

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òCö BENCH

**Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA Nos. 3470/Ahd/2014 & 116/Ahd/2017
Assessment Year 2011-12 & 2013-14**

Jayant S. Sanghvi (HUF), Ground Floor, òPrathamö, ISKCON Tempe Road, Gotri Road, Baroda-390007 PAN: AAEHJ2524A (Appellant)	Vs	The ITO, Ward-2(4), Baroda (Respondent)
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Revenue by: Shri Lalit P. Jain, Sr. D.R.

Assessee by: Shri Sanket A Bakshi. A.R.

Date of hearing : 10-12-2018

Date of pronouncement : 29-01-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two appeals filed by assessee for A.Y. 2011-12 & 2013-14, arise from order of the CIT(A)-II, Baroda dated 22-09-2014, in proceedings under section 143(3) of the Income Tax Act, 1961; in short òthe Actö.

2. As the facts in both the appeals are similar, so, we take ITA No. 3470/Ahd/2014 for assessment year 2011-12 as the lead case and its findings

will be applicable to ITA No. 116/Ahd/2017 for assessment year 2013-14 for the sake of convenience.

3. The assessee has raised following grounds of appeal:-

ITA NO. 3470/Ahd/2014

“1. The learned Commissioner of Income Tax (Appeals) — II, Baroda, [“the CIT(A)] erred in fact and in law in confirming the action of the Income Tax Officer, Ward-2(4) [“the AO”] in treating the profits derived from sale of capital assets amounting to Rs. 49,74,824/- as “Business Income” instead of Capital gain.

2. The learned CIT(A) erred in fact and in law in confirming the action of the AO in not allowing the set off of capital gains against capital loss and thereby computing the income of the Assessee at Rs. 49,74,824/-.

3. The learned CIT(A) erred in fact and in law in confirming the action of AO in charging interest u/s. 234B of the Act.

4. The learned Assessing Officer erred in fact and in law in initiating penalty proceeding u/s 271(l)(c) of the Act.”

4. The return of income declaring income of Rs. nil was filed on 28th Sep, 2011. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 7th Sep, 2012. During the course of assessment proceedings, the assessing officer noticed that assessee has claimed set off of capital gain of Rs. 49,74,824/- on sale of four residential units from the short term capital loss of Rs. 59,04,213/- on sale of shares. The details of profit gain made during the year on sale of four residential units are given as under:-

Unit No.	Purchase Cost	Sale Value	Gain/profit
Unit No. 17 in Pratham Vatika	Rs.27,65,259/-Dt. 28.03.2008	Rs.40,01,000/- Dt.17.08.2010	Rs.12,35,741/-
Unit No. 56 in Pratham Vatika	Rs.13,85,977/-Dt.27 .03.2008	Rs.30,14,000/- Dt.05.08.2010	Rs.16,28,023/-
Unit No. 57 in Pratham Vatika	Rs.13,85,977/- Dt.27.03.2008	Rs.30,14,000/- Dt.05.08.2010	Rs.16,80,023/-
Unit No. 80 in Pratham Vatika	Rs.28,66,963/- Ot31.03.2008	Rs.33,50,000/- 02.06.2010	Rs.4,83,037/-

Total	Rs.84,04,176/-	Rs.1,33,79,000/-	49,74,824/-

On query the assessee explained that all these properties were always held as investment in the books of accounts as business assets. He has also stated that these assets were included in the wealth tax returns. However, the assessing officer was of the view that all the residential units sold during the year under were acquired for the sole motive of earning profit. The assessing officer also observed that purchase of residential units in such large numbers tend to eliminate the possibility of investment for personal use, possession or enjoyment. He also stated that assessee has not acquired the residential units for its own residential purpose. Consequently profit/gain of Rs. 49,74,824/- on sale of four residential units was treated as profit/gain from its business activities holding that such profit was assessable under the head business from profession and not under the head capital gain.

5. Aggrieved assessee has filed appeal before he Id. CIT(A). The Id. CIT(A) has sustained the disallowance made by the assessing officer by observing as under:-

“3.3. I have considered the submissions of the learned Authorized Representative and the order of the Assessing Officer. During the course of assessment proceedings the, Assessing Officer noted that the assessee has claimed set off of capital gains/of Rs,49,74,824/- on, sale of four 'residential, units from short term capital loss of Rs,59,04,213/--on sale of shares. The assessee was requested to give details of profit/gain earned on sale of residential units and loss made on sale of shares. The assessee was also requested to justify its claims of such set-off. The Assessing officer contended that the units are residential ones but these units have been acquired for selling them with the sole motive of earning the profit. The appellant has claimed that he has not treated the the acquired residential units in stock-in-trade in its books of accounts and the intention was to make investment and not to earn profit. However, the main intention of the appellant was to set off the losses from the shares which is evident from the claim made by him. Though the appellant has claimed that investment in the residential properties was made with an intention to earn rental

income since the builder enjoys good reputation in the market, the facts are entirely different. The investments were clearly made with an intention to earn profits as the appellant has sold 4 flats on a substantial premium within 2 years and without paying any tax wanted to set off the capital gains against the capital loss from the sale of shares. Hence, it is held that the acquisition of the said residential units was made with clear intention to earn profit as the appellant has sold 4 flats on a substantial premium within 2 years and without paying any tax wanted to set off the capital gains against the capital loss from the sale of shares. Hence, it is held that the acquisition of the said residential units was made with clear intention not to earn profits as held by the Assessing Officer and the profit/gain of Rs.49,74,824/-made by the assessee on sale of four residential units is rightly treated- as profit/gains from arising from business activities. Such profit is assessable under the head "Business or Profession" and not under the head "Capital Gains". Therefore, the profit/gain, of Rs.49,74,824/- arising in the hands of the assessee on sale of residential units was rightly brought to tax under the head "Profits & Gains of Business or Profession" and not under the head "Capital Gains", The claim of set-off of Short Term Capital loss of Rs.59,04,213/- on sale of shares was rightly' not allowed in view of provisions of section 71 of the Act Thus, addition of Rs.49,74,824/- made to the total income of the assessee is confirmed."

6. During the course of appellate proceedings before us, the ld. counsel has submitted paper book containing detail of submission made before the assessing officer and ld. CIT(A) during the course of assessment proceedings and appellate proceedings. He has contended that assessee has duly shown the investment in the four properties as investment with complete details reflected in the schedule D of the Balance Sheet. He has further contended that assessee has shown such investment in the wealth tax return duly filed showing the properties as investment on which the wealth tax was also paid. On the other hand, ld. departmental representative has supported the order of lower authorities.

7. We have heard the rival contentions and perused the material on record carefully. During the year under consideration, the assessee has claimed set off of capital gains of Rs. 49,74,824/- on sale of four residential units from shorter term capital loss of Rs. 59,04213/- on sale of shares. The assessee has shown the impugned properties under the head investment in his books of accounts. The purchases of residential units were reflected

as investments from assessment year 2008-09 and continually treated as investment in 2011-12 . These investments were also reflected in the wealth tax return and duly paid the wealth taxes thereon. We observe that the assessing officer has not disproved the aforesaid material facts demonstrated with the copies of wealth tax returns filed in the paper book furnished during the course of appellate proceedings before us. In the light of the above facts, we consider that the assessing officer has failed to substantiate how the income arisen to the assessee out of the sale of house property was assessable under the head profit and gain of business or profession. After considering the above facts, we are of the view that the assessee has made investment in house property as investor and therefore, the income arisen to the assessee out of the sale of house property is assessable under the head capital gain and not profit and gain of business or profession. Accordingly, this ground of appeal of the assessee is allowed. Ground no. 3 for charging of interest u/s. 234B and ground no. 4 for initiating of penalty proceedings u/s. 271(1)(c) are of general and consequential in nature which do not require any adjudication at this stage, therefore, the same are dismissed.

8. In the result, ground nos. 1 & 2 of both the appeals are allowed and ground nos. 3 & 4 of both the appeals are dismissed.

Order pronounced in the open court on 29-01-2019

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER
Ahmedabad : Dated 29/01/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

