

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'ए' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ A ” BENCH, AHMEDABAD

सर्वश्री एन.के. बिल्लैया, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER And
SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.1185/Ahd/2012
(निर्धारण वर्ष / Assessment Year : 2008-09)

Shri Kishanchand Belaram Advani, Prop. Hariom Enterprise, 17, Naina Society, Opp : ONGC Gate, Makarpura, Baroda - 390010	बनाम/ Vs.	The ACIT, Circle – 5, Ayakar Bhavan, Race Course Circle, Baroda
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACHPA 8588 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Shri Munkund Bakshi, A.R.
प्रत्यर्थी की ओर से/Respondent by :	Shri K. Madhusudan, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	23/10/2017
घोषणा की तारीख /Date of Pronouncement	27/10/2017

आदेश / O R D E R

PER SHRI MAHAVIR PRASAD, JUDICIAL MEMBER :

This is an appeal by the assessee against the order of the Commissioner of Income Tax(Appeals)-V, Baroda, dated 26/03/2012 for the Assessment Year (AY) 2008-09, on the following Grounds:

- i. *The Ld. CIT (A)-V, Baroda has erred in law and in facts in confirming the action of Ld.AO in charging to tax the income from sale of land held as investment and consistently treated as capital asset, as business income as against the appellant's offer of such income as capital gain.*

- 2 -

- ii. *The Ld. CIT(A)-V, Baroda has further erred in law and in facts in holding that the appellant is a building contractor and that the activities of purchase and sale of land are conducted on a large scale for which substantial borrowings are made and that mere classification of the purchase of land as investment in the Balance Sheet is of no consequence. This finding of the Ld. CIT(A) is in complete disregard of facts and also in contradiction to such income being taxed as capital gains in the past assessments.*
- iii. *Corollary to the Ground no.3 above, the Ld. Commissioner of Income Tax (A)-V, Baroda has erred in law and in facts in confirming the action of Ld. AO in assessing the short term capital gain arising from sale of lands as business income as against the appellant's offer of such income as capital gain. The impugned treatment of capital gains as business income being bad in law as well as on facts, it is, therefore, prayed that the same may be treated as income from short term capital gains.*

2. The relevant facts as culled out from the materials on record are as under:-

In this case, the assessee's business is that a Building Contractor whose business is very much aligned to the purchase and sale of land. In this respect the Balance sheet of the assessee for A.Y. 2006-07, 2007-08 and 2008-09 were analysed. The following chart represents the nature of transaction of the assessee.

Items of the Balance Sheet	F. Y. 2005-06	F. Y. 2006-07	F. Y. 2007-08
Capital :	1882542	2179866	10716611.05
Loans:	34862038	28276898	27043651
Advance from customers:	4968338	2526849	3700223

Booking Advance:	14685447	12708297	10108454
Sundry creditors	6681782	9041825	6077173
Land Investments	56928359	52672513	45016634

On the analysis of the balance sheet for last three Financial Years it is observed that in the F.Y. 2005-06 the assessee did not have much of Capital hence for the purchase of land the assessee was dependent on loans. Therefore the augmentation in the stock of land was primarily based on borrowings. Every year there has been addition to the stock of the land as well as sale of the land. This has resulted in advances from customers becoming negative i.e. to say that the liability in the form of advance from customers has turned into a negative figure because the assessee has sold the land but has not recovered the amount against the sale of land. This is mainly because the assessee has entered into development Agreements with other parties or has given possession to the other parties who are still supposed to make payment to the assessee. From the analysis of land investment it is amply clear that the assessee has been selling land on a frequent basis year after year. As far as booking advance is concerned it has been proved as bogus liability during the assessment proceedings u/s.143(3) of the Act for the A.Y. 2007-08. On this basis the assessee was show caused through show caused notice dated 20/12/2010.

Assessee replied vide his letter dated 22/12/2010 that during the year under consideration and as per the consistently accepted treatment by the department, the appellant has offered for tax as capital gains, the income realized by him on sale of land. The assessee submits to your good office that the land sold by the appellant is held by him for several years and from the time of purchase, the intention of the assessee has always been to hold it as investment. Such intention is reflected in the classification of such holding as "investment" in accounts and the balance sheets prepared and filed with the return of income from year to year. The assessee's contention with respect to the taxation of such income as capital gains has been accepted by department for assessment year 07-08.

2.2 The assessee's submissions considered but not found to be tenable by the learned AO and made addition of Rs.85,27,060/-.

3. Against the said order, assessee preferred first statutory appeal before the learned CIT(A) who dismissed the appeal of the assessee.

4. We have gone through the relevant record and impugned order. Learned AR filed an appellate order in assessee's own case, passed by the learned CIT(A)-V, Baroda dated 09/04/2010 for the A.Y.2007-08. Learned CIT(A) held as under:

"I have carefully considered the facts of the case, the submissions of the appellant and the assessment order. Considering the nature of expenses and the fact the expenses were mostly incurred in cash, the disallowance by the AO to account for non business element is reasonable and is confirmed."

4.2 Ld. AR also filed a copy of assessment order passed u/s.143(3) of the Act dated 22/03/2016 for the A.Y. 2013-14. In this case, learned AO held that *“the asset is certainly a capital asset and not a business asset. Assessee’s claim that the same is business asset is not accepted. As per provisions of section 50C of the Act, full value of consideration is taken.”*

4.3 Ld. AR also filed a copy of assessment order passed u/s.143(3) of the Act dated 16/11/2016 for the A.Y. 2014-15. In this case, it is held that *“The assessee is engaged in the business of trading and Real Estate i.e. purchase and sale of land and investment. The assessee has also derived income from remunerative, interest and shares of profit from partnership firm in which he is a partner. He has also shown income from house property and interest. Net income from business activities have been shown at Rs.73,89,975/-. Income from Long Term Capital Gain has been shown at Rs.37,42,370/-. As it has been held in the case of Radhasoami Satsang vs. CIT(supra).”*

4.4 Ld. AR also filed a judgment of Jurisdictional High Court in Tax Appeal No.716 of 2010, **CIT vs. Jayantilal D. Panchal**, in this appeal following question of law was framed:

“Whether in the fact and circumstances of the case that the Appellate Tribunal has rightly held that the assessee was not carrying on business but was holding assets as capital assets and profit earned is not business profit but is a capital gain ?”

In this case, issue involved in the respect of tax ability of income arising on sale of the land. The assessee treated the profit on sale of land as “*Long Term Capital Gain*” after claiming indexation of cost of acquisition, whereas, the assessing officer treated such profit as “business profit”, relying on certain factual aspects. When challenged, the CIT(A) upheld the findings of Assessing Officer. In an appeal preferred by the assessee-respondent before the Tribunal, the Tribunal reversed the findings on CIT(A) by following its own order in ITA No.289/Ahd/2005 dtd. 24th October 2008 rendered on this very issue in the assessee’s case for Assessment year 2001-02 and Hon’ble Tribunal has held as under:

“6. We have heard the rival submissions. We find that similar issue came up for consideration before the ITAT, “A” Bench, Ahmedabad in assessee’s own case for A.Y.2001-02 in ITA No.289/Ahd/2015. The Tribunal vide its order dated 24/10/2008 has decided the issue in favour of the assessee and against the Revenue observing as under:

"20. In the totality of the facts and circumstances of the case and in view of the various decisions discussed herein before, we are of the opinion that the assessee was not carrying on any business or any adventure in the nature of trade in lands and had been purchasing the lands with the intention to make investment i.e. to keep the same as capital asset and, therefore, any surplus arising as a result of sale of transfer of such assets was taxable as long term capital gain/short term capital gain depending on the nature of assets i.e., whether the assets was short term capital gain/long term capital gain. Assessee’s ground is allowed.”

5. With the above observation as in the Asst. Years 2007-08, 2013-14 and 2014-05, the plea of capital gain was accepted by the department and

after going through the aforesaid High Court judgments we allow the appeal of the assessee.

6. In the result, appeal filed by the assessee is allowed.

This Order pronounced in Open Court on	27/10/2017
---	-------------------

Sd/-
एन.के. बिल्लैया
(लेखा सदस्य)
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
महावीर प्रसाद
(न्यायिक सदस्य)
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad; Dated 27/10/2017

Priti Yadav, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-V, Baroda.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER.

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad