



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.1319/Mum/2016

(Assessment Year :2011-12)

Asst. CIT 19(3) Matru Mandir, 2 nd Floor, R.No.206 Tardeo Road, Mumbai – 400 007	Vs.	Shri Rahul Premnath Bhatia 9, Ashiana Building 5, Altamount Road Mumbai – 400 026
PAN/GIR No. AADPB0626L		
(Appellant)	..	(Respondent)

Revenue by	Shri E Shridhar
Assessee by	Shri Sanjiv M Shah & Shri Rajesh Chamria
Date of Hearing	27/09/2018
Date of Pronouncement	09/10/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the Revenue against the order of CIT(A)-30, Mumbai dated 09/12/2015 for A.Y.2011-12 in the matter of order passed u/s.143(3) of the IT Act.

2. Following grounds have been taken by the Revenue:-

1. "Whether on the facts of the case and in law the Ld. CIT(A) has erred in treating the impugned receipt of Rs. 7,01,50,000/- as 'Business Income' which was treated as 'Income from Other Sources' in the assessment order ?"

2. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

3. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is an individual/ deriving income from 'Salary'/ 'House Property', "Business Income' and-'Income from other sources'. The return of income. for the year under appeal was filed on 26-09-2011 declaring total income., of Rs.2,43,400/-. Subsequently a revised return of income was filed with the same income, to treat the income earned on sale of shares as 'business income' against the treatment of the same as short term capital gains income in the original return of income, inconformity with the stand taken by the AO while completing the scrutiny assessment for the A.Y.2008-09. The case for the year under appeal was selected for scrutiny and the assessment u/s 143(3) of the Act was completed by the Ld. AO on 24-03-2014, determining the total income at Rs.3,94,37,860/-. During the course of assessment proceedings, the A.O. observed that the assessee has credited an amount of Rs.7,01,50,000/- to the P & L account received on account of sale of land as "Other Income" and considered the same under "Business Income" and claimed various expenditures like losses in derivatives and other administrative expenses for arriving the income from 'Business Income'. The Ld. AO after issuing show cause notices that why the amount received should not be treated as "Income -from other sources" for the reasons mentioned therein and after obtaining the explanations, concluded that the sale of land is not a genuine transaction and assessed the profit shown on the transaction as "Income from other

sources" and denied the set-off of brought forward losses. Other addition considered is LTCG of Rs.1,50,625/- originally claimed, as exempt u/s 10(38) of the Act, was accepted by the assessee in the order sheet noting dated 16th September, 2013 as erroneously claimed as exempt income and accordingly assessed by the AO under the head 'Long Term Capital Gains'. Two additions were considered under the head House Property income by the Ld. AO. One is the property at 'Dalmal Tower' let out to one M/s Steeico Metal processors Ltd. and offering a rent of Rs.84,000/- under 'House-Property', treating 17% of the property is let out to them. The AO observed that the assessee categorically mentioned in the return of income that 100% ownership is let out and calculated the proportionate rent for it and after giving the deduction of 30%, an amount of Rs.4,04,250/- is treated as House Property income deemed to be received on the said property / and added the same to the total income under that head. The other addition considered under the same head is .the 'Deemed rent'. The AO noticed that the assessee though owns six properties not offered any income under the head "House property Income". Show cause notice was issued on 03-0.2-2014 to assess the deemed rent on those properties for which the assessee stated that the bungalow at Khandala is SOP and the -other property is in. unsaleable condition., Since the assessee is residing at Altamount Road, Mumbai as per the returns of income filed and SOP can be claimed only on one property and the other reasons given for the other properties are

vague and general the AO not accepted the explanation and treated 7% of the cost of the properties is treated as deemed rent which worked out to Rs.4,71,580/- and after giving 30% of deduction, assessed an amount of Rs.3,30,106/- under the head House Property Income. The other addition considered in the scrutiny assessment is disallowance of Rs.2,19,524/- u/s 14A of the Act, computed as per Rule 8D. The AO observed that the assessee is in receipt of exempt income in the form of dividend of Rs.7,81,991/- and investment in shares on which income on sale of such shares also exempt from 'capital gains'. In view of the same the AO asked, to explain why provisions of section 14A of the Act should not be invoked and disallowance should not be computed as per Rule 8D. Since the assessee could not establish and provide any basis for such proposed disallowance, the AO invoked the provisions of section 14A of the Act and worked out the disallowance as per Rule 8D at Rs.4,08,471/- and added an amount of Rs.2,19,524/- after considering the disallowance of Rs.1,88,947/- already made by the assessee himself in the return. Apart from that out of the debit towards the STT expenses of Rs.14,88,299/- an amount of Rs.4,30,297/- is added back to the business income since the amount of STT is paid towards Delivery based securities which is held for investment purpose and on which the income earned is dividend income', LTCG which is exempt income.

4. By the impugned order CIT(A) allowed assessee's claim of business loss of Rs.7,01,50,000/- after observing as under:-

5. Carefully considered the rival submissions, perused the material on record and duly considered the factual matrix of the case, as well as the applicable legal position and arrived at the following conclusion.

6. GROUND NO. 1

“On the facts and in Jaw, the learned AO erred in assessing the compensation earned Rs.7,01,50,000/- “Income from other sources” on the basis of assumptions and surmises without appreciating the fact that the said income was a business in the course of adventure in the nature of trade.”

6.1.1. *The main issue on which addition was made pertains to the sum of received by the appellant as compensation from the property transaction entered into by .him which .was offered under the head "Business Income" and sought to be set off against current year's loss from derivatives and r thereafter against the brought forward business loss of earlier years. In assessment, the AO held that the said receipt is assessable as income from other Sources" since the nature of the receipt has not been substantiated.*

6.1.2. *According to the appellant, he had entered-into an agreement with. 17 parties to purchase certain agricultural land for a consideration of Rs.2,50,00,000/- for which a token amount of Rs.1,50,000/- was paid in cash and the balance amount was to be paid on getting required permission to convert the land for Non-Agricultural purposes [NA] and NOC from Government authorities for development of land. In support of his contentions, the appellant relied on a Bhanakhat dated. 04-04-2009 which was duly stamped by franking on 28-03-2009 by State Bank of India, Main branch Bhadra and notarized on 04-04-2009.*

6.1.3 *As per the Banakhat the responsibility of converting the land into NA and obtaining various other permissions from local authorities was on appellant which had to be completed within a period of 18 months, i.e., on or before 30-09-2010. On 18-08-2010, appellant paid premium of Rs. 1,27,68,000 to city Mamlatdar, Ahemdabad through demand draft number 033504 dated 18-08-2010 drawn on HDFC Bank, Nariman Point branch and the land was thus converted into non-agricultural land as per order of collector dated 04-09-2010.*

It is further claimed, that in the meanwhile, the land holders had entered into a sale transaction which another party, M/s Shivanta Infra Build, on a äs is where is basis" without the knowledge of the appellant" and without taking NOC from him. According to the appellant, the other party, M/s Shivanta Infra Build put up hoardings on the land and started to advertise the project it was intending to come

up with on the said land in anticipation on receiving the NA without knowing that the said land was already sold to the appellant by the said parties.

6.1.5. According to the appellant, when both parties, M/s.Shivahta. Infra -Build rand the appellant came to know about the developments, they, decided. to negotiate the matter and it was agreed upon that M/s Shivanta Infra Build will pay Rs.7,01,50,000/- to the appellant for relinquishment of his rights: in the properties which he acquired on 04-04-2009 under the Banakhat Accordingly, a deed of cancellation of agreement for sale was executed on 23-11-2010 as per the terms of which the appellant received; compensation of Rs.7 Crs along with premium of Rs.1,27,68,000 paid to the Government authorities for NA and the cost of Rs.1,50,000 paid, for acquiring the said plot of land. . Thus, aggregate consideration of Rs.8,29,18,000 was paid by Shivanta Infra Build to the appellant through RTGS.

6.1.6 It 'is further contended that these facts were confirmed by M/s Shivanta Infra Build also in response to notice u/s 133(6) of the Act issued by the AO along with necessary documents. It is also contended that since it was not in the nature of any professional services but only a compensation and reimbursement of actual expenses, there is no liability to deduct TDS on the part of M/s Shivanta Infra Build.

6.1.7 It is the contention of the appellant that after getting the NA and NOC, the value of the land had shot up and since M/s Shivanta Infra Build had already started the procedure for development, it was inclined to pay off the appellant at any cost and Since appellant had also agreed to the compensation which was by of returns for his efforts and liaison works that he had done for converting the agricultural land into non-agricultural land and the resulting increase in the market value of the property.

6.1.8 It is the claim of the appellant that his intention was not to hold the land as investment but to convert that into non-agricultural land and to sell it by making plots, of smaller sizes and hence this sum of Rs. 7,01,50,000/- is from his business of property pointed out by, the appellant; to the AO that he was not having any funds for making such; investment. As his capital, was in the negative: Accordingly, he had offered the same under the head "Business Income treating the land in question as "stock in trade".

6.1.9 It was further contended that since the transaction was. an adventure in the nature. of trade the asset acquired cannot be treated as investment in capital asset and .the amount realized on relinquishment of the same, cannot be treated as capital gains

6.1.10 -Further,, it- was submitted that it cannot be treated as "Income from Other-Sources", either, because there existed a" clear "intent to make profits out , of acquiring the land and incurring the future cost for improving the value of the land and hence the receipt of Rs.7,01,50,000/- ought to be taxed under the head "Business Income"

6.1.11 During the relevant year, the appellant had shown loss of Rs.3,17,37,918/- from his business in derivatives and has sought to set off the same against the-income of Rs.7,01,50,000/- shown under the head "Business Income".

Findings of the Assessing Officer:

6.2.1 According to the AO, the impugned receipt of Rs.7,01,50,000/- was not in the nature of business receipts but ought to be taxed under the head "Income from Other sources". For arriving at this conclusion, the AO had held that prima facie there seemed serious doubts about the genuineness of whole transaction in impugned land. According to the AO, the land being in the nature of agricultural land it cannot be freely purchased and sold so as to constitute a business activity. It was further held by the AO that the submissions of the appellant are not acceptable. Since the appellant had brought forward business losses of A.Y. 2009-10 at Rs.15.97 cr and also incurred .business loss of Rs.3.17 cr in the current year and la against these losses, the appellant has shown income of Rs.7.02 cr profit on sale of land which is just an entry taken to rebuild the capita! without having to pay legitimate taxes. The AO arrived at this finding on interpretation of facts as under.

6.2.2. The AO observed that the Bhanakhat agreement dated 04-04.2009 is executed with adhesive stamp of Rs.100 and is not registered/ According. to the AO the token money of Rs.1,50,0,000/- is paid in cash by the appellant .to the farmers and it gives rise to suspicion that the impugned agreement could have been executed as an afterthought. He further held that the mere stamping on 04-04-2009 does not give enough credentials to the genuineness, of the agreement for various reasons.

6.2.3. One of the reasons adduced by the AO was that the payment of Rs. 1,27,68,000/- towards premium on conversion of the land was funded by M/s. Shivanta Infra Build received by RTGS on 18-08-2010 which was thereafter issued by way of DD on the same day towards the premium amount from appellant's account. According to the AO, since the appellant claimed "to have dispute with the same party who in fact funded the conversion of land, it strengthens the doubt that the appellant's contentions are not genuine.

6.2.4. It was further observed by the AO that, if the conversion of land was so profitable, the actual land owners would have rather taken

professional help instead of selling the land to the appellant with just a token amount of Rs.1.5 lakh so that the appellant can make a profit of Rs.7.02 crore thereon.

6.2.5 On the claim of the appellant that he is in the business of development of land, it was held by the AO that appellant's main line of business is trading in shares and derivatives and that he has no track record of dealing in land on commercial basis.

6.2.6. The AO further observed that it cannot be understood as to how M/s Shivanta Infra Build could start the procedure without getting NA approval. He further observed that as to how M/s Shivanta Infra Build, Which was. incorporated recently on 17-02-2010 would agree to give hefty compensation of Rs.7.02 crore to the assessee in addition to the reimbursement of Rs.1.28 Crore and payment of cost of land of Rs.2.50 Crore directly to the original owners. Hence, according to the AO, the quantum of compensation was not justified vis-à-vis the cost of land.

6.2.7. It was further noted by the AO that M/s Shivanta.; Infra Build did. not furnish its Balance Sheet and. partners' capital account but perusal of 'bank statement shows that various payments made to the assessee were funded by repetitive receipts of lump sum amount received from few parties. It was therefore, held by the AO that it is most likely that the assessee's unaccounted money, is routed through such parties to M/s Shivanta Infra Build and ultimately.to assessee's account n the guise of compensation for relinquishment of right in impugned land.

6.2.8. It was also observed by the AO that there was; another cancellation agreement dated 05-03-2010, which was much before the payment of premium and conversion of land on 18-08-2010 was made and that the subsequent cancellation 'deed was executed on 23-11-2010 only. It was therefore inferred that on the date of. actual payment of premium on 18-08-2010, the appellant was not having any right over the said land..

6.2.9 It was further held by the AO that since the land was not transferred in the name of the appellant and he was found to be not in the business of dealing in land but in share trading, the impugned income of Rs.7,01,50,000/- could neither be taxed as 'Capital Gain' nor as 'Business Income' of the assessee but ought to be treated as income from "Other sources" only .

Submissions of the Appellant ;

6.3.1 In the grounds of appeal, it was contended by the appellant that while the compensation as income from other sources the learned AO has erred on the following:-

6.3.2. *Regarding the doubts of the AO about the genuineness of the Bhanakhat, it was pointed out by the appellant that the franking stamp was affixed on: 28-03-2009 by SBI with date and time using the automatic machine and backdating is not possible as the said machine is directly-connected with the server of the stamp duty authorities. Moreover the said deed is also notarized by an authorized notary Mr. Tarang R Daye who has duly stamped and notarized the document on 04-04-2009. Therefore; it was; contended that these two facts that the said document was executed during that period of time only and under no imagination it can be assumed that, appellant had managed to get the franking and notary on back dating*

6.3.3 *" On the issue :of. claim of cash payment towards advance, it was' submitted by the appellant that merely because token amount of Rs.1,50,000/- was given in cash does not mean that the transaction becomes suspicious. The token amount was paid to the: farmers who were the owners of agricultural land as per the terms and conditions of the Bhanakhat executed with the 17 Parties. Regarding the observation of the AO that the Bhanakhat was not registered, it was submitted by the appellant that it was not a sale agreement but an agreement to sale of the land in future which was conditional on obtaining the NA and NOC from the Government authorities and hence there was no need for registration.*

6.3.4 *" On the second observation of the AO that the payment of t 1.27 Crores being the premium for converting agriculture land to non-agriculture land was funded by Shivanta Infra Build with whom the appellant claims to have a dispute creates a suspicion about the genuineness of the transaction, it was submitted by the appellant that, there was no dispute regarding the title of said land with M/s Shivanta Infra Build but the dispute was actually with the 17 parties who sold the plot of land to appellant as well as to M/s Shivanta Infra Build. According to the appellant, in fact M/s Shivanta Infra Build came for settlement and agreed to compensation to appellant for relinquishing the right in the land and the compensation was agreed upon because of the conversion of agriculture land into a non-agriculture land by the efforts of the appellant.*

6.3.5 *As regards the payment of Rs.1.34 crores made by M/s Shivante Infra Build to appellant, which was used for paying premium to Government authorities, appellant explained that income from M/s Shivanta Infra Build during the A.Y.2010-11 out of which Rs.1,79,48,125/- was receivable as on: 31-03-2010 and received during the year. It was further submitted that it was a compensation earned in the preceding year from the said party which has been shown as business income and is duly assessed accordingly by the predecessor A.O; u/s 143(3) in A.Y.2010-11. Thus, according to the appellant, the*

AO, without appreciating the above facts, which were available on file for the relevant years, has merely hurried to the conclusion that the transaction with M/s Shivanta Infra Build is not genuine.

6.3.6 On the suspicion about the reasons as to why the land owners did not engage the services of a -professional to get the NA approval; it was explained by the appellant that being illiterate farmers, with small plots of land, it is not within their means to do so. Similarly, on the issue of token payment of Rs.1,50,000/-, it was explained that the final sale deed was to be executed only subject to obtaining N.A. and N.O.C. from Government authorities and hence this token amount was in order.

6.3.7 Regarding the intention of the appellant to indulge in an adventure in the nature of trade, it is contended that the agreement was to convert the land into NA and after getting NOC it was intended to be plotted and sold. According to the appellant, the efforts included liaison with the authorities concerned which clearly established the intention of appellant was to develop the said land as an adventure in the nature of trade. As regards the track record of dealing in land on commercial basis, it is contended that the AO had failed to verify the records of the earlier years as appellant has earned similar income for A.Y. 2010-2011 from M/s Shivanta Infra Build, which has been accepted and assessed as Business income in the assessment proceedings U/s 143(3) of the Act. It was further contended that the AO also failed to observe that appellant has an investment of Rs. 50 lacs in M/S AB Builders and Developers Private Ltd wherein he is a director and a company which is engaged in the business of construction and development since F.Y, 2008-2009. Therefore, it is pleaded that the observation of the AO relating to the absence of intention to carry on business and not having any track record is baseless and cannot be accepted.

6.3.8. Regarding the impugned sale of land by the parties directly to M/s Shivanta Infra Build which has been confirmed by them as per the information filed by them in response to notice U/s. 133(6) of the Act. As regards, the starting of work by M/s. Shivanta Infra Build, without getting NA permission, appellant submits that in general practice the builders start the ground works like planning the project, advertising the project and soliciting the customers even before getting the necessary permissions from the Government authorities.. "This is done by the Builders in anticipation of getting necessary permissions from the Government authorities having regards to their influences and links with various departments-and that this practice is followed by many builders and is also regularized by the Government authorities. Hence, it is contended that starting of procedure for development by M/s Shivanta Infra Build ; without getting NA permission cannot be the ground for treating the transaction as non-genuine.

6.3.9 On the issue of the quantum of compensation which according to the AO is not justified vis-a-vis the .cost of land, it is submitted by the appellants that it is purely a commercial decision taken by M/s Shivanta Infra Build having regard to the rapid increase in prices of land and after analyzing the commercial viability of the project and hence the AO cannot arrive at the conclusion that the same is excessive without considering the surrounding circumstances.

6.3.10 On the further observation of the AO that it is likely that assessee's unaccounted money is routed through some of the parties to M/s Shivanta Infra Build and ultimately to assessee's account in the guise of compensation, it is vehemently denied by the appellant on the ground that M/s Shivanta Infra Build have furnished their bank statements and nowhere in their bank statement there are any cash deposits for giving compensation to appellant and hence it cannot be assumed -that appellant's - unaccounted money is routed through them. - It is, further pointed out by the appellant that there are no findings by the A.O. that appellant has any source of earning unaccounted money since the main business is of dealing in shares and each and every transaction of shares and F & O are executed through the registered stock brokers .and/all the; transactions are appearing in the stock exchanges which has been confirmed by the A.O. by obtaining certificate from the National Stock Exchange relating to. STT, Thus, according to the, appellant the observation of the AO in this regard is not tenable

6.3.11 . On the issue that there were two cancellation deeds in Gujarati, one dated 05-03^2010 and. other dated 23-11-2010,. it is submitted by the appellant that the AO has not asked for any explanation or clarification relating to the said deed of cancellation and the appellant also did not find it necessary to file any explanation regarding the said agreement as it was .pertaining to A.Y. 2010-2011 and the same was already considered while, filing the IT return a nd even at the time of assessment proceedings u/s 143 (3) of the Act for the said assessment year. According to the appellant, the.said cancellation agreement pertains to other plot of land for which compensation of Rs.1,89,48,125/- was given by M/s. Shivanta Infra Build and accounted as business income, during the assessment year 2010-2011. It is therefore contended that in spite of having the records, the AO failed to verify the same and even failed to raise any query seeking an explanation for the same and has come to a conclusion that the transaction is not genuine without offering an. opportunity to the appellant to explain the same.

6.3.12 In view of the above it is contended that the AO has erred in not treating the compensation of Rs.7,01,50,000/- from the impugned transaction in land offered under the head "Business" as shown by the appellant and instead wrongly held it assessable as "Income from Other Sources" merely on the basis of assumptions and surmises without any concrete evidence to prove that the transaction is not genuine.

Decision on Ground No.1

6.4.1. I have carefully considered the finding of the AO in the assessment on the issue and the various submissions and contentions raised by the appellant thereof. From the facts what clearly emerges was that there is no dispute as to the receipt of sum of Rs.7,01,50,000/- from Shivanta Infra Build during the relevant-period both by the AO; and the appellant. According to both the parties, "M/s . 'Shivanta Infra Build and the appellant the receipt represents compensation paid to the appellant to relinquish his rights in the said land arising from the Bhanakhat and also partly in the nature of reimbursement of expenses and a reward.for the efforts put .in to get the NA and' NOC which the AO is not willing to accept

6.4.2 It is also an, admitted" fact that- the payment of. premium of Rs. 1.27 crore was paid by the appellant directly by way of D.D to the authorities .-.concerned and this has admittedly come from the funds received from M/s Shivanta Infra Build, which the appellant is also not denying. According to the AO, this raises suspicion as to why the party with whom the appellant is having a dispute will help in getting the NA by funding the premium to be paid. This inference has been drawn by the AO ostensibly on the basis of the dates of receipt of money from M/s Shivanta Infra Build and payment thereafter by the appellant towards premium for conversion of the land. However, according to the appellant, this payment \-as received by him in connection with the outstanding receivable from M/s Shivanta Infra Build for similar compensation of a sum of Rs.1,89,48,125/- receivable for A.Y. 2010-11 which has already been assessed as business income in that year. Since the issue was not put to the appellant, it is contended that no explanation was .given on the same. This shows clearly that the AO had come to a final conclusion only on presumption without any evidence to support his finding. The AO never questioned the genuineness of the previous transaction alleged to have been made with the same party. The reasons mainly adduced by the AO to hold that the impugned transaction is not in the nature of trade but suspicious nature and hence ought to be assessed under the head "Other sources" are that, firstly, the Bhanakhat was nor registered and hence appears to be an afterthought, secondly the source of funds or payments of the compensation of Rs.7,01,50,000/- and other payments was not explained in the hands of M/s. Shivanta Infrabuild as the balance sheet and

*partner's capital accounts were not adduced in response to notice u/s 133(6) of the Act and hence presumably the money has come from the appellant's undisclosed income, thirdly, there were two cancellation deeds, and the earlier on dated 05/03/2010 is much before the date of payment of premium, for conversion of land into NA on 18-08-2010 and hence the appellant's claim about having any right over the **land** is not genuine and fourthly, the land was: not transferred in appellant's name and hence the receipt of money as compensation cannot be assessed as business income or capital gains and finally the finding that the appellant was never into the business of land development or similar activities in the past.*

6.4.4 'I find that the contention .of the AO that the Bhanakhat is "not registered and the franking of stamp by itself is not acceptable as evidence, is not tenable on facts. As rightly contended by the appellant, the franking of stamp by the bank is linked to the real time execution thereof and hence cannot be swept aside as an afterthought. No evidence has been brought on record by the AO to the effect that the said franking stamp itself was not genuine by resorting to inquiry u/s 133(6) of the Act, from the bank authorities concerned. Further, the document has been duly notarized during the relevant date which also has not been rebutted by the AO. By merely brushing aside these evidences without bringing any other evidence to the contrary on record, will not help the cause of the AO. Hence, it is evident that the authenticity of these documents has not been disproved by the AO.

6.4.5 " Regarding the existence of two cancellation deeds, copy of both were perused and it is seen that the deed dated 05-03-2010 pertains to cancellation of agreement dated 15-08-2009 in respect of a property situate at Survey No. 12/1/1 admeasuring 2125 square meter and the compensation mentioned therein is Rs.1,89,48,125/-. The second cancellation agreement dated 23-11-2010 pertains to cancellation of agreement dated 04-04-2009 in respect of property situate at Survey.No.12/3/2 admeasuring 3339 square, -meter and mentions a compensation of Rs.7,00,00,000/- over and above the sums of Rs.1,27,38,000/-, Rs.1,50,000/- and Rs.2,50,00,000/- on other counts, which was mirroring ;the contentions of the appellant in this regard. Thus, cancellation agreements in connection with said property is found to be on the mistaken notion of facts. As a consequence; :the suspicion raised by the AO that on the 'date of actual payment Of .premium on18-08-2010,the appellant did not have any right over the property since it was already cancelled, vide deed dated 05-03-2010 is also found hot correctly noticed and put by the Ap in the order, that both agreements relate to the same property, which was not the case

6.4.6. Further/regarding the suspicion raised by the AO about the payment from M/s Shivanta Infra Build which was in turn used by the appellant to pay the premium amount, it is seen that the explanation

given by the appellant is duly -supported by the cancellation deed dated 05-03-2010 which shows that a sum of Rs.1,89,48,125/- is payable to the appellant by M/s Shivanta Infra Build in connection -with a similar cancellation deed in respect of another property as mentioned above. Though this sum of Rs.1,89,48,125/- is shown under the head "Other sources" in the schedule to Balance Sheet and Profit & Loss account for the year ended 31-03-2010, it has been offered as forming part of "Business income" in the revised return and computation of income filed on 28-03-2012 for A.Y. 2010-11 which has since been accepted in scrutiny assessment order passed u/s 143(3) of the Act dated 22-03-2013 by the then AO, Additional CIT, Range "16(2), Mumbai and duly assessed as forming part of "Business Income".

6.4.7 Regarding the suspicion raised by the AO about the source of funds in the -hands of M/s Shivanta Infra Build due to their failure to submit Balance Sheet and partners' capital account in response to notice u/s 133(6) of the Act, it is seen that the AO has not invoked the powers u/s 131 of the Act to summon the persons nor did he require the appellant to produce the parties for personal examination. As contended by the appellant, the AO has also not brought on record any other preponderance of probabilities to hold that the source of funds could be reasonably held-as having emanated from the appellant's undisclosed income. **The AO has also not pointed out any close nexus or relationship amongst the parties concerned to harbour a reasonable doubt that it is a collusive transaction. It is therefore evident that without causing necessary verifications as required under the law/ a hurried inference/ has been drawn by the AO based on mere suspicion and surmises alone.**

6.4.8.: .On the issue as to whether the impugned transaction is an adventure in the nature of trade or not, the AO has found his opinion on the suspicions that he harboured on the-timing of payment by M/s Shivanta Infra Build to the appellant and: ';/'; source thereof presence' of two cancellation deeds and the mistaken inference that / the earlier one was also related to the impugned property/about the authenticity, of the franking stamps and notarization of the "documents and the incorrect assumption that in the past the appellant had not carried .out similar activity without considering ' the fact that in A.Y. 2010-11, a similar transaction with the same party, has been . offered to tax by the appellant as business income and has also been assessed as such in scrutiny assessment by the predecessor AO.

6.4.9. The suspicion about timing of payment by M/s Shivanta Infra Build has already been duly explained by the appellant and is found to be in order. On the issue of source of funds in the hands of M/s Shivanta Infra Build, though the AO might have strong reasons to suspect since M/s Shivanta Infra Build was a recently created entity,

suspicion alone could not have formed the basis for holding that the money had emanated from the undisclosed income of the appellant himself. The primary onus cast on the appellant stood discharged with the submission of the details as to the identity of the payer, genuineness of the transaction as supported by the agreements and proof of payment through banking channels and the nature of payment as defined in the cancellation agreement itself. The AO himself has pointed out that there are lump sum credits in the account of M/s Shivanta Infra just before the cheques were issued to the appellant. No further verification has been caused by the AO to link the said credits with the appellant. The onus cast on the appellant extends only to the source of credit and it is for the AO to inquire into the source of source either from the immediate source or independently on his own motion. In the instant case, the appellant was not even asked to explain the source of funds in the hands of M/s Shivanta Infra Build and no independent verification has been carried out by the AO either by invoking powers granted u/s. 131 the Act or intimating to the AO concerned" who is assessing M/s. Shivanta Infra Build to take further; necessary action at his end. Therefore, the inference drawn by the AO that the undisclosed income of the appellant has found its way by way of compensation through this impugned transaction is found to be purely on the basis of suspicion and surmises, as contended by the appellant and not substantiated with facts and evidences.

6.4.10 " Since similar transaction in the past has already been assessed as in the nature of business income in appellant's own case, the finding, of the AO regarding the activity not being in the nature of trade is also found to be contrary to facts on file. Income-Tax Act follows scheduler system of taxation in which definite incomes which do not fall under any of the four specific head can only be brought under the residuary head "Other sources". In this case, the undisputed facts which have not been controverted by the AO are that the appellant is in the business of purchase and development of land and similar income has been assessed under the head "Business" in the preceding year. Existence of the land in question and its conversion into non-agricultural land by the appellant is not disputed. The factum of expenditure incurred by way of payment of premium Rs.1,27,68,000/- and conversion charges to the concerned authority by the appellant is also not disproved. The fact that the land was ultimately purchased by another party M/s Shivanta Infra Build is also not disputed by the AO. The payment of Rs.7 crore by the ultimate purchaser M/s Shivanta Infra Build to the appellant is also not disproved by the AO. That the said amount of Rs. 7 crore also includes reimbursement of expenses incurred by the appellant for payment of premium and advance to the farmers is not disproved by the AO. Having accepted these facts, the AO cannot select certain limbs of the whole sequence of events/transactions to hold that the income is not in the nature of business receipt. More so, when

similar activities were accepted as such and assessed as business transactions in the immediate preceding year, merely because the amount is more or that the land in question is different from the earlier year, the AO cannot deviate from the stand taken earlier, when the payer is also the same in this year. It is also a fact of record that the contract was entered in to in the ordinary course of appellant's business.

6.4.11 In view of the above, "I find force, in the argument of the appellant "that the payment of Rs. 7 crore was towards the reimbursement of actual expenses and also the professional services rendered in converting the agricultural land into non-agricultural land in the regular course of appellant's business, and that it is also towards relinquishment of appellant's right to acquire the property as per the original contract and also the profit forgone by the appellant which he could have earned as appreciation in value, of land on its conversion. In either case, the income cannot be put under any other head other than business as in the first instance it was by virtue of a loss and in the second on account of compensation, for potential , "...;∴ business loss. With respect to the cash payment, a transaction cannot be treated as a sham transaction solely on the basis of such cash payment unless there was a willful desire to evade tax and an arrangement has been made to give the colour of business to a non-business transaction. In this case, AO has not brought out any facts other than doubting the cash payment before holding the transaction as a sham.

6.4.12 The undisputed facts remain that the ultimate beneficiary (purchaser) reimbursed the sums which have been expended by the appellant for converting the agricultural land into non-agricultural land clearly proving that the appellant was engaged in the activity of purchasing and developing land and even if it is one time activity appellant satisfies the criterion of plunge into the waters of trade constituting thereby a business activity. The compensation received did not arise to the assessee due to some agreement or contract thereby not fulfilling the basic criterion of being treated as liquidated damages. As this has a first degree nexus with the activity of acquisition and development of land, it cannot but be characterised as business.

6.4.13 Alternately,, any compensation received towards cancellation of the agreement will tantamount to capital receipt and not at all taxable. Compensation ; received by the assessee is at best in the nature of solatium. Commissioner of Income Tax vs. Vazir Sultan and Sons (1959) AIR 814 (SC) held further “ the fact that the agency agreements are terminable at will, or that only one of them was terminated would not make, any, difference, because in, either, case, . when the agency was terminated and .the amount was paid as compensation for such termination resulted in the sterilization of the capital asset. pro tanto

and it was received as a 'capital, receipt in the hands of the respondent- Whether a given transaction isolated as it is as in the present reference, is a gain made out of conversion, of an. investment in a capital asset or revenue derived out of a transaction amounting to "an adventure in the nature of trade, is always a mixed question of law and fact a• held in V-Amirtham Ammal vs Commissioner, of IncomeTax on 13 February, 1969 74 ITR 739 (Mad.)- In Sarojini Rajah v. Commissioner of Income-tax, reference was made to the considerations that bear upon the identification of badges. of trade to wit the subject-matter of the realisation, the length of the period of ownership, the frequency of a number of similar transactions by the same person, supplementary work on or in connection with the property realised, the circumstances that were responsible for the realisation and the motive. They were all taken from the report of the Royal Commission on the Taxation of Profits and Income, 1955. Each of these badges was taken up and illustrated in that decision. While referring to these badges this court cautioned that it did not accept these badges as comprehensive or exhaustive but thought that they were of considerable assistance in deciding the character of a transaction as of a commercial character.

6.4.14 In Raja J Rameshwar Rao Vs CIT [1961] 42 ITR 179, the Supreme Court observed as under (headnote) :

"Even a single venture may be regarded as in the nature of trade or business When a person acquires land with a view to selling it later after developing it, he is carrying on an activity resulting in profit, and the activity can only be described as a business venture Where the person goes further and¹ divides the land into plots, develops the area to make it more attractive and sells the land not as a single unit and as he bought it, but in parcels he is carrying on business and making a profit."

6.4.5 In appellant's case, the motive and -intention at the time of purchase were ostensibly commercial. The appellant did not intend to buy and keep the property for himself and cultivate it as an- agricultural land. The sole purpose of acquiring the agricultural land was to convert it .into Non-agricultural land so that it can fetch better, price. The agreement entered into with the agricultural land holders also makes it amply clear that the land will be converted into non-agricultural land and only thereafter the consideration will -be paid by the appellant since the intention was to fetch the best possible price after conversion and development of the land so that the consideration can be paid from the sale proceeds likely to be received. There is absolutely no bar in conducting business without much capital or on token payment of advance money. Such a practice is not unknown in the business of real estate dealers. That by itself cannot take away the characteristic of such

activity as a business activity. Nor can the transaction be labelled as a sham since the capital input is not significant.

*6.4.16 In view of the detailed discussion above and after duly considering the above facts and evidences, I am of the considered opinion that the impugned receipt of Rs.7,01,50,000/- is in the nature of "Business Income" and the AO is directed to tax it accordingly. The appellant succeeds on this issue. This ground of appeal is **Allowed**.*

5. Against the above order of CIT(A), Revenue is in further appeal before us.

6. We have considered rival contentions and carefully gone through the orders of the authorities below. From the record, we found that assessee had entered-into an agreement with 17 parties to purchase certain agricultural land for a consideration of Rs.2,50,00,000/- for which a token amount of Rs.1,50,000/- was paid in cash and the balance amount was to be paid on getting required permission to convert the land for Non-Agricultural purposes [NA] and NOC from Government authorities for development of land. For this purpose assessee entered into a Banakhat with the sellers. As per the Banakhat the responsibility of converting the land into NA and obtaining various other permissions from local authorities was on assessee which had to be completed within a period of 18 months, i.e., on or before 30-09-2010. On 18-08-2010, assessee paid premium of Rs.1,27,68,000 to city Mamlatdar, Ahemdabad through demand draft number 033504 dated 18-08-2010 drawn on HDFC Bank, Nariman Point branch and the land was thus converted into non-agricultural land as per order of collector

dated 04-09-2010. In the meanwhile, the land holders had entered into a sale transaction which another party, M/s Shivanta Infra Build, on a "as is where is basis" without the knowledge of the assessee" and without taking NOC from him. According to the assessee, the other party, M/s Shivanta Infra Build put up hoardings on the land and started to advertise the project it was intending to come up with on the said land in anticipation on receiving the NA without knowing that the said land was already sold to the assessee by the said parties. Subsequently, both parties, M/s.Shivahta Infra Build and the assessee decided to negotiate the matter and it was agreed upon that M/s Shivanta Infra Build will pay Rs.7,01,50,000/- to the assessee for relinquishment of his rights in the properties which he acquired on 04-04-2009 under the Banakhat Accordingly, a deed of cancellation of agreement for sale was executed on 23-11-2010 as per the terms of which the assessee received compensation of Rs.7 Crs along with premium of Rs.1,27,68,000 paid to the Government authorities for NA and the cost of Rs.1,50,000 paid, for acquiring the said plot of land. Thus, aggregate consideration of Rs.8,29,18,000 was paid by Shivanta Infra Build to the assessee through RTGS.

7. Furthermore, after getting the NA and NOC, the value of the land had shot up and since M/s Shivanta Infra Build had already started the procedure for development, it was inclined to pay off the assessee at any cost and since assessee had also agreed to the compensation which was

by of returns for his efforts and liaison works that he had done for converting the agricultural land into non-agricultural land and the resulting increase in the market value of the property. All these acts of the assessee clearly shows the intention of assessee was not to hold the land as investment but to convert that into non-agricultural land and to sell it by making plots, of smaller sizes and hence this sum of Rs. 7,01,50,000/- is from his business of property. Since the transaction was an adventure in the nature of trade the asset acquired cannot be treated as investment in capital asset and the amount realized on relinquishment of the same, cannot be treated as income from other sources, nor as capital gains. Since, there was clear intention to make profit out of the land proposed to be acquired and to be divided into plots and to be sold thereafter by incurring cost for its improvement, hence, the receipt ought to be taxed under the head business income. It is also an, admitted" fact that- the payment of. premium of Rs. 1.27 crore was paid by the assessee directly by way of D.D to the authorities concerned and this has admittedly come from the funds received from M/s Shivanta Infra Build. The reasons mainly adduced by the AO to hold that the impugned transaction is not in the nature of trade but suspicious nature and hence ought to be assessed under the head "Other sources" are that, firstly, the Bhanakhat was nor registered and hence appears to be an afterthought, secondly the source of funds or payments of the compensation of Rs.7,01,50,000/- and other payments was not explained in the hands of

M/s. Shivanta Infrabuild as the balance sheet and partner's capital accounts were not adduced in response to notice u/s 133(6) of the Act and hence presumably the money has come from the assessee's undisclosed income, thirdly, there were two cancellation deeds, and the earlier one dated 05/03/2010 is much before the date of payment of premium, for conversion of land into NA on 18-08-2010 and hence the assessee's claim about having any right over the land is not genuine and fourthly, the land was: not transferred in assessee's name and hence the receipt of money as compensation cannot be assessed as business income or capital gains and finally the finding that the assessee was never into the business of land development or similar activities in the past. Each and every objection of the AO has been dealt by the CIT(A) threadbare and after giving detailed finding at para 6.4.4 to 6.4.10. The CIT(A) has reached to the conclusion that transaction was in the nature of trade, accordingly profit accruing there from are liable to tax under the head income business from profession. Detailed finding so recorded by CIT(A) are as per material on record, which do not require any interference on our part. We also found that similar transaction with M/s Shivanta Infra Build [SIB] accepted as business income in earlier assessment year 2010-11 which is not overturned even in re-opened assessment order dated 16.11.2017.

8. Moreover, the facts are similar to the case decided by the Hon'ble Karnataka High Court and reported at 164 ITR 41 wherein it was held

that profit arising out of agricultural land which was converted into non-agricultural land with specific objective to sell them and to make profit taking advantage of its nature and location is liable to be assessed as income from business. Furthermore, in accordance with tax audit report, assessee is engaged in real estate business [accepted by AO on first page of assessment order] and consequently, transaction being in his existing normal line of business. In the instant case, assessee satisfies all badges/indicia of trade such as initial and dominant intention being germane was always commercial, that is intention to make quick/large profits by dividing land into smaller plots or develop and sell them size of land sold is large, Assessee is a businessman and director with a investment of 50 lacs in M/s A. B. builders and developers Pvt. Ltd which undertakes construction and development with effect AY 2009-10. Genuineness of transaction is substantiated by agreement for sale, payment of part price Rs. 1,50,000/- reflected in cash book and endorsed by AO in AY 2010-11, consideration Rs.7,01,50,000/- received through bank exhibited bank statements where SIB's name appears in each entry, transaction is confirmed by M/s SIB by filing account confirmation copy, bank statements and income tax return in response to letter issued by AO under Section 133(6), payment of Rs.1,27,68,000/- as premium by demand draft in favour of City Mamlatdar, Ahmedabad, deed of cancellation dated 23.11.2010 with SIB.

9. In this case, AO held that Banakhat with farmers is not registered overlooking that agreement for/to sale and not a sale deed and thus not required to be compulsorily registered under law. AO observed that payment of token in cash creates suspicion that transaction is an afterthought ignoring that adhesive stamps franked by SBI cannot be tampered with inasmuch machine is directly connected with server of stamp duty authorities nor notary's credentials which could have been verified by issuing summons to necessary parties including farmers. Payment of premium is undisputedly funded by M/s SIB, but in discharge of its liability against outstanding of a similar transaction entered into by assessee in earlier AY 2010-11 and thus transaction is not unbelievable. Moreover, farmers are illiterate to summon services of a professional and getting NA approval is a complex task and thus pooling is necessary to fetch a good commercial bargain/buyer. AO also did not advance any material that consideration of Rs.2.50 crores paid before receipt of NA permission dated 23.11.2010 is a throwaway one. There is no evidence that Assessee is not a dealer in land. It is also a matter of record that the Assessing Officer himself in the immediately preceding A.Y.2010-11 vide order dated 16/11/2017 had accepted similar income as income from business in the assessment framed u/s.143(3) of the IT Act. We found that CIT(A) has dealt with the issue threadbare and after controverting each and every finding of the AO after relying on various evidences placed before AO came to the conclusion that transactions so entered by

the assessee was in the nature of trade, accordingly, same is to be taxed under the head income from business and profession. We do not find any infirmity in the order of CIT(A), accordingly the same is upheld.

10. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 09/10/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 09/10/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai