REPORTABLE

* **THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 08.07.2008
% Judgment delivered on : 08.08.2008

\+ ITR Nos.250-251/1988

THE COMMISSIONER OF INCOME TAX, DELHI-VIII, NEW DELHI **..... Applicant**

-versus-

M/S. ATAM PRAKASH & SONS, NEW DELHI **..... Respondent**

Advocates who appeared in this case:

For the Applicant : Mr.Sanjeev Sabharwal
For the Respondent : None.

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. The Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT') by an order dated 13.4.1988 passed under Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') has

referred to this Court the following question of law arising in the case of two assessees Atam Prakash & Sons HUF (hereinafter referred to as 'the 1st assessee') and Om Prakash (hereinafter referred to as 'the 2nd assessee'):-

> "Whether on the facts and in the circumstances of the case the Tribunal was right in holding that there was no transfer of a capital asset within the meaning of Section 2(47) of the Income-Tax Act, 1961 and hence no capital gain has arisen to the assessee?"

2. In order to answer the aforesaid question it would be important to refer to certain undisputed facts. The same are as follows:-

3. On 9.10.1936 a perpetual deed was executed between the Secretary of State for India-in-Council representing the Government of India (i.e., the lessor) and one Shri Kanwar Narain Singh (i.e., the lessee) whereby, the said indenture demised in perpetutity, as and by way of lease, for a consideration and conditions contained in the said indenture as a lessee; rights, title and interest in land admeasuring 3851 sq. meters situate at block No. 205 in New Capital of Delhi presently known as Bungalow No. 22, Barakhamba Road, New Delhi.

4. By way of devolution, consequent upon partition and

inheritance in the family of the aforesaid lessee, the said plot of land alongwith a double storeyed bungalow constructed thereon including ancillary buildings comprising of servant quarters, garages and the like, vested in the 1st assessee being a 1/6th co-owner alongwith the other co-owners holding 5/6th undivided share in the said property situate at 22, Barakhamba Road, New Delhi (hereinafter referred to as the 'said property').

5. By virtue of a decree passed by this Hon'ble Court dated 25.5.73 the said property stood mutated in the records of the lessor in the name of seventeen (17) persons out of which the 1st assessee is a co-owner of 1/6th share while the other 16 persons including the 2nd assessee collectively owned 5/6th share in the said property.

6. On 24.6.77 an agreement for sale was executed between the 1st assessee and Skipper Sales Private Limited (hereinafter referred to as 'SSPL').

6.1. The broad terms of the said agreement for sale were that the 1st assessee had agreed to grant, convey and transfer by way of a conveyance his 1/6th share in the said property admeasuring 3851 sq. meters to SSPL for a consideration of Rs. 16 lacs. Thus if the said

agreement for sale dated 24.06.1977 was given effect to, it would have resulted in the 1st assessee's right, title and interest in the double storey bungalow constructed on the said land alongwith the underlying land, as also, in the ancillary buildings existing thereon and the fittings and fixtures affixed being transferred to SSPL.

6.2. The said agreement for sale also recorded that the 1st assessee had received, out of the said sum of Rs.16 lacs, a sum of Rs.1000/- as and by way of earnest money in cash and a further sum of Rs.3 lacs as part consideration by way of a cheque bearing No. NC 140601 dated 24.6.1977 drawn on Lakshmi Commercial Bank Limited, Connaught Circus, New Delhi.

6.3. The agreement further records that the remaining amount of Rs.12,99,000/- would be received by the 1st assessee from SSPL within 45 days of the intimation sent by 1st assessee by registered post to SSPL that the said property which had been agreed to be conveyed, has been permitted to be so conveyed alongwith the right, title and interest in the remaining property pertaining to the 5/6th co-owners by the authority under Land and Urban Ceiling Regulation Act, 1976, as also, the Income Tax Department.

6.4. As per the said agreement parties had agreed that a sum of

Rs.12,99,000/- will be paid to the 1st assessee by SSPL at the time of registration of the conveyance deed in the presence of the sub-Registrar, New Delhi by way of a bank draft payable at New Delhi.

7. It transpires that on 24.8.1981 the possession of the said property was handed over to SSPL.

8. On 6.10.1981 the 1st assessee executed two (2) agreements with SSPL. The first, being an agreement to sell dated (hereinafter referred to as the 'first agreement') and the second, being a collaboration agreement (hereinafter referred to as the 'collaboration agreement').

8.1. In the first agreement, the parties therein i.e., the 1st assessee and SSPL, recorded that on account of certain diverse circumstances and reasons, it had not been possible to execute the sale deed in pursuance to the earlier agreement for sale dated 24.06.1977 and hence, the agreement for sale executed on 24.06.1977 stood modified to the extent and according to the terms and conditions provided in the collaboration agreement for redevelopment and construction of a multi-storeyed building after demolition of the existing structure.

8.2. The agreement further recorded that on fulfillment of the

collaboration agreement, the 1st assessee shall be entitled to 6000 sq. feet of the built up area in addition to three (3) garages and a proportionate share of the open area in the said multi-storeyed commercial building.

8.3. It is further recorded in the first agreement that the remaining built up and unbuilt area in the proposed building shall fall within the entitlement of SSPL in accordance with a separate agreement with the remaining 5/6th owners of the said property.

8.4. The 1st assessee also agreed that the collaboration agreement shall be deemed to form an integral part of the agreement of sale dated 24.6.77.

8.5. The 1st assessee also agreed that he shall grant, convey and transfer 4000 sq. feet of the built up area alongwith two garages and a proportionate open area out of the total share of 6000 sq. ft. allocated to the 1st assessee in accordance with the collaboration agreement for a consolidated consideration of Rs.11 lacs.

8.6 Thus as per the first agreement, the 1st assessee would retain the balance 2000 sq.ft. of the built up area and one (1) garage. Out of the 2000 sq. ft. built up area, area equivalent to 1000 sq. ft. would be on the 2nd floor and the balance 1000 sq. ft on any of the seven floors of

the proposed building.

8.7. The first agreement also recorded that the 1st assessee had received a sum of Rs.7,50,000/- towards security in the following manner:-

i) Rs. 3,01,000.00 on 24.06.1977

ii) Rs.2,50,000.00 on 29.01.1979

iii) Rs.1,99,000.00 on 08.01.1981

8.8. Importantly, the first agreement also records that out of the said security deposit of Rs.7,50,000/-, a sum of Rs.6,50,000/- would be appropriated towards the consolidated consideration of Rs.11 lacs after the multi-storeyed commercial building has been duly constructed and the balance sum of Rs.1,00,000/- shall be refunded by the 1st assessee to SSPL in terms of the agreement at the time of handing over of possession of the area allocable to the 1st assessee. The first agreement also records that an amount of Rs.4,45,000/- has been received by the 1st assessee, as further advance.

8.9. It was further agreed that at the time of conveyance and/or transfer of area allocated to the 1st assessee the balance amount of Rs.5,000/- will be paid by SSPL to the 1st assessee.

8.10. It was also agreed by parties that immediately after the

construction of the building on the said property complete in all respects the area allocated to the 1st assessee in this agreement shall be conveyed and transferred by the 1st assessee to SSPL and/or to its nominees at the cost and expense of SSPL.

8.11. The first agreement was, however, made subject to any change as may be necessitated on account of permissions/approvals and sanctions of the municipal authority, Urban Land (Ceiling & Regulation) authorities etc. or by mutual consent of parties.

9. As referred to hereinabove, on 6.10.81 the 1st assessee also executed the collaboration agreement with SSPL. The collaboration agreement reflects the terms agreed to between the 1st assessee and SSPL in the first agreement. The salient terms and conditions as recorded in the collaboration agreement being important for the purposes of deciding the present matter are extracted hereinbelow:-

> "…… (i) THAT the subject matter of this Deed of Collaboration between the Owners and the Builders is the utilization of the bungalow property No.22, Barakhamba Road, new Delhi, for the purpose of erecting a multistoreyed commercial building on the said plot of land after demolishing the existing structures. The area of the said plot No.22, Barakhamba Road, New Delhi is 0.956 are (equal to 4627 sq. yards, equal to 3856 sq. metres) may the same, be little more or little less, and the said plot of land is bounded and butted in the East by bungalow plot No. 24, Barakhamba Road, New Delhi, in

the North by Service Lane and in the South by Barakhamba Road, New Delhi.

(ii) THAT the Agreement of Sale dated 24th June, 1977 stands altered, modified to the extent hereinafter provided.

(a) It is expressly understood between the party that the party of the First Part is equally the joint owner of the said venture, but the clear understanding that they do not owe any liability or assets other than the 6000 sq. ft. and three garages of the built up area, which has to be provided to the party of the First Part by the party of the Second Part, on the completion of the project.

(b) The possession of the property, which was henceto-before with the party of the First Part, has been handed over to the party of the Second Part on 24.8.81.

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(iv) THAT the Owner do hereby irrevocably vest in the Builders all the powers also all the authority of the Owner as may be necessary and requisite in the absolute discretion of the Builders for obtaining all permissions, all sanctions and approvals for the development, construction and completion of the proposed commercial building on the said plot of land.

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(ix) THAT notwithstanding what has been stated in the above paragraph No.(viii), the Owner shall always remain liable for any demand by the Income-tax and/or wealth-tax Departments of the Government of India, or for any other old/pending liability in respect of the said property relating to the share of any of the Owners.

(x) THAT a total sum of s.7,50,000/- (Rupees Seven lakhs and fifty thousand only) already paid by the Builders to the Owner, namely, Shri Atam Prakash Rs.3,01,000/- (Rupees three lakhs and one thousand only) by way of an advance under the Agreement of Sale dated 24th June, 1977 and again an additional advances paid on 29.1.79 and 8.1.81 by the Builders to the Owner, namely, Shri Atam Prakash Rs.2,50,000/- (Rupees two lakhs fifty thousand only) and Rs.1,99,000/- (Rupees one lakh ninety nine thousand only) subsequently which now on execution of this Agreement stands modified and shall be treated as security to ensure due performance of the obligations on the part of the Builders reserved in this Agreement.

(xi) THAT 6,000 sq.ft. (six thousand sq. ft. only) (1,000 sq.ft. on second floor and the rest of the area on any floor, from 1st to 7th floor) in the proposed multi-storeyed commercial building and three garages in the said commercial building with proportionate share of the open area shall be taken by the Owner, and the remaining areas built and unbuilt in the said proposed multi-storyed commercial building shall be taken by the Builders in accordance with their respective separate agreement with the Owners of the five-sixth share of property as a consideration for the liabilities undertaken by the Builders in terms thereof.

(xii) THAT unless exemption of the excess vacant land, if any, also the land that would be obtained after demolition of the existing building on the plot No.22, Barakhamba Road, New Delhi, from provisions of Chapter III of the Urban Land (Ceiling and Regulation) Act, 1976 is obtained with regard to the construction of the multi-storeyed commercial building on the said plot of land, the existing building shall not be demolished either by the Owners or by the Co-owners of the Owners or by the Builders.

(xiii) THAT as and when the said commercial building is ready and complete in all respects, the Builders

undertake to hand over the agreed area of the built and unbuilt areas of the said commercial building and the said open space to the Owners and/or to the nominee of the Owners, and the Owners undertake to take over the same within thirty days of the receipt of notice by pre-paid registered with acknowledgement due post from Builders to take over possession of the areas retainable by the Owners which possession if not taken over by the Owners within the time prescribed in the notice afore-mentioned, the Builders shall be at liberty to forfeit 25% of the area allocable to the Owners and dispose of the said forfeited 25% area in their absolute discretion and use the rest of the 75% area as then allocable to the Owners in terms of this Agreement in their absolute discretion and this area, that is, the 75% remaining area, shall be restorable to the Owners.

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(xvi) THAT the Owner is at liberty to transfer out of his respective allotted areas allocable to the Owners of such persons as the Owner deems fit. All initial and first transfers by the Owner will be without payment of transfer charges to the Builders. However, a transfer to a blood relation of the Owner will not be construed as transfer.

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(xx) THAT this Collaboration Agreement shall not ever be deemed to constitute any partnership between the Owner and the Builders nor shall the same be ever deemed to constitute the Builders as the Agent of the Owner as the Agent of the Builders except to the extent specifically recorded in any separate deeds. ……."

10. As regards the other assessee Mr.Om Prakash i.e., the 2nd assessee, identical agreements were entered into between him and

SSPL. The first agreement for sale which was executed between SSPL and the second assessee was dated 24.06.1977. Under this agreement to sell, the 2nd assessee was to receive a sum of Rs. 16 lacs in lieu of the 2nd assessee conveying and/or transferring his right, title and interest in the land alongwith the super structures built thereon in favour of SSPL. As in the case of the 1st assessee, SSPL and the 2nd assessee entered into a collaboration agreement dated 24.8.81 and an agreement to sell of even date dated 24.8.81. The share of the 2nd assessee in the collaboration agreement is mentioned as 1/6th .

10.1. By virtue of the collaboration agreement dated 24.8.81, the 2nd assessee was to receive 6000 sq. ft. of covered area and three (3) garages alongwith a proportionate open area in the proposed multi-storeyed commercial building. As referred to above, the 2nd assessee, as was in the case of the 1st assessee, also entered into an agreement to sell of even date dated 24.08.1981, by virtue of which, the 2nd assessee agreed to sell to SSPL, 4000 sq. ft. of covered area and two (2) garages alongwith a proportionate open area in the proposed multi-storeyed commercial building.

10.2. The 2nd assessee received similar sums of money as was in the case of the 1st assessee. Also, the stipulations contained in the two

agreements dated 24.08.1981 were identical to the ones contained in the two agreements dated 6.10.81 executed between the first assessee and SSPL.

11. Since the terms and conditions contained in the agreements entered into between SSPL and the two assessees are identical for the purpose of discussion, we propose to refer to clauses in the agreements entered between SSPL and the 1st assessee.

12. A reading of the agreements executed between the 1st assessee and SSPL would show that for various diverse reasons, the concerned parties had given up their rights under the agreement for sale dated 24.6.77 and substituted the said agreement of sale with two agreements both dated 06.10.1981.

12.1. The first being an agreement to sell and second being what the parties termed as the collaboration agreement.

12.2. The sum and substance of the said agreement was that in view of the fact that the parties were unable to give effect to the earlier agreement for sale dated 24.06.1977 whereby, the 1st assessee had agreed to convey for a lump-sum consideration of Rs.16 lacs, the right, title and interest in the said property to the extent of his 1/6th

undivided share, it was substituted by the two agreements whereby the concerned parties on a principal to principal basis, had agreed to enter into a joint venture to construct a multi-storeyed commercial building.

12.3. In the proposed multi-storeyed commercial building, the 1st assessee was to receive 6000 sq. ft. of built up area and proportionate rights in the open area alongwith three garages. Upon the proposed multi-storeyed commercial building being built by SSPL, the 1st assessee would then out of the said 6000 sq.ft. grant, convey and transfer 4000 sq.ft. and two garages to SSPL for a total consideration of Rs.11 lacs. This would ultimately leave, as and when the proposed building was constructed, the 1st assessee with 2000 sq.ft. and one garage in addition to a sum of Rs.11 lacs which was to be appropriated and paid in the manner discussed above.

13. In the background of the aforesaid facts and circumstances, the Assessing Officer by way of an assessment order dated 15.09.1984, in respect of the assessment year 1983-84 for the accounting period ending on 02.06.1982; assessed capital gains in the sum of Rs.8,87,001/- in regard to the transaction as reflected in the afore-mentioned agreement in regard to the said property. The 1st assessee aggrieved by the said order preferred an appeal to the Commissioner of

Income Tax Appeals (in short, CIT). The CIT by an order dated 16.2.1986 dismissed the appeal of the 1st assessee.

14. Aggrieved by the aforesaid order of the CIT, the 1st assessee preferred an appeal to the ITAT. By a common order dated 22.9.87 the ITAT allowed the appeals of both the assessees.

15. As stated hereinabove by virtue of a reference made under Section 256(1) of the Income Tax Act, the afore-mentioned question of law was referred to this Court.

16. Having perused the record and the documents and after hearing the submissions of the learned counsel for the revenue Mr.Sanjeev Sabharwal, we are of the view that the decision of the ITAT deserves to be upheld. In our view, no capital gains accrued to the assessees for the reasons given below.

17. Under Section 45 of the said Act an assessee is liable for capital gains, if any, provided profit or gain arises to him from the "transfer of a capital asset" effectuated in the previous year, by deeming such gains as income of the previous year in which the transfer took place. The relevant portion of Section 45(1) is extracted herein below:-

> " (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in section 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place."

The term "transfer" in turn has been defined in Section 2(47). The relevant portion 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 expression "capital asset" has been defined under Section 2(14) of the Act. The relevant portion reads as follows:-

> "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-
>
> (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;…….
>
> (ii) … … … … … … … …"

18. In the context of the aforesaid provisions of the Act and the terms and conditions of the 1st agreement dated 06.10.1981 and the Collaboration agreement dated 6.10.81, it is clear that capital gains will accrue to an assessee, only if, there is a transfer of a capital asset.

18.1. Thus, it is essential that an assessee shall be liable for tax in respect of any profit and/or gain arising on account of transfer of capital assets, under the head capital gains by deeming it as an income of the previous year, in which the transfer took place only if the following ingredients are present:

(i) that there is a capital asset which means property of any kind held by the assessee within the meaning of Section 2(14) of the Act and,

(ii) that there is a transfer of the capital asset by any mode or manner including transfer by way of sale, exchange or relinquishment of the asset or extinguishment of any rights therein.

19. In the light of the aforesaid provisions, let us analyse what the transaction as reflected in the aforementioned agreements entailed. The terms of the 1st agreement dated 06.10.1981 when read alongwith the collaboration agreement 06.10.1981 would, in sum and substance, establish that the parties had agreed to do the following:

(i) terminate their earlier agreement for sale dated 24.06.1977;

(ii) substitute the said agreement to sell dated 24.6.77 with a collaboration agreement and agreement to sell, whereby it

was agreed that in lieu of the assessee transferring his undivided share in the said property it would get in return, as consideration, 6000 sq.ft. and three garages alongwith proportionate open area in the proposed multi-storeyed building to be built by the SSPL, out of which 4000 sq. ft. alongwith two garages alongwith proportionate open area would be conveyed by the assessee to SSPL, in lieu of consideration in the sum of Rs.11 lacs, which was required to be appropriated and paid in the manner provided in the said agreements, and,

(iii) lastly, to be noted that the, collaboration agreement reflected only the first limb of the transaction whereby, 6000 sq.ft. and three garages alongwith the proportionate open area was required to be allocated to the 1st assessee in lieu of the assessee conveying his undivided share in the said property to SSPL. The reference to the second limb of the transaction, that is, the said proposed sale of 4000 sq. ft. and two garages alongwith with the proportionate open area out of the allocable area to the assessee finds mention only in the 1st agreement dated 06.10.1981.

20. It is, thus, evident that the transaction entered into between the parties envisaged :-

(i) first and foremost a joint venture between the 1st assessee and the SSPL whereby, a permissive right was extended in favour of SSPL to build as and when the existing superstructure was brought down i.e, demolished, but not before the necessary statutory approvals were received in that behalf and,

(ii) second, as and when, the proposed multi-storeyed commercial building was constructed, the assessee would be allocated 6000 sq. ft. out of the total built up area alongwith three (3) garages and proportionate open area, out of which, the 1st assessee would sell and/or convey 4000 sq.ft alongwith two (2) garages and proportionate open area to SSPL leaving the 1st assessee with 2000 sq.ft. and one garage alongwith proportionate open area in addition to a sum of Rs.11 lacs.

21. At this stage, it is to be noted from the record it is not known as to whether the proposed building was constructed in terms of the agreements referred to herein above. However, what is evident is that, the entire transaction entered into between the 1st assessee and SSPL pivoted on the proposed multi-storeyed commercial building

being constructed on the said property. As a matter of fact the agreement did not reach fruition.

22. In such a situation, the question which arises for our consideration is whether any right in the property i.e., capital asset got transferred to SSPL within the meaning of Section 45 read with Section 2(14) and Section 2 (47) of the said Act.

23. In this context the following facts are relevant:-

(i) the land in issue is a lease hold property owned by the Government of India;

(ii) for the 1st assessee to transfer his lease hold rights in the said land, sanction of the Government of India was necessary which eventually had not been granted;

(iii) the agreement to sell dated 24.6.77 did not reach fruition for a period of four years for diverse circumstances and reasons, whereupon parties entered into a collaboration agreement in furtherance of their object to construct a multi-storeyed building on the said property;

(iv) the parties were joint owners of the said venture, however, SSPL was to undertake the development of the said plot at

its own costs after obtaining requisite permissions and approvals;

(v) SSPL was given necessary authority for obtaining such statutory necessary permissions and approvals necessary for the said purpose;

(vi) the SSPL was given power to transfer portions of the building under contemplation both before and after the building was ready. Similarly, the assessee was also free to transfer the areas allocable to them;

(vii) on the record available before us the proposed superstructure did not get constructed and;

(viii) lastly, the collaboration agreement provided that it would not constitute a partnership agreement between the 1st assessee and the SSPL and also that it was subject to a *force majeure* clause.

24. In view of the above, what is clear is that the said property which comprises of the land and the existing super structure was neither transferred nor conveyed by the 1st assessee in favour of SSPL nor could it have been in view of the fact that admittedly, there is no registered sale / conveyance deed executed by the 1st assessee in favour

of the SSPL. The law in India recognize only a legal estate. Therefore, when an agreement for sale in respect of immovable property is entered into between the parties the legal estate remains with the seller, while it creates an equitable estate in the buyer. Similarly, in the instant case when the 1st assessee and the SSPL entered into an agreement for sale dated 24.06.1977, the legal estate in the said property remained with the 1st assessee while creating an equitable estate, in favour of the SSPL giving it a right to seek specific performance of the said agreements for sale.

24.1. As revealed, upon perusal of the recitals in the subsequent agreements entered into between the 1st assessee and the SSPL, for diverse reasons, the agreement for sale dated 24.06.1977 was given a go-by and was substituted by the two agreements dated 06.10.1981. There is thus, no difficulty in coming to a conclusion that in so far as the said property was concerned i.e., the land and the existing super structure, in the absence of a registered conveyance deed executed by the 1st assessee in favour of the SSPL, no right in property within the meaning of Section 45 of the Act got transferred in favour of the SSPL. In this regard, the judgment of the Supreme Court in the case of

***Nawab Sir Mir Usman Ali Khan v. CWE Hyderabad* : (1986)162 ITR 888** is apposite.

25. In the said case, the Supreme Court was called upon to determine, in the context of the provisions of Section 2(m) of the Wealth Tax Act, 1957, as to whether an immovable property in respect of which a conveyance deed had not been executed could be included in the assessee's net worth.

25.1. The assessee in the said case was the Nizam of Hyderabad who had received full consideration for certain immovable properties from the purchaser pursuant to which even though he had handed over possession to the purchaser, he had not executed any registered sale deed in favour of the purchaser.

25.2. In the background of these broad facts, the Supreme Court held that the asset belonged to the assessee in view of the fact that against the world at large the assessee was still the legal and real owner of the property in issue even though he had parted with possession.

25.3. In the instant case, it is important to note that before the ITAT - the Revenue conceded that in order to complete the transfer of the said property, a registered deed of conveyance was necessary and since no

such document had been executed, the said property cannot be said to have been transferred to SSPL.

25.4. The Revenue, faced with a similar difficulty took a stand before us, as was done before the ITAT, that Section 2(47) of the Act spoke of "extinguishment of any rights" in the property which according to revenue would amount to transfer of property within the meaning of the said provision. It was the contention of the revenue before us that the right to build on the said property by the 1st assessee got extinguished by virtue of the collaboration agreement dated 6.10.81 and agreement to sell dated 6.10.81. It was contended that since the assessee cannot raise any building on the said land, his right which is a capital asset within the meaning of Section 2 (14) had got extinguished and hence, there was transfer as contemplated under Section 2(47) of the Act.

26. As discussed above, what the collaboration agreement envisaged was that SSPL had bought for itself the permission to build a multi-storeyed building on the land leased out to the assessee. In view of the fact that there was firstly, no registered document and secondly no building in question had been built, the right granted to the

builders SSPL had not been exercised. SSPL had in a sense merely got a right to occupy the land to construct a building thereupon.

26.1. In our view, mere grant of a permissive right to build on the said plot of land would not amount to a transfer of capital asset. Furthermore, it was, as rightly held by the Tribunal, a permission given to SSPL to build a multi-storeyed building on the said land while all the rights of a lessee continued to vest with the assessee. It is clear upon reading of the aforementioned agreements, as also, found by the Tribunal that there is no extinguishment of the rights of the assessees as a perpetual lessee of the land. What the assessee intended by virtue of the collaboration agreement was to embark on a joint venture to build a multi-storey commercial building, the responsibility and the expense, to give effect to the same, was laid at the door step of SSPL. SSPL in turn was to recoup its expenses by retaining certain portion of the built up area of the proposed building and also allocate a definite area i.e. 6000 sq ft to the 1st assessee as a consideration for the said permission to build.

26.2 In these circumstances can it be said that by virtue of this arrangement, the 1st assessee extinguished his rights in the said property? The answer to our minds lies in the answer to the question as

to what would be the consequence of the collaboration agreement dated 06.10.1981 being breached by either party, or becoming incapable of performance due to supervening circumstances? Could it be said that the right of the 1st assessee to build a superstructure on his own had been extinguished. If the answer to the question is in the negative, which to our minds, it is, then there is no extinguishment of a right and hence, no transfer within the meaning of Section 2 (47) of the Act has taken place. The word extinguishment connotes 'annihilation' or end of a thing (See Black's Law Dictionary, Sixth Edition). To overcome this hurdle the learned counsel for the Revenue tried to demonstrate that there had been an 'extinguishment' of the right to build; as according to him, the usufruct of the leasehold right of the 1st assessee in the said property, had been transferred in favour of SSPL, if reference was had to the following aspects of the transaction entered into between the parties;

i) possession of the land had been given to SSPL on 24.08.1981, and;

ii) the entire consideration had been paid.

26.3. While it is true that possession of an immovable property is a relevant – indicia of creation of interest in an immovable property,

but, it is not conclusive proof of the same. The observations of the Supreme Court in the case of ***Smt Rajbir Kaur & Another v. M/s S. Chokosiri & Company*** **: *AIR 1988 SC 1845*** (at page 1850), while discussing the attributes of a lease as against a license, are apposite and most relevant :-

> "…… In Wood v. Leadbitter (1845) 153 EDR 351 at p.354 Baron Alderson emphasized the element of the transfer of interest:
>
> '**A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful**.'
>
> In Glenwood Lumber Co. v. Phillips (1904) AC 405 at p. 408 the distinction was pointed out thus:
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> 'If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purpose for which it may be used, it is in law a demise of the land itself.'
>
> It is essential to the creation of a tenancy that the tenant be granted the right to the enjoyment of the property and that, further the grant be for consideration. While the definition of 'Lease' in Section 105 of the Transfer of Property Act, 1882, envisages the transfer of a right to enjoy the property, **the other hand the definition of a 'Licence' under Section 52 of the Indian Easement Act, 1882, consistently with the above, excludes from its pale any transaction which otherwise amounts to an "easement" or involves a transfer of an interest in the case of a transfer of right to enjoy it. These**

> **two rights, viz. easements and lease in their very nature, are appurtenant to the property. On the other hand, the grant only of the right to use the premises without being entitled to the exclusive possession thereof operates merely as a licence**. But the converse implications of this proposition need not necessarily and always be true, wherever there is exclusive-possession, the idea of a license is not necessarily ruled out. English Law contemplates what are called 'possessory Licenses' which confer a right of exclusive possession, marking them off from the more usual type of licences which serve to authorise acts which would otherwise be trespasses. (See : John Dwar; "Licenses and Land Law" : Modern Law Review (Vol. 49 No. 6 Nov. 1986) and S. Moriorty "Licences & Land Law : Legal principles and public policies" (1984) 100 LQR 376. **Thus exclusive possession itself is not decisive in favour of a lease and against a mere licences, for, even the grant of exclusive possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease**. In the last analysis the question whether a transaction is a lease or a licence "turns on the operative intention of the parties" and that there is no single, simple litmus-test to distinguish one from the other. The "solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties" See Cobb v. Lane (1952) 1 All ER 1199……."

26.4. The Supreme Court also quoted with approval the following observations in the case of ***Marchant v. Charters* : *(1977) 3 All ER 918*** at page 922 (C.A.) as under:-

> "Lord Denning MR referred to the tests for determining whether an occupier is a licensee or tenant thus :
>
> 'Gathering the cases together, what does it come to? What is the test to see whether the occupier of one room in a house is a tenant or licensee? **It does not depend whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary**. It does not depend on the label which the parties put on it. **All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out**. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stage in the room or did not have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?'

26.5. In the present case SSPL was given the right to occupy the land in order give effect to its permissive right under the collaboration agreement to build subject to terms and conditions contained therein. The project was admittedly a joint venture with responsibility of each party clearly delineated. There was, to our minds, a licence given to make use of the said property in a particular manner, keeping in mind that all through, it was a venture in which the 1st assessee had a stake. Therefore, there was no 'transfer' within the meaning of Section 2 (47)

of the Act since the right to make use of the said property by the 1st assessee in the like manner had not got annihilated i.e., extinguished.

26.6. As regards payment of consideration, it is quite clear that all payments received by 1st assessee were to be treated as security and / or advance and could only be appropriated towards the payment envisaged under the 1st agreement only upon the collaboration agreement being performed. In the instant case the building never got constructed there was thus no opportunity for the 1st assessee to transfer out of the allocable area of 6000 sq ft and 3 garages alongwith proportionate open area, a covered area equal to 4000 Sq Ft and 2 garages alongwith the proportionate open area, to SSPL and, consequently, there was no occasion for the 1st assessee to appropriate towards sale consideration the sum of Rs. 11.00 lacs received as advance.

26.7. In our view once there was no capital asset in existence nothing could be transferred.

26.8. In this context the observations of the Supreme Court in the case of ***Provat Kumar Mitter v. Commissioner of Income-Tax, West Bengal : 41 ITR 624*** are relevant. The Supreme Court while discussing the provisions of Section 16(1)(c) and 16(3) of the Income

Tax Act, 1922 came to the conclusion that the Assessing Officer was correct in his approach in including the dividend declared on shares held by the assessee in a company in the assessee's income even though the assessee by a written instrument had assigned to his wife the right, title and interest in all dividends both present and future, and sums of money which might be declared or might become due on account of or in respect of the said shares held by the assessee for the term of the wife's natural life. In coming to the said conclusion, the Supreme Court held that while a transfer of a property may take place not only *in praesenti* but also in future; but the property must be in existence. The Supreme Court concluded upon reading of the deed of settlement whereby, the husband had assigned all right, title, interest in the dividend or sums which might be declared or might become due on account or in respect of shares held by the husband for the term of the natural life of the wife and the said deed of settlement did not result in transfer of any existing property of the husband. The Supreme Court went on to say that the deed of settlement in its true nature was a contract to transfer or make over in future every dividend and sum of money which may be declared or become due and payable on account or in respect of the shares held by the husband to his wife during her

lifetime. It said that all other covenants in the deed of settlement were ancillary in nature and sub-serve the aforesaid main object of the contract.

26.9. The relevant observations of the Supreme Court are extracted herein below:-

> "…… A transfer of property may take place not only in the present, but also in future; but the property must be in existence. It is clear to us that the instrument of January 19, 1953, was not a transfer of any existing property of the assessee. **It was in its true nature a contract to transfer or make over in future, every dividend and sum of money which may be declared or become due and payable on account or in respect of the shares held by the assessee, to his wife during her lifetime; the other covenants are ancillary in nature and subserve this main object of the contract**. The assessee did not assign the shares and, therefore, retained the right to participate in the profits of the company; he did not part with that right. What the contract provided for was merely this: the beneficiary was given the right to receive from the assessee every dividend and other sum of money which may be declared or become due and payable in respect of the shares. If this is the true construction of the document, then it is clear to us that the answer given by the High Court to the question referred to it is correct. The High Court rightly pointed out that the company paying the dividend can pay it only to the registered shareholder or under his orders (see Howrah Trading Co. Ltd. V. Commissioner of Income-tax); therefore, section 16(I) (c) of the Income-tax Act was not attracted nor the third proviso thereto and the income continued to accrue to the assessee, but was thereafter paid over to his wife under the terms of the contract. The income

> was, therefore, assessable in the hands of the assessee, because it was part of his income though applied subsequently towards payment to the wife under the terms of the contract.
>
> In this view of the matter, it is not necessary to decide the further question if a contract of this nature operates only as a contract to be performed in future which may be specifically enforced as soon as the property comes into existence or is a contract which fastens upon the property as soon as the settler acquires it. .. . ."

26.10. It is important to note that the Supreme Court in the said case did not find it necessary to decide the further question that if a contract of this nature discussed in the said case was only a contract to be performed in future which may be specifically enforced as soon as the property comes into existence or a contract which fastens upon the property as soon as the settlor acquires it.

26.11. Looked at in the light of the aforesaid principle enunciated by the Supreme Court, it would appear that, in the present case as well, the rights conferred upon the parties to the contract will crystallize only if and when the proposed multi-storeyed building would come into existence. Thus, what the assessee received in respect of the said proposed transfer of the built up area was merely an advance towards sale consideration because the property which was subject matter of

the agreement to sell dated 6.10.81 was yet to come into existence and the sale in respect of the which would get effectuated only after the building is raised.

26.12. There was, therefore, in our opinion no consideration received by the assessee for transfer of property as such an eventuality would have arisen only if the property was in existence.

26.13. In the aforesaid circumstances, we are of the view that no capital gains has accrued to the assessee.

27. The learned counsel for the revenue, Mr. Sanjeev Sabherwal, cited the judgment of Madhya Pradesh High Court in the case of ***CIT v. Laxmi Devi & Ratni Devi & Ors* : *(2008) 290 ITR 363*.** A bare perusal of the facts in the said case would show that the same is distinguishable. The broad facts that obtained in the said case were, that the assessee firm entered into an agreement of purchase for a certain immovable property. Since the agreement was not carried out by the seller, the assessee filed a suit for specific performance. The suit for specific performance was compromised and in settlement a certain amount of money was received by the assessee firm. The Assessing Officer treated the said sum of money received by the assessee as 'capital gains' and taxed it accordingly. The matter was carried to the

High Court. In this context, a Division Bench of the Madhya Pradesh High Court held that since the assessee gave up her right to claim the property and instead accepted money as compensation it resulted in relinquishment of a right in property, and consequently, came within the ambit of Section 2 (47) of the Act.

27.1. In the present case, the agreement for sale dated 24.06.1977 was substituted by the collaboration agreement dated 06.10.1981 and the agreement to sell dated 06.10.1981. There was no interest, much less, any right transferred in the property in favour of SSPL by the assessees and hence, as observed above, there was no transfer of a right in property as contemplated under Section 2 (47) of the Act.

28. The question referred to us is answered in favour of the assessee and against the Revenue.

28.1. The reference stands disposed of in the above terms.

RAJIV SHAKDHER, J

BADAR DURREZ AHMED, J

August 08, 2008
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