

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'SMC' BENCH,
NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITA No. 2441/DEL/2017 [A.Y. 2011-12]

Shri Gurpreet Thukral
Farm No. 1, Avenue - 4
Gadaipur, P.O Mehrauli
New Delhi

Vs.

The A.C.I.T.
Circle 24(1)
New Delhi

PAN : AADPT 3031 H

[Appellant]

[Respondent]

Date of Hearing : 11.10.2017

Date of Pronouncement : 16.10.2017

Assessee by : Shri Arun Kishore, CA

Revenue by : Shri T. Vasanthan Sr. DR

ORDER

This appeal of the assessee arises from the order of the ld.
CIT(A)-11, New Delhi, vide order dated 21.02.2017 for A.Y. 2011-12.

2. The assessee has raised the following grounds of appeal:

"1. That the Order of Ld. CIT Appeals 11 [CIT (A)] dt. 21.02.2017 to the extent of confirming the actions of ACIT Circle 24(1) (AO), New Delhi is illegal, unjust and opposed to facts.

2. That the Ld. CIT (A) has erred on facts and in law in confirming the addition of Rs. 40,02,248/- as business income, in place of following capital gains earned on sale of immovable properties:

a) Long term capital gain	Rs.28,88,686/-
b) Short term capital gain	<u>Rs. 3,66,526/-</u>
Total	<u>Rs.32,55,212/-</u>

3. i) That the Ld. CIT(A) has again erred on facts and in law in dismissing the claim for capital loss of Rs. 1.52.302/- on extinguishment of investment in equity shares, as the name of the company was struck off by the promoters, giving no compensation to the share holders.

ii) That the Ld CIT(A) has erred in not regarding extinguishment of rights of the appellant in the equity shares as transfer of capital asset.

4. That the Ld. CIT(A) has erred in confirming lump sum addition of Rs.55,444/- @20% of following expenses:

- Advertisement and Publicity	Rs. 60,756/-
- Conveyance	Rs. 36,962/-
- Business promotion	Rs.1,14,730/-
- Staff welfare	Rs. 20,913/-
- Entertainment	<u>Rs. 43,860/-</u>
Total	<u>Rs.2,77,221/-</u>

ii) That the lump sum disallowance of Rs.55,444/- is not in conformity with the provisions of section 37 for expenses expended wholly and exclusively for the purposes of business and the business expediency explained by the appellant has been ignored.

5. That the Ld. CIT(A) has again erred in confirming lump sum addition of Rs.72,372/- @ 20% of following expenses:

- Maintenance and Running	(vehicle)	Rs.1,45,915/-
- Telephone exp		<u>Rs.2,15,943/-</u>
Total		<u>Rs.3,61,858/-</u>

ii) That looking at the profile and the nature of business of the appellant, communication and mobility expenses are required to be incurred for the purposes of the business of the appellant.

iii) That without prejudice to the above contentions, the disallowance @ 20% is highly excessive.

6. That the net business income of the appellant be reduced by Rs. 41,30,064/- [40,02,248 + 55,444 + 72,372/- short term capital gain be assessed at Rs. 3,66,526/- and long term capital gain be assessed at Rs. 27,36,384/- [28,88,686 - 1,52,302/-]"

3. Ground Nos. 1 and 6 are general in nature and do not require any adjudication.

4. As regards Ground No. 2 with regard to confirmation of addition of Rs. 40,02,248/- as business income in place of capital gains earned on immovable property, the brief facts of the case as emanating from the order of the Assessing Officer are that '4. On perusal of the Audit Report u/s 44AB of the Income Tax Act, 1961. Form No. 3CB assessee is proprietor of M/s Homz R I Js. on further perusal of Form No. 3CD, Para No. 8(a) the nature of business of the assessee is shown as (i) Sale and purchase of Properties and (ii) Property Dealer and Direct Selling agent. In view of the above facts, it is evident that the assessee is a property dealer and involved in the business of purchase *and sale* of properties. During the course of assessment proceeding, it is noticed that the assessee has acquired 6903.85 square yard area involving 19 plots of different measuring area, situated at Gumtala Sub-Urban. Sub-Division No. 2. Tehsil & District Amritsar Abadi *Silver Oak Enclave* from Silver Oak Colonizer Pvt. Ltd. on 20.12.2007 for total consideration of Rs. 1,44,99,000/- (Rupees One Crore Forty Four Lac Ninety Nine Thousand only) and paid stamp duty @ 5% Rs. 7,25,000/- and 3,3% Rs. 4,35,000/- to Punjab Land Record Society. During the relevant period sold 3 plots bearing plot no. 219, 227 & 244 out of these 19 plots and the basement of commercial space a:

Defence Colony D-200, New Delhi and. has shown LTGG & STCG on the basis of date of purchase. On perusal of the Computation of Income, Balance Sheet and profit & loss A/c, it is noticed that the assessee has shown the above mentioned plots and a commercial space at Defence Colony as Investments instead of stock. It is evident from Audit Report as well as nature of business of the assessee that the assessee is involved in the adventure of trade in the field of sale and purchase of properties. Hence, it should be treated as income from business from sale of properties and not as income from capital gain as shown by the assessee.

5. During the course of assessment proceedings the ld. AR of assessee was asked to why these investments should not be treated as stock and Capital Gain arise from selling these plots should not be treated as Business Income. In this regard the AR of the assessee did not give a satisfactory reply. Whether a particular asset is stock-in-trade or capital asset does not depend upon the nature of the article, but the manner in which it is held. The same item may be stock-in-trade in the case of an assessee who deals in that item but it will be capital asset in the case of an assessee who uses it for earning income. Even stock-in-trade may become capital asset in certain circumstances and vice versa. If an assessee who deals in

certain goods or commodities as trader, on closure of the business, retains the existing stock as investment, the stocks will become capital asset in his hands from the time of closure, notwithstanding that they were stock-in-trade earlier in his hands.

6. Even in the course of a business, an assessee may try to transfer some of the stock-in-trade from his trading activity and hold them, as investment. The stocks so held would assume the character of capital asset from the date of such holding. This may usually happen in the case of dealer in shares and real estate. But in all these cases, the finding will be one of fact depending upon the intention, and conduct of the assessee supported by direct and circumstantial evidence. Similarly, when a capital asset is converted *into* stock-in-trade the same will no longer be capital asset. However, this situation is covered by section 45(2). In order to substantiate the view to treat capital gain as income from Profit & Gain of Business or Profession, following case laws are referred:

Gurdial Saraindas & Co. v CTT 1963 50 ITR 633 (Bern) -

“It is well settled that the mere fact that property was purchased with the intention of selling it at a profit is not

conclusive on the question whether an isolated transaction of purchase and resale is an adventure in the nature trade. If there are relevant facts besides the fact of purchase and resale, it is open to come to the conclusion that the transaction is one in the nature of trade.”

Raja J. Rameshwar Rao v CIT (1961) 42 ITR 179 (SO-

“The activity of an assessee in dividing the land into plots and not selling it as a single unit as he purchased, goes to establish that he was carrying on business in real property and it is a business venture.”

CIT v Trivedi (V.A.i (1 988) 1 72 ITR 95 (Bom)

“Ordinarily, where a person acquired land with a view to selling it later after developing it and actually divided the land into plots and sold the same in parcels, the activity could only be described as a business adventure. Generally speaking, the original intention of the party in purchasing the property, the magnitude of the transaction of purchase, the nature of the property, the length of its ownership and holding, the conduct and subsequent dealings of the assessee in respect of the property, the manner of its disposal and the frequency and multiplicity of transactions afforded valuable guides in determining whether the assessee was carrying on a trading activity and whether a particular transaction should be stamped with the character of a trading adventure.

Cher uk uri Ramesh v Asstt. CIT (2010) 36 DTR 269 (Visakha)

“Assessee having purchased land jointly with his wife and son, applied for sanction for converting the same into housing plots soon thereafter and sold all the plots some years after obtaining the sanction, the obvious intention behind the purchase of land was to sell the same at a profit and. therefore, though an isolated transaction, it was an adventure in the nature of trade and (he income there from has to treated as business Income of the above facts that the income arise due to selling of plots are considered as business income and the calculation of 19 Plots located m Amritsar are as: follows:

Total Purchase Price 1,44,99,000/ -

Add: Stamp Paper @ 5% 7,25,000/ -

Add: Stamp Paper @ 3% 4.35.000/ -

Total Purchase Cost 1,56,59,000/-

Total Area Purchased for 1 9 Plots 6903.85 Square Yards

Rate of per square yards 1.56,59.000 = Rs. 2268.15 per square yards

6903.85

Sr. No	Details Property	oj	Area (in yards)	Rate per square yards including Registration expenses	Purchase Price as per deed	Sale Price as per deed	Difference
1	Plot No. Amritsar	227	500	2268.15	11,34,077/-	15,50,000/-	4.15,923/-
2	Plot No. Amritsar	244	500	2268.15	11.34.077/-	15,50,000/-	4,15,923/-
3	Plot No. Amritsar	219	287.77	2268.15	6.52.706/-	6.04,500/-	(48,206/-)
	D 200 Basement Defence		325	Not Mentioned	11,83,QQQ/	40.00,000/	.28.12.000/-
TOTAL							35,95,640/

7. In view of the above findings, it is clear that the assessee is involved in business of sale *and. purchase* of the properties. During the year assessee has shown total income from Profit on sale of Plots Rs. 40,02,248/- in the computation of income and the same was *deducted from* income from business & profession for separate consideration of income under head capital gain, is considered as income from business and profession.

8. The Id. CIT(A) confirmed the action of the Assessing Officer.

9. I have considered the rival arguments made by both the sides, perused the orders of the A.O and the Id. CIT(A) and the paper book filed on behalf of the assessee. It is an admitted fact which has not been controverted by the Id. counsel for the assessee that the auditor

of the assessee, as mentioned in the audit report that the business of the assessee is as under:

- i) Sale and purchase of properties
- ii) Property dealer and direct selling agent.

10. The assessee has acquired 6903.85 sq yds involving 19 plots of different measurements in District Amritsar for a total consideration of Rs. 1,44,99,000/- and during the relevant period has sold three plots out of the said 19 plots and basement of commercial property at Defence Colony as business income by treating the same as income arising from adventure in the nature of trade. The assessee has declared the said sale as investment and shown as capital gain. At the outset, the intention of the assessee has to be seen at the time of purchase of the plot which is very evident in the present case is that the stock was purchased as stock in trade and not as investment. The auditor has also mentioned the same.

11. During the course of arguments, the ld. counsel for the assessee has also argued and accepted and it is also a fact on record that the expenses incurred by the property broker has to be necessarily incurred and therefore, should be allowed, which, in fact, will be dealt with separately. The Assessing Officer has relied upon various courts

of law which are also relied upon by me in the present facts and circumstances of the case and the decision relied upon by the ld. counsel for the assessee is not at all applicable in the present case. Moreover, the assessee has not filed any Wealth Tax Return, and if filed, not placed on record showing the said plots as investment as per valuation to be made under the wealth tax rules. This goes to prove that the assessee is carrying on the business of purchase and sale of properties and is a property dealer-direct selling agent holding assets as stock in trade and not as investment. Accordingly, I find no infirmity in the order of the ld. CIT(A) who has rightly confirmed the action of the Assessing Officer. Ground No. 2 of the assessee is dismissed.

12. As regards Ground No. 3, the ld. CIT(A) observing that no transfer of assets is involved in the present case and also the appellant has not been able to adduce any evidence to prove his case, dismissed the claim of capital loss amounting to Rs. 1,52,302/-.

13. I have considered the rival arguments made by both the sides, perused the orders of the A.O and the ld. CIT(A) and the paper book filed on behalf of the assessee. It is evident from record that the assessee had made investment in shares in two companies and the

companies have been closed and it was stated that the name of the company had been struck out under the Companies Act and the shares invested as loss. Therefore, there cannot be any gain to the assessee in this regard and the same cannot be the income of the assessee from any angle. Accordingly, the addition so confirmed by the Id. CIT(A) is directed to be deleted. Ground No. 3 of the assessee is allowed.

14. As regards Ground No. 4 confirming the lumpsum addition of Rs. 55,444/- being 20% of the various expenses for which no evidence, such as copies of bills, vouchers were furnished. The assessee was also confronted about the same but no satisfactory reply or cogent explanation was put forth. The Id. CIT(A) confirmed the action of the Assessing Officer.

15. Before me also, no cogent explanation has been put forth under such facts and circumstances of the case. I find no infirmity in the order of the Id. CIT(A) who has rightly confirmed the action of the Assessing Officer. Thus, Ground No. 4 is dismissed.

16. As regards Ground No. 5 of the assessee is concerned, the Id. CIT(A) confirmed the addition of Rs. 72,372/- on account of wage expenses because no bills and vouchers were produced before the

Assessing Officer as well as before the Id. CIT(A). Since the assessee has not produced any cogent explanation before any of the authorities below or even before me, I hold that the Id. CIT(A) has rightly confirmed the action of the Assessing Officer. Ground No. 5 stands dismissed.

17. In the result, the appeal of the assessee is partly allowed.

The order is pronounced in the open court on 16.10.2017.

Sd/-

[B.P. JAIN]
ACCOUNTANT MEMBER

Dated: 16th October, 2017

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi