should be computed u/s 50C of the Act and the gain thereon shall be short term capital gain since the deed of confirmation was executed in the assessment year 2007-08 itself and the following computations as per section 50C of the Act was made by the AO vide assessment order dated 29-12-2009 passed by the AO u/s 143(3) of the Act, which are as under:-

Name of buyer	Price at which sold (Rs.)	Value as per valuation authority (Rs.)	Difference amount (Rs.)
Rushi Construction	30,00,000	1,84,13,500	1,54,13,500
Nitesh Enterprises	10,00,000	50,38,000	40,38,000
Kiran Patel Education Trust	18,00,000	1,16,55,000	98,55,000
		Total (difference)	2,93,06,500

4. Aggrieved by the assessment order dated 29-12-2009 passed by the A.O. u/s 143(3) of the Act, the assessee filed its first appeal before the learned CIT(A).

5. Before the learned CIT(A) , the assessee submitted that the assessee transferred the development rights for a consideration of Rs. 58 lacs to the following three parties:-

- | | | |
|----|-------------------------|-----------------|
| 1. | M/s Rushi Constructions | Rs. 30,00,000/- |
| 2. | M/s Nitish Enterprises | Rs. 10,00,000/- |

3.	M/s Kiran Education Trust	<u>Rs. 18,00,000/-</u>
	Total	Rs. 58,00,000/-
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It was submitted that the amount of income was offered for taxation under the head income from business after deducting the cost of property and development expenses and the A.O. erred in applying section 50C of the Act as the assessee had always admitted the income in respect of properties shown under the head 'investment in properties' in the balance sheet in the past as the income from business and the same was not disputed by the A.O. in the assessment order. The assessee argued that as per the principle of consistency, the A.O. ought to have assessed the income only under the head business and not under the head capital gains. It was submitted that the assessee purchased the property for the purpose of development and as per sale agreement dated 15th August, 1994, the assessee was authorised to sell the flats, shops, garage etc. which might be constructed on the said properties which proved that the land was purchased only for business purpose. It was submitted that the assessee agreed to purchase the land which was having defective title and the property was occupied with tenants and assessee did not obtain vacant possession of the land when it entered into sale agreement in year 1994. It was submitted that the seller had already entered into sale agreement with M/s Sweet Home and the assessee purchased the property which could not have been for investment purpose and since the assessee is in the development, this property was purchased even though the title of the land was not clear and approach road was also not there. The assessee was so confident of removing all the defects and purchased the property which shows that the intention of the assessee was to use the property for business purpose. It was submitted that merely because the advances paid to the owners were shown under the head 'investment in property', the A.O. applied section 50C of the Act whereas in respect of other properties shown under the head 'investment' the assessee admitted business income. It was submitted that the intention of the assessee is very clear from

the sale agreement and it is not to be seen from the balance sheet in which the same is shown as an asset and the mere nomenclature used in the balance sheet would not alter the nature of property and the same is to be gathered from the purchase agreement dated 15th August, 1994 and keeping in view the principle of consistency, the profit/loss is to be assessed only under the head income from business. Without prejudice, the assessee contended that the assessee entered into only development agreement on 17th February, 2007 based on which the A.O. applied provisions of section 50C of the Act ignoring the fact that it was not an absolute sale deed. It was further contended by the assessee that the assessee signed the development agreement only as a confirming party as the assessee had entered into agreement dated 15th August, 1994 for purchase of land from the owners. It was submitted that section 50C of the Act is applicable for sale of land or building whereas in the present case assessee entered into development agreement, therefore, section 50C of the Act is not applicable. To support its contentions, the assessee relied upon the decision of ITAT, Mumbai Tribunal in the case of Smt. Kishori Sharad Gaitonde in ITA No. 1561/Mum/2009 for the assessment year 2005-06 vide order dated 27th November, 2009 wherein it was held that section 50C of the Act is applicable only in respect of transfer of capital assets being land or building or both registered by sale deed and it is not applicable for transfer of tenancy rights, though the same is capital asset but not being capital asset i.e. land or building or both.

The learned CIT(A) considered the submission of the assessee and the order of the A.O. and observed that the assessee has entered into agreement dated 15th August, 1994 for purchase of land from Mr. Rebello and others for a total consideration of Rs. 7,50,000/- wherein the agreement was unregistered. The payments made to Mr. Rebello and others by the assessee were accounted in the balance sheet under the head 'Investment in properties'. The assessee has also registered the deed of confirmation in its name in respect of the property

mentioned in the agreement dated 15.8.94 on 9th January, 2007. Mr. Rebello and others in the capacity of land owners and the assessee as confirming party entered into development agreement dated 17th February, 2007 with the developer and received the consideration. The registered deed dated 17th February, 2007 is not an absolute sale deed but only development agreement and the purchaser obtained irrevocable power of attorney from Mr. Rebello and others. Although the amounts paid in respect of this property was shown under the head 'Investment in property', the assessee was admitting income under the head 'income from business' in respect of all other properties which were shown under the head as 'Investment in properties' including Manu Nivas and which was not disputed by the A.O.. It was observed from the agreement dated 15 August, 1994 that the property was not free from encumbrances and the seller had already agreed to sell the same land to M/s. Sweet Home and Mr. Rebello and others had executed power of attorney dated 29th December, 1979 in favour of M/s Sweet Home . The AO observed that the property was not in the possession and occupation of Mr. Rabello and others. There was no approach road . The learned CIT(A) observed that the above defects in the land is clear from the various clauses of agreement dated 15th August, 1994 which are reproduced as under:-

“(h) Sunder Shankar Thakur, Moreshwar Shankar Thakur, Raghunath Shankar Thakur and Laliya Heera Shoir claim to be the tenants (Kuls) of the said property.

(i)The Vendors have informed the purchasers that under the revised development plan of 'R' ward sanctioned by the State Government in the year 1993, the portion of the property is reserved for public purpose of garden as shown washed in green on the plan annexed thereto , for secondary school as shown washed in red on the plan annexed hereto, for the purpose of housing for dishoused as shown washed in orange on the plan annexed hereto, for junction of D.P.Road and 44 wide D.P.Road as shown in burnt sienna colour on the plan annexed hereto, rest of the said property can be used for the purpose of residence.

(l) The vendors have learnt that the said Rocky Anthony Rebello and the said Stanley Rebellow have by an agreement dated 28th December, 1979 agreed to sell the entire property to M/s Sweet Home, a partnership concern consisting of Smt. Savita K Shah and Shri Ramji H.C. Shah having their office at 7/8, Nilkanth Roshan Nagar, Chandavarkar Lane, Borivali(West), Bombay 400092 , at or for the consideration and on the terms and conditions recorded therein though they were not the absolute owners and each one has only 1/4th undivided share, right, title interest in said property and purported to put the said Sweet Home in possession thereof and the said Sweet Home has put up its Board and Security Guard on the said property.

(o) In the said agreement it is provided that the vendors will hand over the original title deeds etc. to the Advocates for the said Sweet Home. However, the title deeds are not handed over to the Advocates for the said Sweet Home;

(p) The said Rocky Rebello and the said Stanley have also executed a Power of Attorney dated 29th December, 1979. The vendors will terminate the same;

(q) The vendors have represented to the purchasers that save and except as provided herein tile said agreement is not acted upon and the same was abandoned by the said Rocky Rebello and the said Stanley Joseph Rebello and the Sweet Home and there is no communication or correspondence of any nature whatsoever from the said M/s Sweet Home;

3. The vendor has informed the purchasers as follows:-

(a) The vendors and their three co-owners viz. said Rocky Rebello, Catherin Leslie Fonseca and Rita Waiter Rebello, are not in possession and occupation of the said property;

(n) That there is no proper right of way and access available to the said property from the public road. The purchasers shall at their own costs and expenses obtain necessary right of way and access to the said property."

It was observed by the learned CIT(A) from the agreement that the assessee agreed to purchase the land for the purpose of constructing flats, shops,

garage etc. as per clause 7 of the agreement. As per clause 16 of the agreement, the assessee was entitled to put up and/ or erect sign boards upon the property as also to issue advertisements for announcing sale of flats, tenements, premises, shops , open plots on ownership basis. Further, as per clause 17 of the agreement, the assessee was to deal with and settle the claims of the said tenants/Kuls and the venders shall not be responsible for the same. Thus, it was observed by the learned CIT(A) from the various clauses of the agreement that the land was purchased only for the purpose of constructing flats/shops, garage etc. and not with an intention to hold it as an investment. The learned CIT(A) observed that the intention of the assessee regarding the head of income in which profit is assessable is to be gathered from various clauses of the agreement and not based on the nomenclature used in the balance sheet and although the assessee had shown the expenses incurred only under the head investment in properties in the balance sheet but this alone will not decide the nature of asset as to whether it is business or investment. The income of the assessee has been assessed to tax under the head business in the earlier years, which was not disputed by the A.O. In the assessee's case, the profit and loss has consistently been assessed under the head business and there was no reason to change the same in this assessment year. The ld. CIT(A) observed that the contention of the A.O. is in-correct that the purchase of land was not mentioned in the partnership deed as it was specifically mentioned that the business of the partnership was to purchase land and construction of building thereon. Further the contention of the A.O. that assessee did not convert the investment as stock-in-trade whereas as per the audit report there was no stock with the assessee were also not correct as the assessee has consistently been admitting that the profit or loss in respect of the properties shown under the head investment in the balance sheet under the head business. The ld. CIT(A) relied on the decision of the Tribunal in the case of Janak S. Rangwalla v. ACIT, 11 SOT 627 and the decision of Hon'ble

Supreme Court in the case of Radhasoami Satsang v. CIT, [1992] 193 ITR 321 holding that though the principle of res judicata does not apply to the income tax proceedings as each year is an independent year of the assessment and to maintain the consistency the same view should be adopted for the subsequent years. Thus there was no justification to bring to the tax the aforesaid business income under the head capital gains during this year. It was also observed that the assessee has entered into agreement for purchase of land on 15th August, 1994 though there were defects in the property and obtained the deed of confirmation registered on 9th January, 2007 and transferred the development right as a confirming party on 17th February, 2007. The development agreement cannot be construed as sale deed and section 50C of the Act is applicable only in respect of sale deed in respect of land or building or both. The assessee had relied on the decision of the Tribunal in the case of Smt. Kishori Sharad Gaitonde in ITA No. 1561/Mum/2009 for the assessment year 2005-06 vide order dated 27th November, 2009 whereby the Tribunal held that section 50C of the Act is applicable only when the land or building or both are registered by sale deed and it would not be applicable for transfer of tenancy right even though it is a capital asset as the same is not land or building or both. Thus, the ld. CIT(A) held that Section 50C of the Act is not applicable to the facts of the case under consideration and the AO erred in taking the value adopted or assessed by the authority of a State Government / the stamp valuation for the purposes of capital gains on transfer of a tenancy rights or development rights as Section 50C of the Act is applicable to transfer of land or building or both. The learned CIT(A) directed the A.O. to delete the addition of Rs. 2,49,20,949/- made by the A.O. under the head capital gains and directed the AO to accept the income/loss offered by the assessee under the head business vide appellate orders of the learned CIT(A) dated 29-03-2010.

6. Aggrieved by the appellate order dated 29-03-2010 passed by the learned

CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. D.R. submitted that the assessee has transferred land during the previous year which was held as capital asset by the assessee since 1994 and the ld. CIT(A) erred in deciding that the section 50C of the Act is not applicable for transfer of development right and deleting the addition of Rs. 2,49,20,949/- made by the AO under the head capital gain and accepting the income offered by the assessee under the head income from business. The ld. D.R. contended that the A.O. rightly treated the transfer of land as capital asset u/s 2(14) of the Act and brought to tax gains arising there-from under the head income from capital gain by applying the provisions of Section 50C of the Act. The Ld. DR relied upon the assessment order of the AO. The ld. D.R. also contended that land held by the assessee was not a business asset but investment made by the assessee and rightly held by the AO as capital asset. It was shown consistently by the assessee in its books of accounts/Balance Sheet as 'Investment in properties' since 1994 when it was acquired. It was a transfer of development rights which is a capital asset. The gain arising there-from on transfer was rightly treated as capital gain by the AO and not business income of the assessee by the AO. The A.O. has rightly invoked the provisions of section 50C of the Act and adopted the value as determined by stamp duly valuation authorities as full value of consideration for the purposes of computing capital gains chargeable to tax. The ld. D.R. relied on the assessment order of the A.O. and submitted that there were defects in the title of the said land whereby the sellers have already entered into agreement to sell dated 28-12-1979 with Sweet Homes . It is stated in the agreement that the original title deeds will be handed over to the advocates for Sweet Homes but the same were not handed over by the sellers. The sellers have executed power of attorney dated 29-12-1979 in favour of Sweet Homes and the sellers are also not in possession and occupation of the property and this property does not have approach road and also there is no

right of way and access to the said property. The said land was also having tenants/kuls . He submitted that the assessee is in the business of purchase and sale of land and construction of building thereon but in the instant case no construction was ever done by the assessee since 1994 when an unregistered agreement was executed by Rabello's in favour of the assessee. The assessee did not had any intention to develop the land as it was suffering from several defects and encumbrances. The assessee made investment in the land carrying several defects with a view to earn gains with efflux of time as well by removal of defects in the title of the land. Section 50C of the Act was rightly been invoked by the A.O. . The assessee transferred the development right in the land for a consideration of Rs. 58 lacs while the stamp duty value for the transfer of development right is Rs. 3,51,06,500/- thus there is a difference of Rs.2,93,06,500/- between the sale consideration and the stamp duty valuation which is brought to tax by the Revenue under the head income from capital gains after providing for deductions on account of cost of acquisition/improvement etc.. It was submitted by learned DR that the ld. CIT(A) erred in accepting the gains on sale of land as offered by the assessee as business income. The ld. CIT(A) relied on the decision of the Tribunal in the case of Smt. Kishori Sharad Gaitonde for the assessment year 2005-06 dated 27th November, 2009 to come to the conclusion that Section 50C of the Act is not applicable in the case of transfer of development rights. It is submitted by learned DR that section 50C of the Act is applicable on transfer of developmental right. The A.O. has rightly applied the provisions of section 50C of the Act to the transfer of development rights executed by the assessee. The ld. DR relied on the decision of the ITAT, Mumbai in Arif Akhtar Hussain v. ITO reported in 45 SOT 257(Mum). It is submitted that the assessee vide agreement dated 17th February, 2007 entered into with Rushi Construction for transfer of development rights wherein the total consideration was Rs. 30 lacs and as against the sale consideration of Rs 30 lacs , the stamp duty value was Rs.1,84,13,500/- and hence the gain arising was chargeable to tax

under the head capital gains based on stamp duty valuation as per provisions of section 50C of the Act. It was submitted that there was part performance of the agreement with Rushi Construction took place whereby Rs.29.50 lacs was paid to the assessee by Rushi Construction in the relevant previous year while balance of Rs. 50000/- is still payable and the possession of the land was handed to Rushi Construction by the assessee in part performance of the contract as contemplated u/s 53A of the Transfer of Property Act,1882 read with Section 2(47) of the Act whereby transfer took place and hence capital gain is chargeable to tax in the impugned assessment year. The said agreement with Rushi Constructions is placed at paper book page 306-685. The ld. CIT(A) erred in holding it as a business income and holding that transfer of development rights is not covered under the provisions of Section 50C of the Act . The ld. D.R. submitted that assessee made an investment in land in 1994 with a view to make gains with efflux of time and by removal of defects in the said land. No approval has been obtained by the assessee for construction on this land in the form of IOD and CC from the authorities since 1994 when the interest in the said land was acquired by the assessee. The intention of the assessee since beginning was to hold the land as an investment since it acquired interest in the land in the year 1994. The assessee has not incurred any development charges on this property since 1994 when it acquired interest in the said land. The ld. D.R. relied on the assessment order of the A.O.

8. The ld. Counsel for the assessee submitted that assessee is a partnership firm. The assessee is in the business of development of properties. The development right has been transferred hence Section 50C of the Act cannot be invoked as there is no transfer of land or building or both relying on decision of ITAT, Mumbai in the case of Kishori Sharad Gaitonde (supra) . By an agreement dated 28th December, 1979 , the owners agreed to sell the entire property to M/s Sweet Home, a partnership concern. The power

of attorney was also executed in favour of Sweet Homes by the owners on 29-12-1979. The owners did not had the possession nor was having the occupation of the property when the assessee acquired interest in the said land. There were tenants/Kul in the property. The title of the property had several encumbrances and defects and hence the assessee who acquired interest in the land vide agreement dated 15-08-1994 was not owner of the said land. The ld. Counsel for the assessee drew our attention to the copy of purchase agreement dated 15th August, 1994 with the owners which is placed at paper book page No. 1 to 94. The ld. Counsel submitted that there is an agreement with Kiran Patel Education Trust entered into on 19th January, 1997 by the assessee, copy of which is placed at paper book page No. 95 to 117 whereby the development right has been sold/ transferred to Kiran Patel Education Trust by the assessee and the consideration was received. The said land was earlier shown as investment in the books of account since acquisition in 1994 but the gain arising from sale of land to Kiran Patel Education trust was charged to tax as business income. Although, the business of the assessee is development of land while the land was shown as investment in its books of accounts/Balance Sheet. The assessee has placed copy of assessment orders u/s 143(3) of the Act for the assessment years 1993-94, 1995-96, 2006-07 which are placed in the file, whereby the ld. Counsel showed that the assessee is regularly assessed to tax under the head income from business by the Revenue in the assessments framed u/s 143(3) of the Act and the assessee's business is of builders and developers. The assessee has placed copy of registered irrevocable General Power of Attorney dated 21-06-2005 vide paper book page 118 to 126 given by Rebello Family in favour of Mr. Manish A. Dattani with respect to this land. It is also submitted that from the tax audit report clearly stated that assessee is valuing the land at cost. The assessee is holding the land for the purposes of development and sale and not as capital asset and the same has been valued at cost. The assessee also drew our attention to the partnership deed clause No. 3 which

is placed at paper book page 810 whereby it is written in the partnership deed that the business of the partnership is and will be that of investors and realtors and to undertake, execute and to purchase lands and construct building or buildings thereon and carry on the contract works or constructions of building, structure, canals, irrigation, bridges, factories, workshop, warehouses, industrial estates, factory sheds and also the work of site supervision of construction works on percentage basis etc., selling flats, shops, garages, office and other tenements or building and/or any part thereof on ownership or other basis or such other business or business as the partners may from time to time decide. Thus, the learned counsel for the assessee submitted that the assessee is engaged business of development of land and construction of building and the said land cannot be treated as capital asset. The ld. Counsel has also drew our attention to the sale deed of development rights and conveyance deed which was registered in favour of the Rushi Constructions, which are placed at paper book page 306 to 710 for transfer of the interest in land and submitted that section 50C of the Act is not applicable to the assessee as the assessee has not transferred land or building or both. The ld. Counsel for the assessee submitted that detailed written submissions were submitted and the same may be considered whereby it is submitted that assessee is not the owner of the property who acquired the development right and the learned CIT(A) has rightly brought to tax income arising from transfer of development rights as business income. The learned counsel for the assessee relied upon the orders of the learned CIT(A). The learned counsel for the assessee relied upon the following decisions:-

1. ITA No. 2519/Ahd/2009 for A.Y. 2006-07 order dated 13.4.2012 in the case of ITO v. Shri Yasin Moosa Godil
2. ITA No. 1561/M/09 for A.Y. 2005-06 order dated 27.11.2009 in the case of Smt. Kishori Sharad Gaitonde v. ITO

3. ITA No. 1459/Kol/2011 for A.Y. 2008-09 order dated 29.2.2012 in the case of DCIT v. Tejinder Singh.
4. In the case of Atul G. Puranik v. ITO in ITA No. 3051/Mum/2010 for A.Y. 2006-07 order dated 13.5.2011 (2011) 58 DTR (Mumbai) (Trib) 208.

Thus, it is submitted that the assessee is engaged in the business of builders and developers. The assessee is not the owner of the land. The assessee has sold the development right as part of its business and income is to be assessed as business income and provisions of Section 50C of the Act has no application. The learned counsel for the assessee has also submitted written submissions to distinguish the case laws relied upon by the Revenue which are duly considered by us.

9. In the rejoinder, the ld. D.R. submitted that the assessee is the owner of the land and the gains are to be charged as capital gain. The ld. D.R. also relied upon the following case laws in support of his contention:-

1. In the case of Chheda Housing Development v. Bibijan Shaikh Farid and Others (Bombay High Court) 2007 (3) MhLj 402.
2. In the case of Arif Akhtar Hussain v. ITO, 45 SOT 257 (ITAT, Mumbai)
3. In the case of Chiranjeev Lal Khanna v. ITO in ITA No. 6170/Mum/2008 (ITAT, Mumbai).
4. In the case of Arlette Rodrigues v. ITO in ITA No. 343/Mum/2010 (ITAT, Mumbai)
5. In the case of ACIT v. Manubhai Sheth Larger (HUF) in ITA No. 5775/Mum/2008 (ITAT, Mumbai) and
6. In the case of Shavo Norgren (P) Ltd. v. DCIT, 33 taxmann.com 491 (ITAT, Mumbai)

10. We have considered the rival contentions and also perused the material placed on record and also gone through the case laws cited by both the sides. We have observed that the assessee is a partnership firm, copy of deed of partnership is placed at paper book page 806-828 filed with the Tribunal. The objects of partnership are mentioned in clause 3 of the partnership deed whereby the business of the partnership is that **of investors and realtors** and to undertake, execute and to purchase lands and construct building or buildings thereon and carry on the contract works or constructions of building, structure, canals, irrigation, bridges, factories, workshop, warehouses, industrial estates, factory sheds and also the work of site supervision of construction works on percentage basis etc., selling flats, shops, garages, office and other tenements or building and/or any part thereof on ownership or other basis or such other business or business as the partners may from time to time decide.

The assessee had purchased the title and interest in the land from the Rebello Family in 1994. The purchase agreement dated 15-08-1994 are placed in paper book page 1-94 filed with the Tribunal. The land so purchased by the assessee from the Rebello family in the year 1994 was subject to several encumbrances and defects which are also listed in the purchase agreement dated 15-08-1994. The said land was also occupied by tenants/Kuls who are having claims in the said land. The said Rebello family earlier sold the land in the year 1979 to 'Sweet Homes' and also handed over possession to them. The said Sweet Homes made part payments under the said agreement to sale executed by Rebello family in favour of 'Sweet Homes' in the year 1979. The Rebello family had also executed the power of attorney in 1979 in favour of 'Sweet Homes' with respect to this land. The said agreement to sale entered into between Rebello family and 'Sweet Homes' in the year 1979 was not yet been cancelled by the 'Sweet Homes'. There was also no approach road as well no right to way /access with respect to the afore-said land. It was also in the

new revised development plan of 'R' ward sanctioned by the State Government in the year 1993 whereby the portion of the property was reserved for public purposes of garden, secondary school, houses for dishoused , roads as well for residential purposes. The assessee had also not undertaken any development or construction of the building on the said land since it acquired interest and title in the land in the year 1994 till the date of sale by the assessee. No approval was even taken by the assessee from the Government for development of the said land or construction of building thereof since interest and title in the land was acquired by the assessee in the year 1994 till the date of sale by the assessee. The assessee was fully aware that the land is having several encumbrances/defects in its title at the time of its acquisition in the year 1994 itself which duly find mentioned in the purchase agreement dated 15-08-1994. The said land was carried by the assessee in its books of accounts/Balance Sheet as 'Investment in properties' since its acquisition in the year 1994 till the date of sale , and was never ever reflected as stock in trade in its books of accounts/Balance Sheet. The assessee did not spent any amount on the land development or construction of building thereon after its acquisition apart from spending on legal charges and payment of interest. The assessee sold development rights in the land for Rs 58 lacs during relevant previous year to three different parties as against stamp duty value adopted by the authorities of Rs.3.51 crores. In-fact on perusal of the development agreements read along with and in conjunction with the conveyance/confirmation deeds executed by the assessee in favour of the buyers, it is clear that the assessee in-fact sold the land with all attached rights of ownership to the buyers for Rs.58 lacs with further rights to sell, construct etc. in favour of the buyers. These development agreements along with conveyance deed/confirmation deeds entered into by the assessee with the three parties are placed in paper book page 95-787 . Thus, if the facts and circumstances are seen in totality , it is crystal clear that the assessee made an investment in the year 1994 by acquiring interest in the land knowing fully

well that there are several encumbrances/defect in the land so acquired by the assessee from Rebello family and the assessee can gain profits by way of appreciation in the value of land with efflux of time as well by removing defects / encumbrances with which the land was then saddled with at the time of acquisition of title and interest in the land and also knowingly well that in the revised development plan of 'R' Ward sanctioned by the State Government, the portion of the land is reserved for secondary school and residential purposes . The assessee was fully aware at the time of acquisition in the year 1994 itself that the development of land and construction of building thereon in near future is not possible in view of several encumbrances and defects in the title of the land with which the land was saddled with , but the assessee was fully aware that the assessee can earn profits from this investment in land by way of appreciation in the value of land with efflux of time as well with removal of defects and encumbrances with which land was saddled with keeping in view also that the development plan of 'R' ward was sanctioned by the State Government in the year 1993 whereby there was reservation earmarked for some portion of this land for secondary school and residential zone . Thus, we are of the considered view, the investment was made by the assessee in the year 1994 for acquiring this land from Rebello family as investment for long term basis by the assessee knowing fully well that the land is suffering from several encumbrances and defects in its title as set out above , with an objective to make long term gains on appreciation in value of land due to efflux of time and also by removing defects and encumbrances in the land. The assessee was also fully aware that there was no possibility of development and construction of building on the land in the immediate near future due to several encumbrances and defects in the title of the land with which the land was saddled with as set out above. The assessee therefore reflected the said land as 'investment in properties' in its books of accounts since the year 1994 till it was sold as intention was always to hold the land for a long period of time to earn gains by way of

appreciation in the value of the land. The assessee has also not demonstrated that there was any project conceived by the assessee to be undertaken on this land for construction or development nor any approvals were even applied for with the Government for development/construction on the said land despite the land being retained for almost 12-13 years by the assessee. Keeping in view the ratio of decisions cited by learned DR as detailed above and overall facts and circumstances of the case in totality, we also find that section 50C of the Act is clearly applicable even to the sale of development rights in the land as was held in the decisions relied upon by the learned DR as detailed above , more-so we have already held that in-fact the assessee has not only sold development rights in the land but the assessee sold the entire land with ownership rights in the land if the development agreement are read in conjunction with deed of confirmation / conveyance executed by the assessee which are placed in paper book filed with the Tribunal. Thus, the land which was sold during the previous year by the assessee, thus keeping in view our above discussions in the light of facts and circumstances of the case, was a capital asset within the provisions of Section 2(14) of the Act and the valuation of the land as per stamp duty valuation authorities as per section 50C of the Act was rightly adopted by the AO as full value of consideration but in our considered view the gains arisen to the assessee in the instant case thereon shall however be long term capital gains as the interest and title in the land has been acquired by the assessee in the year 1994 itself from Rebello family and the assessee shall also be entitled for benefit of cost inflation indexation while computing cost of acquisition and improvement thereon as per provisions of Section 48 of the Act . Thus, to the extent it was held by the AO that gains arising from the sale of the land in the instant case to be short term capital gains as confirmed/sustained by learned CIT(A) are reversed by us vide this order by holding that the gains arising from sale of this land are long term capital gains and not short term capital gains as held by authorities below as the interest and title in the land was acquired by the

assessee in the year 1994 itself and held by the assessee for more than thirty six months in accordance with provisions of Section 2(29A) read with Section 2(42A) of the Act . However, the assessee has contended during the assessment proceedings before the AO that if the A.O. is adopting the valuation as adopted by stamp duty authorities by applying provisions of Section 50C of the Act, the assessee in that case is challenging the valuation done by stamp duty authorities and requested the A.O. to refer the matter to DVO u/s 50C(2) of the Act for finding out the correct value of the land so sold by the assessee which in-fact is the mandate of Section 50C(2) of the Act , and in our considered view the assessee rightly exercised its right and invoked the provisions of Section 50C(2) of the Act to refer the matter to DVO albeit this plea was taken by the assessee for the first time on 23-12-2009 which was at the fag-end of the assessment proceedings u/s 143(3) read with Section 143(2) of the Act being getting time-barred on 31-12-2009 under the provisions of Section 153(1) of the Act. Hence, keeping in view the interest of justice and fair play, in our considered view this matter/issue needs to be set aside and restored to the file of the A.O. for de-novo determination of the issue on merits after referring the matter to DVO for valuation report and thereafter the AO shall complete the assessment de-novo on merits after considering the evidences/explanations submitted by the assessee in its defense , valuation report of DVO as well the value adopted by the stamp duty authorities to arrive at the full value of consideration to compute capital gains chargeable to tax under the head 'Income from capital gains' under Chapter IV-E of the Act. Needless to say that the A.O. shall provide proper and adequate opportunity of being heard to the assessee in accordance with the principles of natural justice in accordance with law. We order accordingly.

11. In the result, the appeal filed by the Revenue in ITA NO. 5075/Mum/2010 for the assessment year 2007-08 is allowed for statistical purposes.

Order pronounced in the open court on 27th July , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 27-07-2016. को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 27-07-2016

I

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "D" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai