

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH AHMEDABAD

BEFORE, SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND SHRI S. S. GODARA, JUDICIAL MEMBER

ITA No. 3400/Ahd/2014
(Assessment Year: 2010-11)

The Income-tax Officer,
Ward 2(2)(5), 1st Floor, C. U. Shah
Bldg., Ashram Road, Ahmedabad 380014

Appellant

Vs.

Smt. Sejal D Shah,
16, Friends Colony, Nr. D. K. Patel Hall,
Naranpura, Ahmedabad 380 013

Respondent

PAN: AASPA3326P

राजस्व की ओर से/By Revenue : Shri V. K. Singh, Sr. D.R
आवेदक की ओर से/By Assessee : Shri S. N. Soparkar, A.R.
सुनवाई की तारीख/Date of Hearing : 19.12.2017
घोषणा की तारीख/Date of
Pronouncement : 10.01.2018

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

This Revenue's appeal for assessment year 2010-11 arises against the CIT(A)-XIV, Ahmedabad's order dated 09.09.2014 in case no. CIT(A)-XIV/ITO/Ward-7(4)/215/2013-14, reversing Assessing Officer's action making short term capital gains addition of Rs.36,06,950/- after invoking Section 50C, in proceedings u/s.143(3) of the Income Tax Act, 1961; in short "the Act".

Heard both the parties reiterating their respective stands. Case file perused.

2. We notice at the outset that the CIT(A)'s findings under challenge elaborately discuss the relevant facts, Assessing Officer's action making the impugned addition in assessment order dated 28.03.2013 as well as various evidences filed during the course of lower appellate proceedings as under:

"5. I have perused the facts of the case as enumerated by A.O. and as submitted by appellant. I have perused the case laws relied on by A.O. as well as appellant. After careful consideration of facts, submission and contention of both A.O. as well as of appellant, ground wise adjudication is as follows:

5.1. Before adjudication of grounds following facts requires consideration:

(1) There is a notarized M.O.U. dated 06.03.2007 between Navratna Township Pvt.Ltd.and appellant to act as facilitator in view of-

(I) M/s. Navratna Group is engaged in the activities of purchasing and selling lands, building and construction of such building.

(ii) A plotting scheme comprising inter-alia various residential and non-residential building, golf course and a club is proposed by M/s.Navratna Group at land situated at Sanand, and at Vsana lyava for which land had already identified by M/s.Navratna group. Negotiations are already made from land owner but in view of the land in question being agricultural land it will take time to get it converted into non-agricultural land and M/s.Navratna Group is not entitled to purchase agricultural land.

(iii) The appellant being agriculturist and can purchase such agricultural land and M/s.Navratna group does not want to lose opportunity or otherwise any impediment in the scheme as well as rate for purchase (cost of acquisition) contacted appellant. The appellant has to only lend her name while all other formalities about identification, title clearance, registration etc. are to be carried out by M/s.Navratna Group's instruction and all related expenses are required to be borne by M/s.Navratna group. The appellant was to receive Rs.15,000 for such name facilitation. It was also agreed that after getting such land converted to non-agricultural, land has to be transferred or conveyed to M/s.Navratna group party.

(2) As per deed of conveyance dated 30.06.2008, agricultural land (old tenure), non-irrigated (Bin piyat) admeasuring 4 Hector, 80 acre and 68 sq.mt. of survey No.231/1 + 2 of Moje Sanand Village, Tal.Sanand was purchased by appellant along with other co-owners for a consideration of Rs.2,28,12,111. The land was purchased from Hasmukh Singh Bhavsingh Vaghela. Three co-owners with respective share are as follows:

(i) Shri Devang Dineshbahi Shah (10%) i.e. land admeasuring 49 Aare 07 sq.mt.of undivided share of land (PAN : ADFPS 9924H)

(ii) Smt.Sejalben Bipinbhai Amin(10%) i.e. land admeasuring 49 Aare 07 sq.mtof undivided share of land: (PAN: AASPA 3326P)

(iii) Smt.Kalaben BipinbhaijjAmin (80%) i.ef. land admeasuring 3 Hector 92 aare 54 sq.mt.undivided share of land.

