

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD B BENCH, AHMEDABAD**

[Coram: Justice P P Bhatt, President and Pramod Kumar, Vice President]

ITA No.: 363/Ahd/17
Assessment year: 2012-13

**Assistant Commissioner of Income Tax
Circle 5(2), Ahmedabad**

.....Appellant

Vs

Jignesh Virambhai Rabari

.....Respondent

B 3, Status Apartments

Near Madhusudan House, Opp Telephone Exchange

C G Road, Ahmedabad 380 009 [PAN: ABMPR1210J]

Appearances by

N R Soni *for the appellant*

P M Mehta *for the respondent*

Date of concluding the hearing : June 04, 2019

Date of pronouncement : June 04, 2019

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 8th November 2016 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13, on the following ground:

The learned CIT(A) has erred in law and on facts by taxing the amount of Rs 9,62,46,603 under the head 'long term capital gain' and not under the head 'income from other sources'

2. The issue in appeal lies in a very narrow compass of material facts. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown long term capital gains, in respect of sale of three properties at Survey No. 55/1, 55/2

and 55/3 Anjana for Rs 9,62,46,603. It was explained by the assessee that under a common memorandum of understanding, the assessee had entered into agreement with respect to 6 pieces of land, including these pieces of land, i.e. 55/1, 55/2, 55/3, 56 paiki, 56/3 and 56/2 paiki. The capital gain was on account of the rights so earned in respect of a part of these six properties, i.e. Survey No. 55/1, 55/2 and 55/3. The requisite details in support of this stand were also furnished. That, however, did not impress the Assessing Officer. The Assessing Officer was of the view that the assessee did not have sufficient evidence of ownership of properties or of rights in these properties. He was of the view that since purchase deed is not shown by the assessee, the assessee cannot be treated as owner of the properties in question. The evidences given by the assessee, with respect of his rights in the properties, were discussed in details and rejected as unacceptable. It was also noted that the payment under the Memorandum of Understanding, which is said to reflect and evidence the rights of the assessee, are in cash and that the MoU is unregistered. Thus rejecting the bonafides of the asset in respect of which capital gains were shown, the Assessing Officer proceeded to treat the entire amount as income from other sources. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) noted that on common set of facts, in the immediately preceding assessment year, he has held that the gains on the sale of remaining three pieces of land are to be treated as capital gains, and the matter rests there. Respectfully following his own order in assessee's own case for the immediately preceding assessment year, the CIT(A) rejected the stand of the Assessing Officer for treating the gains in question as 'income from other sources', the CIT(A) held that the amount of Rs 9,62,46,603 is required to be taxed as capital gains. The stand of the assessee was thus upheld. Aggrieved by the relief so granted by the CIT(A), the Assessing Officer is in appeal before us.

3. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

4. We have noticed that the CIT(A), in the impugned order, has merely followed his own order in assessee's own case for the immediately preceding assessment year wherein it was, inter alia, observed as follows:

The facts of the case and the submissions are considered. The AO has treated the said receipt as income from business mainly on two grounds that as the assessee

is not the owner of the land it cannot be treated as income from capital gain and over a period of time the assessee has acquired various lands at different places which shows that the assessee is in the business of sale of land. On the other hand, the appellant's main contention is that he has made advance payment towards the purchase of land due to which he acquires right in the said land which is enforceable in the law and if the seller tries to sale the land to the third party without his consent he can challenge the action of the seller. 'In the sale deed, the appellant is shown as confirming party and received payments as compensation for relinquishing his right to purchase the said land. Advance payment towards the purchase of land creates a right in the hand of the appellant and it is further confirmed by the sale deed where the appellant has become a confirming party. If no right was vested with the appellant then there was no need for the inclusion of the name of the appellant as confirming party in the sale deed. From the perusal of Section 2(47) of the Act it is clear that transfer includes sale, exchange or relinquishment of asset or extinguishment of any right therein. Here in the present case the appellant has extinguished his right to purchase the land and for this, he has received an amount of Rs.5.26 crore. Considering this the amount received by the appellant is comes under the head income from capital gain.

5. The order so followed by the CIT(A) has reached finality inasmuch as the revenue authorities have not challenged this order before the Tribunal, or, for that purpose, before any other authority. In view of this position, it is clear that the gains on sale of properties covered by the same MoU, and extinguishment of rights coming into existence by the same MoU, have been held to be capital gains by an appellate order passed by the CIT(A), and, the matter has reached finality at that. Clearly, the issue regarding bonafides of the existence of rights stands resolved by the CIT(A) last year and the matter has reached finality at that stage. What is before us is essentially the same issue under the same MoU and same transaction. In this factual backdrop, we may refer to the following observations made by Hon'ble Supreme Court in the case of **Radhasoami Satsang Vs CIT [(1992) 192 ITR 321 (SC)]**:

We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is

decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

6. In this view of the matter, the grievance of the Assessing Officer is devoid of any legally sustainable merits. Once a factual aspect of the matter is settled in one way in one particular year by way of an appellate order, and the parties have sustained that position by not challenging that order, it cannot be open to the parties to challenge the same in a subsequent year. The rule of consistency holds good in this context, and the same issue cannot be reargued.

7. Learned Departmental Representative has submitted that in the immediately preceding assessment year, the taxation of gains was as business income and not as income from other sources, and, it is for this reason that the decision of the immediately preceding year will not hold good in the present context. That plea is only fit to be noted and rejected. What is material is the finding of the CIT(A) which has remained uncontroverted and which has been allowed to be sustained, and that finding is that the gains on sale of properties in question are to be taxed as capital gains. There is also uncontroverted finding about existence of rights extinguishment of which has resulted in these gains. These are the material aspects of the order which has attained finality, and which are crucial in the present context. Whether the stand of the Assessing Officer was for taxation of gains was as business income or as income from other sources is not at all relevant, nor has it met the judicial approval anyway. We reject the plea of the learned Departmental Representative.

8. We may also add that in the case of **Union of India v. Kaumudini Narayan Dalal [2001] 249 ITR 219**, Hon'ble Supreme Court had an occasion to consider whether it is open to revenue to accept a judgment in the case of one assessee, and appeal, against the identical judgment in the case of another. Their Lordships held that such a differential treatment on the same set of facts was not permissible in law, and observed that, "it is not open to revenue to accept the judgment in the case of the assessee in that case and challenge its correctness in the case of another assessee, without just cause." The same view was reiterated by the

Hon'ble Supreme Court in the case of **Berger Paints India Ltd. v. CIT [2004] 266 ITR 992**, and followed by the Hon'ble Delhi High Court in the cases of **CWT v. R.K.K.R. International (P.) Ltd. [2005] 198 CTR 567** and **CIT v. Neo Poly Pack Pvt. Ltd. [2000] 245 ITR 492**.

9. When it cannot be open to revenue authorities to challenge the relief granted by the CIT(A) in one case, when on identical issue the order has not been challenged in the other case, it is only elementary that when the relief granted by the CIT(A) is accepted in one case in one year, it cannot be open to the revenue authorities to challenge identical relief in the other year. Viewed thus, the appeal is not maintainable for this reason as well.

10. In view of the above discussions, as also bearing in mind entirety of the case, we approve the stand of the CIT(A) and decline to interfere in the matter. The grievance of the Assessing Officer does not have legally sustainable merits.

11. In the result, the appeal is dismissed. Pronounced in the open court today on the 4th day of June, 2019.

Sd/-
Justice P P Bhatt
(President)

Sd/-
Pramod Kumar
(Vice-President)

Ahmedabad, dated the 4th day of June, 2019

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad