

**IN THE INCOME TAX APPELLATE TRIBUNAL "D"  
BENCH, MUMBAI**

**BEFORE SHRI RAJENDRA, AM &  
SHRI SANDEEP GOSAIN, JM**

**आयकरअपीलसं./ I.T.A. No. 2353/Mum/2016  
(निर्धारणवर्ष / Assessment Year:2011-12)**

ACIT – 17(3) Room No. 137, 1 <sup>st</sup> floor, Aaykar Bhavan, M. K. Marg, Mumbai-400020.	<b><u>बनाम/</u> Vs.</b>	Vanitkumar I. Gupta 21, Basant Apartment, 101, Cuffe Parade, Colaba, Mumbai-400 005
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**आयकरअपीलसं./ I.T.A. No. 1557/Mum/2016  
(निर्धारणवर्ष / Assessment Year: 2011-12)**

Vanitkumar I. Gupta 21, Basant Apartment, 101, Cuffe Parade, Colaba, Mumbai-400 005	<b><u>बनाम/</u> Vs.</b>	ACIT – 12(2) Now ACIT-17(3) Room No. 137, 1 <sup>st</sup> floor, Aaykar Bhavan, M. K. Marg, Mumbai-400020.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No.      AAFPG5617G		

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Rajesh Kumar Yadav, DR
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri Vimal Punmiya, AR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	22/02/2018
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	27/04/2018

आदेश / ORDER

**Per Shri Sandeep Gosain, Judicial Member:**

These two appeals filed by the revenue as well as assessee are against the order of Ld. CIT(A) – 28, Mumbai dated 12.02.16 for AY 2011-12.

2. Since all the issues involved in these two appeals are common, therefore, they have been clubbed, heard together and a consolidated order is being passed for the sake of convenience and brevity.

**ITA No. 2353/Mum/2016 (AY 2011-12)**

3. First of all we take up revenue's appeal in ITA No. 2353/Mum/2016 for assessment year 2011-12 as lead case. The ground of appeal are mentioned herein below:-

*'1) On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in treating the profit of Rs.2,09,43,529/- on sale of lands as exempt from tax, as against taxable business profit treated by the A.O.*

2) *On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in not appreciating the fact that the activity of the assessee of buying & selling of lands at higher volume, frequency & continuity, is nothing but a business activity, which result into business income only.*

3) *On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in relying upon its own decision in the case of the assessee for AX. 2008-09 when the Department is in the process of filing appeal u/s.260A before the Hon'ble Bombay High Court.*

4) *On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the disallowance u/s.40(a)ia) of the I.T. Act totaling to Rs3,85,380/- with respect to non-deduction of TDS on brokerage paid/incurred by the assessee in relation to sale of lands at Barpe.*

5) *The appellant prays that the order of the A.O. should be restored and order of the CIT(A) should be set aside.*

6) *The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary.'*

4. As per the facts of the present case, the assessee company is engaged in the business of dealer/trader in iron and steel and other ferrous/non metals and also in sale and purchase of lands. The assessee filed its return of income for AY 2011-12 on 30.09.2011, declaring a total income of Rs. 98,35,060/- The return was processed u/s 143(1) of the Act. The case was selected for scrutiny assessment through Computer Assisted Selection System (CASS) and after serving statutory notices and providing opportunity of hearing, assessment order u/s 143(3) of the I.T. Act was passed by AO thereby making addition/disallowance u/s 14A of I.T. Act, treated the profits and gains from the sale of agricultural lands chargeable to tax under the head 'business or profession' and also made disallowance u/s 40(a)(ia) of I.T. Act.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties partly allowed the appeal of the assessee by deleting the additions made by the AO. However sustained the disallowance made u/s 14A of the I.T. Act.

Aggrieved by the order of Ld. CIT(A), both i.e. revenue as well as the assessee have filed their respective appeals before us.

However, at present we are dealing with the appeal filed by the revenue on the grounds mentioned herein above.

**Ground No. 1 to 3**

5. These ground grounds raised by the revenue are inter-connected and inter-related and relates to challenging the order of Ld. CIT(A) in treating the profit of Rs.2,09,43,529/- on sale of lands as exempt from tax, as against taxable business profit treated by the A.O, therefore we thought it fit to dispose of by this common order.

6. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above ground raised by the revenue in its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 5.2 of its order and the same is reproduced below:-

5.2 Ground 2,3&4: This is against the action of the AU in holding that the profit on sale of agricultural land is taxable as business income. The AO has elaborately dealt with the matter in his assessment order. The appellant has also filed lengthy and elaborate submissions on the issue. I find that in the earlier Year the same issue arose on identical facts. The CIT(A) confirmed the action of the AO. The appellant carried the matter to the ITAT for the AY 2008-09. The Hon'ble ITAT vide its order in the appellants own case for AY 2008-09 in ITA No 27361Mum/2016 dated 16.12.2016 has decided the matter in the favor of the appellant. A copy of the order is placed on record. The Hon'ble ITAT has passed a detailed order and the operative portion is para 6 onwards. The ITAT has held in para 15 that the intention of the assessee at the time of purchase of lands cannot be held to be holding the same as stock in trade. They held that the appellant has held the impugned lands as investment only and hence cannot be categorized as a capital asset u/s 2(14) and hence the gains therefrom are not taxable. I have perused the order of the Hon'ble ITAT in this case and find that the issue is identical on facts and is therefore squarely covered, In fact the ITAT has categorically held that the lands held by the appellant in AY 2008-09 are to be

*categorized as investments and not stock in trade and are out of the purview of capital asset. It is these very lands which have been sold during the year leading to profit. Respectfully following the decision of the Hon'ble ITAT in the appellants own case, I hold that the sale of agricultural land cannot be held to be a business activity and therefore the profit therefrom cannot be assessed as business income. I accordingly delete the addition of Rs 2,0 43,529. Ground 2. 3&4 are allowed.*

After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and submissions made by both the parties, we find that Ld. CIT(A) had correctly appreciated the facts of the present case by following the decision of Hon'ble ITAT in ITA no 2736/Mum/13 for AY 2008-09 in assessee's own case wherein it was held that the intention of the assessee at the time of purchase of lands cannot be held to be holding the same as stock-in-trade. It was further held that the assessee has held the impugned lands as investment only and therefore, cannot be categorized as capital asset u/s 2(14), thus gains there from are not taxable. As per the

facts, these very lands which have been sold during the year leading to profit.

Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld CIT (A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT (A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these ground raised by the revenue stands **dismissed**.

**Ground No. 4**

7. This ground ground raised by the revenue relates to challenging the order of Ld. CIT(A) in deleting the disallowance u/s.40(a)(ia) of the I.T. Act totaling to Rs3,85,380/- with respect to non-deduction of TDS on brokerage paid/incurred by the assessee in relation to sale of lands at Barpe.

8. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above ground raised by the revenue in its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 5.3 of its order and the same is reproduced below:-

*5.3 Grounds 5&6: This is against the action of the AO in disallowing the brokerage paid towards sale of agricultural land as TDS was not deducted on the same. This is an admitted fact that TDS was not deducted. The AO held the profit from sale of agricultural land as business income. Naturally profit is calculated after granting all deductions towards expenses. As the appellant has paid brokerage, it should naturally have been allowed as an expense. However the AO noticed that as no TDS was deducted, the same cannot be allowed US 40(a)(1a). Now in the light of my decision above, on the issue of profit from sale of agricultural land as being non taxable, it naturally follows that no deduction for brokerage expenses can be gken I find that the appellant has not claimed these in his P&L A/c. In the circumstances, the*

*provisions of section 40(a)(ia) would not apply and therefore the disallowance made by the AO is deleted. Grounds 5 & 6 are allowed.*

After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and submissions made by both the parties, we find that Ld. CIT(A) had correctly appreciated the facts of the case and rightly concluded that the profit from sale of agricultural land is not taxable. No deduction for brokerage expenses can be given. From the records, Ld. CIT(A) has correctly appreciated that the assessee has not claimed these expenses in profit and loss account. Thus provisions of section 40(a)(ia) was not found applicable.

Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld CIT (A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT (A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are

judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

**Ground No. 5 & 6**

9. These grounds raised by the revenue are general in nature, thus requires no specific adjudication.

10. In the net result, the appeal filed by the revenue stands **dismissed**.

**ITA No. 1557/Mum/2016 for AY 2011-12.**

11. Now we take up assessee's appeal filed in ITA No. 1557/Mum/2016 for AY 2011-12.

12. The assessee has raised solitary ground thereby challenging the order of Ld. CIT(A) in upholding the disallowance made by AO u/s 14A r.w.r. 8D.

13. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities. As per the facts of the case, we find that during the year under consideration, there no

additional investment in the shares as the opening balance and the closing balance is same i.e. Rs. 31,42,624/-. We have further noticed that the total exempt income earned by the assessee comprises of sale of old mutual fund, PPF interest, dividend and the interest received in the proprietary firm of the assessee i.e. Sri Enterprises is Rs. 23,22,400/- and interest paid by the assessee is Rs. 22,77,044/- and in this way, the net interest income of the assessee is Rs. 45,396/-.

The AO while making disallowance had considered the interest paid by the assessee and not the net interest. We have also considered the case laws submitted by Ld. AR in order to support his contentions titled Reliance Utility (Bombay High Court) wherein it has been held that if there is credit balance in capital account, then in that case, the investment made should be presumed to be out of capital. We further noticed that as per the records, the capital of Vinit kumar Gupta as on 31.03.11 is Rs. 584,70,521/-. The AO or the Ld. CIT(A) have not considered these factual and legal proposition.

Be that as it may, considering the interest of justice, we set aside the order of Ld. CIT(A) and remit the matter back to the

file of AO with a direction to consider the above submissions made by the assessee and also the case laws relied upon supra and thereafter pass afresh order of assessment on this ground. It is needless here to mention that before passing the order of assessment on this ground, the AO shall provide sufficient opportunity of hearing to the assessee. Before parting, we may make it clear that our decision to restore the matter back to the file of AO shall in no way be construed as having any reflection or expression on the merits of the dispute, which shall be adjudicated by the AO independently in accordance with law. Resultantly, this ground raised by the assessee is **allowed for statistical purposes.**

14. In the net result, the appeal filed by the assessee is **allowed for statistical purposes.**

*Order pronounced in the open court on 27<sup>th</sup> April 2018.*

Sd/-  
(Rajendra)  
लेखासदस्य / Accountant Member  
मुंबई Mumbai; दिनांक Dated :  
*Sr.PS. Dhananjay*

Sd/-  
(Sandeep Gosain)  
न्यायिकसदस्य / Judicial Member  
27.04.2018

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT,  
Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार**  
(Dy./Asstt.Registrar)  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**