

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 410/Del/2016 : Asstt. Year : 2011-12

M/s Kohli Estates Pvt. Ltd., 80, Scindia House, New Delhi-110001	Vs	Income Tax Officer, Ward-14(4), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACK3430D		

Assessee by : Sh. G. S. Kohli, Adv.

Revenue by : Sh. Rakesh Kumar, Sr. DR

Date of Hearing: 18.02.2020

Date of Pronouncement: 05.05.2020

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-5, Delhi dated 26.10.2015.

2. Following grounds have been raised by the assessee:

"1. The learned CIT (Appeal) was not justified in confirming an addition of Rs.9,63,74,327/- by treating it as business income against the appellant's claim of Rs.9,26,86,690/- as "Long Term Capital Gain".

2. The learned A.O. as well as CIT (Appeal) had failed to appreciate the respective submission before them.

3. The learned A.O. as well as CIT(Appeal) had erred in not treating the concerned land as "capital asset" while the regular income shown by the appellant from such land/ investment has been accepted in the earlier years.

4. That the circumstances and facts of the case evidently proves that the concerned land was "Capital Assets", thus the "Capital Gain" earned on its sales deserves to be accepted.

5. The learned CIT (Appeal) was not justified in confirming an addition of Rs.2,00,000/- related to "brokerage paid" u/s 40a(ia) of Income Tax Act, 1961."

3. Brief facts of the case are that the assessee is engaged in purchase and sale of immovable properties. During the year under consideration, the assessee sold agricultural plot at village Bhatti, Hauz Khas, New Delhi for a consideration of Rs. 10,00,00,000/-. After claiming business expenditure against the sale, the net profit of Rs. 9,63,74,327/- was claimed as exempt under section 10 of the Income Tax Act read with section 2(14) on the grounds that the land was located outside the municipal limits. Consequently the return of income was filed on 28.11.2011 for A.Y. 2011-12 declaring "NIL" income. The AO after due enquiries conducted during the assessment regarding the land sold was situated at village Bhatti, Tehsil Hauz Khas, Mehrauli, New Delhi and found that the agricultural land in question was within the municipal limits of South Delhi Municipal Corporation. Accordingly, the AO show-caused the assessee to explain as to why the claim of exemption on sale of agricultural land should be not disallowed. In reply to the show cause the assessee explained that it had already filed revised computation for long term capital gains, and paid tax on the same. It was also claimed that the land was incorrectly disclosed as stock in trade instead of the investment in the balance sheet. The land has been purchased with an intention to earn profit and has been sold after a long period of thirteen

years and was, therefore, a long term investment. It was stated that the main reason for the sale of land was the notice received from Revenue Department to surrender the possession of land as it was an encroachment on the Gaon Sabha Land hence the AO was requested to treat the sale as long term capital gains as the land was a capital asset in the hands of the assessee. Revised balance sheet was filed before the AO on 19.3.2014. However, the AO was not convinced with this argument as the assessee has in the balance sheet itself shown the asset in question as stock of the current year filed along with the original return of income, but also in the previous years. As per the AO the Gujarat High Court in the case of Rewashanker A Kothari 283 ITR 338 (2006) which analyzed various decisions of the Apex Court, the following tests were held to be necessary to determine whether the transaction question was a business transaction or not:

a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

b) The second test that is often applied is as to why and how for what purpose the sale was affected subsequently.

c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account

and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.

e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, the case may be, authorizes such an activity.

f) The last test, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of transaction bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business.

4. According to the A.O almost all the conditions exist in the assessee company's case which leads to the conclusion that the land was held as stock in trade and the resultant income was business income. That the assessee intended to sell the land at the time of purchase was clear from the fact that successive returns have been filed declaring the same as stock in trade. No investments have been made in the last five years. It is only when the department specifically issued the show cause notice

as to why the profits may not be assessed as business income rather than long term capital gains as shown in the return, that the appellant tried to change its stand. The memorandum of association clearly stated that the appellant is engaged in the dealing in land and other properties. Hence, the claim of the assessee that the income resulted from long term capital gains was rejected and the amount of Rs.9,63,74,327/- was treated as business income.

5. The assessee has challenged this finding of the A.O before the Id. CIT (A).

6. Before the Id. CIT (A), the assessee reiterated the arguments that the said land is shown as closing stock of the property which proves that it is being hold as long term investment. It was argued that the AO has wrongly treated the closing stock as stock-in-trade. It was argued that the assessee was under the impression that the agricultural land is fully exempt from LTCG and hence NIL return was filed. It was argued that the assessee revised the ITR and declared the profit on sale of land as Long Term Capital Gains. It was argued that the Long Term Capital Gains paid by the assessee ought to have been accepted as they have been wrongly shown under the head "stock-in-trade" instead of "investment". Such wrong accounting of the land under the head "stock-in-trade" instead of investment can also be verified from the return filed by the assessee. It was argued that the assessee sold the land after a gap of 12 years, hence it should be treated as sale of investment but not sale of stock-in-trade.

7. The Id. CIT (A) rejected the contention of the Id. AR and confirmed the addition made by the Assessing Officer after going through the balance sheet filed by the assessee.

8. Aggrieved with the order of the Id. CIT (A) the assessee filed appeal before the Tribunal.

9. Before us, the assessee filed additional grounds vide verification dated 10.10.2008 while the original grounds were dated 27.06.2016. The additional grounds read as under:

"1. That without prejudice to the earlier grounds of appeal taken by the appellant company the learned AO as well as CIT(Appeal) has erred in assessing the surplus on sale of agricultural land as "business income" where there is an admitted fact the concerned land is an agricultural land which has been accepted in the earlier years.

2. The receipt on its sale neither is to be worked out as "Capital Gain" nor a "business income" as the appellant company is quite eligible to avail its exemption."

10. On going through the original grounds of appeal, we find there is no material difference between the Ground No. 1 of the original grounds and the additional grounds. Both pertains to treatment of capital gains as business income by the Id. CIT(A).

11. The second ground to be adjudicated deals with exemption available to the sale of land if so treated as capital gains.

12. During the arguments before us, the assessee argued based on the submissions and arguments taken up before the revenue authorities. He further filed his written submissions dated 15.10.2018, 24.12.2018 and also on 18.02.2020.

13. The submissions dated 24.12.2018 consists of balance sheets for the subsequent years post the assessment and the sale deeds and purchase deeds of land in question.

14. The contentions of the assessee have been dealt hereunder alongwith the submissions of the assessee.

"The matter before your honour is that the appellant sold the agricultural land for Rs.10 crores from where they derived the surplus/profit of Rs.9,63,74,327/- and claimed its exemption by treating the "capital asset" u/s 2(14) of Income Tax Act, 1961 while the learned A.O. has treated it as "business income".

That during the course of Assessment proceedings, the learned A.O. deputed Income Tax Inspector (ITI) to give the status of land who reported that the concerned land falls within 8 km from the jurisdiction of municipal corporation, therefore, it does not fall u/s 2(14) of Income Tax Act, 1961. The appellant company objected that ITI is not the competent authority to give such certification. That ITI has neither approved valuer nor technical person nor is holder of any qualification to give such certification. The learned AO did not exaggerated this issue, however he treated the profit as "business income" giving the contention that the appellant company theirselves has shown as "stock-in-trade" under the head "Current Assets".

That to strengthen his observation he stated on page-2 of an assessment order that "the assessee deals in purchase and sales of property". He further stated on page 9 that the assessee has shown theirselves as stock-in-trade. It was objected which has been reproduced by AO on page 4 & 6 of an assessment order that it is "long term investment" and being an agricultural land the assessee company is quite eligible to claim its exemption u/s 2(14) of Income Tax Act, 1961.

It is an admitted fact that there is an omission on the part of the assessee company by showing the concerned land under the head "Current Assets" but still it is not

to be treated as "stock-in-trade". The word "stock-in-trade" indicates where there is frequent purchase and sales while the assessee is showing "at cost" since from its purchase (1998 onwards), thus, it deserves to be treated as "long term investment".

In the circumstances and facts stated above the assessee company preferred an appeal before I.T.A.T. taking two grounds summarized as under:-

(1) The concerned land is to be treated as "long term investment", thus, any surplus/profit on its sale is to be treated as "Capital Gain".

(2) That it is an agricultural land, thus the assessee company is quite eligible to claim the surplus/profit exempted.

That irrespective of the fact that there is an omission on the part of assessee company by showing the concerned land under the head "Current Assets" but not shown as "Stock-in-trade", it has been shown as "closing stock of agricultural land". (Balance Sheet from 2001 to 2010 filed in Paper Book from pages 8 to 17). Thus, there are two factors which can give the conclusion of issue:-

1. Holding

Where an assessee holds the assets for sufficient period it give the sense of "long term investment" and on its sale the profit/surplus is to be treated as "capital gain" as held by

393 ITR 132 (8-17)
Gujarat High Court

397 ITR 687 (18-24)
Gujarat High Court

334 ITR 192 (25-26)
Punjab & Haryana High Court

2. At Cost

That where the assessee is regularly showing the value of capital assets "at cost" it is to be treated as "long term investment" because "stock-in-trade" not only fluctuates every year due to frequent purchase and

sales rather always to be shown at "cost or market price whichever is less" or at any standard mode given for specific product.

Here in the instant case there is no dispute as appellant since from its purchase in 1998 is showing at cost subject to improvement held in that very first year by installing tube-well, boundary walls, etc. and has sold it after the lapse of 13 years.

This factor has been considered by

*382 ITR 175 (27-30)
Jammu & Kashmir High Court*

*387 ITR 248 (31-33)
Karnataka High Court*

*333 ITR 445 (34-37)
Delhi High Court*

"It is submitted that even the books of accounts/Balance Sheet is not conclusive in determining the nature of income" as held by

*336 ITR 287 (38-40)
Bombay High Court*

That without prejudice to above the clerical omission deserves to be over ruled in view of the Circular No.14/XL-35/11-04-55 where they held

"Officers of the department must not take advantage of ignorance of an assessee to his rights particularly where some refund or relief is due to assessee."

Copy of circular placed on Page 78 of Paper Book.

The said circular has been followed giving the reference of the said circular by

*243 ITR 56 (41-60)
Supreme Court*

*150 ITR 460 (61-64)
Bombay High Court*

It will be relevant to state here that the CIT (Appeal) to strengthen his order has cited 2 cases where the facts are absolutely different to the appellant's case as in cited cases the "business income" is quite apparent. The learned C.I.T. (Appeal) cited the case

*73 ITR 735 (65-73)
Supreme Court*

It is related to assessment year 1956-57 or to say it is prior to Income Tax Act, 1961. However, in that case the assessee entered into an agreement for the purchase of land for Rs.6,00,000/- and the payment was to be made within stipulated period of about 2 months. The assessee paid Rs.11,000/- but could not pay the balancing amount, however, he availed the benefit of written clause that the "Sale Deed" can be executed either directly by him or by his nominees, thus, the assessee divided the concerned land into 23 plots and out of that he held 1 plot and remaining 22 plots he sold by executing the "Sale Deed" in favour of nominees. That such transactions evidently proves it were business transactions, thus, the Apex court has rightly given the favour to the revenue by treating it as "business income".

The other case cited by the learned CIT (Appeal)

*328 ITR 556 (74-91)
Bombay High Court*

The assessee purchased an agricultural land which was later acquired by Govt. The surplus which he got along with additional compensation was treated as "business income" giving the contents that there was no intention to cultivate it and further the assessee's past history shows that he was engaged in such activities regularly, thus, it is evident it is his business to purchase the land and took the benefit on its acquisition cost as well as additional compensation given by the Govt.

Agricultural land - Exemption

In view of the facts stated above there should be no dispute that the concerned land was a capital assets or

to say "long term investment" and further the surplus/profit derived by the appellant company on its sale deserves to be exempted by taking this capital assets u/s 2(14) of Income Tax Act, 1961 in view of the reasons/supporting documents given hereunder:-

1. The appellant company is regularly showing the "agricultural income" and the revenue has also accepted it as the ITR placed on the record on page 19 to 24 of "Paper Book."

2. That merely by having agricultural crops it cannot be treated as agricultural land. That land deserves to be recorded in revenue estate and such facts are recorded in "Sale Deed" (purchase) on page 84 and 96.

Further on insertion of "circle rate" it was on the part of the registrar to give the status of land, thus, where the appellant company sold the concerned land on 29/01/2011 the status/structure type is given on Page 107 as "agricultural land". Further on Page 110 it has been specifically stated concerned land is recorded in the revenue records.

It is submitted that where the "agricultural land" is sold at nominal value that can be registered even in the Court of Tehsildar but where the quantum is high like in the instant case that is to be executed in the regular office of the registrar by filing the prescribed Form "A" which is to be duly certified by the registrar giving the status of land as it is given on page 117.

Further "girdwari" always given where the land is recorded in revenue estate that has been placed on the record on page 53 to 59.

Where above such factors are available it is to be treated as "agricultural land as held by

*404 ITR 173 (92-95)
Madras High Court*

*409 ITR 196 (96-100)
Gujarat High Court*

Addition of Rs.2,00,000/- related to brokerage

It has been added by the learned Assessing Officer. Giving the contention that TDS has not been deducted on such payment, therefore on violation of proviso u/s 40(a)(1)(a) it has been added. It is humbly submitted the said proviso is applicable where the income is shown under the head "business income" or has claimed an expenditure u/s 37 of Income Tax Act, company has treated the concerned land as 1961 while in the instant case the appellant "capital assets", thus, the said proviso is not applicable."

Submission Dated 15.10.2018

1. Copy of Balance Sheet as on 31/03/1998 and 31/03/2000 to 31/03/2011---- To prove that the appellant company has never stated as Stock-in-trade, however, there is no doubt that the concerned land is appearing under the head "Current Assets" but had always shown it as "Closing Stock of Agricultural Land". It has always been shown "at cost" while in "Stock in Trade" always at "cost or market price whichever is lower" or "at market price. It deserves to be treated as "capital gain".

2. Circumstances and Intention of the assessee always proves the status related to---- "Capital Gain"

(i) How it is valued

Since from the date of its purchase it has always been shown at cost.

(ii) Period of holding of "land"

That the property was with held with the appellant for 13 years and they sold it under the forced circumstances.

(iii) How the treatment is given to "land"

That during the possession of the property the appellant company has always shown "agricultural income" which has been accepted by the revenue. The above factors evidently gives the smell of "investment" and not a "stock in trade".

(iv) It has been well settled law that where the above 3 contents prevails it gives the smell of "investment" and not as "stock in trade" and further by showing it as "closing stock" the appellant cannot be held liable by treating it as "stock in trade".

A. The foremost factor is how the land has been valued since its purchase. If it had been valued "at cost" since from its purchase subject to nominal addition like boundary-wall, it will be treated as "capital gain".

*(i) Karnataka High Court
Principal Commissioner of Income-Tax and Another
vs
Telestar Investments P. Ltd.
387 ITR 248*

"The cost was reflected throughout in the balance-sheet and it was never treated as stock-in-trade showing cost or market price whichever is lower. The profit derived on its sale was assessable as capital gain"

*(ii) Delhi High Court
Commissioner of Income Tax
vs
Jubilant Securities Pvt. Ltd.
333 ITR 445*

"From the very beginning it had been valuing at cost and not on the basis of cost or market price which was lower at the end of relevant accounting years."

*(iii) The Jammu and Kashmir High Court
Commissioner of Income Tax
vs
Smaa Enterprises Pvt. Ltd.
382 ITR 175*

"It is an admitted fact that the assessee hold stock in trade but without placing any material particularly where it has always been shown as stock from the very beginning.-----The claim of the revenue is doing stock-in-trade is without any basis and no material was

brought on record to show that the assessee had been valuing its holding at the end of the year on FIFO method or at cost or market price whichever is lower."

B. Holding Period

Gujarat High Court
Commissioner of Income Tax
vs
Tejas Securities
393 ITR 132

"The Commissioner of Income Tax (Appeal) and the Appellate Tribunal had rightly come to the conclusion considering the holding period etc. and had specifically held that the transaction could not be said to be frequent transaction of purchase and sale with a view to earn quick profit and to treat it as business income. The Tribunal has rightly treated it as short term capital gain and to levy tax U/s 111 A of Income Tax Act, 1961."

Gujarat High Court
Deepaben Amitbhai Shah
vs
Deputy Commissioner of Income Tax
397 ITR 687

"The period of holding plays a vital role. Any trader deriving the business income won't block his assets for a long period, therefore, the profit derived on such sale deserves to be assessable as capital gain".

Punjab & Haryana High Court
Commissioner of Income Tax
Vs
Amit Modi
334 ITR 192

"Investment in shares with the intention by holding them as investment and surplus arising on its sale has rightly been declared by the assessee under the head capital gain."

*Bombay High Court
Commissioner of Income Tax
vs
Gopal Purohit
336 ITR 287*

"It is held that the entries in the books of accounts alone are not conclusive in determining the return of income. The circumstances, facts of the case and intention of the assessee is to be seen, thus, the Tribunal has rightly treated as short term capital gain and long term capital gain for the respective sections."

That without prejudice to above any omission on the part of the assessee, the revenue should not take undue benefit of it.

Board's Circular No.14(xl-35) dated 11/04/1955 clearly stipulates:-

Officers of the department must not take advantage of ignorance of an assessee to his rights. It is one of their duty to assist a "tax payer" in every reasonable way particularly in the matter of claiming and securing relief."

That without prejudice to above the appellant is quite eligible to avail its exemption as the concerned land is neither capital asset nor the current asset as it is an agricultural land thus, as defined u/s 2(14) is not to be treated as capital assets.

The agricultural income has been accepted in the earlier years as the ITR are placed on the record on Pages 19-24.

It is also brought to your kind notice that in the year when the assessment is made the concerned land became within 8 km limit due to tremendous change of municipality location. But to assess the liability of the assessee the status of the land is to be considered for the year under assessment and not to the period when the assessment is to be assessed. The relevant documents in this respect are enclosed on Pages 19-24 and 52-77."

15. The Id. DR relied on the orders of the Id. CIT (A).

16. Heard the arguments of both the parties and perused the material available on record.

Adjudication as to whether the income earned by the assessee constitute business income or Long Term Capital Gains:

17. We find that the assessee has always shown it as closing stock of agricultural land in the balance sheets. The contention of the assessee that it has always been shown at cost while in stock-in-trade it is always at cost or market price whichever is lower. The arguments of the assessee that since the land have been always valued at cost doesn't give any credence to treat them as capital asset. Even in closing stock or stock-in-trade, the valuation is always as per the market price or the cost price whichever is lower. There is no proof that the cost price has gone down so as to take it at a lower price. Hence, the assessee's contention is that since the land is always valued at cost not at market price cannot be accepted. The period of holding for 13 years cannot be considered to treat the land as investments as it is not the case that all the unsold stock-in-trade should always been treated as investments. Further, we find that the assessee has been continuously treating the land as closing stock in the books of accounts. The argument that the assessee's agricultural income derived out of this land has been accepted by the revenue cannot give rise to a conclusion that the land is held as investment. The deriving of agricultural income from a land doesn't necessarily entitles land to be an investment or for that matter to be an agricultural land in

accordance with the provisions of Section 2(14) and Section 2(14)(iii) the Income Tax Act eligible for exemption not being a capital asset. We have also gone through the Memorandum and Article of Association which proves that the assessee is primarily into business of purchase and dispose of land and plots. The main objects to be pursued by the company on its incorporation are as under:

"1. To purchase, acquire, take on lease in exchange or in any other lawful manner any area, land, buildings, structures and to develop the same and dispose of or maintain the same and build township, markets, or other buildings, or conveniences thereon and to equip the same or any part thereof with all or any amenities or conveniences drainage, electric, telegraphic, telephonic, television installations and to deal with the same in any manner.

2. To acquire land and plots for colonization or otherwise sell plots, construct buildings and flats for sale on installments or otherwise and to act as real estate agents.

3. To lay out, develop, construct, build, erect, demolish re-erect, alter, repair, or do any other work in connection with any building or building schemes, roads, highways, sewers, bridges, canals, walls, dam, power plants, reservoirs, embankments, railways, airports irrigations, reclamations, improvements, sanitary, water and power supply works, or any other structural or architectural work and for such purpose to prepare estimates, designs, plans, specification or models."

18. We have also perused the objects incidental or ancillary to attainment of the main object.

"1. To acquire by purchase, lease, exchange or otherwise any movable or immovable property and any rights or privileges which the company may think necessary or convenient for the purpose of its business and either to retain the same or turn the same to account, as may seem expedient.

2. To enter into partnership or into any arrangement for sharing profits, union of interest, joint venture, reciprocal

concession or co-operation with persons or companies carrying on or engaged in any business or transaction which this company is authorized to carry on."

19. We have also perused the case laws submitted by the assessee. The case CIT Vs Tejas Securities 393 ITR 132 (Guj.), Deepa Ben Shah Vs DCIT 397 ITR 687, CIT Vs dealt with Short Term Capital Gains Vs business income in case of share transaction by a broker. Neither the facts nor the ratio is applicable to the instant case as that case deals with various parameters laid down by the CBDT as to how the holding period of the shares be considered. The case of CIT Vs Amit Modi 334 ITR 192 (P&H) also deals with the treatment of surplus arising on the sale of shares by an assessee taking into consideration of multiple factors for inferring whether a particular transactions is an adventure in the nature of trade or not. Similarly, the case of CIT Vs SMAA Enterprises 382 ITR 175 deals with treatment of shares made out of own funds. Similarly, the case of Telestar Investment 387 ITR 248 and Jubilant Securities Pvt. Ltd. 333 ITR 445 have been perused and found that the facts are pertaining to share transaction and investment and the ratio is not applicable to the instant case.

20. In the case of CIT Vs Gopal Purohit 336 ITR 287, the Hon'ble High Court of Bombay upheld the Tribunal findings that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical. It decided against the action of the revenue to treat the income differently in one particular year against regular method followed by the assessee and the revenue. Similarly, the judgment of Hon'ble Supreme Court in the case Mahendra Mills 243 ITR 56 held that the department cannot take the advantage of mistake done by the

assessee. This judgment has been delivered in connection with non-claiming of depreciation by the assessee in the return which has been claimed as a later date. The other case laws filed by the Id. AR have been duly perused and find that they are not applicable to the facts of the case. Most of the case laws relied upon by the Id. AR pertains to treatment of unsold stock-in-trade as investment by the stock brokers at the completion of the financial year. The conversion of stock-in-trade to investments is a continuous process resorted to by these stock brokers which the revenue disputed to be treated as investments. Similarly, we have also gone through the judgment wherein the revenue cannot take the benefit of the mistake committed by the assessee in offering the income to tax. We have also gone through the judgments stating that books of accounts is not the final authority to determine the nature of the transactions. In this background, we have gone through the nature of the transactions independently so as to determine whether the land in question is investment or stock-in-trade irrespective of the fact whether the books of accounts have been wrongly accounted or whether the capital gains have been wrongly offered to tax.

21. The assessee has also taken plea that the land has been sold only on account of the notice received from the revenue department to surrender the land as it was an encroachment on the Gaon Sabha Land. The notice was issued in the year 1997 hence cannot be given any relevance with regard to determination for the issue before us. The fact that the land in question has been sold after obtaining NOC from the ADM, South District, New Delhi on 24.01.2011. We find that the main

objects of the company are to acquire purchase take on lease are otherwise any land building, structures plot to act as real estate agents in connection with buildings schemes and also to be colonizers to sale plots and flats. Having acquired the land as stock-in-trade, the land continued to be held for business purpose and continued to be shown as closing stock for all the years. The assessee is into the business of acquiring and sale of plot and colonizers. Hence, on going through the Memorandum and Articles of Association, conduct and business affairs of the assessee, and on perusal of the books of accounts of the assessee, it cannot to be said to be an income arising out of capital gains and has been rightly treated as business income by the Id. CIT (A).

Adjudication as to whether the capital gains are eligible to avail its exemption:

22. Since, we have already ruled that the income derived by the assessee is "business income" but not "capital gains", any adjudication as to whether the capital gains are eligible for exemption or not would be only academic in nature. As a ground to this extent has been taken by the assessee, the same is being adjudicated as under:

23. Section 2(14)(iii) deals with agricultural land in India with regard to the meaning of capital asset. The Section reads as under:

*"Section 2(14).....
(iii) agricultural land in India, not being land situate—*

*(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand [***] ; or*

[(b) in any area within the distance, measured aerially,—

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;]]"

24. The fundamental principles with regard to the Section 2(14)(iii) can be summed up in the case of assessee as under:

- a. *"No land within the municipal limit of Delhi can be considered as agricultural land.*
- b. *The issue of population arises if the land is situated outside the limits of the municipality. In that case the twin conditions of distance and the population have to be made to claim it as a non-capital asset."*

25. The assessee's contention that South Delhi Municipal Corporation has come into existence in the year 2011 doesn't materially support anything with regard to the municipal limit as even after bifurcation, the municipal limit remained unaltered. Hence, even based on the municipal limits of Delhi Municipal Corporation or even based on municipal limits of South Delhi Municipal Corporation, the assessee's land which is in the Bhatti, Hauz Khas, New Delhi falls within the jurisdiction of the municipality at the time of purchase and at the time of sale as well as at the time of sale cannot escape the rigors of taxation.

26. Since, the income earned has been already adjudicated on merits to be taxed as "business income", it is hereby clarified that the treatment proposed by the assessee to consider the proceeds of the sale of land under the head "Long Term Capital Gains" and subsequent exemption from taxation cannot be held to be valid in the eyes of law.

27. Regarding the disallowance of Rs.2,00,000/- u/s 40(a)(ia), the assessee claimed to have paid brokerage to a person namely, Sh. Sunder Singh. The assessee submitted that since this is the first year of business transaction in the absence of TAN, no TDS could be deducted. The Id. CIT (A) upheld the disallowance u/s 40(a)(ia) on the grounds that the assessee is not a new company and been in the business of land transactions from 1997 and the provisions of TDS are clearly defaulted by the assessee. In the absence of any evidences contra, putforth by the assessee, we hereby decline to interfere with the order of the Id. CIT (A) on this issue.

28. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 05/05/2020.

Sd/-

(Amit Shukla)
Judicial Member

Dated: 05/05/2020

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR