**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**"C" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER**
**AND**
**SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

ITA No.3034/Ahd/2015

निर्धारण वर्ष/ **Asstt. Year: 2009-2010**

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| Ganesh Housing Corporation Ltd.<br>"Ganesh Corporate House"<br>100 Ft. Hebatpur-Thaltej Road<br>Nr. Sola Bridge<br>Off. S.G. Highway<br>Ahmedabad 380 015.<br>PAN : AAACG 5590 Q | Vs. | DCIT, Cir.2(1)(1)<br>Navjivan Trust Bldg.<br>Ahmedabad. |

ITA No.3083/Ahd/2015

With

CO No.216/Ahd/2015

निर्धारण वर्ष/ **Asstt. Year: 2009-2010**

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| DCIT, Cir.2(1)(1)<br>Navjivan Trust Bldg.<br>Ahmedabad. | Vs. | Ganesh Housing Corporation Ltd.<br>"Ganesh Corporate House"<br>100 Ft. Hebatpur-Thaltej Road<br>Nr. Sola Bridge<br>Off. S.G. Highway<br>Ahmedabad 380 015. |

| **(Applicant)** | | **(Responent)** |
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| Assessee by : | Shri Dhiren Shah, AR |
| Revenue by : | Shri C. Danday, CIT-DR |

सुनवाई की तारीख/**Date of Hearing : 19/09/2018**
घोषणा की तारीख /**Date of Pronouncement: 23/10/2018**

**आदेश/O R D E R**

**PER RAJPAL YADAV, JUDICIAL MEMBER:**

Assessee and the Revenue are in cross-appeals against order of ld.CIT(A)-2, Ahmedabad dated 26.8.2015 passed for the Asstt.Year 2009-10. On receipt of notice in the Revenue's appeal, the assessee has also filed cross-

objection bearing no.216/Ahd/2015. Since issues are inter-connected, we proceed to dispose of all these appeals by this consolidated order.

2. Grounds of appeal taken by the Revenue as well as assessee read as under:

***Revenue's appeal:***

*"1. The Ld.CIT(A) has erred in law and on facts in treating the income of Rs.34,47,78,585/- under the head capital gain instead of income under the head business/profession, without properly appreciating the facts of the case and the material brought on record.*

*2. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.1,08,14,730/- made u/s.40A(2)(b) of the Act, without properly appreciating the facts of the case and the material brought on record.*

*3. On the facts and in the circumstances of the case, the Ld. CIT(A)'ought to have upheld the order of the Assessing Officer.*

*4. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

*5. The appellant craves leave to amend, alter or add a new ground, which may be necessary.*

***Assessee's appeal:***

*Challenging the validity of issuance of Notice issued u/s. 148 of the Act and —assessment proceedings u/s. 143(3) r.w.s. 147 of the Act.*

*1. The Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O in issuing the notice u/s. 148 of the Act and reassessment proceedings u/s. 143(3) r.w.s. M7 of the Act.*

*2.. The Ld. CIT(A) has erred in law and on facts in failing to properly consider the contention of the appellant company and various judicial pronouncements relied upon if tie appellant company in the reassessment proceedings before the A.O as well as in «w appellate proceedings before the Ld. CIT(A).*

*The appellant reserves its right to add, amend, alter or modify any of the grounds stated hereinabove either before or at the time of hearing."*

3. As far as CO filed by the assessee in Revenue's appeal is concerned, the assessee has just made pleading in support of finding recorded by the ld.CIT(A) on the issue that profit earned on transfer of land has rightly been assessed under the head "capital gains" by the ld.CIT(A) instead under the head "business or profession" assessed by the AO. Similarly, the ld.CIT(A) has rightly deleted the disallowance made under section 40A(2)(b) of the Income Tax Act, 1961.

4. Sub-section 4 of Section 253 authorizes the respondent to file CO on receipt of notice in an appeal against any part of order impugned in the appeal. Perusal of grounds taken in the CO would indicate that the assessee has not shown any grievance on these two issues against the order of the ld.CIT(A). In other words, the CO has been filed in support of finding recorded by the ld.CIT(A) on the issue on merit. These have decided against the Revenue and the Revenue is in appeal on those issues, as such CO filed by the assessee is not maintainable. It is rejected.

5. The assessee in its appeal has taken jurisdictional issue vide which it has challenged upholding of re-opening of the assessment by the CIT(A).

6. Brief facts of the case are that the assessee-company at the relevant time was engaged in the business of real-estate development and construction activities. It has filed its return of income on 30.9.2009 declaring total income at Rs.31,17,28,740/-. The assessment was framed under section 143(3) of the Income Tax Act on15.12.2011 whereby the income of the assessee was determined at Rs.63,55,44,890/-. The AO

thereafter recorded reasons and issued notice under section 148 of the Income Tax Act. On receipt of notice, the assessee filed objections against reopening of the assessment vide letter dated 23.5.2014. These objections have been disposed by the ld.AO vide order dated 16.9.2014. Copy of the reasons for reopening of the assessment has been placed on page no.184 of the paper book. Similarly, copy of objections filed by the assessee against reopening of the assessment has been placed on page no.194 and order of the AO disposing such objection is available at page no.363 of the paper book. The ld.counsel for the assessee while impugning orders of the ld.Revenue authorities contended that basically the AO has assigned three reasons for reopening of the assessment. In this first fold of reasons, he observed that the assessee has shown long term capital gain of Rs.34,17,28,740/- received from transfer of non-agriculture land. In the opinion of the AO, the gain received by the assessee on transfer of this non-agriculture land ought to be assessed as business income instead of capital gain accepted by the AO. In other words, the AO in the reasons has observed the land acquired by the assessee on amalgamation of erstwhile company viz. Nachiket Properties P.Ltd. ("NPPL" for short) ought to be construed as stock-in-trade and failure of the AO to assess it under the business income has lead to escapement of income.

7. With regard to second issue, it was contended that the assessee had made provision for gratuity in earlier year, and as per ledger, opening balance as on 1.4.2008 was of Rs.1.06 crores. During F.Y.2008-09, the company decided to go for gratuity scheme with LIC and worked out gratuity provisions of Rs.41.09 lakhs. The assessee credited an amount

of Rs.68.99 lakhs in the profit & loss account being excess provision created in earlier years, and balance of Rs.37,78,483/- was adjusted towards contribution for the year. The AO was of the view that amount of Rs.37,78,483/- was required to be credited to the profit & loss account and debiting of Rs.3,31,353/- was required to be disallowed as wrongly claimed by the assessee, and in view of the above, an income to the extent of Rs.41,09,796/- has escaped assessment.

8. Next reason assigned by the AO is that the company has made payment of Rs.1,08,14,730/- to Shri Govind C. Patel which ought to have been disallowed under section 40A(2)(b) of the Act. On the strength of these three reasons, the ld.AO sought to reopen the assessment. The ld.counel for the assessee contended that as far as second issue is concerned no addition was made by the AO. Therefore, it is no longer in dispute.

9. With regard to first and third issue, he took us through the finding of the ld.CIT(A) and contended that the ld.CIT(A) has agreed that re-opening of the assessment of income of Rs.34,17,28,704/- under the head “capital gain” or “business income” the same was based on change of opinion. The ld.CIT(A) agreed that in the first round of litigation this issue has specifically examined by the AO in the scrutiny assessment. No fresh material was come to the possession of the AO, on the basis of which reopening could be justified. He specifically took us through the observation of the ld.CIT(A) of page no.20 of the impugned order. Such observation recorded in para 2.7 reads as under:

*"2.7 The appellant also argued that while reopening, the AO has reviewed the regular assessment completed u/s.143(3) of the I.T.Act, 1961 and the assessment records of the appellant company for recording the reasons for initiating proceedings u/s. 147 of the I. T. Act, 1961. The AO does not have any power to review or to make revision of the regular assessment order passed earlier. It was also contended that the AO has reopened the assessment on the basis of the audit query of the audit party and there was no independent application of mind by the Id. AO. Further, it was also submitted that by reopening the AO has changed his opinion to hold the opinion different from that of his predecessor on the same set of facts which were available before him during regular assessment proceedings. Thus, the reopening proceedings initiated by the AO were not valid as per the provisions of law. The detailed submission has been reproduced in the preceding paras of this order.*

10. The ld.counsel for the assessee further submitted that with regard to third issue, the ld.CIT(A) has upheld reopening of the assessment. The ld.CIT(A) was of the opinion that on third issue no investigation was made by the AO in the first round of litigation, and therefore, there could not be any allegation of change of opinion. The ld.CIT(A) referred to decision of Hon'ble Delhi High Court in the case of Gee Vee Enterprises Vs. ACIT, 99 ITR 375 wherein the Hon'ble High Court has propounded the role required to be played by the AO as an adjudicator as well as investigator. The ld.AO was duty bound to investigate each and very issue without getting influenced, whether it will go against or in favour of the assessee/revenue. The moment the AO failed to make inquiry *qua* any issue, his action for taking recourse under section 147 would be justified. The ld.counsel for the assessee took us through the explanation of the assessee submitted in the objection against reopening, and thereafter he relied upon the judgment of the Hon'ble Supreme

Court in the case of CIT Vs. M/s.Kelvinator of India Ld., 320 ITR 561 (SC). He made reference to other large number of decisions relied upon before the ld.CIT(A). At this stage, we would like to take note of specific objection raised by the assessee before the AO against reopening *qua* this issue. It reads as under:

> *(C) Payments to director for cancellation of booking being land purchased amounting to Rs.1,08,14,730/-.*
>
> *(i) Your honour has recorded the reason for issuance of notice u/s.148 of the Act on the basis of audit report in Form No.SCD wherein in Annexure-9 of column 18 there is details of payment to persons covered u/s.40A(2)(b) of the Act. Wherein there is cancellation of booking of land purchase amounting to Rs.1,08,14,730/- to a director Govind C. Patel. Your honour has further observed that the director who receives such hefty amount as remuneration is solely responsible for the company's profit and he cannot entered into such a contract to reduce company's profit by way of such vague claims as the contract was made between Shri Govindbhai C Patel and the company assessee and the interesting thing is that Shri Govindbhai is a common man to sign the agreement on behalf both the parties, being as a director and on the other side as individual capacity. Such type of agreements could not be considered as genuine and legal.*
>
> *(ii) The observation of your honour and recorded the reasons for issuance of notice u/s.148 of the Act is baseless, because the 'amount debited being cancellation of plot which was sold to the director in earlier years and said amount of Rs.1,08,14,730/- was already been offered as sales amount in earlier year. During the year the plot no.6 which was been cancelled. Hence said amount was booked as a cancellation amount and during the year the said plot is sold to Celestial Biological Ltd. for an amount of Rs.3,25,00,000/- and assessee company has earned profit of Rs.2,16,85,270/- which is offered for taxation. Copy of account of plot no.6 is attached herewith as per Exhibit-IX. In the above transaction, in fact the assessee company has made huge profit*

*and offered for taxation in the return of income and there is no an escapement of income.*

*(iii) Your honour has recorded the reason as escapement of income for an amount of Rs. 1,08,14,730/- on the basis of material available on record. The then A.O. had verified the same during the scrutiny assessment and has passed the order u/s. 143(3) of the Act. Copy of the said order is attached herewith as per Exhibit-V. Now, your honour has not brought on record any tangible material and it is merely a change of opinion on which reopening is not permissible.*

*In view of the above facts, there is no escapement of income and facts has been duly examined by the A.O while passing order u/s. 143(3) of the Act."*

11. The ld.counsel for the assessee submitted that had the AO appreciated complete facts, then he would have immediately realized that there is no escapement of income on this issue, but instead of that he simply brushed aside all objections by making reference to various case laws. There is no live nexus between information available with the AO vis-à-vis formation of belief that income has escaped assessment. Similarly, the ld.CIT(A) failed to examine this aspect. It simply proceeded on the ground that if an issue was not examined by the AO in the original scrutiny assessment, then on that very issue, he would be justified to reopen the assessment. Such conclusion is directly in contradiction with the ratio laid down by the Hon'ble Supreme Court in the case of Kelvinator of India Ltd. (supra). It to be assumed that the AO must have gone through all details, once he has passed a scrutiny assessment. The ld.DR relied upon orders of the AO. He contended that all objections of the assessee have been considered. These have been rejected. Notice under section 148 has issued within four years from the

end of relevant assessment year. Hence, benefit of proviso appended to section 147 is not available to the assessee in the present case. Since there was no opinion formed by the AO on this issue in earlier original assessment order, therefore, there cannot be any allegation of change of opinion.

12. We have duly considered rival contentions and gone through the record carefully. As observed earlier, assessment was sought to be reopened on three issues viz. (a) long term capital gain on sale of land of Rs.34,17,28,740/- disclosed in the return of income was to be treated as business income; (b) to disallow contribution to approved gratuity fund of Rs.41,09,796/-, and (c) payment to director who is covered under section 40A(2)(b) of the Act for cancellation of booking of land purchased amounting to Rs.1,08,14,730/- ought to be disallowed.

13. As far as first issue is concerned, we have noticed the finding of the ld.CIT(A) that reopening was not valid. According to the ld.CIT(A) the assessment was sought to be reopened on change of opinion. This finding of the ld.CIT(A) has not been challenged by the Revenue in its grounds of appeal, which we have extracted above. Thus, we are not required to devote energy on the first issue. As far as second point is concerned no addition was made. Hence, it is also irrelevant for discussion.

14. On the last issue, the ld.CIT(A) has upheld reopening of the assessment. Short dispute for our consideration is, whether AO was able to lay his hand on any new information after passing of 143(3)-order

which can goad him to form a belief that income has escaped assessment. Before embarking upon an inquiry on the facts of the present case, we would like to take note of law laid down by the Hon'ble Supreme Court in the case of Kelvinator India Ltd. (supra). The finding of the Hon'ble Supreme Court deserves to be noted as under:

*"3.2 After the Amending Act, 1989 , section 147 reads as under :*

*"147. Income escaping assessment.—If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153 , assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)." [ Emphasis supplied]*

*4. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987 , re- opening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1-4-1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989 , power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of*

*"change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989 , Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987 , Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 , dated 31-10-1989, which reads as follows :*

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147. —A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989 , has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same." [Emphasis supplied]*

*5. For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."*

15. We do not deem it necessary to recite and recapitulate ratio laid down in other judgments because for re-opening of assessment within four years before the end of relevant assessment and even a scrutiny assessment was made, the AO has to demonstrate a live-link between escapement of income vis-à-vis information available to him for forming such belief that income has escaped assessment. The assessment cannot be reopened on change of opinion. Let us take into consideration objections submitted against reopening of the assessment extracted above. It emerges out from the record that in the F.Y.2006-07, the director has booked a plot with payment of Rs.1,08,14,730/-. According to the assessee this plot was sold to the director in earlier year and sale consideration was offered for taxation in the year under consideration. That earlier sale was cancelled. Director was paid a sum of Rs.1,08,14,730/- and the plot was sold to Celestial Biological Ltd. for consideration of Rs.3.25 crores. The company in this transaction had earned profit of Rs.2,16,85,270/-. This profit has been offered for taxation. In other words, in earlier years, plot was sold to director, sale consideration was offered by the company for taxation. This year the company cancelled earlier sale, repaid the consideration to the director, which was received from him in earlier year, and the same was sold for higher consideration, which has resulted a profit of Rs.2.16 crores to the company.

16. Section 40A(2)(b) of the Income Tax Act contemplates that if a person covered by clause (b) provide any service or goods to the assessee and the assessee makes payment over and above market rate, then cost of such services or goods such payment, which is considered to

be excessive or unreasonable will not be allowed as deduction to the assessee, because it will amount to undue benefit to persons covered under section 40A(2)(b) of the case, because of its position/association with the assessee. Now question arise in this case is, whether the assessee has made payment ? It has only repaid the sale consideration earlier received from the director for sale of plot and that consideration was offered for taxation. This year, it cancelled the sale of earlier year, and repaid sale consideration. The plot has been sold at higher rate. The company has earned higher profit. There is no payment which is covered under section 40A(2)(b) for harbouring a belief that income has escaped assessment. The ld.AO has simply perused the balance sheet and audited accounts as discernible from the reasons recorded by him for reopening of the assessment on this issue. In the audited accounts, the detail mentioned for this issue is, "cancellation of booking of land purchase". The moment the assessee has given details showing that there is no loss to the company, the booking was cancelled at the cost price to the director, he ought to have dropped the reopening of assessment on this issue. Thus, a perusal of record would indicate that there was no information much less fresh information which can authorise him to form an opinion or record reasons showing escapement of income. We are satisfied that no information was available with the AO to harbor a belief that income has escaped assessment on this issue. We allow this ground of appeal, and quash the reopening of the assessment. Appeal of the assessee is allowed.

17. We now take appeal of the Revenue. The ld.CIT(A) has deleted both the additions sought to be made by the AO in the reopened of the

assessment. We have already quashed the re-assessment order and not required to go into merits of the issue, but considering the quantum of revenue involved in the appeal of the Revenue, we are of the opinion that the issue may further travel to higher appellate authority, therefore, it is appropriate to adjudicate the issue on merit also.

18. First we take the ground no.2. In this ground, the Revenue has pleaded that the ld.CIT(A) has erred in deleting the disallowance of Rs.1,08,14,730/- which was added by the AO under section 40A(2)(b) of the Act.

19. We have already noticed the facts leading to this addition. It is pertinent observe that in the audit report submitted by the assessee in form no.3CD, it has narrated details of payment made under section 40A(2)(b) of the Act at column no.18 annexure-9. From such details, the ld.AO noticed that a sum of Rs.1,08,14,730/- was paid to Govind C. Patel, director towards cancellation of booking land purchase. The case of the assessee is that in F.Y.2006-07, director has paid a sum of Rs.1,08,14,730/- and booked a plot. Sale to the director was offered taxation. This year, booking of plot bearing no.6 was cancelled and the amount paid by the director was refunded. The company has sold this plot to Celestial Biological Ltd. for a consideration of Rs.3.25 crores and earned profit of Rs.2,16,85,270/-. The ld.AO without understanding the issue disallowed this payment. On appeal, the ld.CIT(A) has re-appreciated all these facts and deleted disallowance. Discussion made by the ld.CIT(A) reads as under:

"

| | | | | |
|---|---|---|---|---|
| *25/09/2008* | *Sold to Celestial Biological Ltd.* | *21629.46* | *500* | *10814730* |
| *31/03/2010* | *Sold to Celestial Biological Ltd.* | *335.42* | *500* | *167710* |
| *31/03/2010* | *Sold to Celestial Biological Ltd.* | *491.56* | *500* | *245780* |
| *31/03/2010* | *Sold to Intas Biopharmaceuticals Ltd.* | *7087.21* | *500* | *3543605* |
| *31/03/2010* | *Less: Remaining balance given back to Ganesh Housing Corporation Ltd.* | *3143.35* | *500* | *1571678* |
| | *BALANCE AREA* | *0.00* | | |

*4.6. In other words, the Plot No. 6 admeasuring 32687 Sq. Yds. booked by Shri Govind C. Patel in F. Y. 2006-07 for the consideration of Rs.16343500/- was cancelled by him in F. Y. 2009-10 and the land was sold in part by the appellant in F. Y. 2009-10 and 2010-11. Thus, the original amount received from Shri Govind C. Patel of Rs.16343500/- on 24/03/2008 vide cheque no. 947658 of Tamilnadu Mercantile Bank Ltd. was returned back to him in F. Y. 2008-09 and 2009-10. In other words, on booking of the plot and cancellation thereof, Shri Govind C. Patel has not earned any income, rather the appellant company has derived the income as mentioned earlier in the year under consideration at Rs.2,16,85,270/- for 21629.46 sq. yds of land and in F. Y. 2009-10 for the remaining land sold. Through this transaction, the appellant company has derived the income which has been shown in the P & L Account and offered for taxation. It is not a case where any compensation to Shri Govind C. Patel in lieu of cancellation of the plot has been paid. During the year under consideration, the cancellation amount of Rfs.1,08,14,730/-was the refund made out of his total booking amount of Rs.1,63,43,500/ and the balance of Rs.55,28,770/- was returned back on 01/04/2009 relevant to F. Y. 2009-10. Therefore, the question of any excess payment to Shri Govind C. Patel does not arise at all as the same was the refund of the booking amount and not any compensation of cancellation of the plot. Thus, the addition made*

*by the AO in this regard is without any base, and therefore, the same is deleted. In result, the grounds of the appellant are allowed."*

20. With the assistance of the ld.representatives, we have gone through the record carefully. Disallowance under section 40A(2)(b) of the Act can be made, if the assessee incurs any expenditure for the services and goods provided by persons covered under sub-clause (b) and make payment to such person, which in the opinion of the assessing officer is excessive and unreasonable as compared to fair market value, then so much of such payment, which in the opinion of the assessing officer is excessive and unreasonable will not be allowed as deduction. In the present case, the AO failed to make any case under section 40A(2)(b). The company has earlier made booking/sold the plot in favour of the director and received payment. This year it has cancelled the booking and refunded the payment. The plot was thereafter sold to third concern and earned huge profit of Rs.2.16 cores. Thus, there is no extra benefit to the director which deserves to be disallowed under section 40A(2)(b) of the Act. The ld.CIT(A) has discussed this issue elaborately and we do not see any reasons to interfere in the order of the CIT(A). This ground of appeal is rejected.

21. Now we take first ground of appeal. The grievance of the Revenue is that the gain arisen to the assessee on sale of land ought to be assessed as business income instead of capital gain offered by the assessee and accepted by the ld.CIT(A).

22. Brief facts of the case are that the land in question was originally purchased by "NPPL" in Asstt.Year 2002-03 for a consideration of Rs.7,74,400/-. According to the assessee, this property was under some dispute and "NPPL" had further incurred a sum of Rs.24,36,000/- on 29.10.2005. It has made payment of this amount to one Shri Gandalal Keshavlal to settle the dispute on the land. Thus "NPPL" had incurred total amount of Rs.33,36,855/- for acquisition of this land. "NPPL" shown purchase of this land as fixed assets under the head "investment". This company got amalgamated with the assessee-company on 1.10.2006, and consequently, the assessee-company converted the land into an NA land by paying conversion charges and stamp duty. It shown cost of acquisition at Rs.37,23,615/-. During the accounting period relevant to the assessment year, this land was sold through two agreements dated 31.12.2008 and 28.1.2009 for a consideration of Rs.34,85,02,200/-. The assessee treated the difference between the sale consideration and cost of acquisition of land with related expenditure after indexation as long term capital gain. Dispute before us is, whether it is to be assessed as a long capital gain or it is to be treated business income. Case of the AO is that the assessee is in the business of real-estate. It has acquired plot of land with an intention of earning profit. It has earned huge profit, and therefore, it is to be assessed as business income. On the other hand, the ld.CIT(A) did not concur with the AO and accepted the contentions of the assessee by treating it as a long term capital gain. Relevant discussion made by the ld.CIT(A) reads as under:

> *"3.4.3. After purchase of the aforesaid land by the earlier company namely; Nachket Properties Pvt. Ltd. in 2002-03, except*

*to convert the use of the land as NA land by the appellant company, there was no development activity carried out on the aforesaid land. It is worth here to mention that had there been the profit motive on the aforesaid land then the land could have been developed and the same should have been sold after carrying out the construction activities thereupon. So by doing not so, the intention of the appellant was only to make the investment for long term purposes and accordingly he kept holding the land for almost more than 6 years.*

*3.4.4. It has also been pleaded that in appellant's own case, the scrutiny assessments have been completed in the past and assessment orders have been rendered u/s. 143(3) of the I. T. Act but in no assessment the AO has negated the holding of the land as fixed assets, as investments. Thus, it has been accepted as the investment in the said land being capital asset. Even in appellant's own case for A.Y. 2009-10 i.e. the year under consideration in the original scrutiny assessment completed, the appellant has given the complete details and copies of documents of the land transaction vide its letter dated 21/11/2011 and 14/12/2011 with necessary details and evidences and the same had been accepted after necessary verifications by the AO. Thus, the AO in the original assessment proceedings himself was satisfied about the treatment of the income derived upon sale of land as long term capital gain and not the business profits. Subsequent to original assessment completion, no new evidences have come on record to take a different view. It has also been noticed that as per the provisions of I. T. Act, there is no prohibition that real estate developer cannot have a separate portfolio of investment in capital assets. In the year under consideration, the appellant company or amalgamating company since purchase of land in 2002-03, did not incur any expenditure on the land to carry out any development / construction work. Therefore, the profit on sale of land was in the nature of long term capital gain only. Even this cannot be said to be the business profit or adventure in the nature of trade for the reason that the appellant company's business was mainly building and construction of the real estates and not trading in the lands.*

*3.4.5. Having considered the facts and submission, it is apparent that the investment in land initially when acquired in F. Y. 2002-03 by M/s. Nachket Properties Pvt. Ltd. and after amalgamation of the aforesaid company in the appellant company in F. Y. 2006-07, has not been shown as stock in trade in their balance sheets in any of the years. At all the times it had been shown as fixed assets in the balance sheets. Merely that the appellant company is engaged in development and construction of real estate projects could not be sufficient to hold that the transaction in land would be .amounting to the business transaction and not the investment transaction as these two activities are different from each other. Even, in the same type of business, a person can have two different portfolios; one in the nature of stock in trade and another in the nature of investment. Rather in the appellant's case, the appellant's business was different from the land transaction and it has never been forming part of the business since its acquisition in F. Y. 2002-03. Therefore, the appellant's plea with treating the same as investment is found correct and justified. The AO has changed the basis of taxation and treated under business head without bringing anything on record to do so. Even the appellant or the amalgamating company had not carried out any developmental activities on the aforesaid land except to conversion of the land use. Therefore, the profit derived from sale of land is held to be long term capital gain as offered by the appellant. This view is supported by various decisions / judgments as briefly discussed hereunder: ……*

23. With the assistance of the ld.representatives, we have gone through record carefully.

24. We have considered rival submissions and gone through the record carefully. The dispute before us relates to, whether the assessee was 'investor' or 'trader' in land. Whether an assessee is an 'investor' or 'trader' is an objective consideration taking into account various aspects. According to the assessee, it was maintaining two portfolios i.e. stock-in-trade being developer in real-estate as well as investment.

Both are identifiable in accounts. Expenditure incurred thereof has been debited separately and whatever profit earned or loss suffered has been given effect in the capital account of the assessee. Meaning thereby, whatever income earned and expenditure incurred has been capitalized in investment accounts of the assessee, which establish the investment attitude of the assessee.

25. It is pertinent to observe that ITAT Lucknow Bench in the case of Sarnath Infrastructure (P) Ltd. v. ACIT (2009) 120 TTJ 216 has also considered issue whether an assessee deserves to be treated as a "trader" or "investor". Though the issue involved in that case relates to investment/trading in shares, but broad principle carved out by the ITAT is applicable on all sorts of transactions, where adjudicator is required to find out whether transaction was entered into by the assessee with a pre-dominant intention of trading or investment. The following tests are worth to note:

> *"13. After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:*
>
> *(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.*
>
> *(2) Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.*

*(3) What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, if would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).*

*(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.*

*(5) How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.*
*(6) How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice verse.*

*7. It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.*

*8. The mere fact of credit of sale proceeds of shares ( or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.*

*9. One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on*

*illegal business in that item) since beginning or when purchases were made?*

*10. It is permissible as per CBDT's Circular No. 4 of 2007 of 15th June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.*

*11. Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."*

26. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

"After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

(a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.

(f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proposition to the strength of holding then an inference can readily be drawn that the activity is in the nature of business."

27. In the light of the above, let us examine the facts of the present case.

28. A perusal of the assessment order would reveal that the ld.AO has observed that as per section 28 of the Income Tax Act, profits and gains of any business or profession, which was carried on by the assessee at any time during the previous year shall be chargeable to income tax under the head "Profits & gain of business or profession". According to him, since assessee is in the business of development of real-estate, it has been showing the land under the head "fixed assets", and not under the head "investment". Similarly, in the balance sheet, it used to add or deduct the land in the fixed assets account, according to the transaction taken place during a year through. Therefore, the land could not be considered as an asset held under "investment". The AO thereafter

made reference to the memorandum of association and observed that the land would be considered as "stock-in-trade". He further observed that assessee has been claiming deduction under section 80IB from profits so derived from such activities, therefore, the land should be considered as fixed asset equivalent to the machinery or stock, and profit derived through transfer of such land, should invariably be treated as income from business or profession. The AO thereafter narrated the transaction *qua* this land, and observed that NPPL was also engaged in the business of real-estate development and construction activities before its amalgamation. Thus, it is to be inferred that intention of erstwhile company *ab-inito* was for acquiring investment in stock and not investment in land. The AO made reference to the decision of Hon'ble Supreme Court in the case of V. Venkataswami Naidu & Co. Vs. CIT, , 35 ITR 594 and in the case of Dalmia Cement Ltd. Vs. CIT, 105 ITR 633. On the strength of these decisions, he observed that even a single transaction of purchase and sale may be treated as business transaction.

29. The ld.CIT(A), on the other hand, made re-analysis of all the facts and circumstances and did not concur with the AO as per the finding extracted (supra). On analysis of both orders, it would reveal that emphasis of the AO is that the since amalgamating company as well as amalgamated company i.e. NPPL and the assessee both were engaged in the business of real-estate development and construction activities, therefore, it should be construed that intention of both the assessee was for earning profit from sale of land with or without further development. This intention was there from *ab-initio*. It is pertinent to observe that whether gain from sale of agriculture land/non-agriculture land is to be

assessed as a business income or short term capital gain/long term gain, is highly debatable issue. It always puzzled the adjudicator even after availability of large numbers of authoritative pronouncements by the Hon'ble Supreme Court/Hon'ble High Court. The reason for the puzzle is, one has to gather the intention of an assessee while he entered into the transaction. The expression "intention" as defined in Meriam Webster Dictionary means, what one intends to accomplish or attain, it implies little more than what one has in mind to do or bring out. It suggests clear formulation or deliberation. Thus, it is always difficult to enter into the recess of the mind of an assessee to find out the operative forces exhibiting the intention for entering into the transaction. According to the AO, since both the companies were in the business of real-estate development, therefore, their intention is to be construed as entering into a transaction for giving rise to business profit. On the other hand, the ld.CIT(A) did not concur with the conclusions of the AO. To our mind, the ld.CIT(A) has rightly not concurred with the AO because erstwhile company had purchased this land in Asstt.Year 2002-03. It had shown it as an investment. It was never treated as stock-in-trade. This has been sold by the assessee during the asstt.Yar 2009-10 after amalgamation. It means, continuously for few years, the land was treated as investment in the accounts by the erstwhile company. Then, how the AO has inferred intention of NPPL for entering into transactions leading to business ? It is also pertinent to mention that it was an agriculture land. It came to the assessee on amalgamation of erstwhile company, meaning thereby, it could not be a piece of land on which 80IB could be claimed on development. Its character as non-

agriculture land was got changed during the year. This conduct of both the assessees, amalgamating company as well the assessee would indicate that from the beginning this piece of land was treated as an investment in the land. The AO has not given any other circumstances which can goad him to the conclusion that this transaction is to be treated as a business transaction. His conclusions are based on assumption, rather not on evidence. In the light of ratio laid down by the Hon'ble Gujarat High Court and other tests, we have examined this aspect, and we do not see any reasons to differ with the conclusions of ld.CIT(A). Therefore, this ground of appeal is rejected.

30. In the result appeal of the Revenue is dismissed. CO of the assessee is dismissed and the appeal of the assessee is allowed.

**Order pronounced in the Court on 23rd October, 2018 at Ahmedabad.**

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|---|---|
| **Sd/-** | **Sd/-** |
| **(AMARJIT SINGH)** | **(RAJPAL YADAV)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |