

**[2003] 129 Taxman 497 (Bombay)/[2003] 260 ITR 491 (Bombay)/[2003] 180 CTR 107 (Bombay)[13-02-2003]**

**[2003] 129 Taxman 497 (Bombay)**

**HIGH COURT OF BOMBAY**

**Chaturbhuj Dwarkadas Kapadia of Bombay**

**v.**

**Commissioner of Income-tax**

S.H. KAPADIA AND J.P. DEVADHAR, JJ.  
INCOME TAX APPEAL NO. 24 OF 2003  
FEBRUARY 13, 2003

**Section 45 , read with section 2(47) of the Income-tax Act, 1961 - Capital gains - Year in which assessable - Assessment year 1996-97 - Assessee an individual entered into an agreement dated 18-8-1994, in which he agreed to sell to 'Floreat' his share of immovable property - For that purpose, assessee agreed to execute a limited power of attorney, authorising Floreat to deal with said property and also to obtain permissions and approvals from various authorities for further developments - On obtaining all permissions assessee agreed to grant an irrevocable licence to Floreat to enter upon assessee's share of property - By 31-3-1996 Floreat paid almost entire amount of consideration and obtained all permissions - However, since Bombay Municipal Corporation issued a commencement certificate permitting construction of a building up to plinth level only, plan came to be amended and ultimately power of attorney was executed on 12-3-1999 - Assessing Officer held assessee liable to capital gains tax for assessment year 1996-97 as, according to him, transfer had taken place during accounting year ending 31-3-1996 - However, according to assessee, liability arose during assessment year 1999-2000 as in said assessment year only he had executed an irrevocable licence in favour of Floreat - Tribunal upheld Assessing Officer's finding - Whether, since in instant case a mistake apparent from record was found in findings of Tribunal inasmuch as date of possession of property by Floreat was shown as 1-4-1996 which in fact was 1-4-1997, it could be said that Tribunal was not justified in concluding that assessee had transferred said property during previous year relevant to assessment year 1996-97 - Held, yes**

## **FACTS**

The assessee had undivided share in an immovable property. By agreement dated 18-8-1994 the assessee agreed to sell to Floreat his share of immovable property for consideration with a right to the said Floreat to develop the property in accordance with rule and regulation framed by concerned authority. Under clause 9 of the agreement it was, *inter alia*, provided that on Floreat obtaining all necessary permissions and approvals and upon receipt of NOC under Chapter XX-C of the Act, the assessee shall grant an irrevocable licence to enter upon the assessee's share of the property. Under clause 20 of the agreement it was agreed that the sale shall be complete by execution of conveyance. During the financial year relevant to the assessment year 1996-97, Floreat obtained two permissions out of several other permissions. Similarly, by 31-3-1996, Floreat had paid almost entire sale price. However, BMC issued a commence certificate permitting construction of building upto plinth level only. In the meantime, plan came to be amended and ultimately the power of attorney was executed on 12-3-1999. Dispute arose between the assessee and income-tax authority on the Assessing Officer's decision to assess said capital gain in the assessment year 1996-97. According to the department, the transfer had taken place during the

accounting year relevant to the assessment year 1996-97 as most of the permissions were granted during the accounting year 1995-96 and possession in favour of Floreat was also given. However, the assessee contended that the transfer took place when he executed an irrevocable licence in favour of Floreat to enter upon the property and, therefore, liability to pay capital gain arose during the assessment year 1999-2000. On appeal, the Tribunal sustained the stand of the revenue.

## **HELD**

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*Under section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part-performance of a contract of the nature referred to in section 53A of the Transfer of Property Act would come within the ambit of section 2(47)(v). In order to attract section 53A, the following conditions need to be fulfilled. There should be a contract for consideration; it should be in writing; it should be signed by the transferor; it should pertain to transfer of immovable property; the transferee should have taken possession of the property; lastly the transferee should be ready and willing to perform his part of the contract. Even arrangements confirming privileges of ownership without transfer of title can fall under section 2(47)(v). Section 2(47)(v) was introduced in the Act from assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, assessees used to enter into agreements for developing properties with the builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loop hole, section 2(47)(v) came to be introduced in the Act. It was argued by the assessee that there was no effective transfer till grant of irrevocable licence. [Para 5]*

*In the instant matter, agreement in question was a Development Agreement. Such Development Agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a Development Agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats at a profit. That the aim of these professional contractors is only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements. That such agreements are only a mode of remunerating the builder for his services of constructing the building. It was precisely for this reason that the Legislature has introduced section 2(47)(v) read with section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In the instant case, that test had not been applied by the department. No reason had been given why that test had not been applied, particularly when the agreement in question, read as a whole, showed that it was a Development Agreement. There is a difference between contract on one hand and performance on the other hand. In instant case, the Tribunal as well as the department had come to the conclusion that the transfer took place during the accounting year ending 31-3-1996 as substantial payments were effected during that year and substantial permissions were obtained. In such cases of Development Agreements, one could not go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of section 2(47)(v). [Para 6]*

*In the instant case, the agreement was a Development Agreement and the test to be applied to decide the year of chargeability was the year in which the transaction had been entered into. That view was taken for the reason that the Development Agreement does not transfer the interest in the property to the developer in general law and, therefore, section 2(47)(v) had been enacted and in such cases, even entering into such a contract could amount to transfer from the date of the agreement itself. That view was taken for a precise reason. Firstly, in numerous matters where the Assessing Officer and the department generally proceed on the basis of substantial compliance of the contract. For example, in the very instant case, the department had contended that because of substantial compliance of the contract during the financial year ending 31-3-1996, the transfer was deemed to have taken place in that year. Such interpretation would result in anomaly because what is substantial compliance would differ from officer to officer. Therefore, if on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of agreement for sale, a Development Agreement is contemplated, under which the developer applies for permissions from various authorities, either under power of attorney or otherwise and in the name of the assessee, then the Assessing Officer is entitled to take the date of the contract as the date of transfer in view of section 2(47)(v). In this very case, the date on which the developer*

*obtained a commencement certificate was not within the accounting year ending 31-3-1996. At the same time, if one read the contract as a whole, it was clear that a dichotomy was contemplated between limited power of attorney authorising the developer to deal with the property and an irrevocable licence to enter upon the property after the developer obtained the requisite approvals of various authorities. In fact, the limited power of attorney might not be actually given, but once under the agreement a limited power of attorney was intended to be given to the developer to deal with the property, then the date of the contract viz., 18-8-1994 would be the relevant date to decide the date of transfer under section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter did not arise. That point had not been considered by any of the authorities below. No judgment had been shown on this point. There was no merit in the argument of the assessee that the Court should go only by the date of actual possession and that in the instant case, the Court should go by the date on which irrevocable licence had been given. If the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability. [Para 6]*

*Instant case was not the case where the assessee denied transfer. The assessee had paid capital gains tax for the assessment year 1999-2000. However, the assessee was told that the year of chargeability was the assessment year 1996-97 and not the assessment year 1999-2000. Further, the assessee had paid the tax for the assessment year 1999-2000. In the instant case, a substantial question of law had arisen on interpretation of section 2(47)(v). It was for that reason that abovesaid guidelines were given which may be followed by the department in all future cases. After going through the compilation of documents and from mere substantial compliance of the agreement, one could not infer transfer in the accounting year ending 31-3-1996.*

*There were mistakes, apparent on the face of the record, in the order of the Tribunal. The Tribunal had relied upon the assessee obtaining 7 permissions. It was found that item (vi) and item (vii) were mere repetitions of item (iii) and item (i), respectively. Similarly, the Tribunal had referred to permissions obtained during the financial years other than the concerned financial year ending 31-3-1996 to come to the conclusion that the transfer had taken place during that year. Lastly, the Tribunal had referred to permission, dated 25-6-1995 for redevelopment of the property vide item (iii). However, in the compilation given by the assessee there was no such permission. The assessee had disputed the existence of this document. The assessee's compilation was taken on record and marked 'X'. It was for that reason that the Commissioner (Judicial) was called upon to forward the R&P. However, department had informed that R&P was not available. There were other apparent errors in the order of the Tribunal. The Tribunal had stated as under 'from the dates it is evident that from the very next day, i.e., 1-4-1997 from the end of financial year ending on 31-3-1996, the builder was using the well water against payment of relevant charges to the assessee'.*

*The above quoted finding of the Tribunal was apparently an error because the financial year ended on 31-3-1996 and the first day of the next financial year was 1-4-1996 and not 1-4-1997. According to the Tribunal, the letter dated 18-2-1999 showed that Floreat came into possession on the day next to 31-3-1996, i.e., 1-4-1997. As stated above, the day next to 31-3-1996 would be 1-4-1996 and not 1-4-1997 and even if 1-4-1997 was taken as a typing mistake, it could only be read as 1-4-1996 and if 1-4-1996 was the date on which Floreat/Developer came in possession, then the possession was received by the developer during the financial year 1996-97 corresponding to the assessment year 1997-98. Therefore, the finding of the Tribunal was erroneous because in the instant case the assessment year 1996-97 was in dispute and not the assessment year 1997-98. [Para 7]*

*Taking into account the totality of circumstances, and facts, the appeal of the assessee, was to be allowed. [Para 8]*

## **CASES REFERRED TO**

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*Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society Vol. 3 [2000] Maharashtra Law Journal 131 (Para 6).*

**S.E. Dastur, P.J. Pardiwala, F.V. Irani and N.R. Modi for the Appellant. R.V. Desai and P.S. Jetly for the Respondent.**

## **JUDGMENT**

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**S.H. Kapadia, J.** - Being aggrieved by the Order of the Tribunal dated 29th July 2002, the assessee has come by way of Appeal under section 260A of the Income-tax Act raising the following questions of law for determination by this Court.

- "1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in concluding that the appellant had transferred the property situated at Gamdevi during the previous year relevant to assessment year 1996-97 ?
2. Whether the Tribunal's conclusion that the appellant had transferred the property situated at Gamdevi during the previous year relevant to assessment year 1996-97 was so unreasonable that no person properly instructed could ever have arrived at the same ?
3. Whether the Tribunal's conclusion that the appellant transferred the property situated in Gamdevi in the previous year relevant to the assessment year 1996-97 was arrived at by considering irrelevant circumstances and without appreciating and considering the relevant factual material and was contrary to the material and the evidence of record was thereby vitiated ?"

### *Facts*

2. Assessee is an individual. He had 44/192 undivided share in an immovable property at Gamdevi in Greater Bombay. The entire property consisted of land and 10 buildings. However, a building bearing No. 10 was under requisition by the State Government, which was later derequisitioned. That building was not occupied by tenants. By agreement dated 18th August, 1994, the assessee herein agreed to sell to Floreat Investments Limited [hereinafter referred to, for the sake of brevity as "Floreat"], his share of the immovable property for total consideration of Rs. 1,85,63,220 with a right to the said Floreat to develop the property in accordance with the Rules and Regulations framed under Maharashtra Housing and Area Development Act. For that purpose, the assessee agreed under Clause 8 to execute a limited Power of Attorney, authorising floreat to deal with the property and also obtain permissions and approvals from Urban Land Ceiling Authority, Bombay Municipal Corporation and CRZ Authorities. Under Clause 9 of the agreement it was, *inter alia*, provided that on Floreat obtaining all necessary permissions and approvals and upon receipt of NOC under Chapter XX-C of the Income-tax Act, the assessee shall grant an irrevocable licence to enter upon the assessee's share of the property. Under clause 11 of the agreement, it was provided that after Floreat was given an irrevocable licence to enter upon assessee's share of the property and after Floreat having obtained all necessary approvals, Floreat was entitled to demolish building Nos. 1 to 3 and building No. 10 and any other buildings on the property, subject to Floreat settling the claims of the tenants. Under clause 14 of the agreement, the assessee was entitled to receive proportionate rent till the payment of the last instalment and till that time, the assessee was bound to pay all outgoings. Under clause 20 of the agreement, it was agreed that the sale shall be completed by execution of conveyance. Till date, there is no conveyance.

Pursuant to the agreement, Floreat obtained following permissions : (i) Clearance from CRZ Authority dated 7th February, 1996; (ii) Letter from ULC for redevelopment of the property dated 26-4-1995. These two permissions were amongst several other permissions obtained. These three permissions, however, are mentioned as they were obtained during the financial year ending 31st March, 1996, relevant to the assessment year 1996-97. Similarly, by 31st March, 1996, Floreat had paid almost the entire sale price of Rs. 1,85,63,220 except for the small amount of Rs. 9,98,000. However, the important point which is required to be noted is that BMC issued a Commencement Certificate permitting construction of a building up to the plinth level only on 15th November, 1996. In the meantime, the plan came to be amended. Ultimately, the power of attorney was executed on 12th March, 1999.

The narrow dispute which arises for determination in this Appeal is : Whether the liability of the assessee for capital gains accrued to the assessee during assessment year 1996-97 or whether the assessee was liable to pay capital gains tax during the assessment year 1999-2000. According to the department transfer had taken place during the accounting year ending 31st March 1996 relevant to assessment year 1996-97, whereas according to the assessee, the transfer took place only when the assessee executed an irrevocable licence in favour of Floreat to enter upon the property and, therefore, according to the assessee liability arose during the assessment year 1999-2000.

*Arguments*

3. Mr. Dastur, learned senior counsel appearing on behalf of the assessee contended that the only question which is required to be decided in this case is : Whether the department was right in inferring possession in favour of Floreat during the accounting year ending 31st March 1996 relevant to assessment year 1996-97. He submitted that in this case, the assessee has paid capital gains tax for assessment year 1999-2000. That, this is not a case where the assessee denies transfer of the property. He contended that the only issue which is required to be decided in this appeal was as to whether the transfer, as contemplated by section 2(47)(v), had taken place during assessment year 1996-97 or whether it had taken place during assessment year 1999-2000. He pointed out that the decision of the Tribunal was perverse in the sense that reliance was being placed on documents which do not even exist. He submitted that the Tribunal has come to the conclusion of possession being handed over by assessee to Floreat during assessment year 1996-97 on basis of 7 permissions obtained from various authorities. However, he submitted that item No. (vi) was a repetition of item No. (iii), whereas item No. (vii) was a repetition of item No. (i). He further submitted that the permission under item No. (iii) did not even exist. He, therefore, submitted that the Tribunal has drawn inferences purely on the basis of conjectures. In this connection, he relied upon the finding of the Tribunal to the effect that Floreat was put in possession for which the Tribunal had relied upon recovery of water charges. In this connection, he invited our attention to the findings of the Tribunal which states that possession of Floreat stood established by letter dated 18th February, 1999 written to the co-owners' Attorneys in connection with reimbursement of water charges from Floreat for the period from 1st April, 1997 to 31st January, 1999. The Tribunal has stated in its findings that since reimbursement took place from 1st April, 1997, Floreat was put in possession with effect from 1st April, 1997 *i.e.*, from the end of the financial year 31st March, 1996. Mr. Dastur points out that this finding is perverse; that in this case we are concerned with the accounting year ending 31st March, 1996. He pointed out that the day after 31st March, 1996 is 1st April, 1996 and not 1st April, 1997 and if 1st April 1997 is the date on which Floreat was put in possession then Floreat enters upon possession during Accounting year 1997-98 and not during Accounting Year 1996-97 with which we are concerned. It is for these two reasons mainly that Mr. Dastur has criticized the judgment of the Tribunal as perverse. Mr. Dastur further submitted that even the Commencement Certificate came to be issued by BMC in December 1998 and he submitted that under Clause 9 of the Contract, the parties had specifically agreed that Floreat will not be put into possession till full payment was effected and till all permissions from various authorities were obtained. He contended that the above facts clearly indicated that Floreat was not put in possession during assessment year 1996-97. He contended that the building permission was not obtained during assessment year 1996-97. That the development agreement was dated 18th August, 1994 and, therefore, that agreement also did not come within the purview of assessment year 1996-97. He further pointed out that even IOD was granted by BMC during the period September to November 1996 and, therefore, even the IOD did not come within the purview of assessment year 1996-97. He submitted that even the power of attorney was given on 16th March, 1999 in favour of Floreat. He, therefore, contended that in this case, there was no transfer of possession during the accounting year ending 31st March, 1996 relevant to assessment year 1996-97. Mr. Dastur contended that under section 45 of the Income-tax Act, capital gains was chargeable to tax in the previous year in which a transfer takes place and that unless such transfer takes place, there was no liability to pay capital gains tax. He contended that the assessee stood divested of his proprietary rights only during the accounting year ending 31st March, 1999 relevant to assessment year 1999-2000 as the assessee granted irrevocable licence to Floreat only in that year. That till such date, the assessee had not parted with possession. He, therefore, contended that in this case section 2(47)(v) was not attracted during the assessment year 1996-97. He contended that there is no evidence whatsoever to indicate that Floreat was put in possession during the Financial Year 1995-96. He contended that even under the Development Agreement, possession to Floreat could not have been given without payment of the full purchase price and without obtaining all relevant permissions. He contended that the last instalment was paid during financial year 1998-99 corresponding to assessment year 1999-2000. He contended that under the agreement, irrevocable licence was required to be given to Floreat only on Floreat obtaining all the permissions from various authorities. He submitted that on 7th February, 1996, permission was obtained from CRZ authorities. That only a letter of intent for redevelopment was obtained from MHADA on 14th February 1995. He, however, pointed out that the Tribunal has, in its Order, referred to permission being obtained for redevelopment from MHADA on 25th June, 1995, which is not in existence. He further submitted that ULC authority granted permission for development on 26th April, 1995. He, however, further pointed out that there are various discrepancies in the list of permissions given by the Tribunal, as stated above. That, under the

agreement, large number of permissions are required to be obtained and only on those permissions being obtained, supported by full payment of consideration, Floreat was to be put in possession. Mr. Dastur accordingly contended that there is no basis for coming to the conclusion that possession was given to Floreat during assessment year 1996-97. He submitted that the layout plan was approved on 5th September 1996; that IOD was issued during September to November 1996; that the building plan was amended on 30th March, 1998. He, therefore, contended that there was no reason for the Tribunal to infer possession in favour of Floreat during assessment year 1996-97. He contended that in this case, the assessee has not denied transfer of property; that the assessee has paid the capital gains tax for assessment year 1999-2000. However, assessee is told by the Assessing Officer that transfer has taken place during assessment year 1996-97 and as a result, assessee is now faced with the consequence of payment of interest of almost Rs. 16 lakhs on a tax demand of Rs. 12 lakhs. That, this was apart from the penalty proceedings. He contended that payment of substantial price will not amount to transfer. That, the assessee offered the amount to tax during assessment year 1999-2000 as it was during that year that an irrevocable licence came to be executed in favour of Floreat. That the assessee had possessory rights on 31st March, 1996. That till 31st March, 1996, the assessee had not obtained BMC permission for constructing the building. That till 31st March, 1996, the assessee had not executed the power of attorney in favour of Floreat. That till 31st March, 1996, assessee had collected rent. That till 31st March 1996, the property had not been demolished. That till 31st March 1996, assessee has paid all outgoing That till 31st March, 1996, assessee has recovered water charges. He, therefore, contended that possession was given only during the year ending 31st March, 1999 when irrevocable licence came to be executed in favour of Floreat.

4. Mr. R.V. Desai, learned senior counsel appearing on behalf of the department contended that in this case the agreement dated 18th August, 1994 was a Development Agreement. He contended that the agreement, on execution, gave complete control of development over the property to Floreat. He submitted that under clause 4 there was no forfeiture or termination of the agreement mentioned. He contended that the last payment payable by Floreat was on 15th May, 1995. That, substantial payment was made during the financial year 1995-96. That, the CRZ permission was granted on 7th February, 1996. He contended that ULC permission was granted on 26th April, 1995 and in the circumstances, most of the permissions were granted during accounting year 1995-96 and substantial payment was also made during that year and, therefore, it was permissible for the Assessing Officer to infer possession in favour of Floreat during accounting year 1995-96. He contended that if one reads the agreement plus payments plus permissions obtained, then section 53A of the Transfer of Property Act would apply and in the circumstances, the department was right in inferring possession in favour of Floreat from substantial compliance of the agreement during the accounting year 1995-96. He, therefore, contended that no interference is called for to the impugned judgment given by the Tribunal.

#### *Scope of section 2(47)(v)*

5. Clauses (v) and (vi) of section 2(47) [w.e.f. 1-4-1988] reads as under :

- (v) any transaction involving the allowing of the possession of any immovable property [as defined] to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
- (vi) any transaction (whether by becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property [as defined]."

The above two clauses were introduced with effect from 1-4-1988. They provide that "Transfer" includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property [See section 269UA(d)]. Therefore, in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of immovable property is not effective or complete under the general law [See Kanga & Palkhivala's *Law & Practice of Income Tax* - Eighth Edition, at p. 766]. This test is important to decide the year of chargeability of the capital gains.

## Findings

6. At the outset, we may point out that in this case, the assessee does not deny transfer. The only dispute in this case is whether the transfer took place during the accounting year ending 31st March, 1996 or whether it took place during the accounting year ending 31st March, 1999. In other words, the dispute is confined to the year of chargeability.

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

It was argued on behalf of the assessee that there was no effective transfer till grant of irrevocable licence. In this connection, judgments of the Supreme Court were cited on behalf of the assessee, but all those judgments were prior to introduction of the concept of deemed transfer under section 2(47)(v). In this matter, agreement in question is a Development Agreement. Such Development Agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a Development Agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats at a profit. That the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements.

That such agreements are only a mode of remunerating the builder for his services of constructing the building - *Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society* [2000] 3 ML J 131. It is precisely for this reason that the Legislature has introduced section 2(47)(v) read with section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In this case that test has not been applied by the department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a Development Agreement. There is a difference between contract on one hand and Performance on the other hand. In this case, the Tribunal as well as the department have come to the conclusion that the transfer took place during the accounting year ending 31st March, 1996 as substantial payments were effected during that year and substantial permissions were obtained. In such cases of Development Agreements, one cannot go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of section 2(47)(v) of the Act.

Before us, it was argued on behalf of the assessee that the date on which possession is parted with by the transferor is the date which should be taken into account for determining the relevant Accounting Year in which the liability accrues. It was argued on behalf of the assessee that in this case, irrevocable licence was given in terms of the contract only during the financial year ending 31st March, 1999 and, therefore, there was no transfer during the financial year ending 31st March, 1996. On the other hand, it was argued on behalf of the revenue that one has to go by the date on which the developer substantially performed the contract. It was argued on behalf of the department that since substantial payments were made during the financial year ending 31st March, 1996 and since majority of permissions were obtained during that year, the liability to pay capital gains tax accrued during assessment year 1996-97. In this case, the agreement is a Development Agreement and in our view, the test to be applied to decide the year of chargeability is the year in which the transaction was entered into. We have taken this view for the reason that Development Agreement does not transfer the interest in the property to the developer in general law and, therefore, section 2(47)(v) has been enacted and in such cases, even entering into such a contract could amount to transfer from the date of the agreement itself. We have taken this view for a

precise reason. Firstly, we find in numerous matters where the Assessing Officer and the department generally proceed on the basis of substantial compliance of the contract. For example, in this very case, the department has contended that because of substantial compliance of the contract during the financial year ending 31st March, 1996, the transfer is deemed to have taken place in that year. Such interpretation would result in anomaly because what is substantial compliance would differ from Officer to Officer. Therefore, if on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of agreement for sale, a Development Agreement is contemplated, under which the developer applies for permissions from various authorities, either under power of attorney or otherwise and in the name of the assessee, then the Assessing Officer is entitled to take the date of the contract as the date of transfer in view of section 2(47)(v). In this very case, the date on which the developer obtained a commencement certificate is not within the accounting year ending 31st March, 1996. At the same time, if one reads the contract as a whole, it is clear that a dichotomy is contemplated between limited Power of Attorney authorising the developer to deal with the property *vide* para 8 and an irrevocable licence to enter upon the property after the developer obtains the requisite approvals of various authorities. In fact, the limited power of attorney may not be actually given, but once under clause 8 of the agreement a limited power of attorney is intended to be given to the developer to deal with the property, then we are of the view that the date of the contract viz., 18th August, 1994 would be the relevant date to decide the date of transfer under section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter does not arise. This point has not been considered by any of the authorities below. No judgment has been shown to us on this point. Therefore, although there is a concurrent finding of fact in this case, we have enunciated the principles of applicability of section 2(47)(v). We do not find merit in the argument of the assessee that the Court should go only by the date of actual possession and that in this particular case, the Court should go by the date on which irrevocable licence was given. If the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability.

7. Having laid down broad principles we now come to the facts of this case. This is not the case where the assessee denies transfer. In this case, the assessee has paid capital gains tax for assessment year 1999-2000. However, the assessee is told that the year of chargeability is assessment year 1996-97 and not assessment year 1999-2000. Moreover, this is the first time that we have laid down the guidelines. Further, the assessee has paid the tax for assessment year 1999-2000. Generally, this Court does not interfere in concurrent findings of facts. However, in this case, a substantial question of law has arisen on interpretation of section 2(47)(v). It is for this reason that we have given the guidelines, which may be followed by the department in all future cases. We have gone through the compilation of documents and from mere substantial compliance of the agreement, one cannot infer transfer in the accounting year ending 31st March, 1996. We may also mention that there are mistakes, apparent on the face of the record, in the order of the Tribunal. The Tribunal has relied upon assessee obtaining 7 permissions. We find that item (vi) and item (vii) are mere repetitions of item (iii) and item (i) respectively. Similarly, the Tribunal has referred to permissions obtained during financial years other than the concerned financial year ending 31st March, 1996 to come to the conclusion that the transfer had taken place during that year. Lastly, the Tribunal has referred to permission dated 25th June, 1995 for redevelopment of the property *vide* item (iii). However, in the compilation given by the assessee there is no such permission. The assessee has disputed the existence of this document. Office is directed to take the assessee's compilation on record and mark "X". It is for this reason that *vide* Order dated 29th January, 2003, we called upon the Commissioner of Income-tax (Judicial) to forward to us the R&P. However, learned counsel for the department has informed us the R&P is not available. There are other apparent errors in the Order of the Tribunal. At Page 144 of the Paper Book, the Tribunal has stated as under :

"From the dates it is evident that from the very next day *i.e.*, 1-4-1997 from the end of financial year ending on 31st March 1996, the builder was using the well water against payment of relevant charges to the assessee."

The above quoted findings of the Tribunal is apparently an error because the Financial Year ended on 31st March 1996 and the first day of the next financial year was 1-4-1996 and not 1-4-1997. According to the Tribunal, the letter dated 18-2-1999 shows that Floreat came into possession on the day next to 31-3-1996 *i.e.*, 1-4-1997. As stated above, the day next to 31-3-1996 would be 1-4-1996 and not 1-4-1997 and even if 1-4-1997 is taken as a typing mistake, it could only be read as 1-4-1996 and if 1-4-1996 is the date on which Floreat/Developer came in



possession, then the possession was received by the developer during the financial year 1996-97 corresponding to assessment year 1997-98. Therefore, this finding of the Tribunal is erroneous because in this case we are concerned with assessment year 1996-97 and not the assessment year 1997-98.

**8.** Taking into account the totality of circumstances, on facts, we allow the appeal of the assessee. We answer the above questions accordingly. Question No. 1 is answered in the negative *i.e.*, in favour of the assessee and against the department. In view of our answer to Question No. 1, it is not necessary to answer Question No. 2 quoted above. As far as Question No. 3 is concerned, we answer the said question in the affirmative *i.e.*, in favour of the assessee and against the department.

**9.** Subject to what is stated above, Appeal stands allowed. No order as to costs.

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In favour of assessee