आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL-SURAT-BENCH-SURAT

BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER AND SHRI O.P.MEENA, ACCOUTANT MEMBER

आ.अ.सं/.I.T.A No.629/AHD/2017

निर्धारण वर्ष/Assessment Year:1998-99

Late Shri Vithaldas Khushaldas Mali, L/h Hasmukhbhai Vithaldas Mali Opp. Hanuman Temple, Mota Bazar, Navsari **[PAN: ABOPM 3924 E]**	**बनाम** **Vs.**	Deputy Commissioner of Income Tax, Navsari Circle-Navsari
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारिती की ओर से **/Assessee by**	**Shri Hiren R. Vepari, CA**
राजस्व की ओर से **/Revenue by**	**Mrs. Anupama Singla, Sr.D.R.**

सुनवाई की तारीख/ Date of hearing:	11.12.2019
उद्घोषणा की तारीख/Pronouncement on	11.12.2019

आदेश /O R D E R

PER O. P. MEENA AM:

1. This appeal filed by the Assessee is directed against the separate orders of learned Commissioner of Income tax (Appeals)-Valsad, (in short "the CIT (A)") all dated 03.02.2017 for the Assessment Year 1998-99 passed by the Deputy Commissioner of Income Tax, Navsari Circle- Navsari (hereinafter referred as "the AO").

2. Ground No.(I) and Ground No. (II) regarding Reopening of assessment and validity of assessment is not pressed before us, hence, is dismissed as not pressed.

3. Ground No. (II) states that Ld. CIT (A) ought to have held that long-term capital gain of Rs. 2,77,851 not to have treated as nroml business income.

4. At the outset, the learned counsel for the assessee submitted that the issue is identical as in the case of his brother Shri Ratilal K Mali in I.T.A.No.1637/AHD/2014 in A.Y. 94-95, which has been head by the bench.

5. Per contra, the ld. Sr. D.R. also admitted that issue is identical; hence, finding given therein would apply to this case also.

6. We have heard the rival submissions and perused the relevant material on record. We find that the issue is identical as in the case of Shri Ratilal K. Mali in assessment year 1994-95 in I.T.A.No. 1637/AHD/2014/ wherein the Tribunal has held has given its finding in para 18 & 19 as under:

> *"18.We have heard the rival submissions and perused the relevant material on record. We notice that the assessee along with his brother have received impugned land as gift from their maternal uncle on 09.08.1962 i.e. more than 40 years before the sale. These lands was being as agricultural land for growing flowers thereon and was held as capital asset. The assessee never done any activity of buying and selling land before this transaction or after this transaction. The assessee has decided to sell this land in plots with a view to get better appreciation of its capital asset as the Navsari city grew and become closure to the city and there was fear of encroachment. The assessee has developed the land to earn better gains and sold them after making plots with the help of Shri Madhubhai Patel and Shri Maganbhai Patel. Thus, the assessee has not carried out any business activity hence, capital gains has been rightly disclosed. The learned counsel has relied on decision of Hon`ble Madhya Pradesh High Court in the case of CIT v. Suresh Chand Goyal [2008] 298 ITR 277 (MP), wherein in identical situation where agricultural land was given to the assessee as gift. In the present case, also the assessee has developed the land, and sold it as plots just. Therefore, such activity cannot be considered as the adventure in nature of trade but assessable as capital gains. The Co-ordinate Bench of Tribunal in the case of Ramswroop Saini 15*

SOT 470 (Delhi-Trib) held that agricultural land inherited and sold apart from that making plots in smaller denomination does not amounts the transaction as adventure in nature of trade and was assessable as long-term capital gain. In the case of Raja Malwinder Singh 40 DTR 273 (P&H) the Hon`ble High Court of Punjab held that the assessee sold ancestral land which was capital asset and the Tribunal has not found that same was converted in stock-in trade , the profit on sale of such property is rightly held to be assessable as capital gains. Learned Counsel relied in the case of CIT v. Sushila Devi Jain [2003] 259 ITR 671 (P&H) It is true that even a single venture could be regarded as a trade or business but there have to be circumstances which should give rise to such a conclusion. There were no such circumstances existing in the instant case. What is necessary is to find out the intention of the assessee at the time of the purchase of the land. In the instant case, the land was never purchased by the assessee. She acquired the same on the basis of a Will on the death of her husband. She sold the same in parcels because the huge area could not be sold in one go. Such an activity could not amount to trade or business within the meaning of the Act. Both the Commissioner (Appeals) and Tribunal had followed the correct principle of law and no factual or legal error could be pointed out by the department. [Para 2]. In view of these facts and circumstances, and relying on various case laws as per his case laws Paper Book, The learned Counsel contended the AO was not right in taxing the sale of agricultural land as business income. We, further, find that the assessee was residing out of India and entire transaction of sale on behalf of him was handled by his brother in India, therefore, he cannot be expected to adventure in nature of trade, hence, the income earned from sale of land is not taxable in his case as business income and has to be treated as capital gains as by the Hon'ble Gujarat High Court in the case of D. S. Virani v. CIT [1973] 90 ITR 255 (Gujarat) held as under: In so far as the three assessee other than 'V' were concerned, they were throughout the relevant period residing out of India. None of them had entered into any transaction of purchase or sale of land either prior or subsequent to the purchase of the land in the instant case. It was not the business of any of these assessees to trade in land and dealing in land was not in the line of business of any of them. The transaction of purchase and sale of the land was an isolated transaction in their cases. It is true that there was no immediate prospect of earning return on the amount invested, but the possibility of earning return, if the area developed in the future, could not be ruled out. Moreover, the amount that was being invested by each of the three assessees was a trifling amount, having regard to the large wealth possessed by each of them and even if there was no possibility of obtaining return, that would not be a circumstance, which would suggest that the intention of the three assessees was not to purchase the land by way of investment but to purchase it only with a view to trading in it. There was absolutely no material on record to show that the sole and exclusive intention of the three assessees at the time of

purchase was to resell their respective 1/4th shares in the land at profit. Thus, the three assessees purchased their respective 1/4th shares in the land by way of investment and even if they hoped to be able to make profit by selling a large part of it, if a suitable opportunity came, that would not make the transaction any the less a transaction by way of realisation of the enhanced value of the investment. The Tribunal was, therefore, in error in taking the view that the transaction of purchase and sale of his 1/4th share in the land by each of the three assessees was an adventure in the nature of trade. Therefore, considering these facts and land being received more than 40 years ago, the sales of same after plotting cannot be considered as adventure in nature of trade.

19. In the light of above facts and circumstances, we are of the considered opinion that the assessee has inherited agricultural land as gift before 40 years and there was no intention to carry out any business. The agricultural land was used for growing of flower. The assessee has never don any land dealing before this solitary land and not engaged, thereafter also. Thus, with a view to get better appreciation the assessee has sold the land after plotting with help of person who are engaged in real estate. Further, the assessee has was residing outside India in UK and cannot be expected to do any adventure in nature of trade. Therefore, considering the ratio laid down in above discussed judicial pronouncements, it cannot be said that the assessee has carried out any adventure in nature of trade. Therefore, the capital gains as long-term capital gain has been rightly disclosed by the assessee in his return of income. In view of this matter, the AO was not justified in treating the capital gains as business income. Accordingly, the AO is directed to treat the sale consideration as long-term capital gain. In view of these facts and circumstances, this grounds of appeal id allowed for all the assessment years 1994-95, 1995-96, 1996-97 and 1997-98."

7. In view of above, respectfully following the same we direct the AO to consider the business income as long-term capital gain. Accordingly, Ground No. (III) of appeal is allowed.

8. Ground No. (IV)The learned Commissioner of Income-tax (Appeals) erred in confirming the above addition when addition of Rs. 51,527 in respect of sale of plot based on statement of partner of M/s. Vijay Enterprise before Settlement Commission.

9. At the outset, the learned counsel for the assessee submitted that the issue is identical as in the case of his brother Shri Ratilal K

Mali in I.T.A.No.2127/AHD/2014 in A.Y. 97-98, which has been head by the bench.

10. Per contra, the ld. Sr. D.R. also admitted that issue is identical, hence, finding given therein would apply to this case also.

11. We have heard the rival submissions and perused the relevant material on record. We find that the issue is identical as in the case of Shri Ratilal K Mali in assessment year 1997-98 wherein the Tribunal has held has given its finding in which is reproduced as under:

> *"45. Short facts are that the AO noted that the assessee has sold land directly @208 admeasuring 19561.88 sq. ft., as against the documented price at Rs.40 per Sq. ft. Hence, At the outset, worked out on-money being difference of Rs.168 [208-40=168 per Sq. Ft.] to land sold at Rs.32,86,396 (19561.88X 168) and made addition on this account . This was based on the statement of Shri Madhubhai Patel and Shri Maganbhai Patel before Settlement Commission.*
>
> *46. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). However, CIT (A) has confirmed the addition so made.*
>
> *47. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that the addition is not justified as it is made based submissions made by the M/s. Vijay Enterprise having calculated on-money, when the assessee has not made any statement in this regard. The AO has not brought on record any evidence to show that any on-money has been received. Further, the AO has relied on the papers of which no opportunity was given to the assessee for examination. Shri Madhubhai and Maganbhai Patel have gone to Settlement Commission of which the assessee is not aware as to what they have disclosed. The assessee has no given copy of settlement petition. The assessee has obtained confirmation in form of affidavits of all the buyers in which they have stated that they have not paid any money over and above the document price. The AO has chosen not to examine them and therefore, what is mentioned in the affidavit has to be accepted as laid down by the Hon'ble Gujarat High Court in the case of Glass Line Equipment 253 ITR 454 (Gujarat) the jurisdiction has followed the decision of Hon`ble Supreme Court in the case of Mehta Parikh & Co. 30 ITR 181 (SC). Further, such identical issue had arisen in the case of Ratan Corporation where the assessee had declared Rs. 1 crores as on-money. The Department did not make inquiry with shopkeepers who alleged to have paid on-*

money. The Tribunal by its order dated 12.11.2003 allowed appeals of the assessee. Department appeals were dismissed by Gujarat High Court in its order dated 21.03.2005 on various grounds one of them being failure of the Department to make inquiry with buyers viz. shopkeepers. That was a case of disclosure whereas the assessee has not made any disclosure of receipt of Rs.208 per Sq. ft. On contrary, he himself has obtained confirmation of sellers. The assessee has not given any opportunity to cross examination of partners of M/s. Vijay Enterprise.

48. On the other hand, the ld. Sr. D.R. submitted that the addition is based on statement recorded under section 132(4) from Shri Maganbhai and Shri Madhubhai Patel and their settlement petition. Therefore, lower authorities were justified in making addition.

49. We have heard the rival submissions and perused the relevant material on record. We find that the addition is based on third party statement and petition filed before Settlement Commission. However, the copy of which has not been supplied to the assessee. Further, the assessee has never confronted with their statement nor allowed cross-examination. The assessee has not made any such admission. Since the assessee has not been allowed opportunity of cross-examination. The assessee has had filed copy of affidavit from buyers who were not examined before the AO. Thus, the AO neither allowed any of cross-examination of Shri Madhubhai Patel or Shri Maganbhai Patel, nor examined the buyers whose affidavits were filed before him sellers. Therefore, the addition is not tenable in law as held by the Hon`ble Supreme Court in the case of Andaman Timber Industries v. Commissioner of Central Excise Kolkata-II [2015] 13 STD 805 (SC) [2015] 281 CTR 241 (SC), wherein it was held that not allowing the assessee to cross examine witnesses by Adjudicating Authority, though statements of those witnesses were made basis of impugned order, amounted to serious flaw which makes impugned order nullity as it amounted to violation of principle of natural justice. Therefore, the addition is made without bringing any evidence of record to support the finding as given by the AO. Further, the AO has not examined the affidavit therefore, such addition cannot be made as held by the Hon'ble Gujarat High Court In the circumstances The AO has chosen not to examine them and therefore, what is mentioned in the affidavit has to be accepted as laid down by the Hon'ble Gujarat High Court in the case of Glass Line Equipment 253 ITR 454 (Gujarat) the jurisdiction has followed the decision of Hon`ble Supreme Court, in the case of Mehta Parikh & Co. 30 ITR 181 (SC), In such circumstances, such addition is not tenable in law. Accordingly, this ground of appeal is allowed in favour of the assessee."

12. In view of above, respectfully following the decision in the case of Shri Ratilal K. Mali, brother of the assessee for assessment year 1997-98 in I.T.A.No. 2127/AHD/2014 dated this grounds of appeal is allowed in favour of the assessee.

13. In the result, the appeal of the assessee partly allowed.

14. In the result, the appeal of the assessee from assessment year

15. The order pronounced in the open Court on 11-12-2019

Sd/-	Sd/-
(SANDEEP GOSAIN)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat: Dated: 11th December, 2019/opm
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/ Guard file of ITAT.

By order

// TRUE COPY //

Assistant Registrar, Surat