

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD “B” BENCH  
(Conducted Through Virtual Court)  
Before: **Shri Rajpal Yadav, Vice President**  
And **Shri Amarjit Singh, Accountant Member**

**ITA No. 2211/Ahd/2018**  
**Assessment Year 2015-16**

The ITO, Ward-3(3)(5), Ahmedabad (Appellant)	Vs	M/s. Vishwesh Co-op. Housing Society Ltd. 8, Rajsuya Bunglows, Nr. Sukomal Flats, Ramdevnagar, Satellite, Ahmedabad-380015 PAN: AABAV6865A (Respondent)
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**Revenue by: Shri Vinod Tanwani, CIT-D.R.**  
**Assessee by: Shri Tushar Hemani, Sr. A.R. &**  
**Shri Parimal Singh Parmar, A.R.**

Date of hearing : 16-08-2021  
Date of pronouncement : 19-08-2021

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

This revenue’s appeal for A.Y. 2015-16, arises from order of the CIT(A)-3, Ahmedabad dated 28-08-2018, in proceedings under section 143(3) of the Income Tax Act, 1961; in short “the Act”.

2. The solitary ground of appeal is directed against the order of Id. CIT(A) in deleting the addition of Rs. 11,55,30,800/- made by the Assessing Officer on account of long term capital gain.

3. The fact in brief is that turn of income declaring income of Rs. nil was filed on 2<sup>nd</sup> Sep, 2015. The case was subject to scrutiny assessment. Notice u/s. 143(2) was issued on 20<sup>th</sup> Sep, 2016. On perusal of the detail filed by the assessee during the course of assessment proceedings, the Assessing Officer observed that assessee has escaped his liability to pay tax on long term capital gain arising out of sale on immovable property i.e. open land. On query, the assessee explained that the assessee society was merely acting as a facilitator and the capital gain on the sale of property was belonged to the individual members who were the real owners since the investment was made by those individual members. It was further submitted that the impugned capital gain was fully disclosed in the return of income of the individual member and in the case of the 4 members, the cases were selected for scrutiny and assessment were finalized u/s. 143(3) of the Act. In these four cases, the Assessing Officer have accepted the long term capital shown in the return of income. The assessee has submitted that these facts indicate that the department has accepted that the gain from the sale of land was rightly shown in the return of income by the individual members. In this regard, the assessee has also enclosed the copies of assessment order passed in the case of individual members for the assessment year 2015-16. The Assessing Officer has not agreed with the submission of the assessee. The Assessing Officer has also stated that the copies of all the share certificates have not been submitted by the assessee for verification and the authenticity

of share certificate was also doubtful. The Assessing Officer has also pointed out that purchase deed was in the name of the assessee society and liability of tax payment is lie in the society and not on the member. Therefore, the Assessing Officer has treated the long term capital gain of Rs. 11,55,30,800/- as taxable in the hands of the assessee society and added in its income.

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of Id. CIT(A) is reproduced as under:-

*“3.2 Decision I have perused the assessment order and the appellant's submission. Shri Rajni Shah, C.A. made comprehensive submission and explained the case. It is observed that during the course of the assessment proceedings, the appellant had made a reference to the Jurisdictional Jt. CIT to give necessary directions to the AO u/s. 144A of the Act. The JCIT had thereafter given instructions to the AO for verification of certain documents/information. It is observed that all the information/documents that were called upon by the JCIT, Range-3(3), Ahmedabad were submitted by the appellant and were verified by the AO.*

***Secondly**, the only question that arises for consideration is who is the real owner of the impugned property and in whose hands the income from the sale of the same should be taxable. The payments for the purchase of the property were made by the individual members of the society and therefore it was the members who were the real owners of the society since the society was merely acting as a facilitator.*

*Thirdly, at the time of the sale of the property the consideration was received by the above members and the capital gain on the sale of the property was disclosed by the above members in their returns of income and had paid tax thereon. All the members of the society were assessed to tax and 4 out of the above 10 members were already been assessed to tax u/s. 143(3) of the Act whereby the capital gain shown by them in their individual return of income have been accepted by the AOs. Appellant has also raised the issue of double taxation of the same income. It is not out of place to mention that all such four assessment orders u/s. 143(3) have been issued in the jurisdiction of JCIT, Range-3(3), Ahmedabad. The scrutiny orders accepting the impugned capital gains have been issued in following cases:*

*Babubhai P. Patel*

*Vaishali B. Patel*

*Madhuben Patel*

*Babubhai Patel - HUF*

*The facts have been perused once again as per ratio laid down in the case of Jute Corporation of India Ltd. - 187 ITR 688 (SC). The factual position emerges as is indicated in the chart below:-*

Name of the Assessee	Share Certificate No.	Amt of Share cont	Share	Cost	Indexed Cost	Sale Value	Capital Gain	Exemption	Net Gain	Total Income	Tax Paid
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Babu bhai Patel	12	250	16.26	1200000	2622653	19512000	16889337	15889337	0	784920	79294
Babu bhai Patel HUF	15	250	16.)	1240000	2726797	20163000	17436203	17436203	0	712210	69465
Ketan Patel	13	250	10.84	800000	1753665	13008000	11254335	5000000	6254336	750730	1614002
Ketan Patel HUF	16	250	6.78	500000	1090166	813 0000	7039834	7039814	0	407320	16204
Darc hana Patel	1	250	13.01	960000	2107531	15610000	13502469	5000000	8502463	1015274 0	2377672
Madh uben Patel	11	250	16.26	1200000	2622663	19512000	16889337	16889337	0	816080	85712
Vaish al Patel	2	250	17.62	1300000	2781166	21138000	18356834	18355834	0	584500	43157
D tiara Patel	10	250	0.81	60000	132700	976000	843300	0	843300	843300	132220
Smita Gand hi	14	250	0.95	70000	154816	1068000	913184	0	913184	913180	126315
Dhire n Patel	3	250	0,68	50000	110583	813000	702417	0	702417	773940	108343
		2500		7380000							4642384

*In light of the above, it becomes clear that there is no diversion of income by the appellant since it is the individual members of the society who are the real owners of the property and it is their obligation to offer LTCG correctly in their individual income tax returns. In this regards, the appellant has relied on the decision of the Amritsar Bench of ITAT in the case of Mohinder Kaur Josh (ITA No. 697/Asr/2013) wherein it has held as under:*

*"We have heard the rival submissions carefully and find that the Society was formed by various Members for the purpose of purchase of land and to develop the same and they allotted the plots to the Members The Society purchased 21.2 acres of land and ultimately plots in the sizes of 500sqyd and 1000sqyd were allotted to various Members. When the proposal for development of property came it was resolved in the General Body Meeting of the Society that the Members would*

surrender their rights in favour of the Society so that the Society can enter into the JDA. Thus it is clear that the Society has entered into JDA on behalf of the Members. **It is the members who are owning the plots and the Society was only a facilitator.** It becomes clear from the JDA that payment for consideration was to be made to an individual plot holder and in fact consideration was mentioned in terms of per Member. Each Member holding 500sqyd plot was to receive a sum of Rs. 82,50,000/- and one fully Furnished flat measuring 2250 sqft and the Members holding 1000sqyd plot were to receive monetary consideration of Rs. 1.65 crores plus two flats measuring 2250 sqft. **In tact the payment of cheques is made by Hash by issuing cheques in the name of individual Member and not the Society.** This fact stands admitted because assessee has filed a return declaring capital gain against part money received against his plot. **Thus it becomes clear that it is the individual member who are liable to tax in respect of transfer to plots and the Society being only a facilitator of Post Office** Some more details have been discussed in this respect while adjudicating the appeal of Punjabi Coop House Building Society Ltd. in ITA No. 310/Chdf2012 and 556/Chd/2012 which have been adjudicated little later in this order itself. Accordingly we find no force in the submissions and this ground is rejected."

The appellant also invited my attention to the circular of the CBDT No, 9 dated 25.3. 1 969 wherein it has been instructed as under:

"1 . Instructions were issued in 1955 to the effect that in the case of tenant co-partnership co-operative housing societies, the income from each building should be assessed in the hands of the individual members to whom it had been allotted, notwithstanding the facts that the technical legal ownership in the property in such cases vested in the society. However, it has now been represented to the Board that in the case of tenant co-partnership co-operative housing societies, the societies are usually only lessees of the flats and the legal ownership of the flats really vests in the individual members themselves.

2. The normal procedure in such cases is that an agreement is entered into between the builder and each purchaser of the flat in the building proposed to be constructed. The purchaser pays the entire cost of the flat in instalments spread over the period of the construction. As soon as the building is completed, the builder gives the possession of flats to the various purchasers, who then join together to form a cooperative society. The builder who had originally purchased the land or taken it on lease, transfers the land and the building thereon to the co-operative society. The society then allots the tenancy in the flats to the members in such a way that each member gets the tenancy rights over the flat which he has purchased.

3. The Board are advised that under the above arrangement, the legal ownership in the flats can be said to vest in the individual members themselves and not in the co-operative society. Hence, for all purposes (including attachment and recovery of tax, etc.) the individual members should be regarded as the legal owners of the property in question.

In light of the aforesaid case laws and the CBDT Circular, it is noted that it is the individual members of the society who are the real owners and not the society and therefore the income ought to be included in the hands of the members of the society.

As already pointed out above that 4 out of the 10 members of the society were also subjected to scrutiny u/s. 143(3) of the Act, particularly with reference to the impugned transaction and all the 4 cases, the respective AO accepted the returned income of the individual members as the assessed income, A copy each of such orders issued in 2017 by the AO in the same Range jurisdiction, has been placed on record. Therefore, once the impugned capital gain was taxed in the hands of the individual members, the same cannot be taxed in the hands of the society. The ground No.1 raising specific contention about the departmental procedure has not been individually adjudicated as the overall decision would take care of such procedural matters.

In view of above facts and the ratio laid down in the case laws (supra), the addition made by the AO is not sustainable. Therefore, the addition made by AO is hereby deleted. The ground No.1 to 4 of appeal is **allowed.**"

5. During the course of appellate proceedings before us, the Id. Departmental Representative has relied on the order of Assessing Officer.

On the other hand, Id. counsel has filed paper book comprising detail and copies of document furnished before the lower authorities during the course of assessment and appellate proceedings. The Id. counsel has supported the order of Id. CIT(A).

6. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above in this order, the Assessing Officer has taken a view that the long term capital gain on sale of plot of land to be taxed in the hands of the assessee society whereas the assessee pleaded that such long term capital gain will be taxable in the hands of the members of the assessee society who were the real owners of the land. The Assessing Officer has made impugned addition of Rs. 11,55,30,800/- as long term capital gain in the hands of the assessee society, the Id. CIT(A) has deleted the impugned addition. The Id. CIT(A) has also held that once the impugned capital gain was taxed in the hands of the individual member the same cannot be taxed in the hands of the society. On perusal, it is observed that members of the society have contributed funds for the purchase of the land. The land was purchased by the society only after the introduction of the new members along with the old continuing members who were the real owners of the land. On sale of the land, the society has made distribution to the members in the proportion of the contribution made by the members at the time of the purchase of the land. The genuineness of the member was established from the filing of their income tax return and assessment made in some of the cases. The Assessing Officer has not brought on record any material which establish non-genuineness of the members of the society. It is undisputed fact that all the members of the society were assessed to tax, in

the case of the four members assessments have been made u/s. 143(3) of the Act, the capital gain shown by them in their return of income was duly accepted by the Assessing Officer, in all these four cases assessment were made in the jurisdiction of the same range wherein the case of the society was assessed. Under the circumstances, action of the Assessing Officer for taxing the long term capital gain arising on sale of land in the hands of the assessee society is amount to double taxation since the same has been taxed in the hands of individual member. After considering the above cited facts and circumstances, we consider that Id. CIT(A) has rightly deleted the impugned addition. Therefore, we do not find any merit in the appeal of the revenue and the same stands dismissed.

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 19-08-2021

**Sd/-**  
**(RAJPAL YADAV)**  
**VICE PRESIDENT**  
**Ahmedabad : Dated 19/08/2021**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
अहमदाबाद