

declared sale of flat and plots of land in its profit and loss account and profit derived thereon as income from business. During the course of assessment proceedings, the Learned AO called for the copy of the sale deed in respect of sale of one flat for Rs 4 lakhs during the asst year under appeal and the same was not filed by the assessee. Accordingly, the Learned AO accepted the sale consideration to be correct and brought the entire sale consideration to tax under the head 'capital gains' without giving any deduction towards cost of acquisition as according to Learned AO, the assessee was only engaged in the business of share trading and real estate promoter & developers activity was not carried out by the assessee and hence the resultant gain needs to be brought to tax only under the head capital gains. The assessee pleaded that it started construction of a housing complex named "Neel Kamal Apartment". The assessee was selling flats as well as plots in the housing complex and followed 'completed contract' method of accounting. From Asst Year 1999-2000 to 2004-05, the construction of flats and development of plots was completed and as on 31.3.2004, the value of closing work in progress was Nil as per the accounts but assessee company was holding two plots of land and one flat in its hand. In Asst Year 2005-06, there was no sale of flat / plot. In Asst Year 2005-06, the assessee started dealing in shares and stocks and for that purpose amended its Memorandum of Association by inserting a new clause no. 5 to enable to the company to undertake the business of share trading and accordingly the assessee was carrying on the business of Real Estate Promoters & Developers and Share Trading with effect from Asst Year 2005-06. During the Asst Year 2006-07, the assessee carried on the business of share trading and also sold the remaining two plots and one flat. Since the cost of the said plots and flat was Nil in the books, the assessee offered the entire sale proceeds of plots and flat as sales and offered as income in the return under the head 'income from business'.

2.2. The total addition on this issue made by the Learned AO by treating the business income as long term capital gains are as below:-

Sale of flat to Mr.Jungpoo Bhatia – Rs 4,00,000/-

The assessee sold one flat to Mr.Jungpoo Bhatia for a consideration of Rs. 4,00,000/-. The consideration was received and possession of the flat was delivered to the buyer but registration of conveyance deed was pending. The assessee offered the business income of Rs. 4,00,000/- in the year of receipt of consideration and handing over of possession itself and did not wait for the registration to happen. It was argued by the assessee that since the assessee is engaged in real estate builders & promoters, the receipts on account of sale of flat is offered as business income and not capital gains. It was further argued that mere absence of any sale of flat / plot during immediately preceding year does not change the character of business asset to capital asset.

Sale of plot to Sri Inder Chand Agarwal – Rs 5,00,000/- and Sale of plot to Sri Bishnu Sharma – Rs. 20,09,224/-

The assessee sold two plots of land for Rs. 1,20,000/- and Rs. 1,75,000/- to Sri Inder Chand Agarwal & Sri Bishnu Sharma. The Learned AO directed the assessee to file copies of the sale deeds against which the assessee filed only the IGR of two sales. According to Learned AO, the assessee had not filed the details about the date of acquisition of the plots and the Learned AO accordingly doubted the genuineness of sale of plot and estimated the fair market value of the plot at Rs 5,00,000/- and added the same as capital gains.

According to Learned AO, the second plot was sold to Sri Bishnu Sharma for Rs. 1,75,000/- comprising of area of 4 kathas which was purchased in 1999 for Rs. 1,15,000/-. According to Learned AO, the location of the plot is a very prime area and he found that the fair market value of the plot of land sold by one M/s Cradle Computers Pvt Ltd was Rs. 5,80,000/- per katha and accordingly he estimated the sale consideration as Rs. 21,50,000/-. According to Learned AO, the plot sold is only a

capital asset and gave deduction towards indexed cost of acquisition and arrived at the capital gain of Rs. 20,09,224/- as against business income of Rs. 1,75,000/- offered by the assessee.

It was argued that the plots of land was the trading asset of the assessee and accordingly the assessee had offered the entire sale proceeds as business income.

2.3. On first appeal, the Learned CIT(A) called for the remand report from the Learned AO. The Learned CIT(A) observed that the report furnished by the Learned AO on the submissions of the assessee is the repetition of the same fact as stated by the erstwhile Learned AO who made the assessment order and found that the present AO did not conduct any enquiry to find out the fact of existence of the flat and plots of land which claimed to have been a part of the finished project of the assessee. Accordingly he disregarded the report of the Learned AO. The Learned CIT(A) observed that from the balance sheets filed by the assessee that the value of one unsold flat and two unsold plots as on 31.3.2005 was Rs. Nil in the books of accounts. In the balance sheet as on 31.3.2004, the work in progress was shown at Rs Nil. During the Financial Year 2004-05, no further cost of construction or realization of sale proceeds has been disclosed by the assessee. He found that in the balance sheet of the assessee, the stock or work in progress under the head 'flats' or 'plot of land' has been shown in those two years. He further observed that the argument of the Learned AR that assessee is following completed contract method of accounting is not a convincing argument as the same is applicable only in the case of Contractor and not in the case of a Real Estate Developer. The Learned CIT(A) further observed that the present AO did not make any effort to find out the exact state of affairs and the value applied by the erstwhile AO for the purpose of computation of capital gain was only estimated value without proper evidence and supporting materials. The Learned CIT(A) concluded that as it has not been established with any material evidence that the assessee has sold the flat and plot as his stock in trade, there is no reason to interfere

with the findings of the Learned AO and accordingly the sale of flats and plots of land would only attract capital gains. But for the sake of justice, it is necessary to find out the exact sale proceeds of the assets and for that purpose, while giving appeal effect, the AO is directed to –

1. make a reference to the DVO to find out the Fair Market Value of the flat alleged to have been sold as on the date of sale to determine the actual Long Term Capital Gain.
2. obtain the particulars from the office of the Sub-Registrar in respect of the value of those two plots determined by stamp valuation authority for the purpose of registration and apply the same value u/s 50C of the Act to determine the Capital Gain on sale of the plots.

Aggrieved, the assessee is in appeal before us on the following grounds:-

1. a) FOR that on the facts and in the circumstances of the case the Ld. CIT(Appeals) erred in upholding the order of the AO. that the profit arising from sale of one Flat and two plots of land was income liable to tax as Capital Gains.

b) FOR that the Ld. CIT(A)'s understanding and appreciation of the accounts is erroneous. The accounts during the year were maintained in the same manner as they were regularly maintained in the past. The appellant had been accepted as Real Estate Promoter & Developer in the past and taking of any contradictory view in this year was wrong & unjustified.

2. FOR that the appellant's business being of Real Estate Promoter and Developer and not an investor in Real Estate, the Ld. AO. erred in holding that the appellant was an investor and the profit arising from sale of the Flat and the plots of land was capital gains and not business income and the Ld. CIT(A) erred in upholding such finding of the AO.

3. FOR that the observation of the A O. that "in the TAR that the assessee's nature of business was trading in shares" is wrong and misleading. The appellant's nature of business was Real Estate Promoter and Developer, and that had been accepted all along in the past. The appellant had started business of trading in shares and securities also in the F. Y. 2004-2005 (Asst. Yr.2005- 2006) and during the year the business of the appellant

consisted of both - share Trading and Real Estate Promoter and Developer. The Ld. CIT(Appeals) failed to appreciate the facts correctly and he erred in upholding the finding of the AO. in this respect without appreciating the facts correctly.

4. FOR that the direction of the Ld. CIT(Appeals) at Page-6 of the order-

i) for making reference to DVO for finding out the market value of the Flat sold and to determine the Long Term Capital Gain on the basis thereof AND

ii) for obtaining particulars from the Sub-Register in respect of value of the two plots and for applying the same value by invoking sec.50C of the Act and determining the capital gains on sale of the plots -

is wrong, unjustified, contrary to law and without jurisdiction.

5. FOR that the appellant's business being of Developer and Real Estate Promoter; provisions of sec.50C were not applicable in its case and the Ld. CIT(Appeals) erred in directing the AO. to apply the said provision.

6. Without prejudice to the foregoing grounds, the estimation of the sale value of the two plots of land by the A.O. - at Rs.5 lacs and Rs.21,50,000/- and computation of the purported capital gains there from and its inclusion in the income of the appellant is wholly wrong, unjustified and arbitrary.

2.4. The Learned AR reiterated the submissions made before the lower authorities and strongly objected to the directions given by the Learned CIT(A) to the Learned AO as above. He further argued that there is no power vested in the statute for the Learned CIT(A) to set aside the appeal to the file of the Learned AO. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

2.5. We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed and hence are not reiterated for the sake of brevity. We find from the paper book filed by the assessee, that the assessee has been engaged in the business of construction, real estate developers and promoters. We also find from the certificate of enlistment given by Siliguri Municipal Corporation dated 12.11.2005 confirming that the assessee is engaged in the business

of promoter and developer for the financial year ending 31.3.2006 while renewing the status of the assessee as a promoter and developer. We also find that the assessee has been engaging in the construction of a housing complex wherein both flats as well as plots were sold by the assessee and the profits derived on sale thereon were duly offered to tax as income from business in the earlier years and accepted by the revenue as such. We find that in view of completed contract method of accounting followed by the assessee, the closing stock of work in progress in respect of flats and plots had become Rs Nil as on 31.3.2005 and accordingly the assessee had offered the entire sale consideration of flats and plots as income from business. We also find that the Learned CIT(A) had not disregarded the status of the assessee being a real estate promoter and developer. Against this finding of the Learned CIT(A), the revenue is not in appeal before us and had also not controverted the same by way of adducing any material evidence in this regard before us. We are in agreement with the arguments of the Learned AR that the Learned CIT(A) does not have any power under the statute to set aside the issue to the file of the Learned AO to make further enquiries to decide an issue. We hold that the revenue has been assessing the profits from the housing projects derived by the assessee as income from business and it cannot deviate its stand in the assessment year under appeal in respect of profits of the same project merely because there is no closing stock of plots and flat shown in the books of the assessee and merely because no sale of plots had been offered as business income in the immediately preceding previous year by the assessee. Hence we hold that the profit derived from sale of plots and flat should be assessed only as income from business and not as capital gains. Accordingly the adoption of value determined by stamp valuation authorities u/s 50C of the Act does not arise. Moreover, the amendment in section 43CA of the Act applying the value determined by stamp valuation authorities for stock in trade is applicable only from Asst Year 2014-15 and not earlier. Hence upto the Asst Year 2013-14, the decision rendered by the **Hon'ble Madras High Court in the case of CIT vs Thiruvengadam Investments P Ltd reported in (2010) 320 ITR 345 (Mad)** would hold the fort during the assessment year

under appeal. In the said case, the **Hon'ble Madras High Court** held that the property in the hands of the assessee was treated as a business asset and not as capital asset, and hence there is no question of invoking the provisions of section 50 C of the Act.

2.5.1. With regard to the determination of sale of flat and sale of plots by the assessee, we find that the Learned AO had only merely made an estimation of the fair market value without any basis which is also endorsed by the Learned CIT(A). We find that the revenue had not controverted this finding of the Learned CIT(A) before us. Hence we are not confirming the estimation made by the Learned AO to determine the sale consideration of plots and flat. Accordingly, the ground nos. 1 to 6 raised by the assessee are allowed.

3. The next ground to be decided in this appeal is as to whether an addition of Rs. 4,60,858/- on account of disallowance of expenditure for purchase of construction materials could be made in the facts and circumstances of the case.

3.1. The Learned AO observed that the assessee had claimed an expenditure on account of purchase of materials which were used for making boundary walls. According to him, it is not understood for which property, the boundary walls were constructed and hence he disallowed the whole of such expenses of Rs. 4,60,858/- in the assessment. Before the Learned CIT(A), the assessee explained that the expenditure of Rs. 4,60,858/- was incurred on construction of boundary wall and pavement of approach road for the plots of land sold during the relevant year. The entire details of expenditure incurred together with copies of bills and vouchers were filed before the Learned CIT(A). However, the Learned CIT(A) observed that the project was completed two years back and except some flats, all other flats were sold and there was no closing stock of flats lying in the books of the assessee. He further observed that even if any such work as claimed by the assessee was undertaken, the

same cannot be attributable to the sale of one flat and further observed that the evidences furnished by the assessee in support of its claim are not reliable. He accordingly upheld the addition made by the Learned AO. Aggrieved, the assessee is in appeal before us on the following ground:-

7. FOR that on the facts and in the circumstances of the case the Ld. CIT(Appeals) erred in upholding the disallowance of the expenditure of Rs.4,60,858/- on cost of construction materials purchased for the boundary wall. The finding of the CIT(A) in this regard is wrong, unjustified and arbitrary.

3.2. The Learned AR drew our attention to page 113 of the Paper Book containing the ledger account of purchase of construction materials during the assessment year under appeal and argued that the same are genuine business expenditure incurred by the assessee. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

3.3. We have heard the rival submissions and perused the materials available on record. We have already held in the previous ground that the assessee is engaged in the business of real estate developer and promoter during the assessment year under appeal. The assessee has also shown income from business on sale of plots and sale of flat during the assessment year under appeal. We find from the ledger account of purchase of construction materials amounting to Rs. 4,60,858/- , the same were incurred on various dates by the assessee. We deem it fit and appropriate, in the interest of justice and fair play, to set aside this to the file of the Learned AO to verify the bills and vouchers submitted by the assessee in support of its claim and direct the Learned AO to allow the same as deduction if the same are found to be genuine. Accordingly, the ground no. 7 raised by the assessee is allowed for statistical purposes.

4. The last ground to be decided in this appeal is as to whether an addition of Rs. 1,49,140/- on account of labour charges could be made in the facts and circumstances of the case.

3.1. The Learned AO observed that the assessee had claimed an expenditure on account of labour charges of Rs. 1,49,140/- for completing the walls. The Learned AO observed that the same was not incurred for the purpose of assessee's business and accordingly disallowed the same. Before the Learned CIT(A), the assessee explained that the expenditure of Rs. 1,49,140/- was incurred on labour charges for completion of walls and produced the entire muster roll containing the signatures (thumb impressions) of various labourers. The Learned CIT(A) observed that on bare eye examination of the labour payment muster rolls, it is clear that all the vouchers were signed by one person. Accordingly, he upheld the addition made by the Learned AO. Aggrieved, the assessee is in appeal before us on the following ground:-

8. FOR that the Ld. CIT(Appeals) erred in upholding the disallowance of the expenditure of Rs.1, 49, 140/- being labour charges incurred for the purpose of business (for completing the boundary wall) on irrelevant considerations.

4.2. The Learned AR drew our attention to pages 114-146 of the Paper Book containing the ledger account of labour charges together with the muster roll of various labourers evidencing the payment thereon and argued that the same are genuine business expenditure incurred by the assessee. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

4.3. We have heard the rival submissions and perused the materials available on record. We have already held in the previous ground that the assessee is engaged in the business of real estate developer and promoter during the assessment year under appeal. The assessee has also shown income from business on sale of plots and sale of

flat during the assessment year under appeal. We find from the ledger account of labour charges together with the muster roll, that the labourers had affixed their thumb impression on various dates while receiving the labour charges from the assessee. Hence we find that the observation of the Learned CIT(A) that all the vouchers were signed by one person with identical hand writing is unjustified. We deem it fit and appropriate, in the interest of justice and fair play, to set aside this to the file of the Learned AO to verify the genuinity of the labour charges paid by the assessee together with the evidences submitted thereon and direct the Learned AO to decide this issue based on the evidences filed by the assessee in this regard. Accordingly, the ground no. 8 raised by the assessee is allowed for statistical purposes.

5. In the result, the appeal of the assessee is partly allowed for statistical purposes.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 16 - 03 - 2016

Sd/-
(Mahavir Singh, Judicial Member)

Sd/-
(M. Balaganesh, Accountant Member)

Date 16 -03-2016

Copy of the order forwarded to:-

- 1.. The Appellant/Assessee:M/s. Mana Kamna Developers Pvt. Ltd, Sevoke Road, Siliguri.
- 2 The Respondent/Department: Addl. Commissioner of Income Tax, Range-2, Aaykar Bhawan, Matigara, Siliguri.
- 3 /The CIT, 4.The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,
**PRADIP SPS

By order,

Asstt Registrar