

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'F', New Delhi**

**Before : Shri Bhavnesh Saini, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 3043/Del./2016
Assessment Year: 2008-09**

Bhupinder Singh Kochar, 5, Kasturba Gandhi Marg, New Delhi. PAN- AAIPK4653K (Appellant)	vs.	DCIT, Central Circle-8, New Delhi (Respondent)
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Assessee by	Sh. Gautam Jain, Advocate
Revenue by	Sh. Sanjit Singh, CIT/DR

Date of Hearing	19.07.2018
Date of Pronouncement	24.07.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of Id. CIT(A)-29, New Delhi dated 22.03.2016 for the assessment year 2008-09 on the following grounds :

1. *That the learned Commissioner of Income Tax (Appeals)-29, New Delhi has erred both in law and on facts in upholding the addition of Rs. 9,05,947/- by treating long term capital gain as business income.*

1.1 *That while upholding the addition the learned Commissioner of Income Tax (Appeals) has failed to appreciate that said capital asset disinvested by the appellant in the year under consideration was disinvested after holding for a period close to 20 years and therefore declared capital gain by no any stretch of imagination could be regarded as business income.*

1.2 *That mere fact that assessee was holding substantial investment in properties could not be a ground to regard the disinvestment of capital asset as business income, more particularly when nature of asset stood accepted in the wealth tax proceedings.*

2. The brief facts of the case are brought out by the ld. CIT(A) in the impugned order, which are extracted below for ready reference :

“5. The fact of this case is that a search under section 132 of the Act was carried out on 05.01.2009 in M/s Taneja-Puri group of cases and the case of appellant was also covered under section 132(1) of the Act, Notice under section 153A was issued on 23.07.2009. In compliance to that the appellant submitted return on 31.03.2010 disclosing total income at Rs.24,43,780/-. The appellant has also filed e-return earlier, on 31.03.2009, declaring total income of Rs.24,43,780/. It is observed that the original return filed after the date of search and belated as no return was submitted upto the due date in this case.

5.1 The appellant has disclosed income from salary, capital gains and other sources. During the year under consideration the appellant declared income from capital gain due to the sale of various properties including a property at Asola on 25.01.2008. The sale consideration for the said property has been shown at Rs.42,50,000/- and after claiming the indexation cost at Rs.19,26,182/-, the long term capital gain from said property has been disclosed at Rs.23, 23,818/-. The AO observed that the appellant is engaged in the business of purchase and sale of properties and treating the immovable properties as his capital assets earlier which were converted into business asset (stock in trade) with effect from 01.04.1994. Therefore, all the properties were held as stock in trade for the purpose of business. However, ,during the year under consideration the said property held as stock in trade is again converted as a capital asset and sale proceeds of such property has been treated as capital gains, taking the benefit of indexation cost and lower rate of tax.

5.2 During assessment proceedings, it was submitted by the appellant that since the holding period of the property was more than 10 years, therefore, as per the provisions of Wealth tax such assets are not treated as stock in trade as the same is required to be taxed as capital asset under Wealth tax act. It was also stated that the same has been declared as taxable wealth under the Wealth tax Act.

5.3 The AO did not considered the submissions of the appellant and treated the same as business income on the basis that the appellant is engaged in the business of purchase and sale of property and therefore the income arising out of the sale of property is chargeable as business income. Accordingly, the benefit of indexation was not provided to appellant.

The learned CIT(A) upheld the action of the Assessing Officer vide impugned order by holding that the sale of said property by the assessee will be treated as business income, as it was arising out of the sale of stock-in-trade. He also held

that the assessee is not entitled for the cost inflation index factor. Aggrieved by the impugned order, the assessee is in appeal before the ITAT.

3. At the outset of hearing, the ld. AR of the assessee submitted that similar issue was involved in assessment year 2009-10, which has been decided by the ITAT, Delhi Benches in favour of the assessee vide order dated 28.12.2016 (ITA No. 6085/Del./2013). The facts remain unchanged during the year under consideration.

4. On the other hand, the ld. DR relied on the orders of the lower authorities.

5. After hearing both the sides and perusing the entire material on record and the orders of the lower authorities including the decision of Tribunal for the assessment year 2009-10 in assessee's own case, we find that the issue is squarely covered in favour of the assessee by the above decision. The facts and circumstances in the present case are same as were prevailing in assessment year 2009-10. The findings reached by the Tribunal read as under :

6. We have heard the rival submissions and perused the material on record. It is undisputed that the period of holding of the assets in question was more than 12 years in the case of property 10, Civil Lines More than 7 years in the case of property at 374, Kohat and more than 20 years in the case of land at Alipur. It is equally undisputed that the Assessee had exercised his right to convert the stock in trade to capital asset on 31.3.2007 and that there is no bar under the Income Tax Act on such conversion. It is again undisputed that the capital gain declared by the assessee on the sale of assets has been accepted by the department in assessments for AYs 2010-11 and 2011-12 vide assessment orders framed u/s. 143(3) of the Act. Again, the assets in question have been accepted as capital assets in wealth tax assessments of the assessee. It is settled law that once an assessee has been assessed under Wealth Tax Act wherein his claim has been accepted that the asset is not

stock in trade, the revenue cannot adopt inconsistent position in the income tax proceedings. Mere fact that the assessee purchases and sells properties every year does not imply that the assessee is engaged in business and the nature of assets on the date of transfer is a relevant consideration in such cases. It is further seen that the number of properties held by the assessee during the AY 2006-07 is the same as in AY 2009-10 which points out that the assessee has not entered into voluminous transactions. In the light of the factual circumstances, we are unable to concur with the findings of the authorities below that the assessee was engaged in the business of purchase and selling of property and that the resultant income should be taxed under the head 'business income'. Therefore, it is our considered opinion that the conclusion reached by the authorities below are inconsistent with the facts of the case and we allow assessee's appeal by holding that the resultant income is taxable under the head 'capital gains'.

6. Respectfully following the decision of co-ordinate Bench, the issue is decided in favour of the assessee. Accordingly, the appeal of the assessee deserves to be allowed.

7. In the result, the appeal is allowed.

Order pronounced in the open court on 24th July, 2018.

Sd/-
(Bhavnes Saini)
Judicial member

Sd/-
(L.P. Sahu)
Accountant Member

Dated: 24th July, 2018

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Copy of order forwarded to:

(1) The appellant	(2) The respondent
(3) Commissioner	(4) CIT(A)
(5) Departmental Representative	(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi