आयकर अपीलीय अधिकरण,सुरत न्यायपीठ,सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, Hon'ble JUDICIAL MEMBER
AND SHRI ARJUN LAL SAINI, Hon'ble ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.754/AHD/2017

निर्धारणवर्ष/Assessment Year: 2008-09

Jhonson Electric Company Limited, C/o. C.K.Pithawala Bhimpore, Post: Dumas Dist: Surat. **[PAN: AAACJ 4908 P**	Vs.	The Income Tax Officer, Ward-1(1)(3), Vadodara – 390007.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	Sh. Saurabh Soparkar with Sh. Mayur K. Swadia ARs.
राजस्वकीओरसे **/Revenue by**	Mrs. Anupama Singla – Sr. DR

सुनवाई की तारीख/ Date of hearing:	23.09.2020
उद्घोषणा की तारीख/Pronouncement on:	22.10.2020

आदेश /O R D E R

PER PAWAN SINGH, JM:

1. This appeal by the Assessee is directed against the order of Ld. Commissioner of Income Tax (Appeals)-1, Vadodara dated 17.01.2017 for the assessment year 2008-09.

2. Grounds raised by the Assessee read as under:

> *"1. The learned Commissioner of Income Tax (Appeals) has erred in facts and in law in Treating Long Term Capital Gain as Short Term Capital Gain.*
>
> *2. Your appellant craves the right to add to or alter, amend, substitute, delete or modify all or any of the above grounds of appeal."*

3. Brief facts of the case as gathered from the order of Lower Authorities are that the original assessment under section (u/s) 143(3) read with section (r.w.s.) 147 of Income –tax Act, was completed in the case of assessee on 03.11.2010. The assessee in hits return of income had showed income at Rs.19,34,420/-. The ld. Assessing Officer (AO) while passing the assessment order made addition on account of Long Term Capital Gain (LTCG) on account of sale consideration of Rs.2 Crore. The addition of LTCG was made on the basis of consideration shown in the conveyance deed dated 08.05.2017. Subsequently, the case was reopened by the ld.AO on the basis of information received by the AO that conveyance deed of the property was cleared on 25.07.2010 on charging additional stamp duty by Stamp Valuation Authority. The Stamp Valuation Authority valued the property at Rs.4,67,51,985/-. In the Return of Income, the assessee has shown/offered the sale consideration of Rs.2 crores only. Thus, in view of the aforesaid fact the ld.AO again reopened the case of the assessee. The notice u/s.148 of the Act was issued on 26.03.2014. The AO after serving statutory notice u/s 142(1) and 143(2) proceeded for reassessment. The AO also issued show cause notice on 17.02.2015 requiring the assessee to show cause as to why stamp value of Rs.4.6 Crores be not treated as sale consideration for the purpose of computation of capital gain and further addition of Rs.2.6 Crore should not be made as per the provision of section 50C. The assessee

filed its reply and contended that the stamp duty value as adopted by stamp valuation authority is far excess of the fair market value on the date of transfer of the said property. The assessee also contended that he had appointed an independent registered valuer, who valued the fair market value of the said property. On the contention of the assessee vide application dated 10.03.2014, the AO referred the case to the District Valuation Officer (DVO) to determine the fair market value of the asset/ property. The assessee further vide his application dated 30.03.2015 contended that section 50C is not applicable on the sale of the asset. The valuation report of DVO was not received by the AO till 31.03.2015. The AO recorded that the case was going to be time barred on 31.03.2015, accordingly the AO passed the assessment order under section 143(3) rws 147 on 31.03.2015. The AO treated /adopted the value of the property at Rs. 4.6 Crore, as adopted by stamp valuation authority and after granting benefit of indexation determined long term capital gain of Rs.2.86 crores.

4. Aggrieved by the action of the ld.AO, the assessee filed appeal before the learned CIT(A). During the course of appellate proceedings, the report of DVO was received, wherein the value of land/ asset was determined at Rs.2.30 crores. Thus, the assessee contended that the order passed by the AO be not rectify, in accordance with working the value determined by the DVO. The ld. CIT(A) after taking into account the report of DVO directed the ld.AO to take/adopt the sale

consideration at Rs.2.30 crores and computed the capital gain accordingly.

5. However, during the appellate proceedings, the ld. CIT(A) asked assessee to furnish copy of agreement through which the property was acquired and this conveyance deed wherein the assessee signed as a confirming party and received consideration. The assessee furnished the relevant documents which consist of two agreement to sale both dated 06.04.1993, both executed by Vithalhbai Purshotamdass Patel Managing Trustee of Matrushri Gangaba Trust and being Attorney of Mrs Gngaben Raojibhai Patel and Johnson Electric Company executed through its Director, copy of conveyance deed dated 08.05.2007, which was signed on behalf of assessee as confirming party. The ld. CIT(A) after perusal of agreement of sale dated 06.04.1993 and conveyance deed dated 08.05.2007, signed on behalf of assessee as confirming party, took his view that at the time of signing the agreement of sale dated 06.04.1993, no possession of land was given to the assessee as the same was dependent upon on payment of balance consideration of Rs.30 lakhs. The payment of remaining consideration was paid by assessee to the sellers as per Annexure –VI & VII of Conveyance deed dated 08.05.2007, on the following dates;

(i) Rs.15 lakhs each on 21.05.2004,

(ii) Rs.9 lakhs each on 27.05.2005,

(iii) Rs.6 lakhs each on 27.05.2005.

6. The ld CIT(A) also held that the seller handed over possession of property to the assessee on 15.07.2006, thus, the transfer of land to the assessee within the meaning of section 2(47) took place only on 15.07.2006. The assessee was not having right prior to this date and was not having right to specific performance. The right to specific performance accrues to the assessee as per Clause 6 of agreement to sale dated 06.04.1993, only on 27.05.2005 when full payments of agreed consideration were made to seller.

7. On the basis of aforesaid observation, the ld. CIT(A) issued show cause notice to the assessee in the course of hearing on 04.01.2017 as to why capital gain should not be treated as short term capital gain in place of long term capital gain. In response to show cause notice, the assessee stated that assessee acquired the property on 06.04.1993 and the capital gain earned by the assessee on transfer of asset is long term in nature. The explanation furnished by the assessee was not accepted by the ld. CIT(A). The ld.CIT(A) directed the ld.AO to treat the capital gain as short term capital gain by passing the following order as under:

> *"5.3. I have considered the appellant's contentions. The facts narrated above on the basis of agreements to sale and sale deeds executed by the appellant as a confirming party make it very clear that the land was transferred to the appellant when the appellant was handed over the possession by the sellers on 15.07.2006. The right of specific performance also accrued to the appellant on 27.05.2005 when full payments of consideration as agreed in the sale deeds were made.*

Prior to this, the appellant was not having any right in the land and hence, the rights transferred by the appellant as confirming party on the date of sale of these lands have been transferred within three years of their acquisition. Under such circumstances, the entire capital gain earned by the appellant is liable to be taxed as Short Term capital Gain. Accordingly, the AO is directed to tax the capital gain earned by the appellant on account of transfer of its right in the properties as Short Term Capital Gain.

5.3.1. It may also be mentioned here that the appellant had claimed that it was in exclusive possession of the lands since 06.04.1993. But, from the submissions made by the appellant itself, it is seen that the appellant was occupying the land as a tenant during this period and not as an owner of the land. The right transferred by the appellant by signing the sale deed as confirming party is not a tenancy right by the right to specific performance acquired by it through sale agreements dated 16.04.1993 after payment of the full consideration on 27.05.2005. Such transfer of right to a specific performance is taxable as capital gain in the hands of the assessee and in such circumstances, the earnest money paid by the assessee to the seller is allowed as deduction as cost of acquisition while computing capital gain.

5.3.2. Thus, it is held that the appellant had earned Short Term Capital Gain on account of transfer of its right acquired on 27.05.2005 for the purchase of the land in pursuance to the sale deed agreements signed on 16.04.1993. The appellant was also handed over the possession of the land on 15.07.2006. Thus, the capital gain earned by the appellant was short term in nature. Accordingly, no indexation of the amounts paid by the appellant as earnest money is required to be given while computing the Short Term capital Gain. Besides, by showing the Short Term Capital Gain as Long Term Capital Gain, the appellant has filed inaccurate particulars of income and hence, penalty proceedings u/s 271(1)(c) of the IT Act, 1961 are being initiated separately in this regards."

8. Thus, further aggrieved by the order of ld. CIT (A) the assessee has filed present appeal before this Tribunal.

9. We have heard the submissions of ld. Authorized Representative (AR) of the assessee and learned Senior Departmental Representative (DR) for the revenue and perused the order of Lower Authorities carefully. The ld. AR of the assessee submits that the AO while passing the assessment order u/s.143(3) r.w.s 147 on 03.11.2010 allowed the LTCG to the assessee. Subsequently, the assessment was reopened on the basis of information received from the Stamp Valuation Authority (SVA) that sale deed of property was cleared on 27.05.2010 after charging additional stamp duty. The additional Stamp Duty was charged on valuation of property valued by the Stamp Valuation Authority at Rs.4.67 Crores. The assessee offered sale consideration of Rs.2 Crores received on execution of conveyance deed dated 08.05.2007. In the conveyance deed dated 08.05.2007, the assessee signed as confirming parties.

10. The ld.AR of the assessee further submits that on 06.04.1993 assessee entered into agreement for sale for purchase of a piece of land, wherein the assessee was already tenant. The assessee was having exclusive possession in the said property. As per agreement to sale dated 06.04.1993, the assessee agreed to purchase the property at the total consideration of Rs. 80 lakhs from two co-owners i.e. at Rs.

40 lakhs each, out of which Rs.10 lakhs each was paid to both the owners by the assessee. In the agreement to sale deed 06.04.1993 the seller admitted the possession of assessee. The assessee sold the said property to Tanman Finvest Pvt. Ltd. on 08.05.2007. The purchaser/ Tanman Finevest Private Limited, wants to get the transfer of clear title in their favour. After prolong discussion the original owner/lesser of the property agreed to execute the conveyance deed in favour of purchaser. Since the assessee occupying the property and having agreement, signed the conveyance deed as a confirming party. The assessee also paid the remaining sale consideration which was payable to the original owner as per agreement dated 06.04.1993. The assessee being a confirming party received consideration of Rs.2.00 Crores. The consideration was received by assessee was offered for taxation as Long Term Capital Gain. The facts regarding the tenancy right in the asset/property transferred by the assessee are duly recorded in the deed of conveyance dated 08.08.2007. The ld.AR of the assessee while making his submissions referred Clause 11, 20, 21, 25, 27 and 28 of conveyance deed dated 08.05.2007. The ld.AR further submits that u/s.2(47)(v) any transaction involving allowing possession to be taken over or retain in part performance of contract in the nature referred to in section 53A of Transfer of Property Act would come within the ambit of section 2(47) of the Act. In order to attract section 53A there should be contract for consideration, it must be in

writing, it should pertain to transfer of immoveable property, transferee should have taken possession of the property and transferee should be ready and willing to perform his part of contract. All conditions in case of assessee were fulfilled while singing as a confirming party and received consideration for surrendering there right in the property. The ld.AR submits that the Lower Authority has not disputed that the assessee had transferred the capital asset; only question for determination for Tribunal is whether the capital gain earned by assessee on transfer of asset is short term or long term capital gain. Admittedly, the assessee was occupying/ possessing the asset/property prior to 1993, this fact was duly acknowledged by the transferor in the agreement to sale dated 06.04.1993 as well as in conveyance deed dated 08.05.2007. The ld. CIT(A) wrongly held that transfer of property was handed over to the assessee on 15.07.2006 and that prior to that the assessee was not having right to specific performance or that the asset was transfer within three years. In support of his submissions the ld AR for the assessee relied on the following decisions;

- Rustom Spinners Ltd Vs CIT (198 ITR 351 Gujarat High Court),
- CIT Vs H. Anil Kumar [2012] 20 taxmann.com 530(Karnataka),
- Chandrasekhar Naganagouda Patil Vs DCIT 183 ITD 457 (Bangalore –Trib) and
- CIT Vs Vedprakash & sons (HUF)207 ITR 148 (P& H).

.

11. On the other hand, the DR for the Revenue supported the order of ld. CIT(A). The ld. DR for the revenue further submitted that assessee entered into agreement of sale of land with two share holders of land on 06.04.1993, registered on 12.04.1993 for sale considerations of Rs.40 lakhs to each of the shareholders. The assessee made payment of Rs.10 lakhs each to both the share holders only as an earnest money. These facts are duly recorded in the agreement of sale dated 06.04.1993, copy of which is filed by the assessee on record. Perusal of Clause 3, 4 and 5 make it clear that assessee was required to make balance payment of Rs.30 lakhs to each of the share holders by cheque within 30 days of receipt of various terms as referred in the agreement. Further as per Clause 6 of the agreement, it is clear that if the purchaser failed to make balance payment, then the earnest money deposit stands forfeited. The right to specific performance accrues to the assessee only after payment of balance consideration of Rs.30 lakhs each to the owners. Admittedly, the assessee did not make payment of balance consideration within 30 days of execution of the agreements dated 06.04.1993, and that possession of land continued with the seller. In the conveyance deed dated 08.05.2007 it is clear that the assessee signed the said deed as a confirming party. The right to specific performance accrues to the confirming party (Assessee) only on fulfillment of terms and conditions laid down in the agreement dated 06.04.1993. The terms and

conditions mentioned in agreement dated 06.04.1993 were fulfilled only on 15.07.2005 when full payment as per the agreement dated 06.04.1993 was made. On the basis of aforesaid facts, it is clear that assessee was never in the possession of piece of land before 2005. The possession of land was given to the assessee in 2005 and the right to specific performance accrued to the assessee only in the year of 2005, after making balance payment and fulfillment of conditions of the original agreement dated 06.04.1993.

12. The ld. DR for the Revenue submitted that case laws relied by the ld. AR for the assessee is not helpful to him. In case of Rustom Spinners Ltd. (supra) the Hon'ble Gujarat High Court clearly held that court can give relief on the ground of subsequent impossibility, when it finds that whole purpose or the basis of contract has not been fulfilled by the occurrence of unexpected events which was not contemplated by parties that date of contract. In the instant case, it is clear that the terms and conditions were completely laid down in the agreement dated 06.04.1993. There were not such occurrences of an unexpected event in the case. Moreover, the assessee failed to complete the terms and conditions of the contract. It was clearly mentioned that in case of assessee failed to make the full payment, the payment shall be forfeited. The most crucial fact to be seen is “whether assessee enjoyed the possession in the land in absence of making balance payment of land” or “the assessee had right for specific performance before 2005,

when balance payment was made". The answer to this question is ….no! When the assessee did not have the possession of land and the right to specific performance in the same, there was no question of being treating the transfer of such land as Long Term Capital Asset.

13. In case of H. Anil Kumar (supra) the Hon'ble Karnataka High Court held that giving up of a right to claim specific performance of by conveyance in respect of immoveable property amounts to relinquishment of capital asset. In the instant case right to specific performance accrued only on 27.05.2005 on balance payment. Further, the Hon'ble Punjab & Haryana High court in case of Ved Prakash & Sons (HUF) (supra) held that assessee was in possession of piece of land since 1973, the tenant and the assessee has submitted that what is relinquished is the tenancy right by the assessee which the assessee had since 1993. However, on perusal of agreement dated 06.04.193, in the present case it is clear that possession of the piece of land and right to specific performance accrues to the assessee only on fulfillment of terms and conditions laid down on the agreement dated 06.04.1993, it was done by assessee only in the year 2005. Thus, the reliance placed by ld.AR is misplaced. In the preset case, no question/issue was raised that assessee sold the tenancy rights. In the agreement dated 06.04.1993 there is no reference of tenancy right. In fact, agreement clearly laid down that assessee occupies possession of land only on fulfillment of conditions laid down therein. The capital

asset in this case, is not the tenancy right and the argument of the ld. AR for the assessee about the tenancy right should not be accepted as it was never argued before the Lower Authorities. The ld. DR prayed for upholding the order of ld.CIT(A).

14. We have considered the rival submissions of the parties and have gone through the order of the ld CIT(A) carefully. The assessee while filing return of income offered LTCG of Rs. 19,34,426/-on sale of asset/ land. The assessment was completed under section 143(3) rws 147 on 11.06.2010. Again the assessment was reopened under section 147 on the basis of information received by the AO that conveyance deed of the property was cleared on 25.07.2010. The Stamp Valuation Authority valued the said property at Rs.4,67,51,985/-, however, in the Return of Income, the assessee offered the sale consideration of Rs.2.00 Crores only. The notice under section 148 of the Act was issued on 26.03.2014. The AO after serving statutory notice under section 142(1) and 143(2) proceeded for reassessment. The AO also issued show cause notice on 17.02.2015 requiring the assessee to show cause as to why stamp value of Rs.4.6 Crores be not treated as sale consideration for the purpose of computation of capital gain and further addition of Rs.2.6 Crore should not be made as per the provision of section 50C. The assessee in its reply and contended that the stamp duty value as adopted by stamp valuation authority is far excess of the fair market value on the date of transfer of the said

property. The assessee had appointed an independent registered valuer, who valued the fair market value of the said property. During the second re-assessment, the AO referred the case to the District Valuation Officer (DVO) to determine the value of the fair market value of the asset/ property. The assessee again vide his application dated 30.03.2015 contended that section 50C is not applicable on the sale of the asset.

15. We have seen that the valuation report of DVO was not received by the AO till 31.03.2015 and the AO noted that the case was going to be time barred on 31.03.2015, accordingly he passed the assessment order under section 143(3) rws 147 on 31.03.2015 and adopted the value of the property at Rs. 4.6 Crore, as determined by stamp valuation authority and after granting benefit of indexation determined long term capital gain of Rs.2.86 Crores. The report of DVO was received during the pendency of appeal before ld CIT(A), wherein the DVO estimated the value of property at Rs. 2.30 Crore. The assessee made prayer to rectify the assessment order accordingly. The ld CIT(A) directed the AO to treat the sale consideration of asset at Rs. 2.30 Crore. During the appellate proceedings, the ld. CIT(A) asked assessee to furnish copy of agreement through which the property was acquired and this conveyance deed wherein the assessee signed as a confirming party and received consideration. The assessee furnished the relevant documents which consist of two agreements to sale both dated

06.04.1993, executed by Vithalhbai Purshotamdass Patel Managing Trustee of Matrushri Gangaba Trust and other being Attorney of Mrs Gngaben Raojibhai Patel and Johnson Electric Company (assessee) executed through its Director, copy of conveyance deed dated 08.05.2007, which was signed on behalf of assessee as confirming party.

16. The ld. CIT(A) on perusal of agreement of sale dated 06.04.1993 and conveyance deed dated 08.05.2007, signed on behalf of assessee as confirming party, concluded that at the time of signing the agreement of sale dated 06.04.1993, no possession of land was given to the assessee as the same was dependent upon on payment of balance consideration of Rs.30 lakhs. The payment of remaining consideration was paid by assessee to the sellers as per Annexure –VI & VII of Conveyance deed dated 08.05.2007. It was also concluded that the appellant had claimed that it was in exclusive possession of the lands since 06.04.1993, but, from the submissions made by the appellant itself, it is seen that the appellant was occupying the land as a tenant during this period and not as an owner of the land. The right transferred by the appellant by signing the sale deed as confirming party is not a tenancy right by the right to specific performance acquired by it through sale agreements dated 16.04.1993 after payment of the full consideration on 27.05.2005. Such transfer of right to a specific performance is taxable as capital gain in the hands

of the assessee and in such circumstances, the earnest money paid by the assessee to the seller is allowed as deduction as cost of acquisition while computing capital gain. Thus, it is held that the appellant had earned Short Term Capital Gain on account of transfer of its right acquired on 27.05.2005 for the purchase of the land in pursuance to the sale deed agreements signed on 16.04.1993. The appellant was also handed over the possession of the land on 15.07.2006 and the capital gain earned by the appellant was short term in nature. We have gone through various clauses of the agreements to sale dated 06.041993 and the Conveyance deed dated 08.05.2007.

17. For appreciation better appreciation of facts, the various clauses of agreement to sale and conveyance deed are reproduced below:-

> "1. The Seller is in absolute ownership with clear marketable I title of the Said Property and the possession is with the tenants as referred in the schedule. The Seller assure that no notice for acquisition or requisition has been received in respect of the Said Property from any government or other authorities. Further there has been no despondance or attachment before or after judgement or decree of any court or authority.
>
> 2. The Purchaser agrees to purchase the Said Property at total consideration of Rs 40,00,000.00 (Rupees Forty lac only) and the Seller agrees to sell the Said Property to the Purchaser.
>
> 3. Purchaser had made a payment of Rs 10,00,000.00 (Rupees Ten lacs) by Cheque as earnest deposit payment, and in consideration of this earnest deposit payment, the Seller is making this agreement to sell the Said Property.
>
> 4. The Seller shall approach the Appropriate Authority of Income Tax for obtaining the permission under sec 269UC of the Income Tax Act 1961 to transfer the Said Property. The Seller shall also approach

the Industries Commissioner, Gujarat to avail the permission for transfer of the Said Property in terms of the condition laid down in the approval granted under Urban Land (Ceiling and Regulation) Act 1976 vide IC/ULC/Exemption/31/95/214/82/1482 dated 30.06.1987.

5. The Purchaser saree to make the balance payment of Rs. 30,00,000.00 (Rupees Thirty Lacs) by cheques within thirty days of receipt of above referred permissions.

6. The Seller hereby agrees to execute necessary document for transferring the property to the Purchaser and hand over the constructive possession of the Said Property on receipt of the balance euro of Rs 30,00.000 (Rupees Thirty lacs). However, if the Seller fails to do so even after the payment is made, the Purchaser is entitled for specific performance of this agreement through the court. Similarly if the Purchaser fails to make balance payment within stipulated time under terms of this agreement, the earnest deposit money of Rs 10,00.000.00 (Rupees Ten lacs) already paid will stand forefeited by the Seller.

7. The Seller agrees to provide all original records such as the registered sale deed- in. favour of the Seller for acquiring the Said Property, the latest payment receipts of Municipal and other taxes, the permissions under Urban Land (Ceiling and Regulation) Act, lease and rent agreements and details connected thereto and other related documents etc at the time of the execution of the sale deed. However copies of these documents will be made available immediately.

8. All the municipal and other taxes upto date of this agreement have already been paid. However, if any dues till the time of execution of sale deed are unpaid the Seller undertakes the payment of the same. All the rates and taxes thereafter related to the Said Property shall be responsibility of the Purchaser.

9. The Purchaser shall not be liable for the expense incurred by the Seller for providing infrastructure Said Property. The Seller shall not be liable to do any further work to complete or provide any further infrastructure to the said building.

10. The seller shall at their own cost and expense get the consent of the persons including legal heirs, if required, having interest in the property agreed to be sold and shall get the documents duly executed

by them whenever necessary. The Seller shall also clear the revenue or city survey record or such other record of rights.

11. The Seller assures the clear, and unencumbered title of the Said Property to the Purchaser. The Seller will furnish report on title within two months to the Purchaser. However if any dispute arises at a later date, the Seller indemnifies the Purchaser against all the costs for defending the same* Similarly the Seller indemnifies the Purchaser against all outstanding actions and claims whatsoever in respect of the Said Property.

12. All the expenses relating to execution of conveyance such as stamp duty, registration charges etc. will be borne by the Purchaser.

SCHEDULE

Plots of land located on R. S. No 974 and 957/2 of village: 3orwa, Taluka: Vadodara, Revenue Sub district and District : Vadodara, having area of Acres 1-05 guntha and Acres 2-38 Guntha respectively, bearing final plot no 155 of T. P. Scheme no 12 of Vadodara. Total area of 16,491.00 sq m with construction admeasuring about 2375.00 sq m. and alongwitho all internal roads, boundary wall, trees, easements, rights of way, flow of water etc with following four boundaries:

On East	:	River Bhuki
On West	:	Municipal School and transformer sub station
On North	:	Road of T. P. Scheme
On South	:	Village Lalpura

The property is in occupation of following tenants:

M/s Jhonson Electric Company on lease of Rs 800.00 per month
M/s Union Electric Company on rent of Rs.750.00 per month
M/s Jay Corporation on rent of Rs 650.00 per month
M/s Jhonson Electric Company on rent of Rs 3550.00 per month

In confirmation of having executed this agreement, both the parties have placed their respective seals and signatures hereunto on the day and place mentioned hereinabove."

XXXXX

Conveyance deed dated 08.05.2007

This ***DEED OF CONVEYANCE*** *is made and entered into at Vadodara on this 8th day of in the Christian year Two Thousand Seven.*

BETWEEN

*SHRI VITHALBHAI PURSHOTTAMDAS PATEL,**Managing Trustee of** MATRUSHRI GANGABA TRUST **and**Constituted Attorney of* **SMT.GANGABEN RAVJIBHAI PATEL**, *adult of Vadodara, Indian Inhabitant, residing at Kamdhenu, RaceCourse Circle, Vadodara, hereinafter referred to as* **"the CO - OWNER / VENDOR"** *(which expression shall unless it be repugnant to the context or meaning thereof shall deem to mean and include its heirs, administrators, executors, assigns and successors-in-title) of* **FIRST PART (PA No: AAATM3712 B)**

And

M/S. JHONSON ELECTRIC COMPANY PRIVATE LIMITED, *a company registered under Companies Act, 1956, having Registration No. 1988 of 1971-72, having its registered office at Chhani Road, Navayard, Vadodara - 390 002 and having Mumbai Office at 401/E, Poonam Chambers, Dr. A.B. Road, Worli, Mumbai - 400018, represented by it's Director, MR. MAHESH C. PITA WALLA, hereinafter referred to* **as "THE CONFIRMING PARTY"** *(which expression shall unless it be repugnant to the context or meaning thereof shall deem to mean and include it's administrators, successors-in-title and assigns) of the* **SECOND PART***(PA No.: AAAPP8879 L)*

AND

TANMAN FINVEST PRIVATE LIMITED, *a company registered under Companies Act, 1956, having it's registered address at 146, Nagdevi Street, Mumbai 400003, represented by it's Director, MR.JUGAL KABRA, hereinafter referred to as* ***"THE PURCHASER"*** *(which expression shall unless it be repugnant to the context or meaning thereof shall deem to mean and include it's administrators, successors-in-tile and assigns) of the* ***THIRD PART*** *(PA No.: AJQPK 1301H).*

1.-----
2-----
3------

20. By an Agreement for Sale dated 06/04/1993 registered on 06/04/1993 at Sr. No. 5971 with the Sub Registrar, Matushri Gangaba Trust, through managing trustee, Shri Vithalbhai P. Patel, has agreed to sell their undivided 50% share in the total property described as First Property as well as Second Property, in favour of the Confirming Party, on the terms-and conditions set out therein.

21. By an Agreement for Sale dated 06/04/1993, "registered on 06/04/1993 at Sr. No. 5972 with the Sub Registrar, Mrs. Gangaben Raojibhai Patel, through power of attorney holder Shri Vithalbhai P. Patel, has agreed to sell her undivided 50% share in the total property described as First Property as well as Second Property, in favour of the Confirming Party, on the terms and conditions set out therein.

22. The Confirming Party declare that the aforesaid two Agreements were partly implemented, but could not be complied in full, in view of the fact that the said Confirming Party came in financial loss and could not comply with the financial obligations casted upon under the two Agreements referred hereinabove. However the said Agreements were registered with the Sub - Registrar at Vadodara on 12/04/1993 at Sr. No. 5971 & 5972. However, in view of the Agreements and the reasons set out hereinabove, the Confirming Party continued to be in exclusive use, occupation and possession of the properties described as the First and Second property hereinabove as the Vendors have handed over the possession of the said Properties mentioned as First and Second Property on 15/07/2006 after receipt of the full payments towards the two Agreements for sale both dated 06/04/1993.

23. The Confirming Party due to various reasons could not continue the business on the said property and thus demolished the entire factory building structure on the said property and converted the same into an open piece of land, without any structure of whatsoever nature thereon.

24. The Confirming Party thereafter approached the purchaser to purchase the said property with the no - objection of the Co - owners.

25. After prolonged negotiations, the confirming party and the purchaser herein entered into an MOU dated 24/06/2006 thereby agreed to sell, transfer and assign all right, title and interest in respect of the said property in favour of the purchaser herein at a total consideration of Rs.2 crores on complying with the obligations casted upon the Confirming Party under the said Agreement.

26-----

27. The purchaser after verifying the title documents came to the conclusion that the confirming party is not the holder of the said property and thus, requested to

approach the Co – owners to convey the said property in favour of the purchasers.

28. *On the representation of the Confirming Party the Co-Owners agree to sell, transfer and convey their entire rights in respect of the said property described in the Schedule hereunder, written in favour of the Purchasers, without any consideration as the consideration."*

18. A careful reading of the various clauses of the aforesaid documents shows that the assessee was in possession of the asset of the property much prior to execution of the agreement to sale April 1993. This fact that the assessee was in possession of the property is clearly mentioned in the last clause of the agreement, though, it was possessed (occupied) as a tenant. Further, a careful reading of various clauses of the Conveyance deed dated 08.05.2007 nowhere stipulates that after the agreement dated 06.04.1993, the assessee was occupying the property as a tenant. In clause 12 of Conveyance deed it is clearly mentioned that under the lease dated 16.09.1975, the assessee had constructed a Factory Building and started business activity. Further there is no averment in the Conveyance deed that the assessee was making any periodical payments as a tenant or in default of the conditions of the agreements the status of the assessee was treated as tenant.

19. In clause 22 of Conveyance deed it is mentioned that "*in view of the agreements and the reasons set out hereinabove, the confirming party continued to be in exclusive use, occupation and possession of the properties described as First and Second property hereinabove as the*

venders have handed over the possession of the said property mentioned in the first and second property on 15/07/2006 after receipt of the full payments towards the two agreements for sale both 06/04/1993." This clause is the bone of contention on which the parties have locked their horn. In our view the aforesaid clause has ambiguity in drafting. Once the seller has accepted that the assessee was holding possession of the property, and there is no stipulation in the Conveyance deed that the possession of the property was ever surrender to the owner, the possession cannot be said to have handed over only on the payments of alleged balance payments as mentioned in Annexure VI & VII of Conveyance deed.

20. Further, in para 25 of the Conveyance deed it is clearly mentioned that after prolonged negotiations, the confirming party and the purchaser entered into MOU dated 24/06/2006 thereby agreed to sell, transfer and assign all right, title and interest in respect of the property in favour of purchaser for a total consideration of Rs. 2.00 Crore on complying with the obligation casted upon the assessee under the agreements. In view of the above discussion, we are of the view that the assessee was not only holding the possession of the property, besides having right and interest in the property, for at least from the year 1993, which was assigned to the purchaser and earned capital gain. The gain earned by the assessee qualify as long term and not the short term as held by ld CIT(A) in the impugned order.

21. The Hon'ble Karnataka High Court in CIT Vs H. Anil Kumar (supra) while considering the question of law "whether the Tribunal was correct in holding that the amount of compensation received for giving up the right to specific performance of an agreement to sell dated 14th Oct., 1992 for a purchase of a property by paying an advance of Rs. 50,000 cannot be treated as a transfer and brought to capital gains tax". The Hon'ble Court after referring the decisions of various High Courts answered the question by passing the following order;

> **"13.** Before we answer these substantial questions of law, it is necessary to look into the views expressed by the various High Courts in this country, which will be helpful in answering the aforesaid substantial questions of law.
>
> **14.** Before referring to the aforesaid decisions, it is necessary to look into a few definitions which would be helpful in answering the substantial questions of law.
>
> **15.** Sec. 2(14) of the Act defines what a 'capital asset' means. It reads thus :
>
> "'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*) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes-
>
> (*a*) jewellery;
>
> (*b*) archaeological collections;
>
> (*c*) drawings;
>
> (*d*) paintings;

(*e*) sculptures; or

(*f*) any work of art."

Sec. 2(47) defines what 'transfer' means in relation to a capital asset, as under :

"'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 compulsory acquisition thereof under any law; or

(*iv*) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or

(*iva*) the maturity or redemption of a zero coupon bond; or

(*v*) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in s. 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(*vi*) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other AOP 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."

Though the words 'capital gain' as such is not defined under the Act. Sec. 45(1) of the Act deals with capital gains, which reads as under :

"45(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in ss. 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.

(1A) Notwithstanding anything contained in sub-s. (1), where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to or destruction of, any capital asset, as a result of -

(*i*) flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature: or

(*ii*) riot or civil disturbance; or

(*iii*) accidental fire or explosion: or

(*iv*) action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),

then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of s. 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.

Explanation : For the purposes of this sub-section, the expression 'insurer' shall have the meaning assigned to it in cl. (9) of s. 2 of the Insurance Act, 1938 (4 of 1938)."

However, ss. 2(29A) and 2(29B) defines what a 'long-term capital asset' and 'long-term capital gain' means, which reads thus :

"2(29A) 'long-term capital asset' means a capital asset which is not a short-term capital asset;

2(29B) 'long-term capital gain' means capital gain arising from the transfer of a long-term capital asset;"

Similarly, ss. 2(42A) and 2(42B) defines what 'short-term capital asset' and 'short-term capital gain' means. It reads as under :

"(42A) 'short-term capital asset' means a capital asset held by an assessee for not more than (thirty-six) months immediately preceding the date of its transfer :

(42B) 'short-term capital gain' means capital gain arising from the transfer of a short-term capital asset."

16. When once the Act defines the aforesaid terms, in deciding the section or the provisions in the Act. we have to go by the aforesaid definitions. Therefore, when once the word 'transfer' in relation to a capital asset is defined under the IT Act, we cannot import the meaning assigned to them under the provisions of the Transfer of Property Act. The word 'capital asset' means property of any kind held by the assessee which does not necessarily be confined to an immovable property. Similarly, when the word

'transfer' in relation to a capital asset though includes sale, exchange or relinquishment of the asset, the said asset need not necessarily be an immovable property. It is in this background, we have to consider the judgments of the various High Courts, where these words have been the subject-matter of interpretation.

17. In the case of *CIT* v. *Tata Services Ltd.* [1979] 13 CTR (Bom) 227 : [1980] 122 ITR 594 (Bom), the Division Bench of the Bombay High Court dealing with the transaction of an assignment of a right to obtain conveyance which was assigned under the tripartite agreement on receipt of Rs. 5 lakhs as consideration for assigning the right in the contract, held as under :

> *"It is no doubt true that as provided for in s. 54 of the Transfer of Property Act, a contract for sale of immovable property does not by itself create any interest in or charge on such property. It is, however, difficult to see how the provisions of s. 54 of the Transfer of Property Act at all become relevant for the purposes of the present case. The word 'property', used in s. 2(14), is a word of the widest amplitude and the definition has re-emphasised this by use of the words 'of any kind'. Thus, any right which can be called property will be included in the definition of 'capital asset'. A contract for sale of land is capable of specific performance. It is also assignable. Therefore, a right to obtain conveyance of immovable property, was clearly 'property' as contemplated by s. 2(14). The mere fact that ultimately the earnest money was to be treated as a part of the purchase price, the balance of which was to be paid on the completion of sale, did not detract from the fact that the immediate consideration for the execution of the agreement of sale was the payment of earnest money. Therefore, this was clearly a case which squarely fell within s. 45 and the assessee had made a profit or gain arising from the transfer of the capital asset which was the right to obtain a sale deed in respect of immovable property. Therefore, the entire amount of Rs. 5,00,000, being the difference between the amount of Rs. 5,90,000 received by the assessee and Rs. 90,000 originally paid by the assessee as earnest money, would be capital gain in the hands of the assessee. Therefore, it is liable to capital gain tax. The assessee would, however, be entitled to a deduction of Rs. 14,115 on account of legal and other expenses transferred to by the ITO."*

18. Again the Bombay High Court in the case of *CIT* v. *Vijay Flexible Containers* [1990] 81 CTR (Bom) 29 : [1990] 186 ITR 693 (Bom), dealing with the case of a suit for specific performance of the agreement where a consent decree was passed in favour of the assessee for a certain sum, where he gave up his right to claim specific performance, held as under :

"Having regard to the statutory provisions and the authorities cited above, it cannot be said that the right acquired under an agreement to purchase immovable property is a mere right to sue. The assessee acquired under the said agreement for sale the right to have the immovable property conveyed to him. He was, under the law, entitled to exercise that right not only against his vendors but also against a transferee with notice or a gratuitous transferee. He could assign the right. What he acquired under the said agreement for sale was. therefore, property within the meaning of the IT Act, and consequently, a capital asset. When he filed the suit in the Court against the vendors he claimed specific performance of the said agreement for sale by conveyance to him of the immovable property and, only in the alternative, damages for breach of the agreement. A settlement was arrived at when the suit reached hearing, at which point of time the assessee gave up his right to claim specific performance and took only damages. His giving up of the right to claim specific performance by conveyance to him of the immovable property was relinquishment of the capital asset. There was, therefore, a transfer of a capital asset within the meaning of the IT Act. The payment of earnest money under the agreement for sale was the cost of the acquisition of the capital asset.

Right to obtain a conveyance of immovable property falls within the expression 'property of any kind' used in s. 2(14) and amount received in connection therewith is liable to capital gains tax."

19. However, in the case of *CIT* v. *Abbasbhoy A. Dehgamwalla & Ors.* [1992] 101 CTR (Bom) 425 : [1992] 195 ITR 28 (Bom) the Bombay High Court dealing with the case of a right to sue for damages for breach of a contract of lease, held as under:

''There is no difficulty in holding that the right to lease constituted 'capital asset'. Such a right got extinguished at least on 20th Sept., 1961, when this Court refused to grant specific performance of the agreement, if not earlier on 7th Jan., 1958, i.e., the date of breach of contract mentioned by the Court in its decree. Unlike compensation payable by the State when it acquires a citizen's land under the Acts such as the Land Acquisition Act where the right to receive compensation is statutory right, the right that a person acquires on the establishment of a breach of contract is at best a mere right to sue. Despite the definition of the expression 'capital asset' in the widest possible terms in s. 2(14), a right to a capital asset must fall within the expression 'property of any kind' and, must not fall within the exceptions. Sec. 6 of the Transfer of Property Act which uses the same expression 'property of any kind' in the context of transferability makes an exception in the case of a mere right to sue. The decisions thereunder make it abundantly clear that the right to sue for damages is not an actionable claim. It cannot be assigned. Transfer of such a right is as much opposed to public policy as is gambling in litigation. As such, it will not be quite correct to say that such a right constituted a 'capital asset' which in turn has to be 'an interest in property of any kind'. The question of the assessee's right under the agreement of 1945 being converted or

substituted by another right which can be said to be a 'capital asset' does not therefore, arise. In the next place, the right to sue for damages for breach of contract no doubt is capable of maturing into a right to receive damages for breach of contract. But that happens only when the damages claimed for breach of contract are either admitted or decreed and not before."

20. The Gujarat High Court in the case of *Rustom Spinners Ltd.* v. *CIT* [1992] 103 CTR (Guj) 142 : [1992] 198 ITR 351 (Guj) dealing with a case of an assignment of a right in immovable property acquired under a purchase agreement, held as under;

"Contention that the assessee had not incurred any cost in respect of the agreement of purchase in view of the fact that the cheque for the earnest amount of Rs. 5 lakhs was not encashed by the vendor and was returned to the assessee cannot be accepted because admittedly the assessee had incurred an expenditure of Rs. 2,05,768 as claimed by him by way of service charge expenses, legal and professional charges and miscellaneous expenses for acquiring the rights under the agreement and for their assignment. It may also be noticed that the amount of Rs. 5 lakhs which was given by way of deposit or earnest money under the cheque issued by the assessee to the vendor was to be adjusted towards the total amount of Rs. 2.75 crores being the price of the textile mill, as recorded in the agreement. There is no dispute about the fact that, under the assignment deed, the assignee was required to pay the full amount of Rs. 2.75 crores to the vendor. In view of this arrangement between the parties, it is clear that the liability of the assignor, that is the assessee, to pay the total consideration of Rs. 2.75 crores was also assigned to the assignee and that is why the cheque of Rs. 5 lakhs was returned to the assignor (assessee) by the vendor who was a confirming party to this arrangement. In other words, though a sum of Rs. 9 lakhs was paid under the deed of assignment to the assignor, the assignee paid Rs. 5 lakhs directly to the vendor in view of the cheque of the earnest amount of Rs. 5 lakhs having been returned to the assessee-assignor. If the amount of Rs. 5 lakhs were retained by the vendor, then an amount of Rs. 5 lakhs would have been paid by the assignee to the assignor in view of the assignee having undertaken the liability to pay the entire amount of consideration under the deed of assignment. Therefore, it cannot be said that the assessee had acquired rights under the agreement of sale without having had to incur any cost simply because the cheque for Rs. 5 lakhs was returned to it unencashed by the vendor. The amount of Rs. 5 lakhs it received less from the assignee because instead of being paid to it, it was directly paid to the vendor by the assignee in view of the assignor having been returned the earnest amount by the vendor. Thus, the Tribunal was right in holding that the claim of the assessee that it did not incur any cost in acquiring the rights under the said agreement was not acceptable. It is a settled legal position that the Court can give relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract has frustrated by the inclusion or occurrence of an unexpected event or change of circumstances which were not contemplated

by the parties on the date of the contract. In the instant case, it is evident that the assessee not only did not rescind the contract but proceeded to assign its benefits and liabilities which it had incurred under the contract in favour of the assignee by a deed of assignment. Under the agreement the 'purchaser' was defined to mean as the assessee or his successors and assigns and, therefore, under the original agreement itself it was envisaged that the purchaser could assign his rights and liabilities in favour of an assignee. Neither the vendor nor the assessee ever treated the contract as having been frustrated by virtue of the interim orders which were operative on the date on which the deed of assignment was executed. It is clear that this is not a case where the parties had not foreseen the fact that interim relief would be granted in the winding up petition, nor is it a case where mere grant of a temporary injunction resulted in any fundamental or radical change in respect of the obligations originally undertaken under the agreement. The fact that the same rights and liabilities were assigned in favour of the assignee, under the deed of assignment to which the vendor was a confirming party, clearly shows that no such fundamental or radical change was brought about merely by virtue of the temporary injunction and that it is not as if any situation which was not foreseen by the parties had arisen. Therefore, there was no frustration of the contract as is sought to be contended on behalf of the assessee. It is also clear that time was not treated to be of the essence of the contract. From the agreement, it is clear that it was specifically agreed that the purchaser may, instead of rescinding the contract extend from time to time the time for completing the sale and if the time for completion as stipulated in cl. 21, namely, a period, of two weeks of the receipt of the necessary permission from the Urban Land Ceiling authorities expired, the vendor would have the option of rescinding the agreement notwithstanding that the purchaser extended time for the same. It was further stipulated that, if the purchaser did not comply with its obligations under the agreement within the time fixed for completion, the vendor would be entitled to cancel the agreement and would return the earnest amount. This arrangement which is reflected in the latter part of the cl. 32 of the agreement clearly shows that, though the parties indicated the time of performance of the contract in cl. 21 of the agreement and described it as of essence, in reality, it never treated the time to be the essence of the contract. It is a settled legal position that in the case of sale of immovable property, there is a presumption against time being of the essence of the contract and mere fixation of the period within which the contract has to be performed, does not make the time the essence of the contract. Therefore, it cannot be said that there was no assignment made by the assessee. Once it is held that there is no frustration of the contract and that there was cost of acquisition of the rights of the contract, the assessee would be liable for tax on capital gains in respect of sum received by it in consideration of the assignment of the contract."

21. Similarly, the Indore Bench of the Madhya Pradesh High Court in the case of *CIT* v. *Smt. Laxmidevi Ratani & Ors.* [2005] 198 CTR (MP) 336 : [2008] 296 ITR 363 (MP)

dealing with a case of giving up a right to claim specific performance of a contract in lieu of consideration received in terms of the compromise between the parties, held as under :

> *"The expression 'property of any kind' used in s. 2(14) is of wide import. When this expression is read along with expression defined in s. 2(47)(ii), i.e., extinguishment of any rights therein, there is no hesitation in holding that giving up of right to claim specific performance by the assessee to get conveyance of immovable property in lieu of receiving consideration resulted in extinguishment of right in property thereby attracting the rigour of s. 2(14) r/w s. 2(47). In other words, the action on the part of assessee in giving up her right to claim the property and instead accepting the money compensation was a clear case of relinquishment of a right in the property resulting in transfer as defined in s. 2(47). When the legislature in its wisdom defines a particular type of transaction to be in the nature of transfer for taxing purpose, then the effect has to be given to such transaction to be in the nature of transfer as defined. The reading of definition of transfer under s. 2(47) clearly indicates that the intention of legislature is to include several kinds of transactions to be falling in the category of transfer for the purpose of bringing them in income-tax net under the IT Act. Amount of Rs. 7,34,000 is a capital receipt exigible to capital gains tax as it involved transfer of property within the meaning of s. 2(47)."*

22. The Delhi High Court in the case of *CIT* v. *J. Dalmia* [1984] 42 CTR (Del) 168 : [1984] 149 ITR 215 (Del), dealing with the case of a nominee of the assessee giving up a right to specific performance but retaining his right to claim damages held as under :

> *"The relevant question is not whether the assessee acquired any interest in the immovable property by virtue of the contract for sale. Under s. 54 of the Transfer of Property Act, a contract for sale of immovable property does not by itself create any interest in or charge on such property. It is to be determined whether damages received by the assessee were in respect of transfer of a 'capital asset'. There was a breach of contract and the assessee received damages in satisfaction thereof. He had a mere right to sue for damages. Assuming the same to be 'property' this could not be transferred under s. 6(e) of the Transfer of Property Act which read that 'a mere right to sue cannot be 'transferred'. No exception is found under the IT Act though the word 'transfer' in relation to capital asset has been defined in s. 2(47) which includes 'sale, exchange or relinquishment of the asset or the extinguishment of any right therein'. The damages which were received by the assessee cannot be said to be on account of relinquishment of any of his assets or on account of extinguishment of his right of specific performance under the contract for sale. Under s. 5 of the Transfer of Property Act, transfer of property means an act by which a person conveys property to another and 'to transfer property' is to perform such act. A mere right to sue may or may not be*

property but it certainly cannot be transferred. There cannot be any dispute with the proposition that in order that receipt or accrual of income may attract the charge of tax on capital gains the sine qua non is that the receipt or accrual must have originated in a 'transfer within the meaning of s. 45 r/w s. 2(47). Since there could not be any transfer in the instant case, it has to be held that the amount of Rs. 1,02,500 received by the assessee as damages was not assessable as capital gains.

23. From the aforesaid judgments it is clear that the right to obtain a conveyance of immovable property falls within the expression 'property of any kind' used in s. 2(14) of the Act and consequently it is a capital asset. It is because the expression 'property of any kind' is of wide import. When this expression is read along with the expression defined in s. 2(47)(ii) i.e., 'extinguishment of any rights therein', the giving up of a right of specific performance by the assessee to get conveyance of immovable property in lieu of receiving consideration, results in the extinguishment of the right in property, thereby attracting the rigor of s. 2(14) r/w s. 2(47). Giving up of a right to claim specific performance by conveyance in respect to an immovable property, amounts to relinquishment of the capital asset. Therefore, there was a transfer of capital asset within the meaning of the Act. The payment of consideration under the agreement of sale, for transfer of a capital asset is the cost of acquisition of the capital asset. Therefore, in lieu of giving up the said right, any amount received, constitutes capital gain and it is exigible to tax. However, as is clear from s. 48, before the income chargeable under the head capital gains is computed, the deductions set out in s. 48 has to be given to the assessee. It is only the amount thus arrived at, after such deductions under s. 48, would be the income chargeable under the heading capital gains.

24. In the instant case both the assessees entered into an agreement to purchase the immovable property and paid Rs. 1,00,000 as advance amount. It is the cost of acquisition. They filed a suit for specific performance of the agreement of sale. It is thereafter under an agreement entered into between them and the purchasers, they gave up their right to sue for specific performance in lieu of a payment of Rs. 7,50,000. Therefore, the amount received by them for giving up the right of specific performance i.e., to give up their right in a capital asset constitutes capital gains. However, they are entitled to deductions as per s. 48, both regarding the investment

made as well as the expenditure incurred and only after such deduction the amount arrived at would be exigible to capital gains tax."

22. The Hon'ble Punjab & Haryana High Court in CIT Vs Ved Prakash & sons (HUF) (supra) held from the bare reading of section 2(42A), the word 'owner' has by design not been used by the Legislature. The word 'held' as per dictionary meaning means to possess, be the owner, holder or tenant of property, stock, land, etc. Thus, a person could be said to be holding the property as an owner, as a lessee, as a mortgagee or on account of part of performance of agreement, etc. Conversely, all such other persons who may be termed as lessees, mortgagees with possession or persons in possession as part performance of the contract would not in strict parlance come within the purview of an 'owner'. As per Shorter Oxford Dictionary, 'owner' means one who owns or holds something; one who has the right of claim or title to a thing.

23. In view of the aforesaid factual and legal discussions, we are of the considered view that the assessee was occupying the asset for more than the qualifying period of 36 months and on assigning the right in the property, the gain earned is certainly qualified for LTCG.

24. The submissions of ld. DR for the revenue that the assessee was not in possession of the asset or that the right to specific performance accrued only in the year 2005 is not correct being contrary to the contents of various clauses the agreements to sale dated 06.04.1994

and the conveyance deed dated 08th May 2007, which we have discussed above. The assessee possessed the property since long and not from the date of making balance payment in the year 2005. It is settled legal position that the contents of documents should not be read in isolation but as a whole.

25. In the result the grounds of appeal raised by the assessee is allowed.

The order announce on 22/10/2020 as per Rule 34(5)of Income tax (Appellate Tribunal) Rules1963.

Sd/-	**Sd/-**
(ARJUN LAL SAINI)	**(PAWAN SINGH)**
(लेखा सदस्य /ACCOUNTANT MEMBER)	**(न्यायिक सदस्य /JUDICIAL MEMBER)**

सुरत/ **Surat,** दिनांक **Dated:** 22/10/2020
S.Gangadhara Rao, Sr.PS
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

// **True Copy** //

Assistant Registrar, Surat