आयकर अपील य अ धकरण, अहमदाबाद यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' C'' BENCH, AHMEDABAD

BEFORE, SHRI RAJPAL YADAV, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.809/AHD/2016**

नधारण वष/Asstt. Year: 2011-2012

Sanjay Ramanlal Bhatt, 1-B, Trustnagar Society, Near Ayodhyanagar Post, Paldi, Ahmedabad-380007. PAN: ACIPB0370J	Vs.	I.T.O, Ward-14(1), [Now Ward 5(1)(3)] Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by	:	Shri Tushar P. Hemani, A.R
Revenue by	:	Shri G.C Daxini, Sr.DR

सुनवाई क तारख/**Date of Hearing : 27/03/2019**
घोषणा क तारख **/Date of Pronouncement: 27/05/2019**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals), Ahmedabad-5, [Ld. CIT (A) in short], dated 02/02/2016 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 30/03/2014 relevant to Assessment Year (AY) 2011-12.

The assessee has raised the following grounds of appeal:

"1.1 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in confirming the action of the AO in passing the impugned assessment order on the basis of the directions issued u/s. 144A of the Income Tax Act by the Additional Commissioner of Income Tax, Ahmedabad Range 14, Ahmedabad, which are prejudicial to the appellant assessee and such direction has been issued without affording the appellant assessee an opportunity of being heard, Therefore, the assessment order under appeal which has been passed in contravention of the principles of natural justice, is perverse and is liable to be quashed.

1.2 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in holding that the direction u/s. 144A of the I.T. Act issued by the Additional Commissioner of Income Tax, to the AO to finalize the assessment by applying a particular judgment of Supreme Court is not prejudicial to the interest of the assessee and that the directions are in the nature of what line of investigation is to be made and therefore requirement of providing an opportunity to the assessee is not necessary.

1.3 It is therefore prayed that the addition made in the assessment order as per the direction issued u/s. 144A by the Additional CIT, which has been issued in contravention of the provisions of Section 144A itself, may please be deleted.

2.1 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in confirming the action of the AO in making addition for an amount of Rs.85,00,658/- on account of short term capital gain on transfer of immovable property at Survey No. 197 and 213 at Village Gokharva, Sabarkanta in utter disregard to the fact that these properties were transferred by the assessee as the possession over the land was handed over to the buyers of the property pursuant to agreement to sell in F.Y. 2009-10 and therefore the transfer of the property in question took place in A.Y. 2009-10 and not in A.Y. 2011-12.

2.2 It is therefore prayed that impugned addition may please be cancelled.

3.1 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in confirming the action of the AO in holding that the transfer of the properties in question took place on 14/02/2011 and 28/12/2010 when the conveyance deed for sale of property was executed and thereby making addition of Rs.85,00,658/- on account of alleged short-term capital gain, in utter disregard to the fact that transfer of these properties as per the provisions of Section 2 (47) of the Income Tax Act had taken place when the assessee had in accordance with the terms of agreement to sell, which was duly notarized, part consideration received and promised to be paid, handed over the possession of these properties to the

buyers of the said properties viz. Abellon Clean Energy Pvt. Ltd. and Abellon Properties Pvt. Ltd. on 15/1/2009 and 31/3/2009 respectively.

3.2 It is therefore prayed that the impugned addition made by the AO may please be deleted.

4.1 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in confirming addition made by the AO by blindly applying the ration of the Supreme Court judgment in the case of Suraj Lamb & Industries Pvt. Ltd. (2011) 14 Taxmman.com 103 in utter disregard to the fact that the said judgment was concerned with the term "transfer" as per the Transfer of Immovable Property Act and was not under the Income Tax Act and therefore has no applicability to the facts of the appellant's case.

4.2 It is therefore prayed that the impugned addition made by the AO may please be deleted.

5.1 Without prejudice to the grounds 1 to 4 above, and in the alternative, it is stated that the learned CIT(A) and the Assessing Officer had grossly erred in law and on facts of the case in making the impugned addition, without appreciating the fact that the appellant has entered into the transaction of purchase of agricultural land not in his personal capacity but as an agent and representative of Abellon Clean Energy Private Limited and Abellon Properties Private Limited to whom the properties had ultimately been transferred. The entire amount of consideration for purchase of the land from the agriculturist and also the expenditure on account of development of the land, land filling, registration fees and other related expenses, etc. were fully paid & borne by the above said companies and the role of the appellant assessee in the entire transaction was that of an agent/representative of the company. Therefore, on the facts & circumstances of the case, which the AO has failed to recognize, understand & appreciate, the addition on account of short term capital gain is wholly unjustified, wrong and requires to be deleted in full.

5.2 It is therefore prayed that the impugned addition made by the AO may please be deleted.

6.1 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in confirming action of the AO in computing the short term capital gain at Rs.85,00,658/- without considering the cost of improvement on the land as per the provisions of Section 48(ii) of the Income Tax Act.

6.2 In the facts and circumstances of the case as well as in law, the learned Commissioner of Income Tax (Appeals), Ahmedabad-5, Ahmedabad has grossly erred in not appreciating the fact that after considering the cost of acquisition and cost of improvement there would be no capital gain chargeable to tax.

6.3 It is therefore prayed that the impugned addition made by the AO may please be deleted.

7. The appellant craves leave to add and / or alter the ground at the time of hearing of the appeal."

2. At the outset the ld. AR for the assessee submitted that he had been instructed by the assessee not to press ground no. 1 of the appeal. Therefore we dismiss the same.

The issues raised by the assessee in all other grounds of appeal are interconnected. Therefore we have clubbed all of them together for the sake of adjudication and convenience. The interconnected issue raised by the assessee is that the Ld. CIT (A) erred in confirming the addition made by the AO for a sum of Rs. 85,00,658/- on account of Short Term Capital Gain.

3. The facts of the case are that the assessee is an Individual and earned income under the head salary from Abellon EPC Technologies Pvt. Ltd. The assessee during the year under consideration has entered into certain transaction for the transfer of property/lands. The assessee furnished the details of sale, purchase, and agreement to sale of these lands as mentioned under:

"2(iii) On verification of copy of sale deed it was noticed that during the year the assessee had sold immovable property as under:

Dist/ Taluka/ Village	*Block/ survey No.*	*Area*	*Date sale/ Sale consideration*	*Name of the party to whom sold*	*Registration no. and date of sale deed*	*Name of Sub Registrar*
Sabarkantha Modasa Gokharva	*197*	*26507 sq. Me*	*14-02-2011 / Rs. 5965000*	*Ablon Clean Energy Ltd.*	*506/ 15-02-2011*	*Sub Registrar, Modasa*
Sabarkantha Modasa Gokharva	*213*	*23472*	*28-12-2010 / Rs. 5285000*	*Ablon Properties Pvt. Ltd.*	*3662/ 31-12-2010*	*Sub Registrar, Modasa*

The details of purchase of these property were as under:

Dist/ Taluka/ Village	*Block/ survey no.*	*Area*	*Date of purchase / cost of purchase*	*Name of the party from whom purchased*	*Registration no. and date of deed*	*Name of Sub Registrar*
Sabarkantha Modasa Gokharva	*197*	*26507 sq. Me*	*20-09-2008 / Rs. 1383003*	*Patel Sudhir Kantilal, Village Gokharva*	*2558/ 20-09-2008*	*Sub Registrar, Modasa*
Sabarkantha Modasa Gokharva	*213*	*23472*	*28-12-2010/ Rs. 1224652*	*Patel Maganbhai karsanbhai villabe Gokharva*	*2589/ 20-09-2008*	*Sub Registrar, Modasa*

3(iii) During the assessment proceedings the assessee also furnished "agreement to sale" dated 15-01-2009 and 31-03-2009 in respect of land bearing survey no. 197 and Rs. 213. The complete details of these agreement to sale are as under:

Dist/ Taluka/ Village	*Block/ survey No.*	*Area*	*Date of agreement/ Amount of consideration*	*Name of the party in favour agreement to sale made*	*Serial No. of agreement to sale*	*Name of Sub Registrar*
Sabarkantha Modasa Gokharva	*197*	*26507 sq. Me*	*15-01-2009 Rs. 5965000*	*Abellon Clean Energy Pvt. Ltd.*	*1-005/2009*	*Notary, Government of India*
Sabarkantha Modasa Gokaharva	*213*	*23472*	*31-03-2009 Rs. 5285000*	*Ablon Properties Pvt. Ltd.*	*D-024/2009*	*Notary, Government of India*

3.1 The assessee also claimed that he had not received the sale consideration against the transfer of such lands. The assessee in support of his contention claimed that there was no credit entry for the receipt of the consideration appearing in the bank account. The assessee further submitted that he had borrowed loan from M/s Abellone Agrisciences to purchase the above-said properties/ lands. The details of the loan/ amount outstanding stand as under.

Sr. No.	*Name of the company*	*Particulars*	*Balance as on 31-03-2011*	*Type of balance*
1.	*Abellon Properties*	*Creditor for land*	*Rs. 52,85,000*	*Credit balance*

	Pvt. Ltd.	*survey no. 213*		
2.	*Abellon Cleananergy Ltd.*	*Creditor for land survey no. 197*	*Rs. 59,65,000*	*Credit balance*
3.	*Abellone Agriscience*	*Loan Given(Survey no. 197)*	*Rs. 13,83,003*	*Debit balance*
4.	*Abellone Agriscience*	*Loan Given(Survey no. 213)*	*Rs. 12,24,652*	*Debit balance*

3.2 The assessee also claimed that the transaction of transfer of the lands had been concluded in the A.Y.2009-10 by way of the agreement to sell. Accordingly, the possession of the lands was handed over to the purchaser, i.e. Abellon Clean energy Ltd. and Abellon Properties Pvt. Ltd. respectively and the only some technical compliance like sale deed has been registered in the year under consideration. Hence there are no transactions for the transfer of any capital assets in the year under consideration.

3.3 The assessee further submitted that the impugned lands were transferred at the time when it was agriculture land, i.e. A.Y.2009-10. Therefore as per the provision of section 2(14)(iii) of the income tax Act, the agriculture land has expressly been excluded from the capital assets and accordingly the provision of section 45 is not applicable on him and accordingly the question of capital gain does not arise.

3.4 The assessee also submitted that he acted as an agent of the group companies as discussed. He purchased the said properties on behalf of the companies and accordingly the group companies paid all the related payment such as registration charges, land filling charges and expenses for conversion to agriculture into non-agriculture.

3.5 However, the AO as per the AIR information observed that the assessee during the year under consideration had sold two immovable properties amounting to Rs. 52,85,000/- and Rs. 59,65,000/- dated 31-12-2010 and 15-02-2011 respectively. The AO accordingly disagreed with the submissions of the assessee as the sale deed reveals that the said lands were non-agricultural lands which are covered under the definition of capital assets. Accordingly, the AO was of the view that the same shall be charged to tax under the head capital gain u/s 45 of the Income Tax Act.

3.6 The AO further observed that the details and mode of payment were not mentioned in the sale deed and also the assessee not received any advance/part payment in respect of agreement to sell executed.

3.7 The AO further conducted inquiries u/s 133(6) from the companies and found that there was a huge time gap between the agreement to sale and incorporation of the company. Furthermore, the assessee did not provide any evidence that the company was in the process of incorporation.

3.8 The AO also noted that the assessee during the assessment proceeding submitted that he was acting as an agent of the group companies. However, from the purchase deed, it is clear that the assessee was the owner of the properties and he transferred the properties to the group companies as evident from the sale deed. However, the assessee did not submit any evidence to prove that he acted as an agent of the respective companies.

In view of the above, the AO worked out the short term capital gain amounting to Rs. 85,00,658/- as detailed under:

Block / survey no.	*Date of sale*	*Sale consideration*	*Date of purchase*	*Cost of purchase/value of stamp duty/ registration charges*	*Short term capital gain*
197	*14-02-2011*	*Rs. 59,65,000*	*20-09-2008*	*1452190 (1383000+67800+13900)*	*45,12,810*
213	*28-12-2010*	*Rs. 52,85,000*	*20-09-2008*	*12,97,152 (1224652+6001000+12400)*	*39,87,848*
					85,00,658

Hence the AO added the sum of Rs. 85,00,658/- on account of short term capital gain to the total income of the assessee.

4. The aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) reiterated the same submission as made before the AO. The Ld. CIT (A) observed that for the part performance of the contract/agreement to sale there are two basic conditions/ingredients as detailed under:

1 Possession should be handed over

2 A substantial amount of the transaction must be received

4.1 As such in the present case the assessee did not receive any payment from the buyer and accordingly part performance of the contract has not been completed.

4.2 Therefore the transaction for the transfer of the properties was completed in the year when the sale deed was executed, i.e. A.Y. 2011-12.

4.3 The Ld. CIT (A) also not accepted the assesseeôs contention that he acted as an agent in the absence of any evidence and accordingly no credit of

the expenditure incurred by the group companies in respect of the land was given to the assessee.

4.4 Hence the Ld. CIT (A) after considering all the facts confirmed the addition made by the AO on account of capital gain in the A.Y.2011-12.

Being aggrieved assessee by the order of the Ld. CIT (A) is in appeal before us:

5. The Ld. AR before us filed a paper book running from pages 1 to 199 and submitted as under:

"The AO made addition of Rs.85,00,658/- being alleged Short Term Capital Gain ("STCG'' for short) on sale of two pieces of land and the same came to be confirmed by CIT (A) as well.

Both, AO and Ld. CIT (A), failed to appreciate facts in its entirety.
Assessee purchased two pieces of land bearing Revenue Survey Nos.197 and 213, situated at village Modasa, vide purchase deeds dated 20.09.08.
Thereafter, assessee entered into ''Agreement to sale'' (" ATS" for short) w.r.t such two pieces of lands as follows:

Survey No.		*Date of ATS*	*Purchaser*	*Pgs. P/B*
197		*15.01.09 (i.e AY 09-10)*	*Abellon Clean Energy Ltd.*	*33-40 (Gujarati) 129-142(English)*
213		*31.03.09 (i.e Y 09-10)*	*Abellon Properties Pvt. Ltd*	*74-82 (Gujarati) 164-178 (English)*

Possession was handed over to purchasers at the time of entering into ATS (Pgs.129-142 @ 133 of P/B and Pgs.164-178 @ 169 of P/B)

It was categorically mentioned in ATS that duration of such ATS was "three years" and during such period, seller (i.e. assessee) was to obtain permission for conversion of land from "agricultural land" to "non-agricultural land" (Pgs.129-142 @ 134 of P/B and Pgs. 164-178 @ 170 of P/B). Post conversion of such land to Non-agricultural land, final sale deeds were executed during the year under consideration as follows:

Survey No.	*Date of deed*	*Purchaser*	*Pgs. P/B*
197	*15.02.09*	*Abellon Clean Energy Ltd.*	*42-56(Gujarati) 143-163(English)*
213	*28.12.10*	*Abellon Properties*	*83-89 (Gujarati)*

		Pvt. Ltd	*179-199 (English)*

The AO was of the view that since final sale deeds have been executed during the year under consideration, resultant capital gain, which has been worked out at Rs.85,00,6587-, is chargeable to tax during year under consideration. Hence, he made the impugned addition which was confirmed by CIT (A).

5.1 "Transfer", in terms of S.2(47)(v), was effected in AY 09-10:

As per S.2(47)(v), "transfer" includes any transaction involving the allowing of "possession" of any immovable property to be taken or retained in part performance of a contract of the nature referred to in S.53A of The Transfer of Property Act, 1882 ("TP Act" for short).

As per the above definition, the moment "possession" of an immovable property is handed over to the prospective buyer in part performance of a contract of a contract of the nature referred to in S.53A of the TP Act, "transfer", for the purpose of The Income- tax Act, is said to have been effected.

In simple terms, the moment an "Agreement to Sale" w.r.t. an immovable property is executed and "possession" of such property is handed over to the prospective buyer in part performance of such agreement, requirements of S.2(47)(v) stand fulfilled and "transfer" takes place.