The appellant paid Rs.22,81,211 (as mentioned in conveyance deed) vide ch.No.521852, dated 14.08.2008 drawn on Union Bank of India, C.G.Road, Ahmedabad Stamp duty of Rs.11,17,200 (577100 + 540100) was paid.

(3) The appellant submitted a contra account and confirmation from M/s.Navratna Township Pvt.Ltd. (PAN AACCN 3909 L) which reflect that Rs.22,81,211 vide ch.No.348396 of HDFC Bank paid on 21.08.2008 to appellant for purchase of this land. The appellant submitted ledger account, contra account to reflect that expenditure

related to stamp duty, for conversion of agricultural land to non-agricultural land also incurred by M/s. Navratna Group.

(4) *As per sale deed dated 01.10.2009 of this land between all the three co-owners i.e. Shri Devang Dineshbhai Shah, Smt.Sejalben Bipinbra Amin and Smt.Kalaben Bipinbhai Amin through their power of attorney Srr Piyush Bhanuprasad Trivedi(Shri Piyush Bhanuprasad Trivedi was witness for the MOU) and Sagar Sanand Infrabuild Pvt. Limited(PAN AALCS3683F) for a consideration of Rs.2,47,23,000, the purchaser paid stamp duty :•" Rs.28,85,300 (1211500 + 1673800). The appellant received Rs.24,72,300 vide ch.No.244916 dated 01.10.2009 drawn on HDFC Bank, Navrangpura.*

(5) *The appellant submitted ledger account of land held for Navratna group where apart from appellant share for cost of purchase of Rs.22,81,211 and share of sale consideration of rs.24,72,300, appellant debited share of stamp charges for purchase of Rs. 1,11,802, Regd. expenses of Rs.22,857 and N.A.charge,s M Bs.50,295 resulting into profit on sale of land at Rs.6135.*

(6) *A copy of statement recorded by A.O. of Smt.Sejalben Bipinbhai Amin u/s. 131 of the Act dated 01.11.2012. reflect that appellant admitted in reply to Q.No.5 that her name as facilitator was used in dealing of land by Sagar Sanand Infrabuild Pvt. Limited which is a company in which her husband Shri Devang D Shah is one of the directors. She stated categorically that al! the transactions of money are related to company.*

(7) *The appellant submitted a copy of order dated 08.02.2013 u/s.143(3) of the Act for A.Y.2010-11 in the case of Shri Devang Dineshbhai Shah (PAN ADFPS 9924 H) by the ITO.Wd.11(1), Ahmedabad where A.O. show caused (dtd. 16.01.2013) as follows:*

"4 From the details submitted by you on 16-01-2013 it appears that the purchase of lands are made by you from the funds provided by a company called Navratna Township Private Limited and it also appears that these lands are sold to a company named Sagar Sanand Infrabuild Private Limited, please provide what is the arrangement/agreement/understanding with these companies. Further, considering the significant number of transaction of purchase and sale of land with such borrowed funds show me cause as to why the profit made on the sale of land of Rs. 30,771 shown as capital gain in your Return of Income of A. Y. 2010-11 should not be treated as profits and gains made from business and profession."

Shri Devang Dineshbhai Shah vide letter dated 24.01.2013 replied as follows:

"3. Vide Point No. 4 Your Goodselves has show caused as to why the profit earned on sale of land of Rs. 30,771 should not be treated as profit and gains made from business and profession as against profit shown as capital gain in the Return of Income for A. Y. 2010-11, considering that the purchase of land was made from the funds provided by Navratna Township Pvt Limited. In this connection the Assessee submits as under:

(i) The facts of this transaction are that the Assessee is a fairmer and is eligible to purchase an agricultural land in his name. Navratna Township Pvt Limited in 2006 -07 had approached me to purchase an agricultural land on their behalf for the reason that the Company was unable and legally not eligible to purchase the agricultural land from the farmers In its name till the same was converted into non-agricultural land.

(ii) For helping the Company to purchase the land the Assessee had acted as a facilitator for purchasing the agricultural land from the..,owners of the agricultural land i.e. the farmers on behalf of Navratna Township Pvt. Limited.

(iii) As the Assessee was only a facilitator, the entire legal work for verification of the title till the completion of the transaction upto registration of Conveyance Deed was to be carried out by the Navratna Group.

(iv) Further, all the funds required for purchase of land on behalf of the Company including all charges, expenses and outflows were to be borne by the Navratna Group. It was also understood that all risk, rewards and obligations including compliance of legal provisions were to be done by the Navratna Group.

(v) The Assessee was also under obligation to sell the said land after its conversion to non-agricultural status to the Navratna Township Pvt Limited or any of its Group Companies.

(vi) All the above were mutually understood by way of a memorandum of understanding entered by the Assessee with Navratna Township Pvt Limited in- 2006-07, the copy of which is enclosed vide Annexure —3 for your ready reference.

3.1 In view of the above and taking into consideration the Memorandum of Understanding entered the Assessee was being provided the necessary funds for purchase of land on behalf of Navratna Township Pvt. Limited. The copy of the ledger account is also submitted to Your Good serves vide communication dated 16th January, 2013 and for the sake of convenience the same is not repeated. These funds were utilized in making payment to the farmers for purchase of agricultural land.

3.2 Once the land was purchased from the farmers necessary legal formalities for converting the land into non-agricultural land was carried out by the personnel of the Naviatna Group and after short period all those lands were sold to Sagar Sanand Infrabuild Pvt. Limited at the instance of Navratna Township Pvt Limited. The date on which the NA permission was obtained and Conveyance Deed executed is as under:

Survey No	Date on which the approval of conversion into NA land received	Date of Conveyance Deed
230/2	6/2/2008	27/07/2009
273/1	21/05/2009	1/10/2009
249/2	29/06/2009	1/10/2009
249/3/1+4	29/06/2009	1/10/2009
191/1+2+3P3	30/06/2009	1/10/2009
196/1	30/06/2009	1/10/2009
231/1+2	30/06/2009	1/10/2009

Accordingly, a/most all the lands were being transferred within for a period as small as three months.

3.3 For the purpose of facilitating the purchase of land on behalf of Navratna Group, the Ass'essee was to be paid an amount of Rs. 15,000 per conveyance deed or such amount as may be mutually decided. Accordingly, the Assessee has shown the profit of Rs. 31,077 in the Return of Income.

3.4 In view of the above stated facts it is submitted that the Assessee has only facilitated in purchasing and selling of the land on behalf of Navratna Group. This is for the reason that the Company cannot legally purchase the land and the Assessee being an individual was eligible to purchase the said land from the farmers. The same is also evident from the treatment and the disclosure shown in the Balance Sheet which is reproduced hereunder. A copy of the Balance Sheet has already been furnished to Your Honour vide an earlier communication.

<u>Assets</u>	<u>Amount(Rs.)</u>
CURRENTASSETS:	
WIP (Asset held for Navratna Group)	2,89,77,291

Further, the funds provided by Navratna Group is also reflected on the liability side of the Balance Sheet.

3.5 Summarizing, the Assessee is only a facilitator in the entire transaction for purchase of land by the Navratna Group from the owners of the agricultural land i.e. the farmers.

3.6 In view of facts and circumstances mentioned above, there is every possibility that one may validly take a view that the income is not a capital gain but it is business income. However, the Assessee requests Your Goodselfs that; all facts having been truly and correctly stated, no penalty proceedings be initiated, if it is treated differently."

From the Memorandum of Understanding entered by the assessee with Navratna Township Pvt. Limited, filed by the assessee, it was seen that vide para No. 2(j) the assessee was to receive a compensation of Rs. 15,000 per conveyance or any other amount as was mutually decided. During the assessment year, a total of seven conveyance deeds were executed and accordingly, the income which had accrued to the Assessee was Rs. 1,05,000/-. Against the same, the assessee has shown income of Rs. 30,771/- only under the head "Capital Gain". The income of Rs. 30,771/- has been computed after considering all the cost and expenses towards the purchase of land on behalf of Navratna Township Pvt. Limited."

The A.O. held as follows:

"I have duly considered the submission of the assessee. On verification of the MOU filed by the assessee, it is proved that the assessee has acted as a facilitator in the entire transaction for and on behalf of Navratna Group. All the lands have been purchased with the funds provided by Navratna Group to the Assessee which in turn have been used for making payment to the farmers. All the legal work and the verification process have been carried out by Navratna Group. Subsequent to the conversion to non-agricultural, these lands within a very short period have been sold to Sagar Sanand Infrabuild Pvt, Limited. It is also important to note that the assessee in the Balance Sheet so filed in the proceedings has also classified these lands as asset held for Navratna Group. All these factors cumulatively leads to the conclusion, that the said lands are not a capital asset in the hands of the assessee and accordingly the income shown by the assessee as capital gains is not acceptable. The assessee is a trader and the entire transaction entered by the assessee is treated as business income. The same is also accepted by the assessee himself in the written submission filed by him, reproduced above.

Hence, as mentioned in para No. 4, the assessee ought to have shown business income of Rs. 1,05,000/- as against the income of Rs. 30,771/- and accordingly, difference of Rs. 74,229 (1,05,000 — 30,771) is treated as business income and therefore, the same is added back to the total income of the assessee. Since the assessee has furnished

inaccurate particulars of income and thereby concealed his income and the assessee himself offered the same only after the same is pointed out to him during the course of assessment proceedings, penalty proceedings U/S.271(l)(c) of the I.T. Act is being initiated separately."

(8) *The appellant submitted a copy of order dated 13.01.2014 u/s.143(3) r.w.s. 147 of the Act for A.Y.2010-11 in the case of Kalaben Narottamdas Patel (ADTPP 7689N) by the ITO.Wd.7(4), Ahmedabad. The AO show caused the assessee as follows:*

"Please furnish the copy of purchase deed of agriculture land at survey no. 231/1 & 231/2 along with details of investments along with necessary supporting evidence. You have soft! above land far Rs. 2,47,23,000/— your share is 80%. As per jantri value, the sale consideration is worked out to Rs. 5,88,81,600/-. As per section 50C of I.T. Act, for calculation of capital gain the sale consideration is taken as per jantri value. You are thereof requested to show cause as why capital gain should not be worked out on sale cons/deration of Rs. 5,88,81,600/—. Please furnish the details of movable and immovable property held by you."

After considering various details and explanation the A.O. held that-

"I have duly considered the submission of the assessee. On verification of the MOU filed by the assessee it is seen that the assessee's business is of purchase of agricultural land for the entities ~ ho cannot purchase the same because of legal constraints The assessee had purchased the agriculture land from the owners of the agricultural land i.e. the farmers on behalf of Navratna Group during the course of business of real estate development of that group for the reason that the Company was unable and legally not eligible to purchase the agricultural land from the farmers in its name till the same was converted into non—agricultural land. On detailed reading of the Memorandum of Understanding together with the submission filed by the assessee, it is seen that the assessee has purchased the land with borrowed funds of Navratna Township Pvt Ltd. on behalf of them which in turn have been used for making payment to the farmers. All the legal work and the verification process have been carried out by Navratna Group. The assessee was also under obligation to sell the said land after its conversion to non-agricultural status to the Navratna Group of Companies. Subsequent to the conversion to non-agricultural, these lands within a very short period have been sold to Sagar Sanand Infrafauild Pvt. Led: a group concern of Navratna Township Private Limited. Upon selling the land the assessee has given hack the money to Navratna Township Pvt. Ltd. It is also important to note that the assessee has got the books' of account audited u/s.44AB Of the I.T. Act 196 i and has also filed the fax Audit Report during the course of assessment proceedings. In the Audited Balance Sheet so filed in the proceedings the assessee has also classified these lands as asset held for Navratna Group. The funds provided by Navratna Group are also reflected on the liability side of the Balance Sheet Considering the nature of business, the number of transactions entered into during present & subsequent assessment year is also high. Accordingly the factors such as the nature of business, the number of transactions entered into and the fact that the lands have been purchased with borrowed funds leads to the conclusion that the said lands are not a capital asset in the hands of the assessee, The assessee is a trader and the entire transaction entered by the assessee is treated as business income,

9. *Further, it is stated that as per MOU entered with Navratna Township Pvt. Ltd., the assessee is being compensated at the rate of R.s. 15,000/- per transaction for purchasing land on their behalf as part of business carried out by the assessee, The assessee has carried out two such transactions during the year under consideration and*

accordingly has shown compensation income of Rs, 30,000/- under the head business income. The compensation income shown by the assessee is not commensurate to the business activity carried out by her, The compensation income of Rs, 15,000/- per transaction is being enhanced to 1% of sale consideration as per conveyance deeds executed during the year under consideration on the half of Navratna Group. Moreover, on perusal of the bank statement it is found that the assessee has withdrawn substantial amounts on various dates against which payments have not been made for purchases / expenses relating to acquisition of land. Finally, these cash withdrawals have been accumulated to Rs.5,89,50 I/- as on 31/03/2010. Even though, this amount has been shown in the Balance Sheet yet it cannot be denied that the assessee is in possession of the cash at her hand and some of this amount may be utilised by her for other personal purposes also. Meaning thereby is that the assessee may be receiving the amount over and above the agreed amount has stated in the Memorandum of Understanding, Hence, the assessee ought to have shown business income of Rs.2,01,679/- [1% (1,97,78,400 + 3,89,500)] as against the income of Rs, 30,000/- and accordingly, difference of Rs. 1,71,679,- (2,01,679 - 30,000) is added to the business income of the assessee, Since the assessee has furnished inaccurate particulars of income and thereby concealed his income penalty proceedings u/s.27 1(1)(c) of the I.T. Act is being initiated."

5.2. Now coming to adjudication of various grounds of appeal as follows:

(A) Ground No.1 to 3 are interlinked and against the computation of short term capital gain of Rs.3606950 by invoking provisions of section 50C of the Act for transaction of land purchase and sale.

The A.O. rejected appellant's explanation of being a facilitator of land purchase and sale on behalf of M/s.Navratna Group because both in purchase as well as sale deed related to land, there is no mention about M/s.Navratna Group interest. The A.O. has not considered the MOU entered into between appellant and M/s.Navratna Group as authentic and credible. Further, A.O. invoked the provisions of section 50C of the Act in view of stamp duty valuation taken in sale deed.

The appellant in the return of income disclosed income as follows:

Sale consideration of Sanand land	24,72,300
Less: Cost of acquisition and other expenses	<u>24,66,165</u>
Net income declared	<u>6,135</u>

In view of the facts related to purchase and sale transactions of this land being co-owned by three members of Shri Devang Dineshbhai Shah i.e. his wife (appellant) and his mother and in their respective cases, the A.O. accepted the credibility of MOU as well as explanation about genuinity of transactions as facilitator. The A.O. in the case of appellant is not justified in treating the transaction coming under capital gain. When it is not doubted as evident from other evidences like MOU, asstt.order in the case of other co-owners particularly in the case of Kalaben by the same AO after reopening, then such explanation of being facilitator cannot be rejected. The difference of stamp value on sale though incurred by M/s.Sagar Sanand Infrabuild PvtLtd. but the same is on account of the fact that initially purchased / acquired land was an agricultural land while the same was transferred as non-agricultural land before sale. It is therefore even if A.O.'s contention is accepted that the land is an asset in the hands of appellant then, I am inclined with appellant that as per settled legal proposition, acquiring agricultural land and getting it converted to non-agricultural land before sale is amounting to business activity. Hon'ble ITAT, Ahmedabad in the case of Shri Jayantibhai C. Patel HUF vs. ITO.Wd.9(2) in ITA No. 1001/Ahd/2004 & ITA No.1123 and 11234/Ahd/2006, vide order dated 22.12.2011 held that when agricultural land is converted into non-agricultural activity and sold then such activity is an adventure in the nature of business and trade.

It is also not disputed that source of acquisition, all incidental expenses are sourced by M/s.Navratna Group and the same can be treated as borrowed fund. This further made these transactions as business transactions.

But, on the other side, as per ratio of asstt.order in the case of other co-owner as well as from the MOU also, appellant has not disclosed the amount of Rs. 15,000 as facilitation charges per conveyance. It is therefore, when conveyance deed is completed, such amount accrued to appellant in previous year. This amount of Rs.15,000 is therefore required to be treated as business income of appellant and to be added as enhancement of income on this issue.

In reference to invocation of section 50C of the Act in the case of appellant, the AO is not justified on the facts of the case. The A.O. of other co-owners also not taken such view. It is therefore addition of Rs..36,06,948 being 10% share of appellant out of total capital gain of Rs.3,60,69,489 taking recourse to section 50C is directed to be deleted. The appellant gets relief of Rs.36,06,948. In conclusion, all these grounds are treated as partly allowed with an enhancement of Rs. 15,000 for appellant's facilitating income accrued and arised in previous year.

(B) Ground No.4 is against the initiation of penalty u/s.271(1)(c) of the Act. This issue is now consequential in view of relief granted above. This ground is therefore treated as allowed.

(C) Ground No.5 is in respect of charging of interest u/s.234 A, 234B, 234C and 234D of the Act. The same is also consequential in view of relief granted. But, considering the mandatory nature of charging such interest, the AO is directed to levy such interest after giving effect to the relief as well as enhancement of income. This ground is treated as partly allowed.”

3. Learned Departmental Representative vehemently contends that the Assessing Officer had rightly invoked Section 50C of the Act before making the impugned short term capital gains addition. His case therefore is that the impugned addition is liable to be restored. We find no merit in the instant argument. It has come on record that the assessee's share in the land in question is only to the extent of 1/10th. The department itself has assessed the remaining two co-sharers namely Smt. Kalaben N. Patel (8%) and Shri Devang Dineshbhai Shah(10%) to have derived business income from plotting the relevant capital asset in question. There is no distinction on facts pointed out at the Revenue's behest in assessee's case vis-à-vis above two remaining co-sharers. This tribunal in case of Jayantibhai C. Patel (supra) admittedly holds that income derived from sale agricultural land after its conversion to a non-agricultural parcel amounts to an adventure in the nature of business and trade resulting in business income. It has further come on record that the instant assessee had entered into an MOU(supra) with the developer in question. We therefore affirm CIT(A)'s findings under challenge treating the assessee to have derived business income

instead of capital gains. Learned Departmental Representative fails to dispute that the Section 50C of the Act does not apply in the instant case. We therefore see no reason to accept Revenue's grievance pleaded in the instant appeal.

4. The Revenue's appeal is accordingly dismissed.

[Pronounced in the open Court on this the 10th day of January, 2018.]

Sd/-
(PRAMOD KUMAR)
ACCOUNTANT MEMBER
Ahmedabad: Dated 10/01/2018

Sd/-
(S. S. GODARA)
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।