

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD “D” BENCH**

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER  
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER)**

[Through Virtual Court]

**ITA. No: 147/Ahd/2019  
(Assessment Years: 2013-14)**

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| <b>Yagnesh Dayabhai Vyas<br/>(Prop. Premire Design) 10,<br/>Chanrakant B/h Lal<br/>Bunglows, Ellisbridge,<br/>Ahmedabad-380061</b> |  | <b>I.T.O, Ward-4(2)(5),<br/>Ahmedabad</b> |
| <b>PAN No. ABHPV 1757F</b>   |  |   |
| <b>(Appellant)</b>   |  | <b>(Respondent)</b>                       |

**Appellant by : Shri Biren Shah, A.R.  
Respondent by : Shri Shyam Prasad, Sr. D.R.**

**(आदेश)/ORDER**

Date of hearing : 28-04-2021  
Date of Pronouncement : 16 -06-2021

**PER MAHAVIR PRASAD, J.M.**

1. This appeal has been filed by the Assessee is directed against the order of the Commissioner of Income Tax (hereinafter called CIT(A)) order no. CIT(A)-

4/10308/2016-17 order dated 20/12/2018 arising out of assessment order dated 30.03.2016. Assessee has taken following grounds of appeal:

- 1. In Law and in the facts and circumstances of the appellant's case, the Ld CIT(A) has grossly erred in upholding the disallowance of Rs 58,55,3151- out of total addition made by Assessing Officer of Rs 61,11,115/- being opening balance of sundry creditors in the books of accounts of the assessee.*
- 2. In Law and in the facts and circumstances of the appellant's case, the Ld CIT(A) has grossly erred in not allowing the additional claim raised by the appellant during the course of assessment proceedings being inadvertently by oversight short term capital gain of Rs 22,88,832/- was offered in return of income filed u/s 139(1) though the property was not transferred during the year under consideration.*
- 3. The appellant craves leave to add, amend and/or alter the ground or grounds of appeal either before or at the time of hearing of the appeal.*

2. Brief facts of the case are that the assessee is in the business of Building Construction and architectural work.
3. On perusal of details submitted during the course of assessment proceeding, it is noticed that assessee has shown sundry creditor of Rs. 66,01,980/-. Thereafter assessee was asked to provide name, present address, PAN, Contact No. and contra ledger confirmation of sundry creditors. Assessee TMT Bar and materials from several parties and list of the same was supplied to the Assessing Officer. For purchase of items at Rs.61,11,115/- total from 8 parties.
4. Thereafter A.O. has issued notice u/s 133(6) to 8 sundry creditors having opening balance for confirmation of outstanding amount due to them in the books of accounts of the proprietorship firm of the assessee. But out of 8 creditors only 1 creditor has confirm the transaction with the assessee and 1 creditor has rescind the transaction and rest of 6 creditors are not traceable hence notices were unserved.

5. On the other hand assessee's contention was that he has purchased material from the parties and delivery challan were issued and in some of the case part payment was made through banking channel. But A.O. was of the opinion these were mere accommodation entries and not we are purchases and made addition of Rs. 61,11,115/-.
6. Thereafter assessee preferred first statutory appeal before the Ld. CIT(A) . Before the Ld. CIT(A) submitted that the disputed amount is at Rs. 58,55,315/- and not Rs. 61,11,115/- and Ld. CIT(A) confirmed the order of the ld. A.O.
7. Now Assessee has come before us by way of second statutory appeal is stated that opening balance of sundry creditors has been added by the lower authorities and sales made against the purchase of above creditors not disturbed. Purchases made from creditors were in earlier year payments were made through banking channel and same are part of paper book at page no. 24 to 46 and ledger account of creditors along with statement of purchases are part of paper book at page no. 47 to 77.
8. Ld. A.R. cited a judgment of Jurisdictional High Court in the case of Dattatray Poultry Breeding Farm Ltd. vs. ACIT reported in [2019] 104 taxmann.com 366 (Guj.) wherein it is held :

*15. From the findings recorded by the Assessing Officer as well as the Tribunal, it appears that the very genuineness of such entries has been doubted, inasmuch as the Assessing Officer has tried to verify the existence of such liabilities from the creditors, however, many were not found at the given address and some of them had categorically denied having any transaction with the assessee. In the opinion of this court, if the existence of such liabilities is doubted, the same could have been disallowed in the year in which it was claimed, or could have been treated as unexplained cash credit in the hands of the assessee under section 68 of the Act in the relevant assessment year, but the same cannot be taxed under section*

*41(1) of the Act, inasmuch as if the liability itself is not genuine, the question of remission or cessation thereof would not arise.*

9. Ld. A.R. cited a judgment of ITAT Delhi Bench in the matter of Smt. Sudha Loyalka vs. ITO where A.O. made addition to assessee's income under section 69C in respect of amount payable to creditors towards purchases, in view of fact that said purchases were duly recorded in books of account and sales made against those purchases were not disputed, impugned addition was to be set aside. ITAT held no addition could be made under section 41(1) in respect of unexplained purchases where amount was shown as payable in balance sheet and thus there was no cessation of liability.
10. Respectfully following the Jurisdictional High Court order and parity with the Delhi ITAT order and sales were not disputed by the lower authorities, so in view of the above, we allow this ground of appeal.
11. The next ground is relating to confirming the addition of Rs. 22,88,832/- being short term capital gain erroneously considered by the appellant in computation of total income.
12. The ground is relating to notional short term capital gain on transfer or otherwise of some real estate asset. The appellant stated that asset was converted from fixed asset to investment in the year consideration but same has not been disposed off and has been accounted at the original value in all the years ending on 31.03.2018. The copy of balance-sheets filed indicate that the same is shown at Rs. 1,20,02,487/- for years ending on 31.03.2018. The A.O. has noted that the property has been purchased at the cost of Rs. 97,13,655/- and has been converted to stock in trade at stamp duty valuation of Rs. 1,20,02,487/-. And held that provision of section 45(2) are applicable in this case.

- Section 45(2) contemplate: Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.
13. Ld. D.R. vehemently relied on the orders of the lower authorities.
14. We have gone through the relevant record and impugned order. Contention of the Id. A..R. was that assessee moved an application u/s. 154 of the Act stating that he has inadvertently made the claim of capital gain and explained all the details pertaining to property. But Ld. A.O. did not agree with the assessee and assessee did not raise this issue before the ld. CIT(A). Ld. A.R. cited the case of CIT vs. Mitesh Impex [2014] 46 taxmann.com 30 (Guj.) wherein Hon'ble Gujarat High Court has held that if any legal contention or even a claim would be permissible to be raised for the first time before the appellate authority or the Tribunal when facts necessary to examine such ground, contention or claim are already on record. In such a case the situation would be akin to allowing a pure question of law to be raised at any stage of the proceedings. This is precisely what has happened in the present case. The Appellate Commissioner and the Tribunal did not need to nor did they travel beyond the materials already on record in order to examine the claims of the assessee for deductions under section 80-IB and 80HHC of the Act.
15. The present Assessee's case is of assessment year 2014-15 and after going through the sale deed we have noted that property was sold on 19.08.2019 and in his balance sheet assessee has shown it as an investment not as a closing stock and same is part of paper book at page no. 5. Since assessee inadvertently shown the property as

capital asset and moved an application before the lower authority u/s 154 for rectification of the order but ld. A.O. did not pay and any heed and same property was shown as investment in the individual balance sheet of the assessee. In such case notional capital gain cannot be added. Thus this ground of appeal of the assessee is allowed.

16. In the result, appeal filed by the Assessee is allowed.

Order pronounced in Open Court on 16- 06- 2021

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER True Copy**  
Ahmedabad: Dated 16/06/2021

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

**Sd/-**  
**(MAHAVIR PRASAD)**  
**JUDICIAL MEMBER**

By ORDER

Deputy/Asstt.Registrar  
ITAT,Ahmedabad