The Reliance is further placed on ***"CIT vs. Radhe Developers - 341 ITR 403 (Guj)"*** *(relevant at Para 40 & 41) wherein Hon'ble the High Court was concerned with the issue of ownership of land on the part of Developer who had only entered into an "Agreement to Sale " with land owner and on the strength of such agreement, taken "possession " of land in question. Under such circumstances, Hon'ble High Court treated such Developer as "owner" of land by holding that under the Income 'I'ax Act, the moment Agreement to sale is executed and possession is handed over, transfer has taken place. Relevant extract is reproduced herein for ready reference:*
"41. In the present case, we find that the assessee had, in part performance of the agreement to sell the land in question, was given possession thereof and had also carried out the construction work for development of the housing project. Combined reading of Section 2(47)(v) and Section 53A of the Transfer of Property Act would lead to a situation where the land would he for the purpose of Income Tax Act deemed to have been transferred to !he assessee.
XXX... "

The AR submitted that in assessee's case, ATS were entered into in AY 09-10 and also possession of land was handed over to prospective buyers at that point in time. Thus, as per S.2(47)(v), lands were transferred in AY 09-10. Hence, no capital gain can be charged to tax during the year under consideration i.e. AY 11-12.

As regards AO's reference to sale deed which contains a clause that possession is handed over while executing sale deed, it is submitted that such words were part of the standard format of the sale deed.

From the ATS, it absolutely clear that possession was handed over to the prospective buyers while entering into the ATS.

Neither AO nor CIT (A) has brought any clinching evidence to controvert the fact that "possession" was handed over while entering into ATS, as duly mentioned in such ATS.

In fact, AO has, on Pg.19 of Asst. Order, simply stated that there was no "part payment" pursuant to ATS and hence, conditions of section 53A of TP Act are not fulfilled. Even CIT (A) has, on Pg.23 of CIT (A)'s order, held that in absence of "part payment", it cannot be said that "transfer" took place when ATS were entered into.

The AO and CIT (A) failed to appreciate that the definition of "transfer" under the Act is to be considered and not the provisions of S.53A of TP Act. S.2(47)(v) does not mandate that "part consideration" must be passed on to the seller so as to ensure that "transfer" of immovable property takes place. As and when "Agreement to sale" is entered into and "possession" is handed over to the prospective buyer, "transfer" takes place.

Thus, as discussed above, "transfer" took place in AY 09-10 and not in AY 11-12. In such scenario, AO was not right in discarding the fact that possession was handed over while entering into ATS and that "transfer" took place in AY 09-10.

The Reliance is further placed on "Smt. Sandhyaben A. Purohit - (2013) 35 taxmann.com 472 (Ahmedabad - Trib.)" (Annexure "A").

As regards observation of AO that "Certificate of Incorporation" ("COI") of "Abellon Properties Pvt. Ltd." was issued on 21.06.10 and hence, it could not have entered into ATS dated 31.03.09, it is submitted that it was decided by the said company would be promoted and necessary steps were taken for its formation. Necessary formalities were pending as of that date. Hence, when ATS was entered into, such company was under formation (proposed company) and hence, it could very well have entered into the ATS. The only care that ought to have been taken was to mention the words "proposed" was required to be added in the name of the company which, inadvertently, was missed out. However, the mere fact that COI was received subsequently cannot be a ground to hold that ATS was not valid. At this stage, attention is invited to Section 15(h) and 19(e) of The Specific Relief Act, 1963 which specifically provides that when promoters of a company have, before its incorporation, entered into a contract for the purposes of the company and such contract is warranted by the terms of incorporation, specific performance of such contract may be obtained by the company. Relevant extract of Specific Relief Act is annexed at Annex. "B".

Further, COI in the case of "Abellon Cleanenergy Ltd." was dated 07.07.08 (Pg.9 of Asst. Order) i.e. prior to ATS dated 15.02.11. AO as well as CIT (A) conveniently chose not to comment on the same at all Pg.l9 of Asst. Order and Pg.23 of CIT (A)'s order]. Thus, there is no reason for doubting at least ATS dated 15.02.11.

Thus, "transfer" very well took place in AY 09-10 and not in AY 11-12. Hence, impugned addition deserves to be deleted.

5.3 Agricultural land" is not a "capital asset" in terms of S.2(14)(iii); Hence, no capital gain can be charged to tax:

As per S.45, capital gain arising on transfer of "capital asset" can be charged to tax. The term "capital asset" is defined u/s 2(14). As per such definition, "agricultural land" is excluded from the ambit of "capital asset". Hence, gain on transfer of "agricultural land" is not chargeable to tax.

In assessee's case, "transfer" took place in AY 09-10 and that point in time, the concerned lands were "Agricultural lands". In fact, time gap of three years was fixed so as to ensure that assessee gets such "agricultural lands" converted into "non-agricultural lands". Post such conversion, final sale deeds came to be executed during the year under consideration.

Status of capital asset at the time of "transfer" is relevant in order to decide the chargeability of tax. In assessee's case, "transfer" took place in AY 09-10 and at that point in time, the concerned lands were "agricultural lands". Thus, such lands were not "capital asset" at the time of "transfer" and hence, gain arising thereon cannot be charged to tax.

Even on that score, impugned addition deserves to be deleted in the larger interest of justice.

5.4 Lands were purchased in the capacity of "agent' and ‘’representative’’ companies which are the ultimate buyers:

In any case, assessee has merely acted in the capacity of "agent" and "representative" of the companies which have ultimately bought the lands.

Assessee is a salaried employee of the Abellon group of companies ("Abellon group" for short).

The Abellon group was looking forward to buy the lands in question. However, such lands were "agricultural lands" and as per the prevalent law, only an "agriculturist" can buy an "agricultural land". Since assessee is an "agriculturist", assessee was chosen by the Abellon group for the entire transaction w.r.t. purchase of such agricultural lands. Assessee was asked to purchase lands in question from the original owners. Purchase consideration to them was paid by the Abellon group. Thereafter, assessee entered into "Agreement to sale" with Abellon group for transfer of such lands and even possession was handed over to it. Thus, the

Abellon group got hold over the lands in question. The Abellon group even incurred expenditure on development of such lands thereafter. Duration of three years was fixed during which, assessee was to seek permission for conversion of such lands from "agricultural lands" to "non-agricultural lands". The said fact is mentioned in Agreement to sale. Post conversion of such lands into "non-agricultural lands", final sale deeds came to be executed and the Abellon group. Thus, the Abellon group, finally, became the legal owner of the lands in question. Assessee has not received a single penny towards either of the above transactions, including the final sale deeds; In light of the above, followings are certain undisputed facts:

1. *Purchase consideration for land was paid by Abellon group;*
2. *Soon after purchasing the lands, ATS were entered into with the Abellon group and possession was handed over to it;*
3. *Abellon group incurred expenditure on development of such lands;*
4. *No sale consideration has actually flown to the assessee;*

The above aspects are also clear from assessee's statement recorded by AO u/s 131 (Pgs.7-9 of Asst. Order) as well relevant ledgers in the books of the Abellon group (Pgs.57-59, 98-100, ***110-115*** *of P/B).*

Thus, in reality, assessee was merely acting as "agent" and "representative" of the Abellon group for effecting the final transaction of purchase of lands in order to meet the requirements of the revenue laws.

In such a scenario, no tax liability, emanating from such transactions can be fastened upon the assessee. Hence, impugned addition must be deleted.

5.6 Alternatively, deduction of "cost of improvement" in terms of S.48(ii) be given to the assessee:

Alternatively, substantial expenditure has been incurred on development of the lands in question and hence, while the same must be deducted while capital gain in light of provisions of S.48(ii).

Total sale consideration is equivalent to aggregate of "cost of land" and "cost of improvement" thereto. Hence, once such benefit is given, there is no capital gain. Even on that score, impugned addition must be deleted. CIT (A) denied such benefit by merely stating that such expenditure was carried out by "company" and not by the assessee (Pg.23 of CIT (A's order). At this stage, it is clarified that "genuineness of expenses" and so also the "quantum of expenses" have not been doubted.

On one hand, AO and CIT(A) state that assessee is owner of lands and on other hand, they say that "cost of improvement" is incurred by "company" owing to which, benefit of cost of improvement cannot be given. It may be appreciated that even "cost of land" was incurred by "company" and not by the assessee just as "cost of improvement" has been incurred by the companies. When benefit of "cost of land" incurred by "company" has been extended, there is no reason to deviate from such stand and deny benefit of

"cost of improvement" incurred by the very same company. Department cannot blow hot and cold simultaneously. In any case, if "assessee" is held to be the actual owner of the land, then benefit of "cost of land' and also "cost of improvement" must be given. Even if such expenditure has been incurred by "company", it a matter between "assessee" and "company" as to how to settle such cost. However, that cannot be a ground to deny benefit of "cost of improvement".

6. The Ld. DR before us filed a paper book running from pages 1 to 271 and submitted that the agreement made by the assessee in the AY 2009-10 is void as the assessee cannot make the sale of the land being agricultural land to the non-agriculturist.

6.1 The ld. DR further submitted that the assessee was not acting in the capacity of the authorized representative on behalf of M/s Abellon Agrisciences Ltd. Therefore he is liable to the tax on the income of capital gain under the Act. The ld. DR vehemently supported the order of the authorities below.

7. We have heard the rival contentions and perused the materials available on record. The assessee in the instant case has purchased 2 pieces of agricultural lands out of the money advanced by M/s Abellon Agrisciences Ltd (for short AAL) in the A.Y. 2009-10. As such M/s AAL directly paid the money to the landowners but the same was registered in the name of the assessee dated 20-09-2008. It is because the impugned lands were the agricultural lands and it can be registered only in the name of the agriculturist.

7.1 The assessee in the same A.Y. has transferred the lands to the group companies namely M/s Abellon Properties Pvt Ltd (for short APPL) and M/s Abellon Cleanenrgy Pvt Ltd. (for short ACPL) through an agreement dated 15-01-2009 and 31-03-2009 respectively. However, the assessee executed the

sale deed in the name of the above companies in the A.Y. 2011-12 after the conversion of agriculture land into non-agriculture land. The AO accordingly treated the transfer of land by the assessee to these two companies as a transfer in the year under consideration.

7.2 Thus the AO worked out the short-term capital gain on the transfer of the lands amounting to Rs. 85,00,658/-only. The Ld. CIT (A) subsequently confirmed the view taken by the AO.

Now the following questions before us arise for education:

Question 1

Whether there was a valid transfer of land by the assessee to the companies described above based on an agreement to sell executed in the A.Y.2009-10.

Question 2

Whether the assessee can be treated as an agent of the group companies described above in the given facts and circumstances

7.3 Regarding the question no. 1, an agreement to sell shall amount to transfer of the property if it is supported with the valid consideration and handing over the possession of the property in pursuance to the provisions of section 53A of the Transfer of Property Act which has been recognized under section 2(47) of the Act.

7.4 In the light of the above provision, we note that the assessee has not transferred the property in question in the A.Y. 2009-10 as there was no consideration received by the assessee. Therefore we are of the view that there was no transfer by the assessee to the companies above in the A.Y.2009-

10 under the Act. We also find that the Hon'ble Supreme Court in the case of Suraj Lamp and Industries Ltd reported in 14 taxmann.com 103 has held that the transaction for the transfer of the property on the basis of agreement to sale shall be completed if it is supported with the valid sale consideration and handing over of the possession of the property. The relevant extract of the order is reproduced as under:

> *"Section 54 makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. It is, thus, clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred. [Para 11]*
>
> *Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A)."*
>
> **********
>
> *Section 53A of the TP Act defines 'part performance' thus :*
>
> *"**Part Performance**. - Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*
>
> *and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :*
>
> *Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."*

7.5 However before concluding, we note that the facts of the case on hand are different from the facts as discussed above. Regarding this, we note certain undisputed facts as detailed under:

1. The assessee is an employee of the AAL as per the finding of the AO which is reproduced as under:

   "During the year the assessee is having income from salary from Abellon EPC Technologies Limited."

2. The AAL has paid the money directly to the landowners which was recorded in its books as an advance for the acquisition of land. This fact can be verified from the copy of the ledger placed on pages 57 & 98 of the PB in respect of the land survey no. 197 and 213.

3. The registry was finally done in the name of the assessee in the AY 2009-10 vide dated 20-09-2008 though the assessee did not make any payment on the purchase of such land.

4. The assessee immediately on getting the registry in his name transferred both the lands in the group companies of the assessee by way agreement to sell dated 15-01-2009 and 31-03-2009.

5. The AAL has further incurred the cost on the registration charges and land development charges and conversion charges which were duly recorded in its books etc. This fact can be verified from the copy of the ledger placed on pages 57 & 98 of the PB in respect of the land survey no. 197 and 213.

6. The assessee finally converted the land to non-agricultural and transferred the same to the AAL/ its group companies.

7. The assessee accordingly transferred the land by registering the sale deed to the group companies of the AAL dated 31-12-2010 and 15-02-2011 in the AY 2011-12 at book value of Rs. 52,85,000/- and Rs. 59,65,000/- respectively.

8. It is also pertinent to note that the land was transferred by the assessee to the group companies at the value as appearing in the books of the AAL. As such there was no extra money charged by the assessee on the transfer of the lands.

9. The AAL on transferring the land by the assessee to the group companies debited the account of the transferee company and credited the account ñadvance for acquisition of landò in respect of both the lands. This fact can be verified from the copy of the ledger placed on page 57 and 98 of the paper book.

10. There was no transfer of the fund by AAL or its group company to the assessee directly or indirectly as the case may be.

Thus from the above discussion, it is transpired that the assessee was never the real owner for the impugned lands and the entire transaction was carried by AAL and its group company to acquire the lands through the involvement of the assessee being an agriculturist. Thus the assessee was just a name lender in the entire deal of the transactions, and at all the time the AAL & its group companies were the beneficial owners of the impugned land right from the inception of the deal.

7.6 Thus in the given facts and circumstances and after considering the question no. 2 as discussed above, we feel that the assessee did not have any

occasion to receive any consideration on the transfer of such lands on the agreement to sell. It is because the assessee has not incurred any cost on the purchase of the land, registration of the land, conversion of the land and the development of the land. Thus the assessee being a representative of AAL had no occasion to receive the consideration on the transfer of the land either at the time of agreement to sell or registration of sale deed. Therefore we are of the view that the provisions of section 53A of the Transfer of Property Act can be applied in the case on hand for the reasons as discussed above.

7.7 It is also important to understand that the assessee has agreed to sell the land to the company namely Abellon Properties Pvt. Ltd. which was not in existence during the relevant time. Thus the question arises about the validity of the agreement with the company which was not there in existence. Regarding this, we note that the agreement between the assessee and the company was made as on 31st March 2009 whereas the company was registered as on 21st June 2010 almost after 15 months from the date of the agreement. Thus a doubt may arise about the genuineness of the impugned agreement to sell. However, on perusal of the agreement, we note that it was duly notarized as on 31st March 2009 and there was substantial compliance of the agreement between the assessee and the company as the company was finally registered though after a huge gap.

7.8 We further note that the agreement made by a company before its incorporation with any third party was also protected by the provisions of the Specific Relief Act as discussed below:

> ***Section 15(h) in The Specific Relief Act, 1963***
> *(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company: Provided that*

> *the company has accepted the contract and has communicated such acceptance to the other party to the contract.*

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

> ***Section 19(e) in The Specific Relief Act, 1963***
> *(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.*

7.9 Therefore after considering all the facts in totality we are of the view that there was a property transfer by the assessee to the companies as discussed above in the A.Y.2009-10. Accordingly, we are of the view that the subsequent registration of the conveyance deed in the A.Y.2011-12 will not amount to transfer of property under the provisions of section 2(47) of the Act. Accordingly, the question of capital gain for the year under consideration does not arise.

7.10 We are also conscious to the fact that the impugned land transferred by the assessee in the A.Y.2009-10 when it was an agricultural land which does not fall within the meaning of capital assets as provided u/s 2(14) of the Act. Accordingly the same cannot be the subject matter of capital gains under the Act in the AY 2009-10.

7.11 We also want to make it clear that the buyers of the impugned land have recorded the purchase consideration in the books of accounts at the actual cost incurred by its group company. As such we note that there was no element of profit transferred by the companies to the assessee. Therefore it can be inferred that there is no loss to the Revenue as the buyers of the land have recorded the purchase consideration at the actual cost incurred by its

group company. Accordingly, the buyers (group companies) will show the profit at the high value or less loss as the case may be on the subsequent sale of such impugned land in the given facts & circumstances.

7.12 In view of the above, we hold that the assessee is not liable to pay tax on the capital gain computed by the AO as the same is not the real income and it was not generated in his hands. Hence the assessee succeeds in his grounds of appeal.

7.13 As the assessee has succeeded in the appeal filed by him on the reasoning discussed above. Therefore we are not inclined to address the other contentions raised by the Ld. AR for the assessee and the ld. DR for the Revenue. Hence the ground of appeal of the assessee is allowed.

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Court on 27/05/2019 at Ahmedabad.

-Sd-	**-Sd-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 27/05/2019
Manish