

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C" NEW DELHI"**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.3565/DEL/2015  
Assessment Year: 2010-11

Joginder Pal M/s. Raj Kumar & Associates, CAs, L-7 A, South Ext., Part-2 New Delhi – 110 049 PAN AKLPP5112F	Vs.	ITO Ward-39(1) New Delhi.
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by:	Shri Raj Kumar Gupta, CA Shri Sorabh Jain, CA
Department by :	Shri Gaurav Dudreja, Sr.DR
Date of Hearing	10/12/2020
Date of pronouncement	10/03/2021

**ORDER**

**PER AMIT SHUKLA, J.M.:**

The aforesaid appeal has been filed by the assessee against impugned order dated 10.4., passed by Ld. CIT (Appeals) XX New Delhi for the quantum of assessment passed u/s 143(3) of the I.T. Act. In the grounds of appeal the assessee has raised following grounds:-

1. *"That under the facts and circumstances, the proceedings and consequential Asstt. is barred by limitation for not serving the statutory notice u/s. 143 (2) within the time allowed as per proviso to Sec. 143 (2) of the I.T. Act.*

2. *That under the facts and circumstances, both the lower authorities erred in law as well as on merits in adopting the circle rate of Rs. 1,30,77,000/- as purchase cost of Indirapuram Property against declared at Rs. 41,80,000/-, thus, in making and sustaining addition of Rs. 88,97,000/- (1,30,77,000 - 41,80,000) U/s. 68 as investment in purchase of property from undisclosed sources.*
3. *That under the facts and circumstances, both the lower authorities erred in law and on merits in not accepting that the assessee has been into real estate business also and in rejecting the books of accounts for real estate business. Consequently, erred in not accepting the real estate P & L a/c. showing sale of Indirapuram property at Rs. 1,31,00,000/- as a business receipt and **further** erred in treating the Indirapuram property as Capital Asset and consequently calculating Short Term Capital Gain (STCG) at Rs. 80,04,500/- (1,31,00,000 - 50,95,500).*
4. *That under the facts and circumstances, both the lower authorities erred in law as well as on merits in not allowing the loss of Rs. 70 lacs suffered on account of forfeiture of advance given against Panipat property and also erred in not treating it as business loss.*
5. *That **without prejudice to** G.N. 4, alternatively, the loss of Rs. 70 lacs should have been allowed as short term capital loss eligible for setting off against any short term capital gain (STCG).*
6. *That under the facts and circumstances, both the lower authorities erred in law and on merits in presuming the net profits of M/s. Goodluck Tyres at Rs. 54,291/- by presuming the N.P. at 10.60% on sales of Rs. 5,12,180/-."*

2. The facts, in brief, in the grounds of appeal raised are that assessee is an individual and proprietor of M/s Tyre Shed which is engaged in the business of trading of tyres, tubes and flaps. During the year under consideration, the assessee has declared total sales at

Rs. 13,90,69,368/- and net profit was declared at Rs. 15,88,080/- and accordingly, e-return was filed declaring total income of Rs. 15,88,080/- on 29.09.2010. Thereafter, notice u/s 143(2) has been issued, which as per the assessment order is dated 29.9.2011, stated to have been served upon the assessee on 30.09.2011. One of the contentions raised by the assessee before the Ld. CIT(A) as well as in the ground of appeal No. 1 before us is that the assessee was not served upon the said notice u/s 143(2) on 30.09.2011 and the date has been manipulated on the receiving by interpolating the date which in fact was served on 1.10.2011. Another notice u/s 143(2), dated 29.09.2011 was served through speed post which was served on 4.2.2011; and thus it was contended that both the notices have been served beyond the statutory time period which was ending on 30.09.2011. This issue was challenged before the Ld. CIT (A) that the date appearing below the signature of the assessee is 30.09.2011 has been manipulated by changing the date, because the notice was actually served after 30.09.2011. Thereafter, the Ld. CIT (A) sought for the report from the AO. The Ld. CIT (A) after perusal of the records has observed and held as under :-

- > *“The notice has been received by the appellant himself as is apparent from the signatures on the notice and the date and time of receipt of the notice as well as the telephone number.*
- > *The signatures, date and telephone number of the appellant have been written in close proximity, thus must be written by the same person.*
- > *No objection regarding the valid service of notice has been raised by the appellant during assessment proceedings.*
- > *Objection raised during appeal is clearly an afterthought.*
- > *There is an overwriting not only in respect of date, month but also*

*in respect of the year. There is overwriting also in respect of telephone number. Thus the overwriting cannot be by any departmental person.*

- > This shows that the cause of overwriting is not manipulation or due to shaking of hand of the writer but due to some problem with the pen or lack of proper base or due to nervousness at the time of receipt of notice*
- > Without prejudice to above provisions of Section 292BB was introduced w.e.f. 1-4-2008 , according to which, where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. Where the assessee has raised objection regarding issue of notice before the completion of such assessment or reassessment, the provisions contained u/s 292BB will not be applied. Since no objection has been raised by the appellant during assessment proceedings therefore provisions of Section 292BB are applicable.*

*THUS on the basis of above facts the service of notice is held to be valid and within time and the ground of appeal is dismissed.”*

3. Before us, Ld. Counsel Shri Raj Kumar Gupta submitted that the notice dated 30.9.2011 was physically served on the assessee on 1.10.2011 and another notice was received by post on 4.10.2011 which is not in dispute. During the assessment proceedings itself the

assessee vide letter dated 6.8.2012 informed the AO that the notice was served on 1.10.2011 on 2 pm and similarly another notice has been served on 4.10.2011 on 2.42 pm. However, the AO despite raising specific objection did not adjudicate this objection. It has also been placed on record that the notice u/s 143(2) which has been alleged to be served by hand on 30.9.2011 has been procured from the department through RTI application placed in the second paper book at page 9. From there, he pointed out that there is a clear cut interpolation whereby date of 1.10.2011 has been interpolated as 30.09.2011. The signature and the time and the telephone number are in the handwriting of the assessee himself, but there is an interpolation in the date. He heavily harped upon the interpolation done in the said date and submitted that, had the service been taken place of on 30.09.2011 by hand then there was no reason for sending another notice on the same date through speed post. In sums and substance his arguments can be summarised as under:-

- *Notice Dtd. 30.09.11 was physically served on assessee on 01.10.11*
- *Since notice Dtd.29.09.11 was reed, **by post on 04.10.11**, therefore, during asstt., vide letter Dtd. 10.10.11 sent through speed post, the assessee informed the A.O. that notice has been served on 04.10.11 at 2:42 PM*
- *Again during asstt., vide **letter Dtd.06.08.12**, the assessee re-informed the A.O. that the notice by hand was served on 01.10.11 at 2 PM and similar notice by speed post was served on 04.10.11 at 2:42 PM*
- *The A.O., in spite of objections taken during asstt. as required **u/s.292BB**, did not adjudicate this objection in whole asstt.*
- *During appeal proceedings, the copy of by hand served **notice was taken through RTI***
- *It was signed, with date, with time and with telephone no. by the assessee himself*

- Now, if we see this notice, the date of “**01.10.11**” has been interpolated as “**30.09.11**”
- There is **no dispute** that signatures, the time as 2 PM and the telephone no. are in the handwriting of assessee himself
- The numerals “**0**”, “**1**” & “**9**” are common in the date and telephone no.
- It will be noticed that the manuscript of these 03 numerals in the date and in the telephone no. are clearly not of the same person being **interpolated / overwritten subsequently with shaken hands**
- There is **no shivering in the hands of the assessee** while writing as is apparent from his signatures, the time put and the telephone no. put by assessee himself
- There was **no reason for the assessee to do overwriting** on the date of service while there existed a strong reason for the A.O. for overwriting, for showing the service in time
- Even in the complete **order sheet** taken through **RTI** there is no mention of any service of notice on 30.09.11
- Had the service being there on 30.09.11, there was no reason for the assessee to put the time of receipt of notice as “2 PM”
- **Had the service took place on 30.09.11 by hand**, there was no reason for sending the notice by speed post it was reed, on 04.10.11 at 2:42 PM, which must has been sent after 30.09.11 since speed post is served within 24 hours
- During appeal proceedings, the assessee duly filed his **affidavit** Dtd.03.01.15 mentioning all these facts
- During appeal proceedings, **CIT(A) personally called the assessee** and took his signatures and the dates and his writing of similar words and figures to match it with the notice and found that there was no similarity
- **CIT(A) also called for asstt. records** and did not find anything therein which may show the undisputed service on or before 30.09.11

- **Remand report** of A.O. wrongly mentioned that this objection was not taken during asstt. therefore cannot be entertained **u/s.292BB**
- **CIT(A) also wrongly dismissed this contention** mainly on the ground that no objection was taken during asstt. and it is clearly and after thought
- Copy of the same was **taken from A.O. through RTI** during CIT(A) appeal proceedings
- The assessee signed, put date, put time and his telephone no. in his own handwriting and the date of service was put as 01.10.11 and not as 30.09.11
- Clearly and apparently, the facts and circumstances shows that to just show the service in time, the date put by assessee as 01.10.11 has been interpolated as 30.09.11
- By filing the affidavit to be considered with other evidences, the **onus** of assessee stands discharged to prove his case while the onus of A.O. remains un-discharged
- This issue was vigorously raised before CIT(A) also.

4. On the other hand, Ld. DR after referring to the finding of the fact by the Ld. CIT(A) that has been incorporated above, submitted that nowhere it can be established that the date has been manipulated by the AO. Thus, such an unsubstantiated allegation is completely false.

5. After considering the aforesaid submissions and on perusal of the relevant records, specifically the notice u/s 143(2) dated 29.9.2011 placed in the Paper Book 2 at page 9, it is seen that the said notice contains; **signature of the assessee; date mentioned is 30.9.2011; time 2 pm; and telephone number 01147059177.** Apparently, there is some overwriting in the date, but it cannot be established that the date has been interpolated to 30.9.2011 from

1.11.2011 unless some forensic report is obtained from expert. In the notice, the date of receiving is clearly mentioned below the signature of the assessee which is 30.09.2011, though there is overwriting. But to allege that it was done by AO or any staff and to establish it as matter a fact that any interpolation or mischief has been done is difficult to accept. If the assessee is making any charge of interpolation then he should have then asked for forensic examination. Under these circumstances, the benefit of doubt cannot be given to the assessee. Accordingly, we hold that notice was served on to the assessee on 30.9.2011. Accordingly ground No. 1 is dismissed.

6. Now coming to issue of addition of Rs. 88,97,333/- made u/s 68 and also other grounds, the facts in brief are that as per AIR details, it was found that assessee has purchased property bearing Hall No.3 & 4 Ground floor, under *Block No. A & B, Gaur Gravity, Gaur Green city, Plot No. 8, Vaibhav Khand, Indrapuram, Ghaziabad*. Information was also sought by the AO u/s 133(6) from the Sub Registrar, Ghaziabad, wherein it was intimated that the sale consideration of the said property was Rs. 41,80,000/- and the value as per Stamp Valuation Authority was Rs. 1,30,77,000/-. The assessee's contention was that assessee has purchased the property at sum of Rs. 41,80,000/- on which stamp duty paid was 9,15,500/- and, therefore, the total cost to the assessee was Rs. 50,95,500/-. However, the stamp duty was paid on the circle rate at Rs. 1,30,77,000/- as per the sale deed dated 11.8.2009. The AO further noted that assessee has not shown the purchase of the property in his return of income and in response to the show cause notice the assessee gave the explanation that during the previous year assessee had endeavoured into a new business of real estate by purchasing the properties, developing the same into a profitable venture and sell the same. In such venture, the assessee

had incurred loss in the new business and, therefore, inadvertently no claim was made in the computation of income. The claim of loss was on the ground that the assessee had entered into an agreement for purchase of land at Village Sewah, Panipat for a sum of Rs. 2,50,00,000/- with two ladies, Mrs. Veena Saluja and Mrs. Usha Saluja and as per the agreement, he has given an advance of Rs. 35,00,000/- each ladies. Later on, assessee came to know that project would not be permitted by the Govt. and therefore, the claim was cancelled and extinguished all the rights and claims in the agreement and the advance given by him was retained by the selling parties. Since the property at Indirapuram, Ghaziabad was sold at Rs. 1,31,00,000/-, therefore, the assessee had computed the net loss on the so called property business in the following manner :-

Particulars	Amount	Particulars	Amount
Purchase	51,03,600	Sale	1,31,00,000
Alterations and constructions	7,63,000		
Stamp Duty	1,91,900		
Legal Fees	3,500		
Advance for purchases forfeited	70,00,000		
Conveyance	13,440		
Entertainment	3100		
Maintenance	21,689		
Telephone	1300		
Net profit	<b>(1,695)</b>		
Total	1,31,00,000		1,31,00,000

7. Ld. AO, first of all held that in so far as the difference between purchase of property at Indirapuram shown at Rs. 41,80,000/- and

the circle rate of the property at Rs. 1,30,77,000/-, the difference of Rs. 88,97,000/- was added by him u/s 68.

8. Thereafter, the AO rejected the assessee's revised claim of doing the property business and net loss claim in such property business. After detailed reasoning, AO held that there was a short term capital gain on the sale of property, because the assessee has shown purchase at Rs. 50,95,500/- and sold the property at Rs. 1,31,00,000/- and therefore, the difference of Rs. 80,04,500/- is a short term capital gain and not business income. Since he had already made the addition of Rs. 88,97,000/- on account of addition u/s 68 being a difference amount in purchase and sale consideration, therefore, he did not added separately the short term capital gain of Rs. 88,04,500/- as it relate to the same transaction.

9. AO again disallowed the loss of Rs. 70,00,000/- claimed on the forfeited advance given for purchase of property at Panipat on the ground that the agreement with these two ladies was made on Rs. 100 stamp paper, because, neither the date was mentioned on which these stamp papers were purchased nor the date on which these two agreements were executed were made available. He had also sent notices u/s 133(6) from both the ladies. In response the two ladies have confirmed to have received the amount Rs. 35,00,000/- towards advance but he observed that no where it has been stated that these advances were forfeited by them. Accordingly, he disallowed the claim of loss of Rs. 70,00,000/- on account of forfeiture of account.

10. Ld. CIT(A) in so far as rejection of assessee's claim of new business venture with regard to transaction of purchase and sale of Indirapuram, Ghaziabad property had rejected the said contention on the following grounds :-

*“In the return of income only trading of Tyre and Tube business was reflected.*

*Inspite of the time available to him the assessee did not revise his return to show any income/loss from property business.*

*The books of accounts produced by the assessee only related to the business of M/s. Tyre Shed and no books of account in respect of property business were produced by the assessee.*

*The assessee had failed to establish that he was actually doing property business and the same was declared in the return of income.*

*The alleged property business consisted of only a single transaction and that too for the first time in the relevant year.*

*The assessee was asked to produce the return of income for A.Y. 2011-12 and 2012-13 and on examining these it was seen that there is no sale purchase of properties in subsequent years.*

*As per the confirmations received from Mrs. Usha Saluja and Mrs. Veena Saluja nowhere it has been mentioned that the deal has been cancelled and the money has been retained by them.*

*The reason given by the assessee regarding cancellation of the agreement has also not been found convincing.”*

And, therefore, he held that AO has rightly added an amount as short term capital gain. Since the AO had already added investment of Rs.

88,97,000/- out of undisclosed source, therefore, he held that no separate addition required to be made.

11. Before the Ld. CIT(A), the assessee had filed an application under Rule 46A wherein confirmation from Mrs. Veena Saluja and Mrs. Usha Saluja was filed stating that they have received the advance. However, he noted that inspite of repeated opportunities provided to the assessee before the AO they did not appear. In the confirmation letter they have stated as under :-

1. *“Bank statement from 01.04.2010 to 31.03.2011 is attached highlighting the receipt of Rs. 35 lacs from Joginder Pal as bayana*
2. *Original copy of agreement with Sh. Joginder Pal as he was the buyer.*
3. *No formal cancelation deed was executed. It was treated as canceled as on 31.03.2010, as it was written in the Agreement itself. The bayana amount of Rs. 35 lacs was forfeited, as Sh. Joginder Pal did not make further payments, and did not appear for getting land registered in his name on the due date.*
4. *The said property is still, in our possession as it is owned by us. Copy of the ownership documents are filed.*
5. *Copy of ITR of A. Y. 2010 -2011 & 2011 - 2012 are filed*
6. *As the summons dtd. 30.09.2014 for 09.10.2014 have been received on 08.10.2014 and there are already some pre - engagements, therefore, appearance cannot be made on 09.10.2014. We had filed letter earlier and now we are sending details as required by your goodself.”*

12. In sums and substance the Ld. CIT(A) after considering the entire facts has disallowed the adjustment of loss of Rs. 70,00,000/- and the claim of business loss in the following manner :-

- ❖ *“The property transaction entered into by the appellant during the year in respect of Indrapuram property and Panipat property were not reflected in the return of income.*
- ❖ *The claim of the appellant that the property transactions were part of a new business started by the appellant is not backed by any evidence in subsequent returns.*
- ❖ *The appellant has claimed that it had got the books of account in respect of real estate transactions audited, but though the audit report was produced however the books of accounts or the vouchers of expenses were not produced.*
- ❖ *No revised return showing the profit/loss in respect of real estate business was filed by the appellant.*
- ❖ *It is not only Income/loss which have an impact on the total taxable income which is declared in the Income Tax Return but also exempt income which has no impact on the amount of tax due is reflected in the return. Thus the claim of the appellant that the return was not revised as there was no impact on the taxable income is not accepted.*
- ❖ *The assessee has been unable to thus show the genuineness of the real estate business. The Assessing Officer rejection of books of accounts in respect of Real estate business is therefore upheld.*
- ❖ *The Assessing Officer’s action in holding the income from sale purchase of property as taxable under the head capital gains rather than under the head income from business and profession is therefore upheld.*
- ❖ *The claim of the appellant to allow adjustment of loss of Rs.70 lacs against short term capital gain is rejected as there is no such provisions under the Income Tax Act. Forfeiture of earnest money*

*by the vendor if due to default on the part of vendee, will not amount to relinquishment of a right in that asset. Therefore the amount forfeited will not be allowed as a capital loss under the head capital gains as held in CIT vs. Sterling Investment Corporation Ltd (1980) 123 ITR 441. Further, the genuineness of the transaction has not been proved by producing Mrs. Veena Saluja and Mrs. Usha Saluja and by showing that the entries of payment were appearing in their bank statement.*

- ❖ *Without prejudice to above even if it is held that the transaction entered into by the appellant were in the nature of business transactions even then the advance money for the purchase of a property cannot be treated as a business expenditure incurred by the buyer as the transaction has not crystallized and the forfeiture of the money by the seller is a capital loss. In CIT vs. Jaipur Mineral Develop Syndicate (1995) 216 ITR 469 (Raj), it was held that if the payment is made for the purpose of acquiring a capital asset, the amount lost upon forfeiture will not be considered as revenue loss though the amount may not have the same consequence or character in the hands of the recipient or beneficiary. Thus even in that case the amount of difference between the purchase and sale price of the Indrapuram Property would be taxable income in the hands of the appellant.*
- ❖ *The Assessing Officer has further made an addition of Rs.88,97,000/- under section 68, without prejudice to the above addition by invoking section 68 in respect of cash payment made in purchase of Indrapuram property on the basis of Circle Rate applicable for the area. The perusal of the facts of the case show that the appellant has himself shown a rise of 300% in the value of the property from a purchase price of Rs. 41,80,000/- to a sale price of Rs. Rs.1,31,00,000/- within the same year. In any market in any area under any conditions this is impossible. Though the provisions of Section 50C are not applicable in case of a purchaser however keeping in view the specific facts of the case, without*

*prejudice to above, the addition of Rs. 88,97,000/-made by the Assessing Officer is upheld.”*

13. We have heard the rival submissions and also perused the relevant finding given in the impugned order as well as material referred to before us. Though all the three issues are by and large interlinked, but we will first deal with the issue of addition of Rs. 88,97,000/- made by the AO u/s 68 by taking the difference between the purchase consideration and circle rate as unexplained investment/credit. It is an undisputed fact that the purchase consideration as per the registered sale deed is Rs. 41,80,000/- and for the purpose of stamp duty valuation the circle rate of the property was at Rs. 1,30,77,000/-. First of all, provision of section 50C as was prevalent at the time of registration of sale deed i.e., 11.1.2009, it was applicable only in the case of the seller and not in the hands of the purchaser; and that to be it was for calculating the capital gain in the hands of the seller. The deeming fiction for taxing such transaction in the hands of the purchaser came w.e.f. 1.10.2009 u/s 56(2)(vii) (b), wherein it has been provided that if any property has been received for a consideration which is less than the stamp duty valuation the same valuation is to be treated as income in the hands of purchaser or receiver. Thus, without any evidence on material on record to show that the assessee had paid over and above the sale consideration price, it cannot be deemed or presumed that assessee must have paid the price over and above the purchase consideration. In any case, section 68 would not be applicable in the present case, since no sum has been found to be credited in the books of accounts of the assessee. These additions can be made only under the deeming provision u/s 50C or u/s 56 (2) (vii) (b), which we have already held that it is not applicable in the case of the assessee. Accordingly, there

is no ground to sustain the addition of Rs. 88,97,333/-. Hence, same is directed to be deleted.

14. In so far as the issue of accepting or non accepting the real estate business and treating the transaction of purchase and sale of Indirapuram property as short term capital gain of Rs. 80,04,500/-, the contention of the Ld. Counsel before us in short are as under :-

- *The assessee commenced real estate business in this year.*
- *Indirapuram property was purchased on 11.08.09 for Rs.50,95,500/-, expenditure of Rs.7,63,000/- incurred on alterations and constructions and thereafter sold on 27.01.10 for Rs.1,31,000/- vide registered sale deed.*
- *One more real estate business transaction also took place in this year for which G. No.4 & 5 have been taken separately.*
- *The A.O., however noted that no tax audit report was furnished in respect of this business and no P&L was filed alongwith the return.*
  - *The ITR was filed on 29.09.10, however after filing the ITR, the counsel was informed of this independent business activity started in this year.*
  - *On advice of counsel, the A/c of real estate business were audited vide audit report Dtd.30.09.10 and audit report, audited financial A/c and computation of income were filed to the A.O. during asstt. However, since the net result of this business was Rs.(-)1695/-, therefore it was not creating any tax liability, hence as per the advice of counsel, no revised return was filed.*
- *During asstt., audited bal. sheet, audited report and computation of income of real estate business were filed to the A.O.*

- *The A.O. has also abstracted the audited P&L A/c in the asstt. Order.*
- *The property was purchased with the intention of its sale after getting it renovated.*
- *Hence the property purchased on 11.08.19, thereafter incurred Rs.7,63,000/- on its alterations and construction and then sold on 27.01.10 i.e. within the same year, clearly shows the intention of the assessee not to get the property as a capital asset but as a stock of newly started real estate business.*
- *The assessee produced complete books of A/c etc. wherein no discrepancy was pointed out, hence the A.O. is wrong in mentioning that books and supporting of this business are not produced.*
- *Auditor also certified in the audit report that he examined books of A/c and other supporting and no discrepancy has been found in this finding of auditor.*
- *Simply not filing the audit report and not including the business results of real estate business in ITR is not sufficient for holding that no real estate business activity has been done in this year, especially when the same stood provided during asstt. with no discrepancy and also there existed a reasonable cause for not including the same in the ITR and also for not filing the revise return as already explained above”*

15. On the other hand, Ld. DR strongly relied the order of the reasoning of the Ld. CIT (A) as well as by the AO.

16. As stated above, the assessee had purchased the property at Indirapuram Ghaziabad on 11.8.2009 for Rs. 50,95,500/- including the stamp duty. It further stated to have incurred expenditure of Rs. 7,63,000/- on alterations and constructions which was sold at Rs.

1,31,0,000/- on 27.1.2010. First of all, neither in the original return of income nor in the initial stage there was any claim nor any mention that assessee had purchased the property which has been declared or shown as stock-in-trade. The said claim was only made during the course of assessment proceedings after getting the fresh audit and the audited balance sheet and computation of income of real estate business was filed before the AO. However, neither the intention nor the conduct of the assessee reflects that the assessee was doing or intended to do any real estate business nor it has been demonstrated that in the subsequent years the assessee has been carrying out any real estate business. The assessee might have incurred expenditure on the improvement of the property before the sale of Rs. 7,63,000/-, but that does not mean it is some kind of business expenditure related to the property business. At the most it could be treated as an improvement after the acquisition of the capital asset for which benefit of indexation can be given while computing the capital gain. Accordingly, we confirm the finding of the AO and Ld. CIT (A) that the purchase and sale of property has to be treated as short term capital gain.

17. However, as pointed out by the Ld. Counsel the benefit of improvement of Rs. 7,63,000/- has not been given. This issue has not been discussed by the AO. Therefore, AO needs to verify and examine the cost of improvement. Accordingly, we hold that sale of Indirapuram property is to be taxed under the head **short term capital gain** and not under the head business income. However, the computation of short term capital gain would be done by the AO after taking in to consideration any cost of improvement if the assessee provides the details.

18. Lastly, coming to the claim of loss of Rs. 70,00,000/- of forfeiture of advance given for purchase of property of Panipat, we find that there is no dispute that assessee has entered into an agreement for purchase of property at Panipat from Mrs. Usha Saluja and Mrs. Veena Saluja for Rs. 2.5 Crore against which the assessee had given Rs. 35,00,000/- to each of the ladies as advance, that is Rs. 70,00,000/-. The details of such advances given are as under :-

Intending Seller	Advance Given		Total Agreed Amount	Copy of agreement
	Cheque/DD	Date		
Usha Saluja	95537	04.02.2010	25,00,000/-	Yes
	346474	04.03.2010	10,00,000/-	
Veena Saluja	95538	04.02.2010	25,00,000/-	Yes
	346473	04.03.2010	10,00,000/-	

19. The factum of the payment of advance to these two parties cannot be disputed for the reason that, firstly, there is an agreement entered into by these two ladies against which the advance has been given through cheque; and secondly, they have confirmed the receipt of advance before the AO. The whole dispute is regarding forfeiture of the said advance by these two ladies. The AO's case is that in their confirmation, there is no mention that the money is to be forfeited by them. Therefore, it cannot be taken as money stands forfeited. The Ld. Counsel had drawn our attention to the notice sent u/s 133(6) by the AO and pointed out that, AO never specifically asked to inform whether the advance to be forfeited and therefore, there is no occasion for the ladies to make any mention on this aspect. From the perusal of the said notice, we find this contention to be correct. Later on, both the ladies vide confirmation dated 20.9.2014 sent to the AO directly had confirmed about the cancellation of the agreement and have admitted that the amount have been forfeited by them and the said

property continues to be with them. In order to prove that the amount was received and still with them they have also filed their bank statements. In so far as the personal presence by both the ladies, they have specifically communicated to the AO to give further time due to their preoccupation. This cannot be the ground for disbelieving the entire transaction of forfeiture. If the confirmation of cancellation of agreement and forfeiture of the said amount stood confirmed, then certainly there is a loss incurred to the assessee.

20. However, the said loss cannot be said to be a business loss as we have already held above that assessee was not into the business of dealing in property. But certainly this loss is on account of capital loss, because the money was advanced for purchase of a capital asset and as per the agreement, the assessee got a vested right on the said property after the payment of advance. Further, there was a stipulation that if the entire amount is not paid then the advance amount would be forfeited. Right to acquire property is a capital asset and when the said right got extinguished due to cancellation of agreement and amount got forfeited, and then certainly it is a capital loss. In such a case, short term capital loss is to be set off against short term capital gain within the same year in terms of section 70(2) of the Act and accordingly, we direct the AO to allow the loss of Rs. 70,00,000/- from short term capital gain as directed above.

21. Accordingly ground No. 2 is allowed; ground No. 3 is partly allowed as we have treated the gain as short term capital gain; ground No. 4 is dismissed; whereas ground No. 5 which is alternative ground which is allowed.

22. Now coming to the presumption of net profit of Rs. 54,291/- by presuming the net profit at 10.60% on sale of Rs. 5,12,180/-. The facts are that the assessee was proprietor of M/s. Goodluck Tyres up to

assessment year 2009-10 and the closing stock of the business as on 31.03.2009 was Rs. 5,12,180/-. Since the assessee had decided not to continue his sole proprietary business after 31.03.2010, therefore, no purchases were made in the financial year 2009-10 and the existing stock was sold at cost and no profit was declared. The AO on presumptive basis has applied a net profit rate of 10.60% on the declared sales as was there in assessment year 2009-10. First of all, neither there any discrepancy has been found nor there is any material that the assessee has sold the stock at a higher price. Apart from that, the net profit earned for the entire year when the business is full-fledged run, cannot be applied when the business has been closed down and the existing stock has been disposed of at whatever best available price. Hence, under these circumstances such an estimation of net profit is not warranted and the same is directed to be deleted.

23. In the result the appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 10<sup>th</sup> March, 2021.

sd/-  
**(PRASHANT MAHARISHI)**  
**ACCOUNTANT MEMBER**

sd/-  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Dated: 10/03/2021

***Veena***

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR

ITAT, New Delhi