

CAPITAL GAINS – PROPERTY DEVELOPMENT AGREEMENTS-When Chargeable to Tax



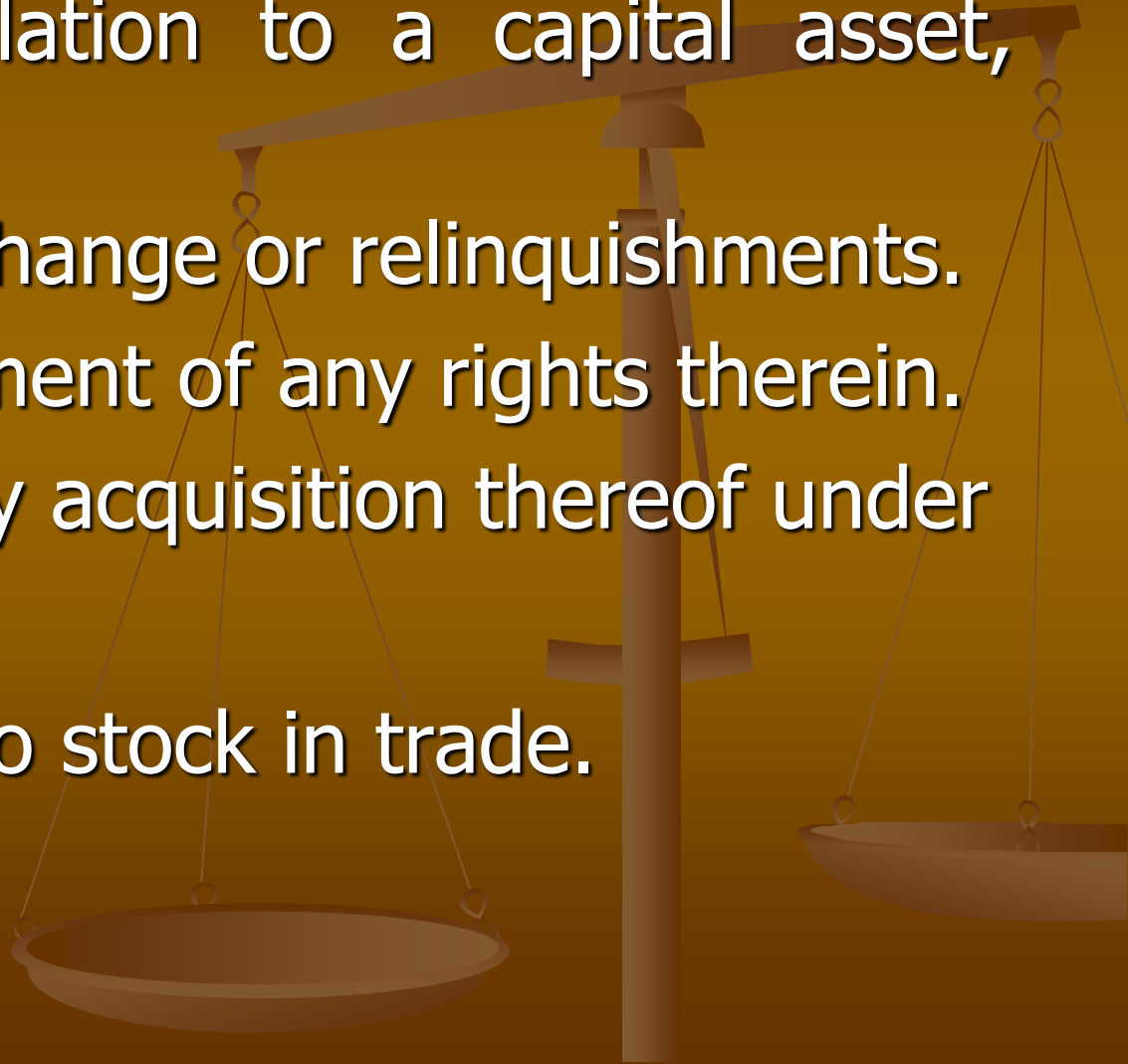
CAPITAL GAINS- CHARGEABILITY

- Sec 45(1) : Capital Gains tax liability arises only when the following conditions are satisfied:-
 - A. There should be a capital asset.
 - B. It is transferred by the assessee.
 - C. Transfer takes place during the previous year.
 - D. Any profit or gain arises from transfer
 - E. Such profit not exempt u/s 54-54GA.

TRANSFER U/S 2(47)

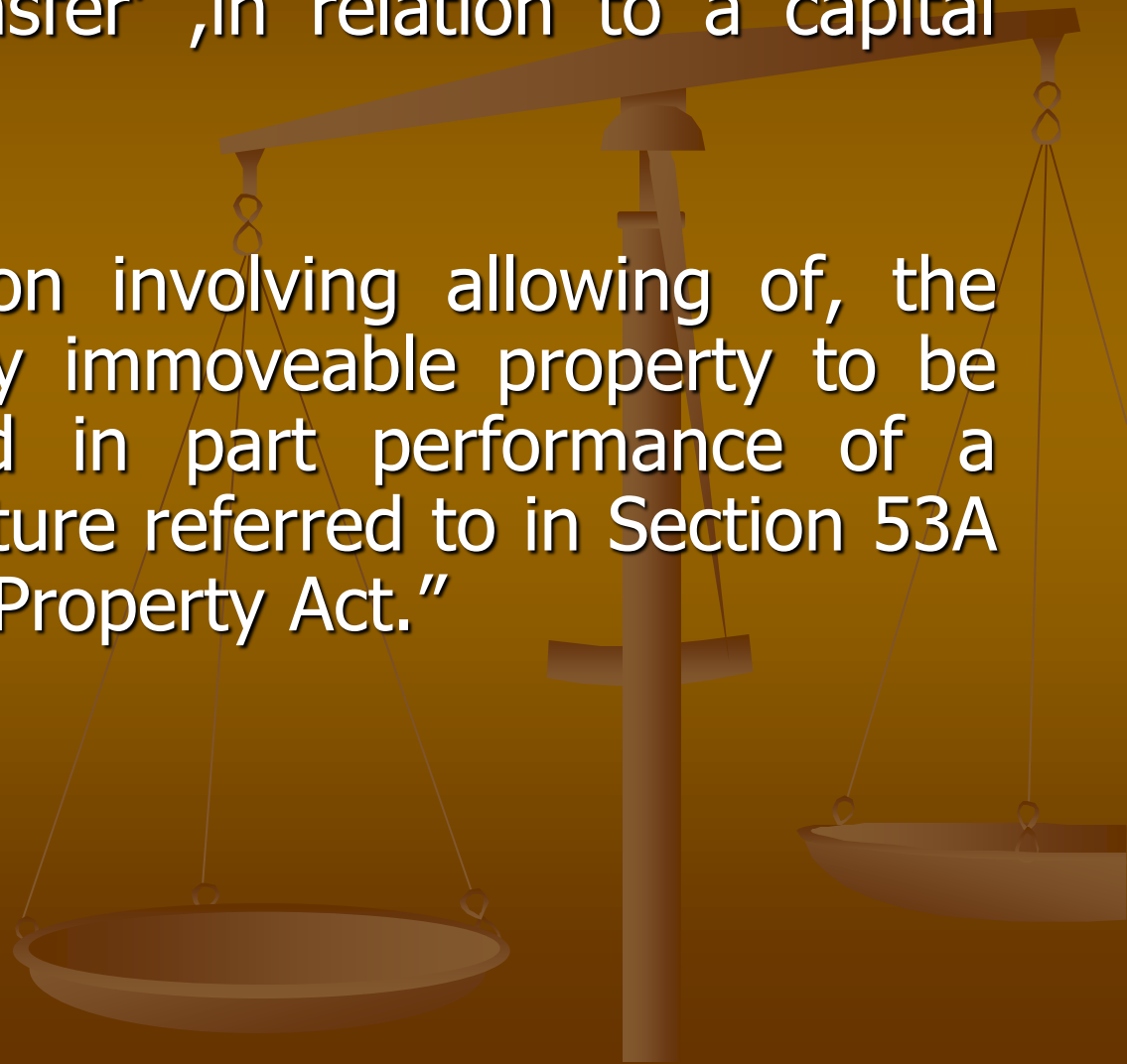
“Transfer”, in relation to a capital asset, includes :-

- i) the sale or exchange or relinquishments.
- ii) the extinguishment of any rights therein.
- iii) the compulsory acquisition thereof under any law.
- iv) Conversion into stock in trade.

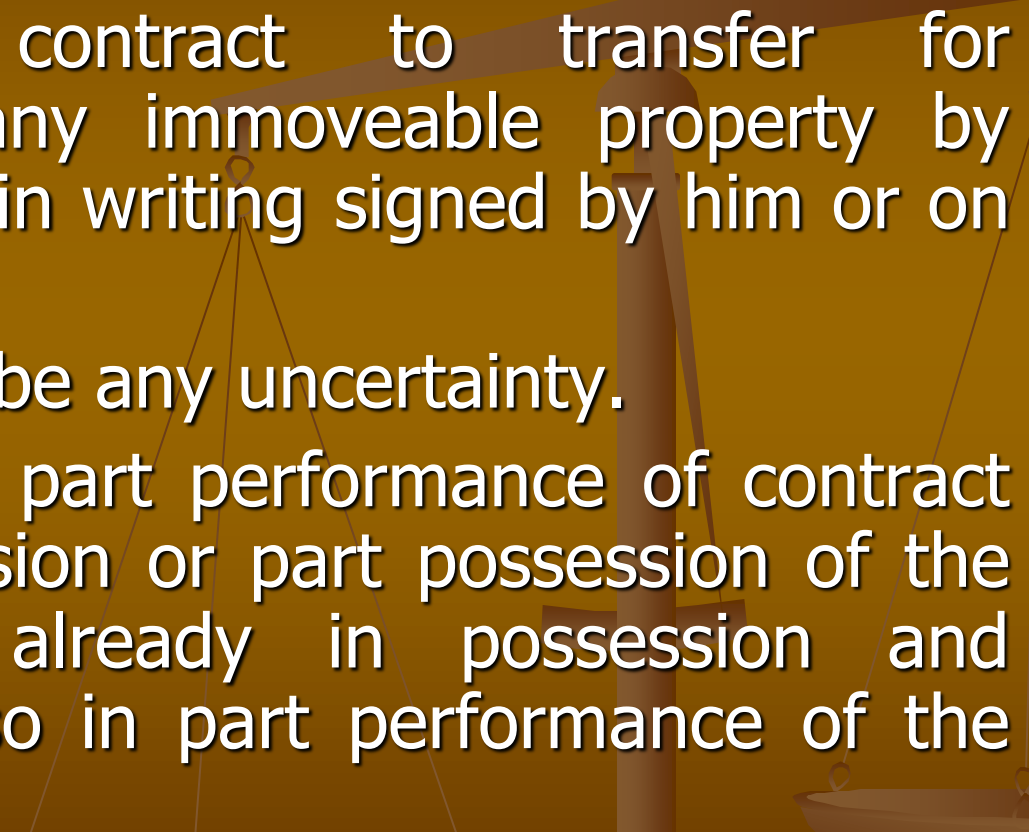


- Section 2(47)(v) introduced w.e.f 01-04-1988 lays down – ‘transfer’ ,in relation to a capital asset, includes

“any transaction involving allowing of, the possession of, any immoveable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act.”



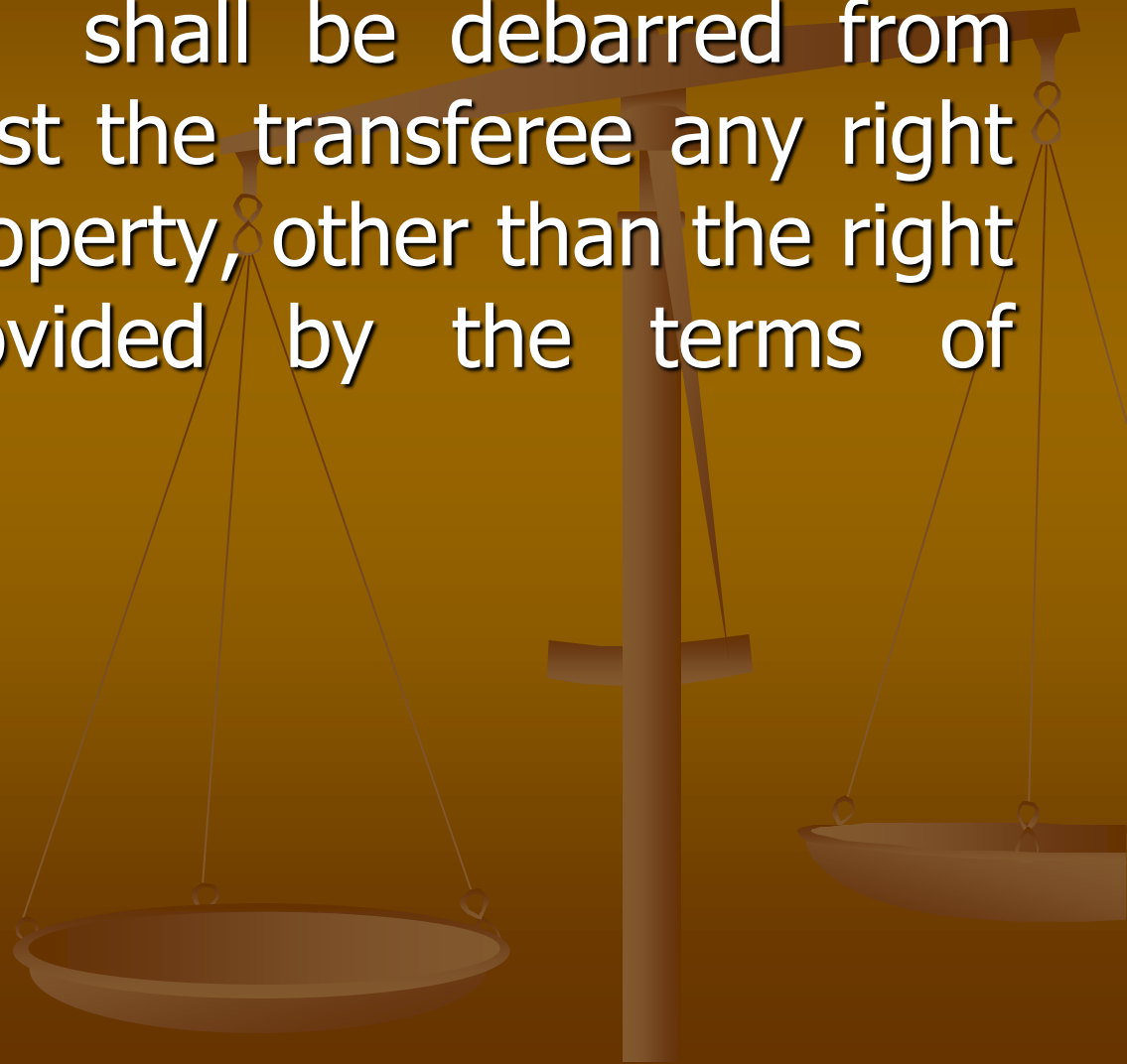
IMPORTANT INGREDIENTS OF SECTION 53A OF TRANSFER OF PROPERTY ACT

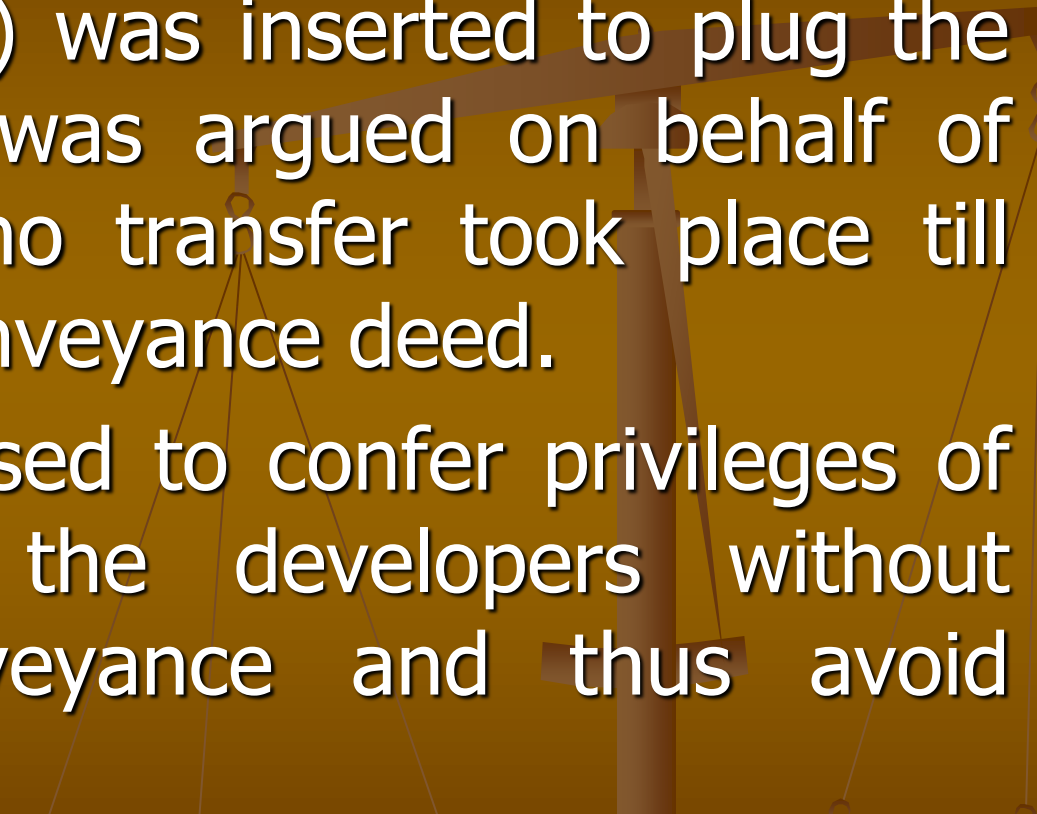
1. Any person - contract to transfer for consideration - any immoveable property by virtue of contract in writing signed by him or on his behalf
 2. There should not be any uncertainty.
 3. Transferee has in part performance of contract has taken possession or part possession of the property or is already in possession and continues to do so in part performance of the contract
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4. Transferee has performed or willing to perform his part of the contract i.e. he has paid or ready to pay the consideration—then –

Notwithstanding that the contract, registered or not ,or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed by the law for the time being in force-

- -the transferor shall be debarred from enforcing against the transferee any right in respect of property, other than the right specifically provided by the terms of contract.



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- Section 2(47)(v) was inserted to plug the loophole as it was argued on behalf of assesses that no transfer took place till execution of conveyance deed.
 - The assesses used to confer privileges of ownership to the developers without executing conveyance and thus avoid capital gains.

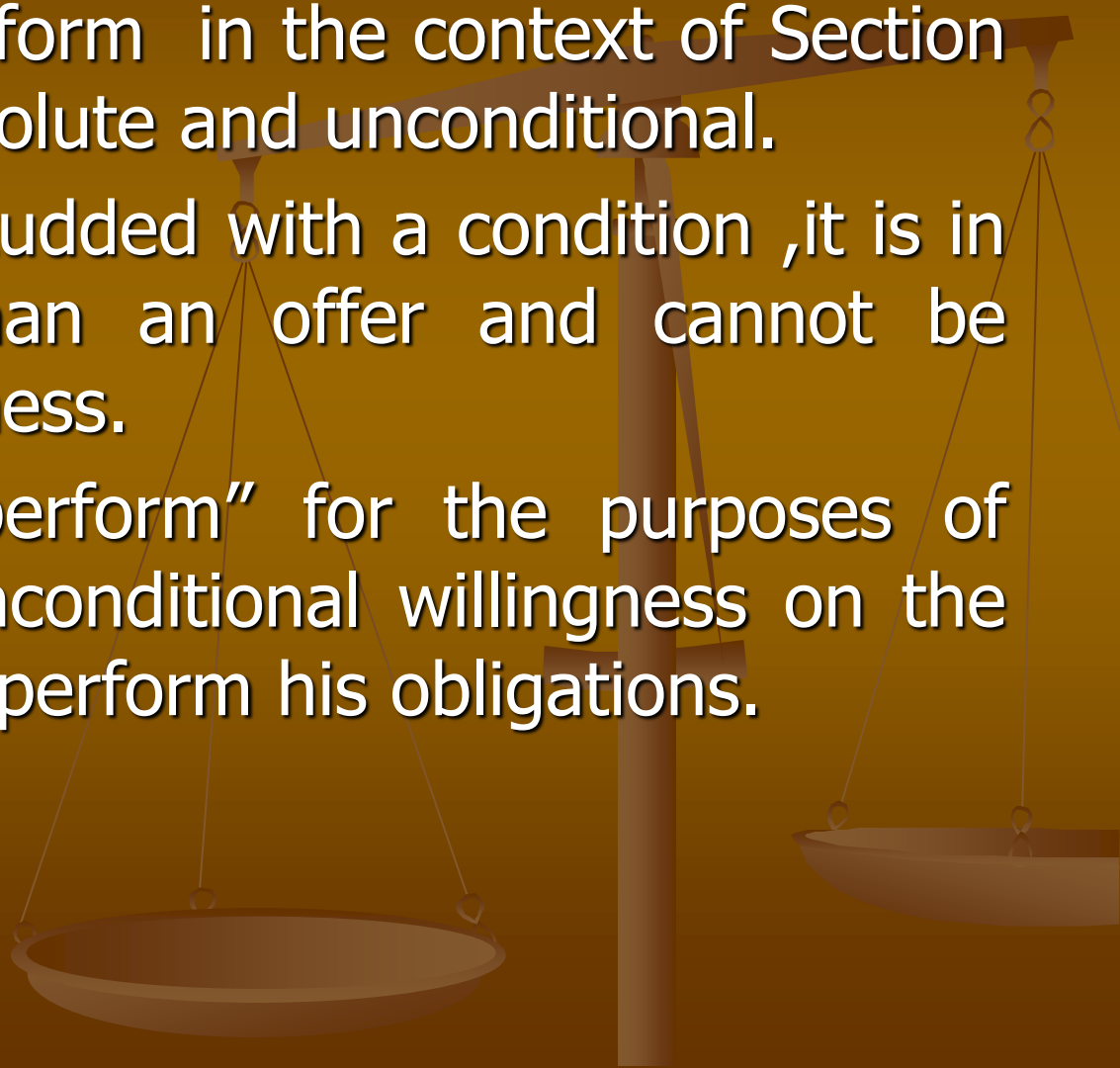
SCOPE OF SECTION 2(47)(v) & SECTION 53A OF TRANSFER OF PROPERTY ACT

The Bombay High Court in Chaturbhuji Dwarkadas Kapadia vs. CIT 260 ITR 491 observed, that in order to attract section 53A, the following conditions need to be fulfilled:-

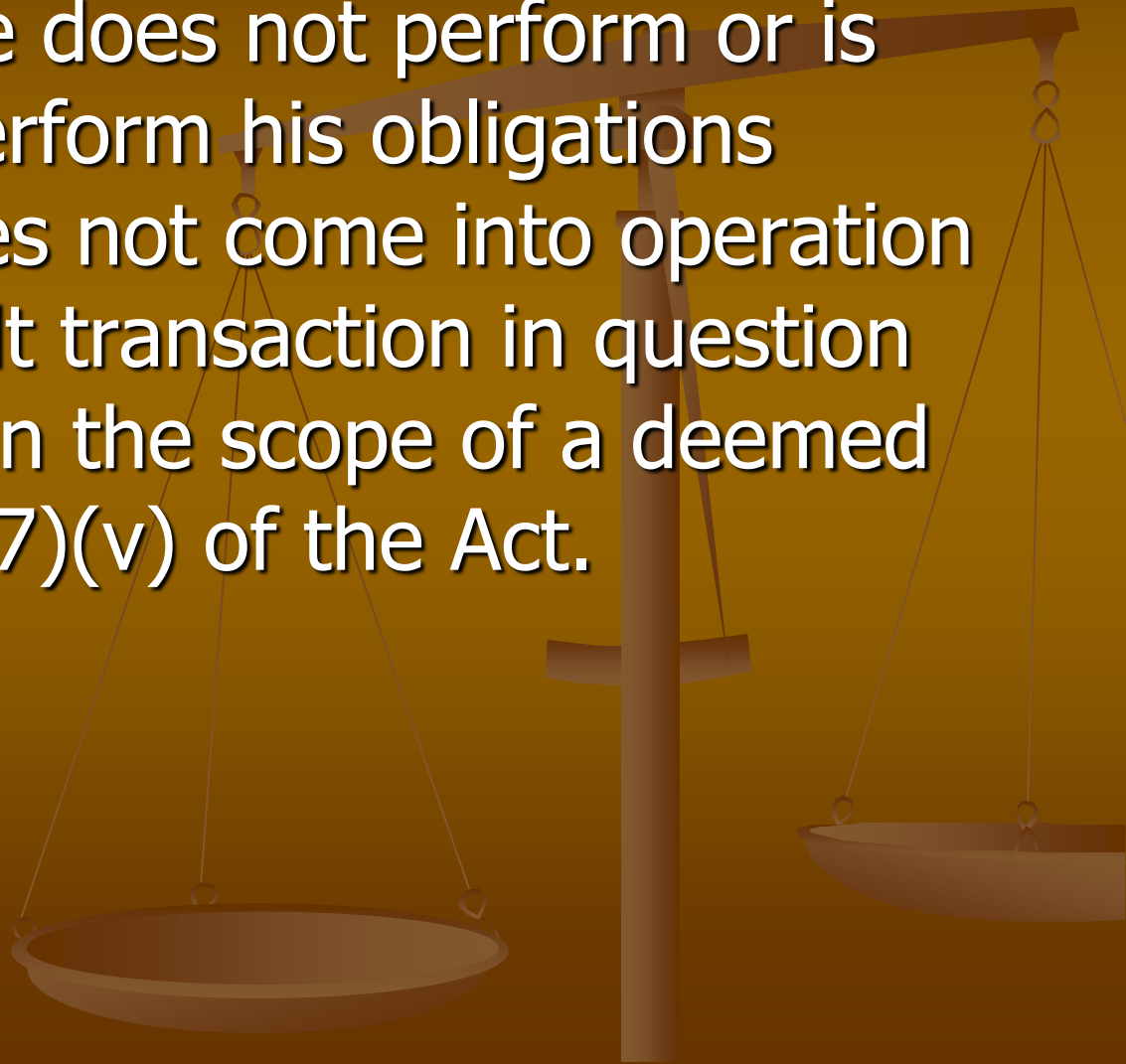
1. There should be contract for consideration
2. It should be in writing
3. It should be signed by the transferor
4. It should pertain to the transfer of immoveable property
5. Lastly, transferee should be ready and willing to perform his part of contract.

“has performed or is willing to perform”-Scope

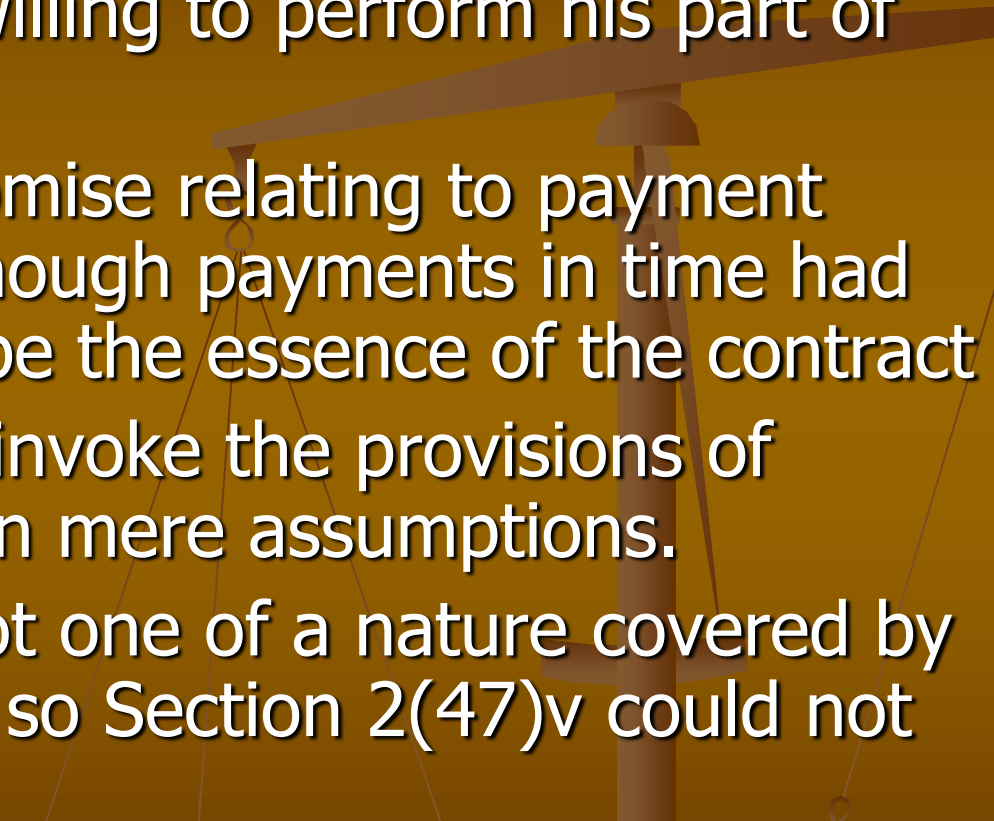
- Willingness to perform in the context of Section 53A has to be absolute and unconditional.
- If willingness is studded with a condition ,it is in fact no more than an offer and cannot be termed as willingness.
- “Willingness to perform” for the purposes of Section 53A is unconditional willingness on the part of vendee to perform his obligations.



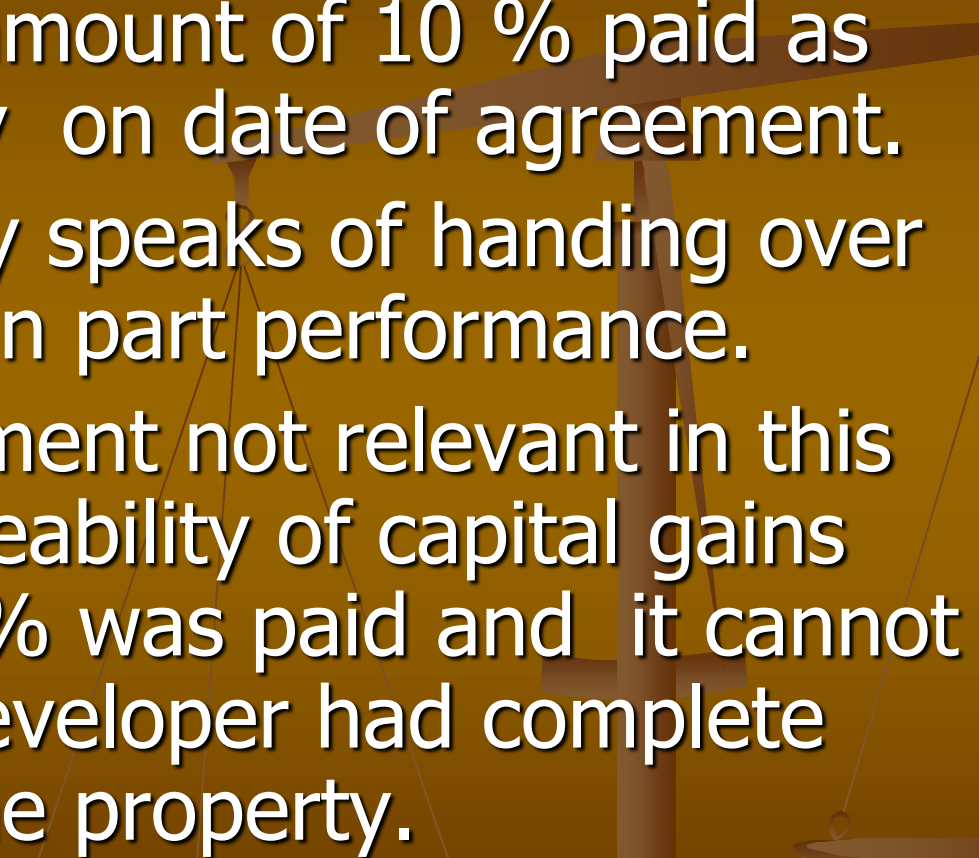
- So if the vendee does not perform or is not willing to perform his obligations Section 53A does not come into operation and as the result transaction in question cannot fall within the scope of a deemed transfer u/s 2(47)(v) of the Act.

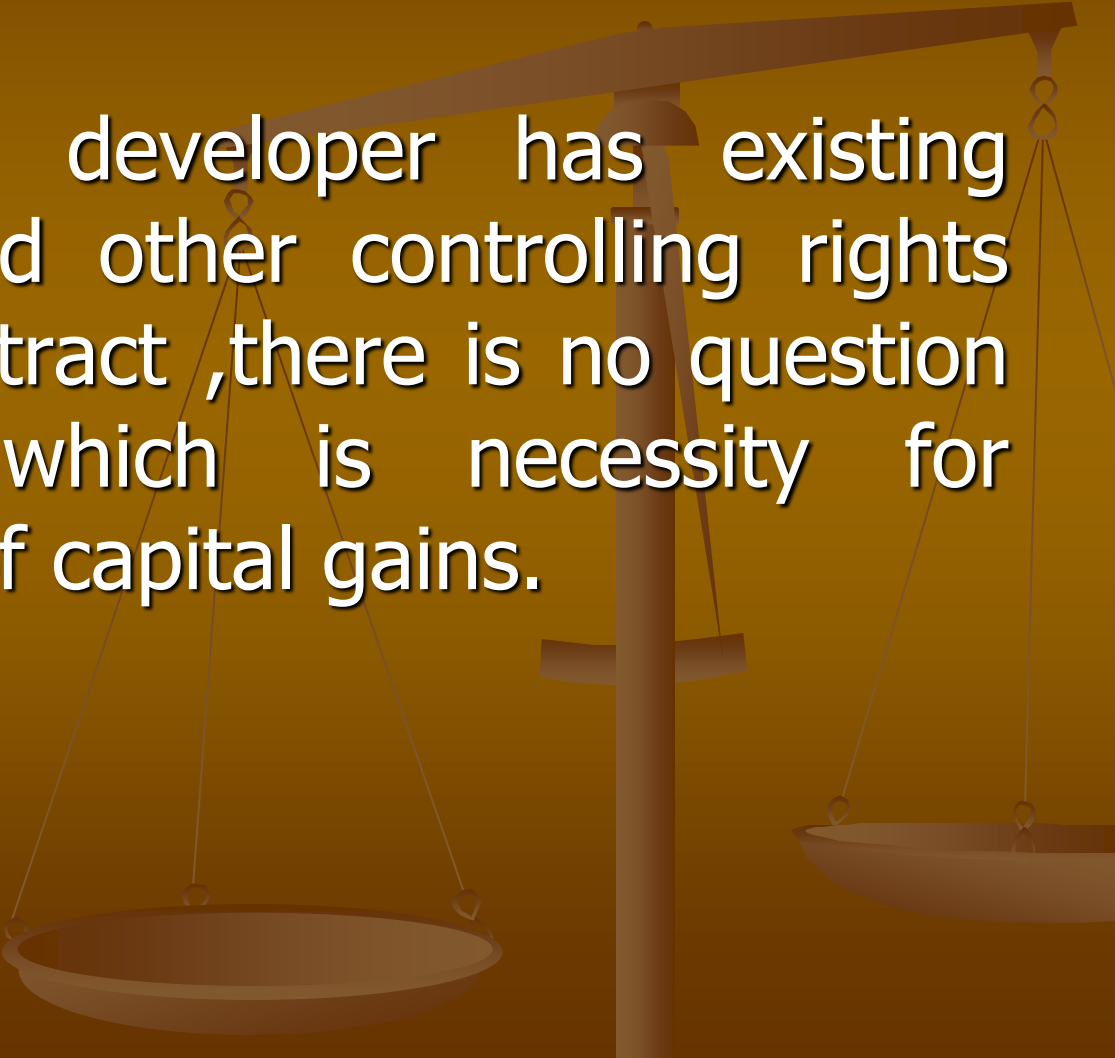


General Glass Co. (P) Ltd. vs. Dy. CIT-108 TTJ (Mumbai) 854

1. Transferee not willing to perform his part of contract .
 2. Did not keep promise relating to payment schedule even though payments in time had been agreed to be the essence of the contract
 3. Deptt sought to invoke the provisions of Section 2(47)v on mere assumptions.
 4. So Contract is not one of a nature covered by Section 53A and so Section 2(47)v could not be invoked.
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Asst. CIT vs. Mrs. Geeta Devi Pasari-104 TTJ (Mum)375

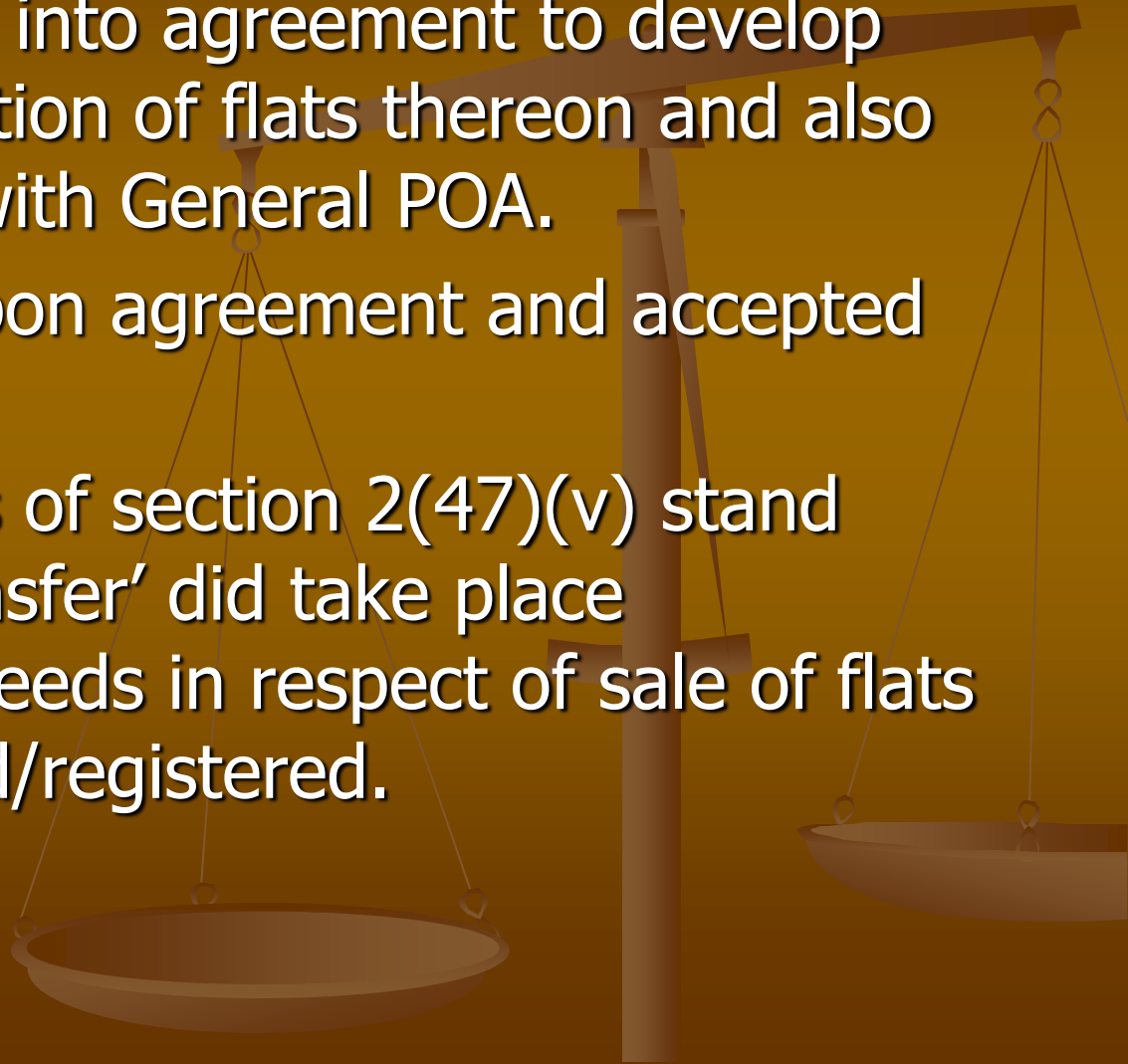
1. Only mearge amount of 10 % paid as earnest money on date of agreement.
 2. Sec 53A clearly speaks of handing over of possession in part performance.
 3. Date of agreement not relevant in this case for chargeability of capital gains since only 10 % was paid and it cannot be said that developer had complete control over the property.
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4. Unless the developer has existing possession and other controlling rights under the contract, there is no question of transfer which is necessary for chargeability of capital gains.

DNYANESHWAR N. MULIK VS.

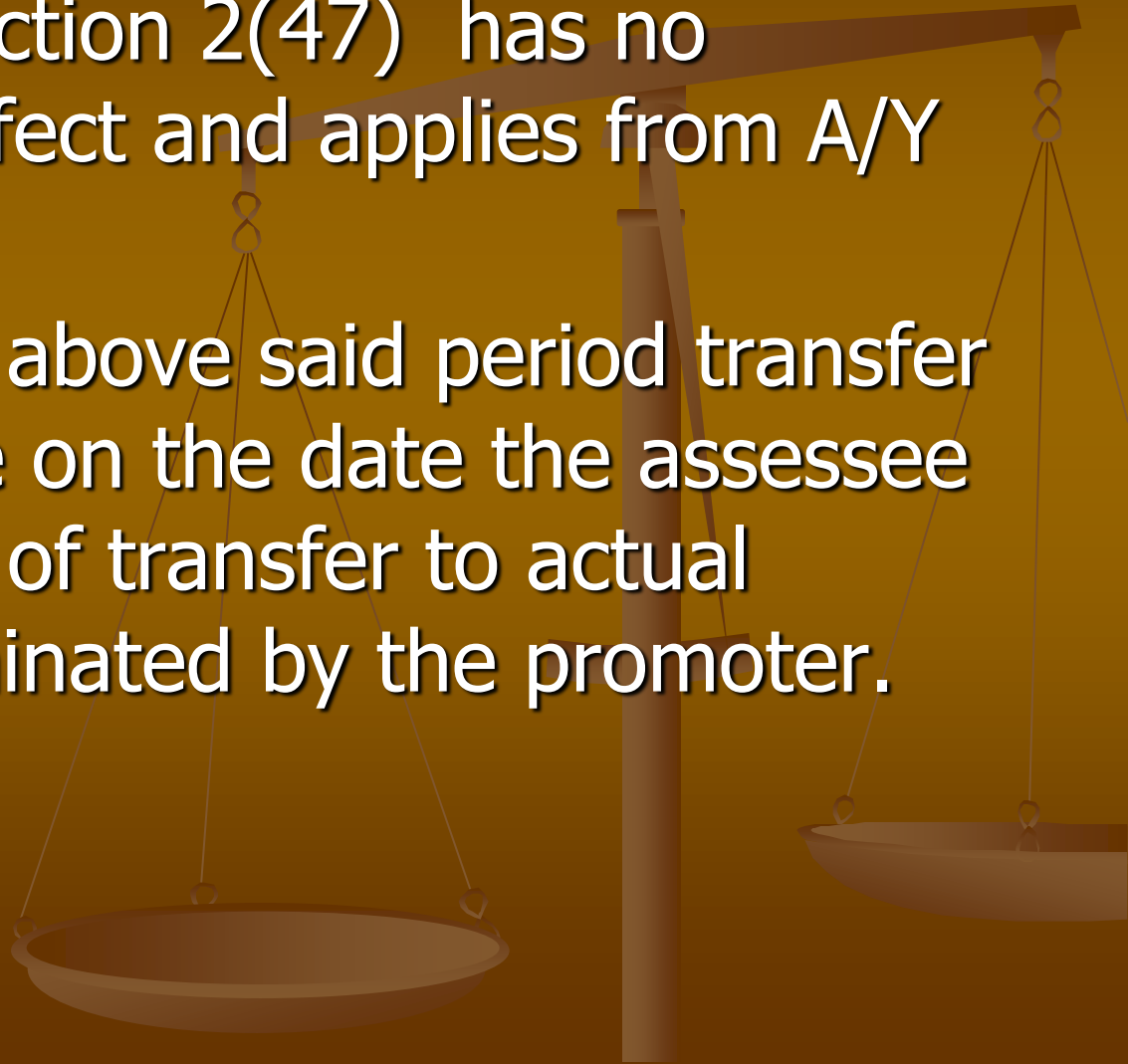
Asst CIT – 98 TTJ (Pune) 179

- Assessee entering into agreement to develop land and construction of flats thereon and also gave possession with General POA.
- Assessee acted upon agreement and accepted payments.
- Held all conditions of section 2(47)(v) stand satisfied and 'Transfer' did take place notwithstanding deeds in respect of sale of flats were not executed/registered.

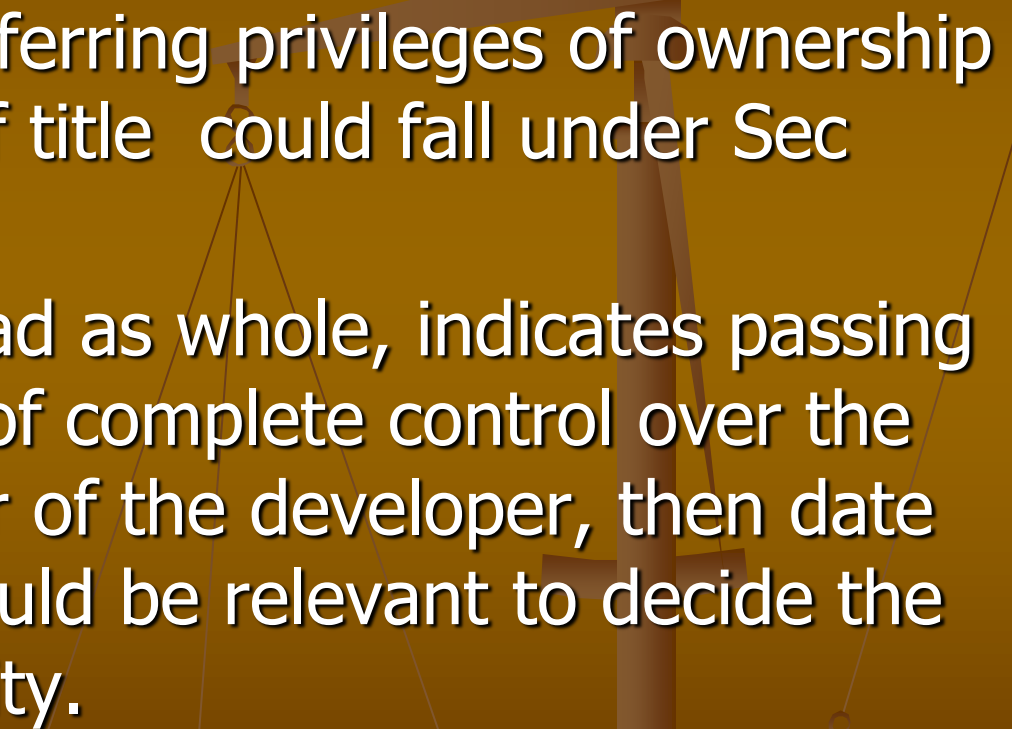


C.R.Murugesan vs. Asstt CIT – 60 ITD 313 (Mad)

- Clause (v) of section 2(47) has no retrospective effect and applies from A/Y 88-89.
- In cases before above said period transfer only takes place on the date the assessee executes deeds of transfer to actual purchasers nominated by the promoter.

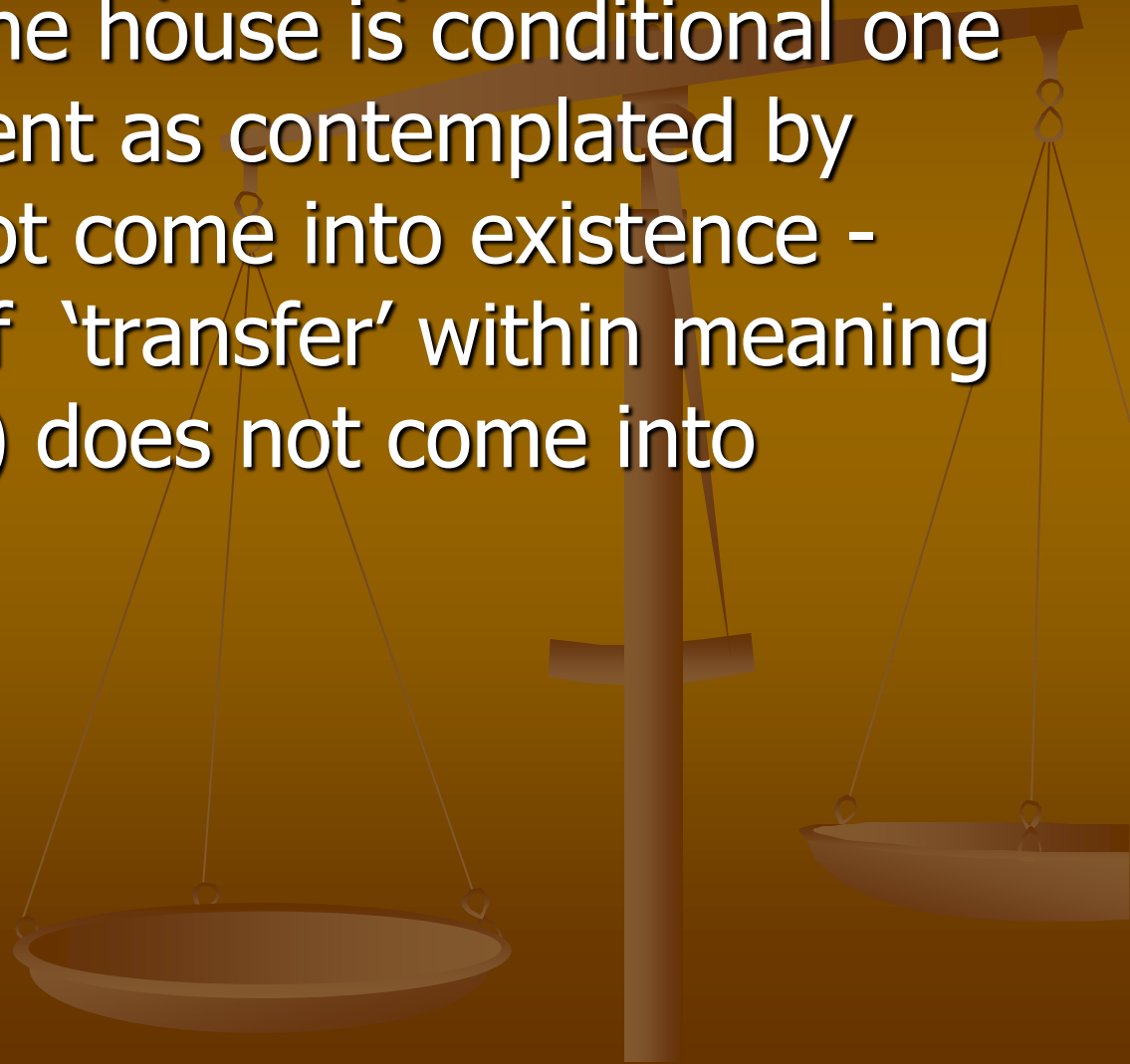


Chaturbhuji Dwarkadas Kapadia vs, CIT 260 ITR 491 (Bom)

- Arrangements conferring privileges of ownership without transfer of title could fall under Sec 2(47)(v).
 - If the contract, read as whole, indicates passing of or transferring of complete control over the property in favour of the developer, then date of the contract would be relevant to decide the year of chargeability.
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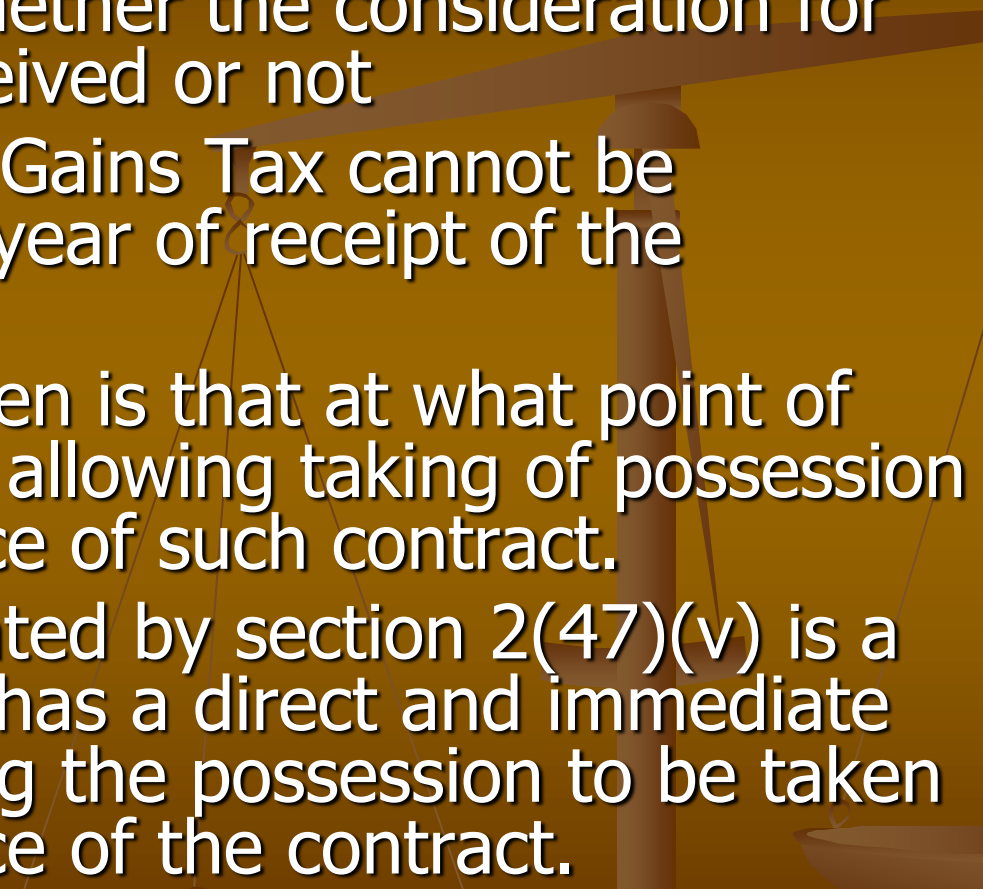
Zuari Estate Development & Investment Co. (P) Ltd. 271 ITR 269 (Bom)

- Where sale of the house is conditional one and an agreement as contemplated by Sec. 53A had not come into existence - the requisites of 'transfer' within meaning of Section 2(47) does not come into existence.

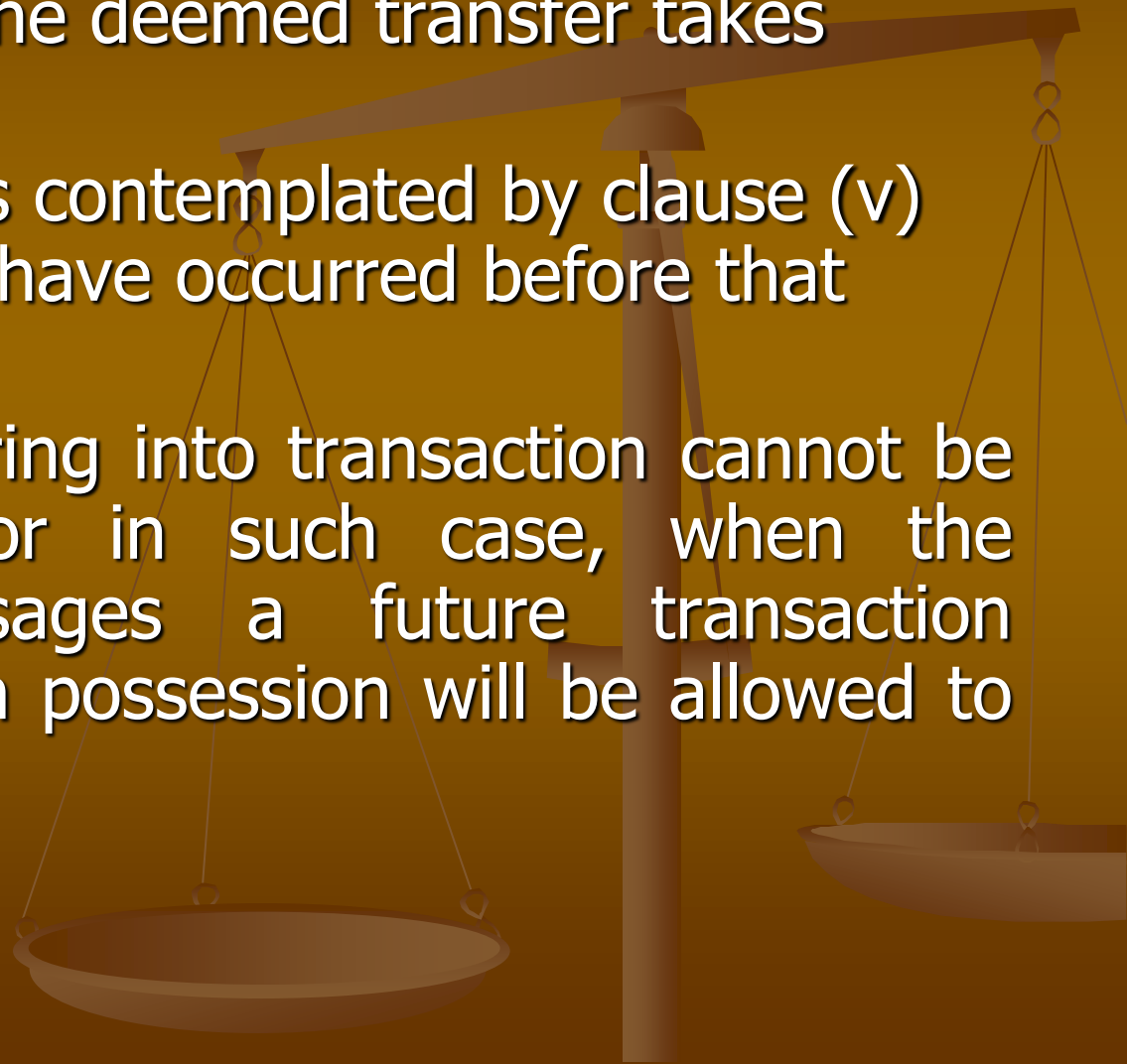


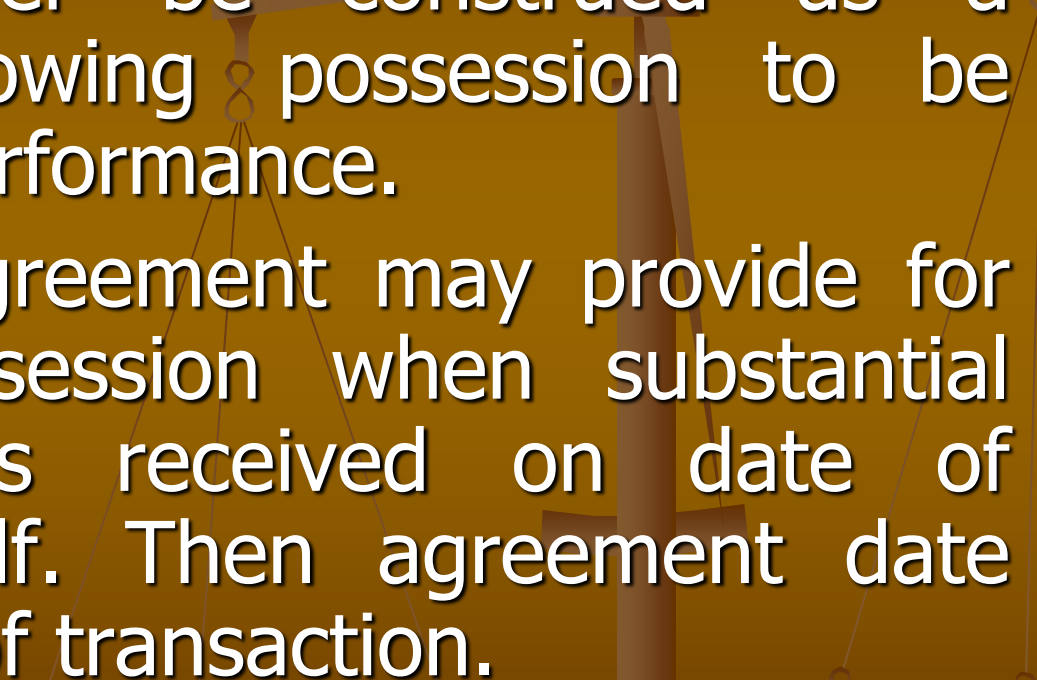
Advance Ruling in case of Jasbir Singh Sarkaria-164 TAXMAN 108(AAR-NEW DELHI)

- Capital Gains Tax liability would be attracted by the owner of the land entering into development agreement immediately when the irrevocable POA is executed in favour of developer as it constitutes the “transaction” by which the developer is allowed to take possession of the property in part performance of the contract for transfer.

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- It is immaterial whether the consideration for the transfer is received or not
 - Liability to Capital Gains Tax cannot be postponed till the year of receipt of the consideration.
 - What has to be seen is that at what point of time “transaction” allowing taking of possession in part performance of such contract.
 - What is contemplated by section 2(47)(v) is a transaction which has a direct and immediate bearing on allowing the possession to be taken in part performance of the contract.

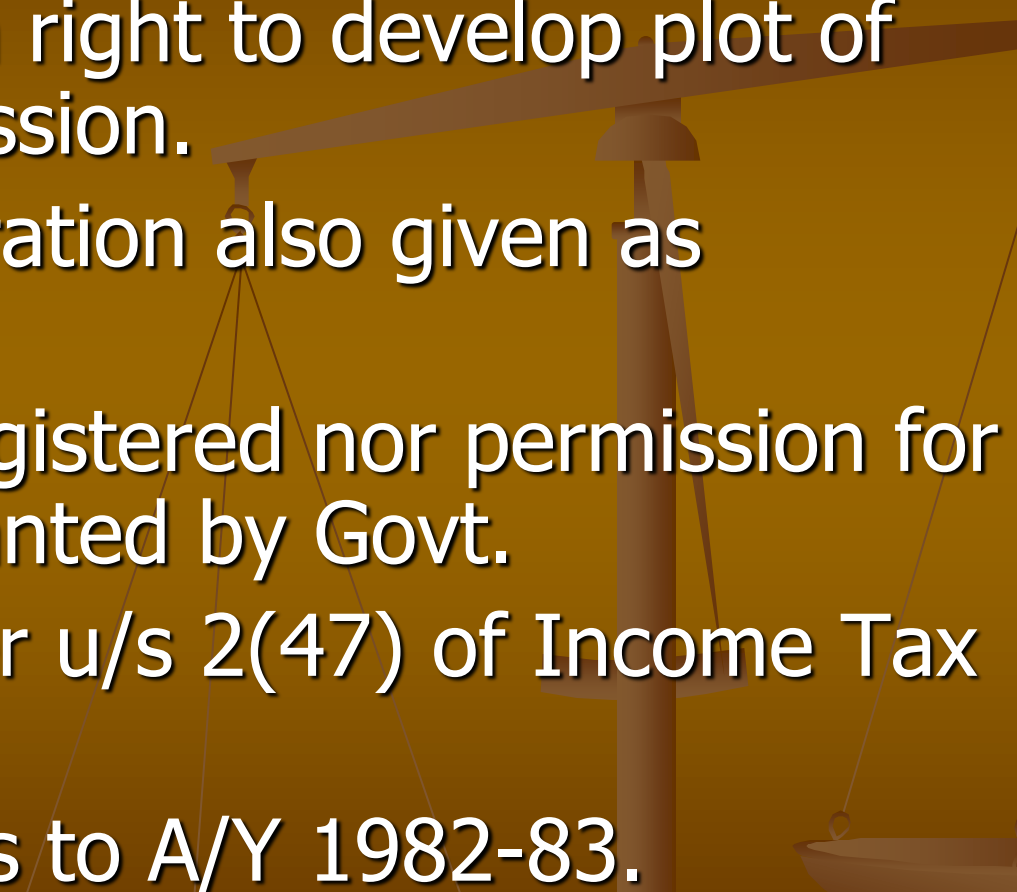
- It is at that time the deemed transfer takes place.
- The transaction as contemplated by clause (v) cannot be said to have occurred before that date.
- The date of entering into transaction cannot be determining factor in such case, when the agreement envisages a future transaction pursuant to which possession will be allowed to be taken.



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- However it is not rigid that an agreement date can never be construed as a transaction allowing possession to be taken in part performance.
 - For e.g. the agreement may provide for immediate possession when substantial consideration is received on date of agreement itself. Then agreement date would be date of transaction.

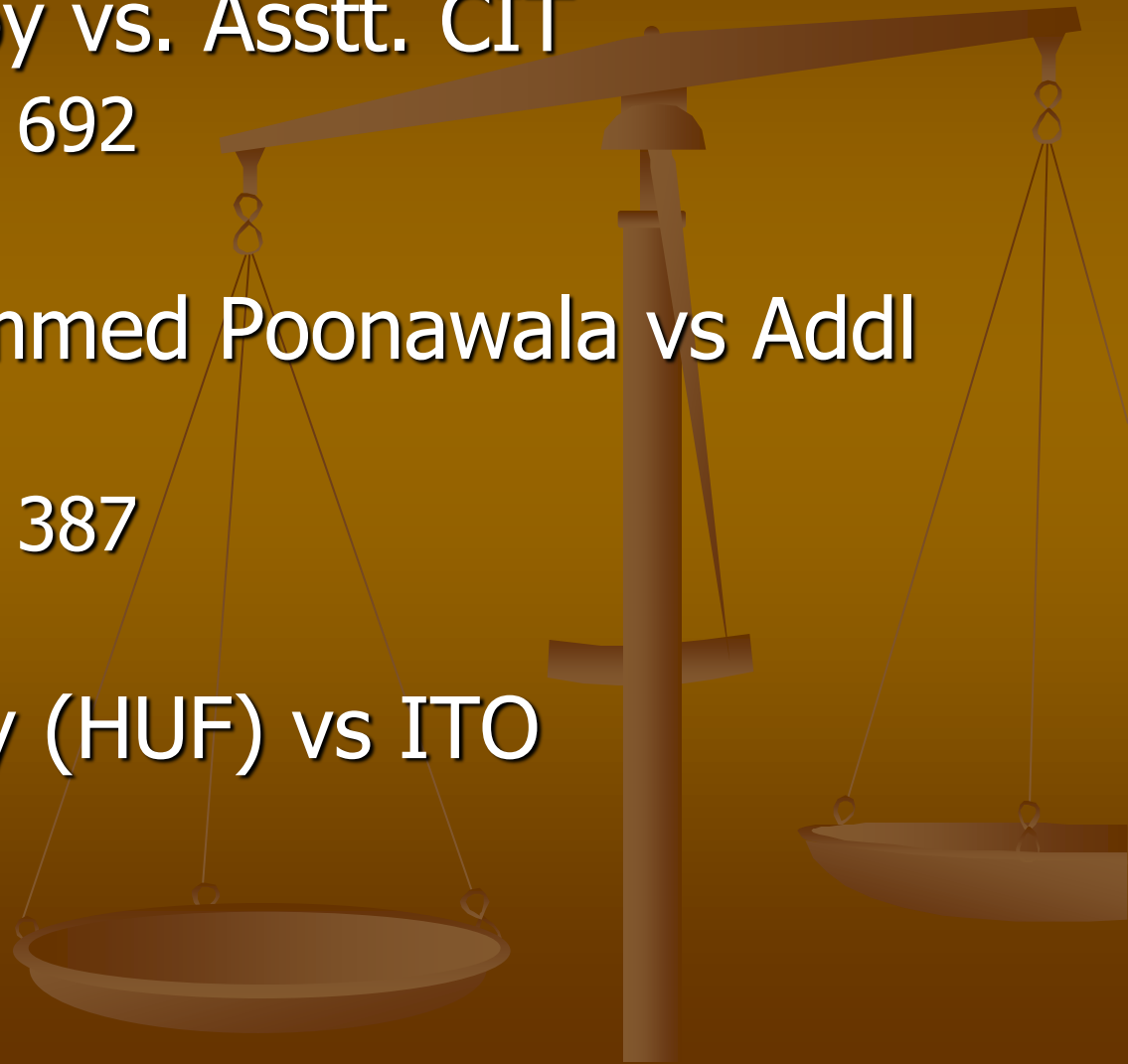
CIT VS Atam Parkash & Sons- 219

CTR (Del) 164

- Developer given right to develop plot of land with possession.
 - Certain consideration also given as security.
 - No sale deed registered nor permission for construction granted by Govt.
 - Held, no transfer u/s 2(47) of Income Tax Act.
 - This case relates to A/Y 1982-83.
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OTHER IMP JUDGEMENTS

- Dr. Maya Shenoy vs. Asstt. CIT
 - (2009) 124 TTJ 692
- Taher Aumohammed Poonawala vs Addl CIT
 - (2009) 124 TTJ 387
- Vemanna Reddy (HUF) vs ITO
 - 114 TTJ 246



- R.Gopinath (HUF) vs ACIT (2010) 133 TTJ 595 (Chennai) :Conversion of Land into SIT and thereafter development agreement entered into with developer-Held Capital Gain arising from the conversion of the land and building into stock in trade were assessable proportionately in the previous years in which the constructed property was sold by the assessee and not in the year of development agreement.

THANK YOU

