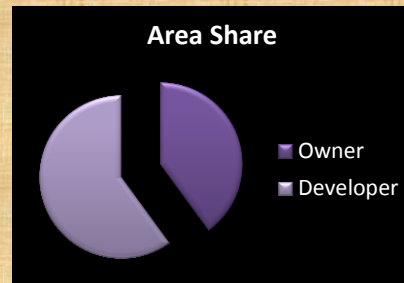




Development Agreement on Area Sharing Basis



1. Nature of transaction

- i. Owner and Builder/Developer agree to develop the Immovable Property for residential/ commercial/ mixed use.
- ii. Owner and Developer/ Builder agree to share the area developed at a ratio as agreed upon. The area to be shared would be identified post plan sanction and detailed by way of an allocation agreement.
- iii. General Power of Attorney to be executed in favour of the Developers/Builders to do all acts, deeds and things for the purpose of the development.

- iv. The Developer/ Builder is granted the right to enter the Immovable Property as a "Licensee" as understood under Section 52 of the Indian Easement Act, 1882 to commence the construction activity. It is explicitly stated that the legal title, domain, and control of the property continues to be vested with the Owner till its transfer in favour of the ultimate purchasers of apartments.
- v. Developer given the right to mortgage the Developer's interest in the property for obtaining construction finance.
- vi. Owner to deposit original title deeds with the Financing Institution. The Financing Institution will give a letter of sanction stating that the Owners share of interest is not secured or charged.
- vii. Clause on date of commencement, date of completion, grace period to be given to the Developer, compensation to Owners for delay subject to conditions force majeure to be included.

- viii. Compensation from prospective buyers to be charged by both the Owner and Developer for delay in receipt of installments to be standardized.
- ix. Agreements on price parity i.e. review of minimum price to be fixed periodically to be provided for in the agreement.
- x. Developer to be responsible for all matters relating to construction including adherence to applicable laws, specifications agreed to be provided, quality of construction etc.
- xi. Power to the Developer to enter into agreements and collect advances from his/ their share of buyers will be given. However, the power to execute conveyance deeds in respect of their share will be given only on the Developer handing over the Owner's share of super built up area in habitable condition after joint inspection by both the parties.

2. Issues arising out of Area Sharing Development Agreement

i. Point of incidence of capital gain on the land owner

➤ Applicable on date of entering into the joint development agreement, refer decisions below-



- ✓ Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom)
- ✓ JCIT (Asst)(Spl Range 6)Vs Dr T.K Dayalu (ITA No 3209 of 2005) dated 20-06-2011.

- ✓ Karnataka High Court has in the case of CIT and Others Vs H B Jairaj in ITA No 20 of 2005 C/W ITA No 21 of 2005 dated 16.09.2011
- ✓ CIT Vs Ved Prakash Rakhra (2012) 210 Taxman 605 Karnataka: (2013) 256 CTR (Karn) 285
- ✓ Smt. Prameela Krishnan vs. Income Tax Officer, Ward -1(2) Mysore vide judgement dated 18/11/2013 reported in [2014] 42 taxmann.com 185 Karnataka and (2014) 221 Taxmann 418(Kar)
- ✓ Potla Nageswar Rao Vs DCIT IITA 245 of 2014 rendered on 9-4-2014 reported in (2014) 365 ITR 249 (AP), (2014) 269 CTR (Hyd) 325
- ✓ Jasbir Singh Sarkaria (2007) 294ITR 196(AAR)
- ✓ R Kalanidhi Vs ITO (2009) 314 ITR (AT) 266 (Chennai-ITAT)

➤ **Applicable on date when builder commences construction activity in carry out the Development.**

- ✓ Ranjith Reddy Vs Dy CIT (Hyd) Circle 6(1) in ITA Nos. 290,292,336/Hyd/2012/rendered on 7/6/13 reported in 144 ITD 461 (Hyd "A" Trib)
- ✓ Fibars Infratech Pvt. Ltd vs. ITO Ward 1(2) Hyderabad (ITAT Hyderabad), ITA. No. 477/Hyd/2013
- ✓ ABVS Prakash Vs The Asst CIT Hyderabad Central Circle – 1 ITA No 462/Hyd/2013
- ✓ Binjusaria Properties (P) Ltd Vs ACIT (2014) 45 taxmann.com 115 (Hyd Trib) also reported in (2014) Tax Pub (DT) 2438(Hyd "B" Trib)
- ✓ Dilip Anand Vazirani Vs ITO (2015) 57 taxmann.com 142
- ✓ CIT V/s Eastern Ceramics Ltd (2013) 54(I) ITCL 216 (Bom HC), 219 Taxmann.com 68/219 Taxmann 66 (Mag) (Bom)

➤ **At a point when Owner receives his share of super built up area**

- ✓ CIT Vs Attam Prakash & Sons (Del HC) IT Reference Nos 250-251 Of 1988 – delivered on August 8, 2008-(2008) 175 Taxman 499 (Del)
- ✓ CIT-I vs Naju Daru Deboo (2013) 38 taxmann.com 258(All), 218 Taxmann 473(All) rendered 16-9-2013
- ✓ Refer wordings of Section 53A and 54 of the Transfer of Property Act, 1882.
- ✓ Observations in the case of Govind Saran Ganga Saran v/s Commissioner of Sales Tax and Others (1985) 155 ITR 145 (SC)
- ✓ Observations in the case of Ishikawajima – Harima Heavy Industries Ltd. Vs Director of Income Tax, Mumbai (2007) (SC) 288 ITR 408



- NOTE- To avoid incidence of capital gains at the stage of signing the Development Agreement or at the point when the construction activity commences, it is advisable for the Owners to convert the immovable property into stock in trade either in the books of the proprietary concern of the Owner or by introducing the said immovable property into a partnership firm as capital contribution
- R Gopinath (HUF) v. ACIT (2010) 5 Taxmann.com ITA Nos. 29 & 30/MDS/2008 rendered by the ITAT Chennai 'A' Bench on 24th July, 2009 also reported in 133 TTJ (Chennai) 595.
- Ramesh Abaji Walavalkar v. Addln CIT 150 TTJ 725 Mum Trib. (D Bench)
- Vidyavihar Containers Ltd v. Dy. CIT (2011) 133 ITD 363 (Mum. Trib)
- DCIT vs Crest Hotels Ltd (2001) 78 ITD 231 (Chennai Bench).
- Fardeen Khan Vs ACIT 11(1) Mumbai- ITA No 1588/1589 of 2013 (ITAT F Bench Mumbai) rendered on 25-2-2015.

ii. Consideration for the purpose of transfer-

- ✓ Adopt estimated construction cost of Owner's share of super built up area plus non-refundable deposit.
- ✓ Adopt guideline value of the land to be transferred to the Developer and/or his/its nominees as per provisions of Section 50 D

iii. Tax incidence on sale of Owner's share of apartments

In most cases-

- Long term for land
- Short term for super built up area



iv. Service Tax and VAT on the Owner's share of super built up area



- ✓ Refer Circular No. 12 dated 07/12/2009 issued by Commissioner of Commercial Taxes
- ✓ Refer Circular No. 151/2/2002-ST dated 10/02/2012 issued by CBE & C under Section 65 (105) (zzq) of the Finance Act, 1994 relating to commercial or industrial construction service.
- ✓ Refer Circular No. 108/02/2009-ST dated 29/01/2009 on service tax leviable on Builders and Developer prior to 01/07/2010 r/w the decision of Magus Construction Pvt Ltd and Anr v. UOI and Anr (2008) 22 (I) ITPJ 343 or STR 2008 (II) STR 225 (Gou HC)

Opposite view –

- AAR- Ruling in Harikrishna Developers (2008) 10 STR 341 (AAR)



v. Stamp duty under Article 5(f) of the Schedule to the Karnataka Stamp Act, 1957 r/w Article 41 (ea) of the said Schedule. 2% of market value of Owner's super built up area or 2% of the market value of land being transferred to Developer or their nominees, whichever is higher plus consideration by way of refundable or non refundable deposit. Market Value taken is the guideline value.

II. Development Agreement on Revenue Sharing Basis



1. Nature of agreement, arrangement-

- i. Owner and Builder/Developer agree to develop the Immovable Property for residential/ commercial/ mixed use.
- ii. Owner and Builder/Developer agree to share the revenue at a ratio as may be decided between the parties.
- iii. Various terms for sharing of revenue such as 'distributable surplus' etc will be detailed in the agreement.
- iv. Agreement will be styled keeping the dual ownership concept in mind i.e., Owner will transfer undivided right, title and interest in land and Developer will transfer super built up area in favour of the ultimate purchasers of the apartments.

- v. Modality of sharing revenue such as opening and operating of bank accounts, distribution of revenue etc., will be detailed.
- vi. Clause on date of commencement, date of completion, grace period to be given to the Developer, compensation to Owners for delay subject to conditions force majeure etc is included.
- vii. Compensation from prospective buyers to be charged by both the Owner and Developer for delay in receipt of installments to be standardized.

- viii. Agreement on pricing i.e. periodical fixation of minimum price to be adopted for sale for a specified period
- ix. Developer to be responsible for all matters relating to construction including the adherence to applicable laws, specifications to be provided, quality of construction etc.
- x. General Power of Attorney will be given to the Developer to enter into agreement and sell undivided interest in land and Developer to transfer super built up area in favour of the ultimate purchasers of the apartments.

2. Issues arising out of Revenue Sharing Agreement

- i. Point of incidence of tax on the owners.
AS 9 r/w Section 145
- ii. Point of incidence of tax on the
AS 7 r/w Section 145- Tax Accounting Standards
 - S N Builders and Developers Vs ACIT 4(1) Bangalore ITA No 487/Bang/2013 rendered on 11-4-2014.
 - Prestige Estate Projects Ltd V DCIT ITA 218/Bang/2009 (ITAT Bangalore)
 - CIT Vs Rema Country Holdings Pvt Ltd ITA No 1041 and 1042/2006 order dated 29-9-2011 (Kar HC)
- iii. Applicability of Section 50 D
- iv. Service Tax and VAT on the owner's revenue share whether applicable?
- v. Stamp duty under Article 5(f) of the Schedule to the Karnataka Stamp Act, 1957 r/w Article 41 (ea) of the Schedule.- 2% of market value of Owner's super built up area or 2% of the market value of land being transferred to Developer or their nominees, whichever is higher plus consideration by way of refundable or non refundable deposit. Market Value taken is the guideline value.

Advantages

- a) Postponement of tax for land owner.
- b) No Service Tax and VAT on owner's share
- c) Provisions of Section 50 D not applicable on date of entering into revenue sharing agreement.

Disadvantages

- a) Owners cannot hold on to their stock and have benefit of increase in sale price
- b) No recourse available to Owner if Developer delays completion, except invoking specific performance and claiming compensation
- c) Developers could have an issue if Owner/s has/have not paid his/their tax on his revenue share and Department takes coercive steps to recover tax dues by attaching the unsold apartments.
- d) Owner could also be deemed to have entered into an activity which could be construed "as an adventure in the nature of trade" and therefore his revenue share will be taxed as business income.
- e) Department could take a contention that it is an AOP.

Thank you!!!



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Bengaluru