

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES , JAIPUR

श्री भागचन्द, लेखा सदस्य एव श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 605/JP/2016
निर्धारण वर्ष/Assessment Year: 2010-11

The ACIT Central Circle – 1 Jaipur	बनाम Vs.	Smt. Pratima Sankhla A-3, Moti Lal Ataal Road Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AGBPS 4131 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by: Shri Varinder Mehta, CIT - DR
निर्धारिती की ओर से / Assessee by: Shri P.C. Parwal, CA

सुनवाई की तारीख / Date of Hearing : 07/09/2017
घोषणा की तारीख / Date of Pronouncement : 13 /10/2017

आदेश / ORDER

PER BHAGCHAND, AM

The Revenue has filed an appeal against the order of the Id.
CIT(A)-4, Jaipur dated 29-03-2016 for the assessment year 2010-11
raising following grounds of appeal:-

“1. Whether on the facts and in the circumstances of the case, the Id. CIT(A) was right in deleting the addition of Rs. 38,00,050/- made on account of transaction made in real estate business without appreciating the fact that during the year assessee was actually engaged in business of Real Estate.

2. Whether on the facts and in the circumstances of the case, the Id. CIT(A) was right in deleting the addition of Rs.23,07,000/- made on account of undisclosed investment without appreciating the fact that this property was not disclosed in the balance sheet.

2.1 In Ground No. 1, the Revenue is aggrieved that the Id. CIT(A) has erred in deleting the addition of Rs. 38,00,050/- made by the AO on account of transaction made in real estate business without appreciating the facts that during the year the assessee was actually engaged in business of real estate . Brief facts of the case are that the AO held that profit on sale of flat at Tilak Nagar and land at village Khatwara which were acquired in the year 1997-98 and 2005-06 respectively is adventure in the nature of trade. He therefore treated the sale of these properties as business receipt and assessed the gain of Rs.38,00,050/- as business income. He also did not allow the expenses incurred in connection with purchase/sale of these assets and also the claim of deduction u/s 54B on sale of agricultural land at village Khatwara.

2.2 In the appellate hearing, the assessee has taken a specific ground as Ground No.1 whereby the action of the AO in holding the various immovable properties owned by the assessee and those purchased during the year as 'adventure in the nature of trade' was challenged. This ground

was decided by Id. CIT(A) in favour of the assessee as per his finding given at Para 4, Pg 18-20 of the order. Thereafter, the Id. CIT(A) with respect to the sale of flat at Tilak Nagar accepted the claim of the assessee that gain arising out of disposal of this flat cannot be assessed as business income and directed the AO to assess the same as long term capital gain. The Id. CIT(A) also accepted the claim of the assessee with respect to sale of agricultural land at Khatwara that the same is situated beyond 8 kms from the Municipal limit and directed the AO to assess the same as capital receipt not chargeable to tax. The relevant observation of the Id. CIT(A) on the issue in question is as under:-

“4. I have duly considered assessee's submission and carefully perused the case record. I have also taken a note of factual matrix of the case as well applicable case laws relied upon by the assessee.

The magnitude of transaction of purchase, the nature of the commodity, subsequent dealing of assessee, the nature of organization to be employed by the assessee and manner of disposal may be such that transaction may be stamped with the character of trading nature. If a person invest money in land intending to hold it, enjoy its income for some time, then sales it at profit, it would be a clear case of capital accretion and not profit derived from an adventure in nature of trade. Cases of realization of investment consisting of purchase and resale, though profitable are clearly outside the domain of adventure in the nature of trade. Further Hon'ble Apex Court while deciding the case of S. Venkataswami Naidu and Co. (35 ITR 594) has given a illustrative factors (supra) to decide a case to be fit as real estate transaction or not ?

On perusal of annexure appended with the assessment order, it is also seen that there are 15 transactions of purchase and sale of immovable property amongst 6 members of the group over a period of 6 years. These transactions therefore, cannot be said to be regular or frequent or voluminous to treat the same as adventure in the nature of trade. Further the transaction of Aruna Sankhla, Hemantraj Sankhla and Harsshraj Sankhla are not related to the family of assessee and therefore, if these transactions are excluded, there are only 6 transactions which relate to the family of assessee comprising of the assessee Pratima Sankhla, her spouse Shri Ashok Kr Sankhala and son Amritraj Sankhla.

Further, here in this case, assessee was never engaged in real estate business and she had purchased agricultural land at Boraj in the year 2004 along with other family members, 2.74 bigha land (Rs. 31,57,000/-) at Khatwara in Dec. 2004, 8.00 bigha land at Phogadiwala (Rs. 12,93,060/-) in May – Aug 2004 and agricultural land at Bichapuri on 01-02-2005 by M/s. Sreeram Farms for Rs. 4,95,000/- in assessee's name. Assessee sold the land at Phogadiwala on 30-11-2004 to M/s. Meganaimus Trade and Finance Ltd. for Rs. 36,00,000/-. Apart from this, assessee was also allotted a flat (A 301 Park View) at Gurgaon by M/s. Park View Infrastructure (P) Ltd. and assessee paid Rs. 3,50,875/-. Assessee has also booked a flat with Raheja Developers and during the F.Y. relevant to A.Y. 2005-06 had paid Rs. 8,79,986/-. Assessee sold these following properties subsequently.

Land at Phagodiawala in May-Aug 2004	Rs. 12,93,060/-
Land at Khatwara in Dec. 2004	Rs. 31,57,000/-
Right of allotment of Park View Flat in A.Y.09-10	Rs. 52,99,105/-
Flat with Raheja Developers transferred to Smt. Sankhala in 2008-09 for	Rs. 38,73,336/-

But from these transactions, it cannot be comprehended that assessee was indulging in real estate business. Further even if we apply 8 illustrative factors as prescribed by the Hon'ble Apex Court in 35 ITR 594, it is seen that this transaction cannot be termed as real estate transaction. It is a fact that assessee's family members have made as many as 67 transactions of purchase and sale (reference annexure enclosed with the assessment order). From this it can never be assumed that assessee is engaged in the business of real estate.

Further, on perusal of balance sheet as on 31-03-2010, the assessee has shown agricultural land at Khatwara & others at Rs. 19,70,000/- under the "head assets" and the same has also been duly acknowledged by the department for A.Y. 2010-11 in return filed u/s 139(1) of the Act for the year. It is also seen that the facts of the assessee's case are totally different from the facts of the case laws relied upon by the AO, therefore, the same cannot be applied here. It is also a fact that no incriminating document suggesting that assessee being engaged in the business of real estate was found from the assessee's premises during the search and seizure operation. As against this, the conduct of assessee show that assessee is an investor. The following cases relied by the A.R. also support the case of assessee.

- (a) M/s. SKM Construction Pvt. Ltd (ITAT Mumbai) 2011-TIOL-470
- (b) Saroj Kumar Majumdar (SC) (37 ITR 242)
- (c) Janki Ram Badhurram (SC) (57 ITR 21)
- (d) Michael A Kallivayalil (Kerala) 102 ITR 202
- (e) Sairam (2002) (Madras) 242 ITR 104

On similar facts and circumstances in case of Shri Ashok Sankhala (husband of assessee) in A.Y. 2010-11 (ITA No.877/2011-12), he has been treated as investor, not being indulged in the business of real estate. Therefore, considering all these facts and case laws relied upon the claim of assessee that she, being an investor, is accepted. Assessee's appeal in Gr No. 1 is allowed.

Further, in this year, assessee sold the Flat at Tilak Nagar for Rs. 9,75,500/- on 19-08-2009 which was purchased on 6-12-1997 for Rs. 4,74,450/- resulting into gain of Rs. 5,01,050/-. This flat was let out from which the assessee regularly declared rental income. This Tilak Nagar Flat was sold after holding the same about 12 years and for these years rental income on this flat has been declared by the assessee under "House Property Income" which was also accepted by the AO in the respective year. Therefore, considering the indexed cost, long term capital gain of Rs. 69,602/- was declared in the return by the assessee.

Further, the assessee also sold the agricultural land at Khatwara for Rs. 50,49,000/- on 02-03.10 which was acquired on 29-09-05 for Rs. 18,48,000/- (17,50,000+98,000). The gain of this land was claimed exempt as it was situated beyond 8 KM from Municipal Limit.

It is also a fact that in the search operation conducted against the assessee, no incriminating document, whatsoever, was found from her premises to suggest that assessee was indulged in real estate business; was found and seized. As in Ground No. 1, it has already been held that the properties in question were held for investment, accordingly, I do not find any justifiable reason to sustain AO's action in treating the sale of these properties as business receipt to assess the gain of Rs. 38,00,050/- as business income. Since, the agricultural land at Khatwara is situated beyond 8KM from the Municipal Limit, which has not been disputed by the AO, the gain on sale of these agricultural land is a capital receipt, not liable for tax. Since this gain is not liable for tax, therefore, question of allowability of deduction u/s 54B of the Act does not arise. In view of these facts and circumstances of the case, AO is hereby directed to assess the gain on sale of property at Tilak Nagar, under the head "Long Term Capital Gain" and on sale of agricultural land at village Khatwara as capital receipt not chargeable to tax. Assessee's appeal in Gr No. 2 stands allowed.

2.3 During the course of hearing, the ld. DR relied on the order of the AO.

2.4 On the other hand, the ld.AR of the assessee supported the order of the ld. CIT(A) for which the ld.AR of the assessee filed the following written submission.

“Submission:-

A. **Tilak Nagar flat :-**

1. *At the outset it is submitted that department has not filed any appeal against the finding of CIT(A) where he has held that that assessee has hold various immovable properties as investment and the same is neither an adventure in the nature of trade or the business stock of the assessee. Once this finding is not*

challenged, the sale of flat under consideration cannot be considered as a business transaction and therefore the ground of the department needs to be dismissed at the threshold.

2. It is submitted that the flat at Tilak Nagar was purchased by assessee on 06.12.1997 for Rs.4,74,450/- (PB 58-72) and since then it was let out. This flat was sold on 19.08.2009 for Rs.9,75,500/- (PB 73-82). Rental income received was duly declared under head "Income from House Property" and accepted by AO as under:-

<i>Assessment Year</i>	<i>Rent from flat at Tilak Nagar shown in returns</i>
2004-05	80,628/-
2005-06	87,180/-
2006-07	92,638/-
2007-08	99,582/-
2008-09	1,07,050/-
2009-10	1,12,615/-

3. From the above facts it is clear that assessee held this flat as investment and sold it after holding it for about 12 years. Hence, it cannot be presumed that the investment made in this flat was with an intention to sale the same to earn profit. Therefore, such investment made by the assessee is not a business transaction or a transaction of an adventure in the nature of trade and the gain arising on disposal of this investment cannot be assessed as business income. Reliance in this connection is placed on various decisions as mentioned at Pg 13-15 of the order of CIT(A).

B. Agricultural land at village Khatwara:-

1. The agricultural land was purchased by the assessee on 31.05.2005 (PB 83-89). The total cost of the land including the registration expenses was Rs.18,48,000/- (17,50,000+98,000). This agricultural land was sold on 02.03.2010 to Sh. Akhey Ram Chowdhery of village Balmukundpura for Rs.50,49,000/- (PB 90-94). The land was used by the assessee for agricultural purpose. The agricultural income declared by the assessee in various years is as under.

<i>Assessment Year</i>	<i>Agricultural income shown in returns</i>
2004-05	25,000/-
2005-06	1,69,650/-
2006-07	1,50,000/-
2007-08	1,42,616/-
2008-09	1,69,702/-
2009-10	1,73,915/-
2010-11	69,996/-

2. *From the above facts it is clear that this land was sold by the assessee after holding it for around 4 years and 9 months. The land was used for agricultural purpose for which agricultural income was declared and accepted by the AO. Therefore, it cannot be presumed that assessee held this land as business stock and the gain on sale of this land is an adventure in the nature of trade. The long term capital gain on sale of this land works out at Rs.26,99,028/- [50,49,000-23,49,972 (indexed cost)]. The assessee has claimed deduction u/s 54B on the capital gain arising on sale of this land as she has made investment of Rs.43,57,800/- including the registration expenses on 23/09/2010 (PB 95-104) for purchase of agricultural land at village Kishanpura at Tehsil Sanganer. Therefore, the gain on sale of this land is not liable for tax. Otherwise also, this agricultural land was situated beyond 8 kms. from the Municipal limit and therefore it is not a capital asset u/s 2(14) of the Act and hence gain arising on sale of this land is exempt from tax.*

In view of the above, the order of CIT(A) be upheld by dismissing the ground of the department.”

2.5 We have heard the rival contentions and perused the materials available on record. In this case, it is noted that the AO made the addition of Rs. 38,00,050/- in the hands of the assessee holding it as business income which in first appeal has been deleted by the Id. CIT(A) by observing as under:-

“It is also a fact that in the search operation conducted against the assessee, no incriminating document, whatsoever, was found from her premises to suggest that assessee was indulged in real estate business; was found and seized. As in Ground No. 1, it has already been held that the properties in question were held for investment, accordingly, I do not find any justifiable reason to sustain AO's action in treating the sale of these properties as business receipt to assess the gain of Rs. 38,00,050/- as business income. Since, the agricultural land at Khatwara is situated beyond 8KM from the Municipal Limit, which has not been disputed by the AO, the gain on sale of these agricultural land is a capital receipt, not liable for tax. Since this gain is not liable for tax, therefore, question of allowability of deduction u/s 54B of the Act does not arise. In view of these facts and circumstances of the case, AO is hereby directed to assess the gain on sale of property at Tilak

Nagar, under the head “Long Term Capital Gain” and on sale of agricultural land at village Khatwara as capital receipts not chargeable to tax. Assessee's appeal in Gr No. 2 stands allowed.”

It is also noted that the Id. DR could not controvert the findings of the Id. CIT(A) on the issue in question. It is further noted that in search operation, there was no incriminating document against the assessee which could suggest that the assessee was indulged in the real estate business. In this view of the matter, we find no reason to interfere with the order of the Id. CIT(A). Hence, the Ground No. 1 of the Revenue is dismissed.

3.1 In Ground No. 2, the Revenue is aggrieved that the Id. CIT(A) has erred in deleting the addition of Rs. 23,07,000/- made by the AO on account of undisclosed investment without appreciating the fact that this property was not disclosed in the balance sheet. Brief facts of the case are that the AO observed that as per the trading account prepared by him, the value of immovable properties held by the assessee as on 31.03.2010 is of Rs.1,20,63,114/- whereas as per the statement of affairs filed by the assessee the value of such immovable properties is Rs.97,56,114/-. The AO, therefore, made addition of Rs.23,07,000/- u/s 69 of the Act .

3.2 In first appeal, the ld. CIT(A) deleted the addition of Rs. 23,07,000/- by observing as under:-.

“5.1.3 I have duly considered assessee's submission and carefully perused the case record. I have also taken a note of factual matrix of the case. Here in this case, AO has made addition of Rs. 23,07,000/- as undisclosed investment u/s 69 of the Act on the ground that as on 31-03-2010 assessee hold agriculture land at Rs. 1,20,63,114/- where in the balance sheet it is declared at Rs. 97,56,114/-. It is also submitted that while preparing the Trading A/c, AO has not correctly appreciated the facts. In this regard, it is submitted that the addition of Rs. 23,07,000/- was made on the basis that assessee was holding land at Khatwara for Rs. 31,57,000/- and land at Natlapura for Rs. 11,20,000/- aggregating to Rs. 42,77,000/0 but in the statement of affairs only the land at Khatwara is shown at Rs. 19,70,000/-. For this, it is submitted that the amount of Rs. 19,70,000/- is appearing in the statement of affairs in respect of land at Khatwara and Natlapura as in A.Y. 2005-06 and if the gain on sale of land at Phogadiwala at Rs. 23,07,000/- (36,00,000 – 12,93,000), leaving the balance at Rs. 8,50,000/-. In this amount if the land at Natlapura purchased in A.Y. 2006-07 at Rs. 11,20,000/- is added, the value of both the land becomes at Rs. 19,70,000/- which is reflected in the statement of affairs as on 31-03-2010.

On perusal of the aforementioned facts, I find that the assessee has already shown the investment in the balance sheet filed with the return and therefore, addition made by the AO is deleted.”

3.3 During the course of hearing, the ld. DR supported the order of the AO.

3.4 On the other hand, the ld.AR of the assessee supported the order of the ld. CIT(A).

3.5 We have heard the rival contentions and perused the materials available on record. So far as addition of Rs.23,07,000/- made by the AO is concerned, it is basically for the reason that assessee is holding land at Khatwara for Rs.31,57,000/- and land at Natlalpura for Rs.11,20,000/- aggregating to Rs.42,77,000/- whereas in the statement of affairs only the land at Khatwara is shown at Rs.19,70,000/-. However, the fact is that the amount of Rs.19,70,000/- is appearing in the statement of affairs both in respect of land at Khatwara and Natlalpura as in AY 2005-06, the gain on sale of land at Fogadiwala at Rs.23,07,000/- (3600000-1293000) was reduced from the cost of land at Khatwara purchased for Rs.31,57,000/-, leaving the balance at Rs.8,50,000/-. In this amount if the land at Natlalpura purchased in AY 2006-07 at Rs.11,20,000/- is added, the value of both the land becomes Rs.19,70,000/- which is reflected in the statement of affairs as on 31.03.2010. It may also be noted that the amount of Rs.23,07,000/- is already added by the AO in AY 2005-06 being part of Rs.23,64,450/-. Hence, again making addition of this amount in AY 2010-2011 has resulted in double addition. In this view of the matter, we find no reason to interfere with the order of the Id. CIT(A). Thus Ground No. 2 of the Revenue is dismissed.

4.0 In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 13 -10-2017.

Sd/-	Sd/-
(कुल भारत)	(भागचन्द)
(KUL BHARAT)	(Bhagchand)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य/Accountant Member

जयपुर /Jaipur

दिनांक /Dated:- 13/10/ 2017

*Mishra

आदेश की प्रतिलिपि अग्रेषित /Copy of the order forwarded to:

1. अपीलार्थी /The Appellant- The ACIT, Central Circle-1, Jaipur
2. प्रत्यर्थी / The Respondent- Smt. Pratima Sankhla, Jaipur , Jaipur
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर /DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 605/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar