

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Shri Shamim Yahya (AM)

I.T.A. No. 4280/Mum/2019 (Assessment Year 2015-16)

M/s. Nancy Traders Midtown Heritage Shop No. 7-14, Opp Virdhavan Paradise Vasant Valley Road Gandhare Village Khadakpada, Kalyan Maharashtra-421 301. PAN : AAGFN3518E (Appellant)	Vs.	DCIT, Circle-2 2 nd Floor, Mohan Plaza, Wayale Nagar, Khadakpada Kalyan West Maharashtra Pincode-421 301. (Respondent)
---	-----	---

Assessee by	Shri Sunil Makhija
Department by	Ms. Smita Verma
Date of Hearing	15.12.2020
Date of Pronouncement	03.02.2021

ORDER

This is an appeal by the assessee directed against the order of learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] dated 3.5.2019 pertaining to assessment year 2015-16.

2. The grounds of appeal read as under :-

1. The Ld. CIT(A) has seriously erred in confirming the action of Assessing Officer in setting off business loss against the profit of the firm which included profit on sale of plot which was trading asset of the assessee only on the ground that inadvertently/on account of typographical error that the said asset was shown as fixed asset in the balance sheet of earlier years ignoring the documentary evidences produced to the effect that it was trading asset only.

2. Without prejudice to the above the appellant submits that the Ld. CIT(A) has seriously erred in ignoring the ratio laid down by various courts which are of binding nature up on them to the effect that mere entry in the books of accounts does not decide the nature of income when other circumstances clearly supports assessee's contention.

3. The appellant craves leave to add, amend, alter or vary any of the grounds at the time or before the hearing of this appeal.
 4. The appellant therefore prays that assessing officer may please be directed to hold the surplus earned on transfer of land held as trading asset as part of business profit instead of short term capital gain and allow to set off the same against brought forward business losses of firm of earlier year.
3. Brief facts of the case are During the year under consideration, the assessee had sold vide agreement dated 26.11.2014 an immovable property bearing survey No.-1 Hissa No. -1A and Hissa No. 2, Chikhloli, Thane for Rs. 14,47,80,300/- alongwith three other partners. The said property was purchased vide agreement dated 16.07.2013 for Rs. 88,75,000/-. The total consideration on sale of property comes to Rs. 3,61,95,075/- being 25% share of the assessee. AO noted that it is seen that the assessee has shown in the audit report for A.Y. 2012-13 and 2013-14 nature of business as Dealers in Electronic Items and Trading. He further noted that the above mentioned property was purchased during the F.Y2013-14 (date 16.07.2013) and the same plot was shown in the balance sheet under the head Fixed Assets as plot at Ambernath valued at Rs. 1,10,99,954/- (including registration fees and various expenses) during the A.Y 2014-15.
4. Assessing Officer further observed that on going through the deed of retirement of partners and reconstitution of firm wherein it is seen that assessee had shown nature of business of sale and purchase of Electronic/Electrical Appliances. That in this agreement no business activity was mentioned against business and developers. That a stamp paper was purchased on 11.03.2013 for amendment in partnership deed under the name of Nancy Traders wherein the signature was executed adding builders and developers, dealing in real estate, dealers in sale and purchase of TDR (Transfer of Development Rights) also as nature of business for Nancy Traders. That subsequently, the said plot was sold out on 26.11.2014 before 36 months. That the profit/gain of Rs. 2,44,32,077/- has been credited in the profit and loss account as profit on sale of plot. The net profit of Rs.

2,44,49,627/- has been set off with brought forward business loss of Rs. 15,97,358/- and brought forward depreciation of Rs. 2,04,96,065/-.

5. The Assessing Officer held that the assessee has shown the plot at Ambernath in its Audited Financials under Fixed asset Schedule for A.Y 2014-15. That also there is nothing qualified in the Tax Audit Report of either A. Y 2014-15 or 2015-16, that a capital asset has been converted into Stock-in-trade. That this clearly shows that, the asset transacted is a Capital Asset which has been sold within a period of 36 months, to a Short Term Capital gain. Assessing Officer was of the opinion that considering these factual aspect and the statutory provisions for set off of brought forward losses within the meaning of the provision of section 73A(2), which clearly mentions that brought forward business loss cannot be set off against Capital gain.

6. On inquiry assessee informed that it was an inadvertent mistake to classify the land as fixed asset. However the Assessing Officer was not convinced. He held as under :-

“The assessee amended the partnership deed. In spite of amending the partnership deed and change in business, the assessee chose to classify the asset under Fixed Asset. It is important to mention that the assessee group is renowned group in the real estate sector and has successfully completed various real estate projects across the state wherein deduction is available to the profits. The assessee group is well aware of the provisions of the sections of the I.T. Act, 1961 and classification of assets into Current or Fixed assets. The auditor himself has supported the stand of the assessee that the said asset is a fixed asset. So, it is difficult to believe that this was an inadvertent error. The assessee has heavily relied upon the decision of jurisdictional Bombay High Court in M/s Sanchit software and Solutions Pvt Ltd V/s CIT 8 and others in writ petition no 783 of 2012 dated 07/09/2012. The said decision is not covering the assessee's case since there is no inadvertent error, but a well thought after and conscious decision to put the asset under Fixed asset. Also the other judicial pronouncements relied upon by the assessee are not applicable in the instant case since the present case is taxability of a transaction shown as per the audited financials of the assessee and its set-off with brought forward losses. The judgment cited relates to allowability of expenses and whether they are revenue or capital in nature.

In case the assessee intended to regard the same as business asset, then it would have converted this capital asset into stock in trade and would have reported the same in column no. 15 of the tax audit report for mere

repetition, it is brought to notice that the assessee group is technically aware of the statutory and legal provisions as discussed in para above.

Since the assessee itself has put the assessee in the block of assets, the sale of which is resulting in the value of that block becoming Nil and the resultant gain/profit is taxable as short term capital gains.

Hence, it seems to be a deliberate attempt on the part of the assessee to hood wink the department with the motive of escaping the taxation provision. Therefore, the brought forward business loss of Rs. 15,97,358/- cannot be set off against the short term capital gain as per provision of section 73A(2) of the Act. The penalty proceedings u/s 271(l)(c) are separately initiated for furnishing inaccurate particulars of income of Rs. 15,97,358/-."

7. Upon assessee's appeal learned CIT(A) summarised the facts as under :-

(a) That originally appellant firm was engaged in the business of trading of electronic items, **(b)** On 11/3/2013, appellant firm purchased stamp paper for carrying out amendment in partnership deed (page no. 34 of paper book) and on 01/4/2013, appellant firm amended the partnership deed wherein they appended the business activities that of builders and developers, dealing in real estate, dealers in sale and purchase of TDR (Transfer of Development Rights) (page no. 35 of paper book). **(c)** On 16/7/2013, appellant firm purchased a land for a consideration of Rs. 88,75,000/-, the total cost of which including the expenditure thereon, was Rs. 1,10,99,954/-, **(d)** While finalizing the books of accounts as on 31/03/2014 (relevant to A.Y. 2014-15) the year in which the land was purchased, the land under consideration is shown under the head fixed assets (page no. 84 of paper book), **(e)** Appellant firm has sold the said land, vide agreement dated 26/11/2014, (i.e. F.Y. 2014-15, relevant to A.Y. 2015-16) for a consideration of Rs.3,61,95,075/-, resulting into earning surplus of Rs.2,44,32,077/-, **(f)** The said surplus earned on sale of land is offered by appellant firm as its business income, in the P & L A/c. (page no. 62 of paper book), **(g)** However, the AO while completing the assessment has treated the same as short term capital gain, for the reason that appellant firm itself had shown the land as fixed asset in Balance Sheet for earlier year i.e. F.Y. 2013-14 (A.Y. 2014-15).

8. He noted following submission from the assessee :-

"During the course of appellate proceedings, the AR of the appellant has drawn any attention to the fact that, before entering into the business transaction relating to its real estate business, the appellant firm has amended the partnership deed which fact has been accepted by the assessing officer in para 6.1 of his order & as such according to him appellant firm has followed the due procedure by amending the partnership deed before having entered into real estate business transaction. The Ld. AR of appellant has further drawn my attention to the reply filed by him in the course of appellate proceedings, which he has reproduced at pg Nos. 3 to 6 of his submissions filed before me. He has particularly pointed out the relevant portion at Pg. No.4, wherein he has stated of having mentioned the nature of business in column 10(a) of form 3CD as that of retailers & also builders. He

also raised the contention that, the assessing officer has not commented a word on this issue but has simply held it to be a capital asset only due to an inadvertent error having been made while finalising the books of accounts, for earlier year.

The A.R of appellant has relied upon on various judgements in support of his contention that mere entry/treatment given by appellant to a particular transaction does not and/or is not conclusive in determining the actual nature of transaction.”

9. However without making any discussion on the assessee’s submission he confirmed the Assessing Officer’s action and held as under :-

“In view of the above discussions, as also bearing in mind entirety of the case, I am of the considered view that, the assessing officer has rightly disallowed the claim of set-off of business loss, treating the profit on sale of land as Short Term Capital Gain. In support of the AO, the undersigned has further observed that, the aforesaid land was shown in the balance sheet under the head capital asset in the year of purchase of the land i.e.F.Y.2013-14 relevant to A.Y.2014-15 and the appellant has also not converted' from capital asset to stock in trade, therefore, the appellant has failed to fulfill the basic requirement to treat as business profit. Even If the appellant has amended the partnership deed, however, it cannot be considered the aforesaid land as stock in trade because each asset has to be categorized, whether it is held as capital asset or stock in trade.”

10. Against the above order the assessee is in appeal before the ITAT. I have heard both the counsel and perused the records. In find that the sole issue raised by the authorities below is to treat the surplus on sale of land as short term capital gain as against business income treated by the assessee. I note that the partnership deed amendment has been done on the stamp paper of 11/3/13 wherein assessee has brought in the partnership deed that it is also dealing in real estate, builder and developer etcetera. This is accepted by the Assessing Officer. The impugned land was purchased on 16/7/2013. This date is clearly after the amendment in the partnership deed bringing into the deed that the assessee was also dealing in the business of real estate developer. In these circumstances when the said land was sold the revenue authorities have tried to thrust upon the assessee that the said sale of land resulted in short-term capital gain. This has been done solely on the ground that assessee has classified the said land as fixed asset. It is settled law that description in the

books of account is not the determinative of the true nature of the transaction. The fact that the partnership deed has been duly amended bringing into account the fact that assessee was dealing in the business of real estate developer prior to the purchase of land and that the tax audit report also showed the assessee to be in the said business cannot be ignored. The assessee's plea that it was an inadvertent mistake to classify the same as fixed asset has to be accepted. No cogent reason has been brought on record by the authorities below to dispute the facts as recorded above.

11. Except for mentioning about the assessee's classification in earlier year authorities will have not at all commented upon the assessee's explanation that the said purchase of land happened after the assessee started the business of dealing in land and real estate and the fact that auditor in the auditor's report did mention the same as the assessee's business. In this view of the matter authorities below action has no legs to stand. The gain is directed to be treated as business income with the necessary consequences. Accordingly I set aside the orders of authorities below and decide the issue in favour of the assessee.

12. In the result this appeal by the assessee stands allowed.

Order pronounced under Rule 34(4) of the ITAT Rules by placing the result on notice board on 3.2.2021.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 03/02/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai

6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai