

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" A " BENCH, AHMEDABAD

**BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकरअपीलसं./ITA No.1273/AHD/2019
निर्धारणवर्ष/Asstt. Year: 2016-17

D.C.I.T. Central Circle-1(1), Ahmedabad,	Vs.	DRV Builders Pvt. Ltd. 101, Chinubhai Centre, Ashram Road, Nehru Bridge Corner, Ahmedabad-380015 PAN: AACCD3894N
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(Applicant)		(Respondent)
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Revenue by :	Shri B. P. Makwana, Sr. D.R
Assessee by :	Shri Tushar Hemani, Sr. Advocate with Shri Parimalsinh B. Parmar & Shri Vijay Govani, A.Rs.

सुनवाईकीतारीख/**Date of Hearing** : **24/11/2022**
घोषणाकीतारीख/**Date of Pronouncement**: **23/12/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax(Appeals)-11, Ahmedabad, dated 29/05/2019 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2016-17.

2. The solitary issue raised by the Revenue is that the learned CIT-A erred in deleting the addition of Rs. 1,78,29,700/- business income on sale of land.

3. The facts in brief are that the assessee in the present case is a private limited company and engaged in the business of real estate development. The assessee in the financial year 2006-07 has purchased a piece of land which was classified in its balance sheet as fixed asset. As per the assessee, it was intending to construct the hotel on such piece of land and for this purpose, it has entered into an agreement with the company namely City Max Hotels (I) Pvt. Ltd. Some advance money was also provided by City Max Hotels (I) Pvt. Ltd in connection with the construction of the hotel on such piece of plot. However, such agreement was cancelled at the end of FY 2007-08 and thereafter the assessee has also returned the advance money received from the City Max Hotels (I) Pvt. Ltd. However, the assessee continued to show such land as fixed assets in the books of accounts despite the fact that the assessee was engaged in the real estate business activities.

3.1 The assessee has also utilized borrowed fund for the purchase of impugned land and therefore the assessee capitalized the interest paid on such borrowed loan to the fixed assets as the development expenses. Besides, the assessee was also incurring other expenses in connection with such land which were also capitalized. The details of the interest expenses along with the other details of expenses stand as under:

<i>S.NO</i>	<i>PARTICULAR</i>	<i>Amount</i>
01	Bore A/c	654697/-
02	Electrification A/c	61708/-
03	Land Development	18200071/-
04	Site Development	91420/-
05	Submersible pump	22300/-
06	Electricity Bill	4680/-
	Total Rs.	19034876/-

3.2 The assessee in the year under consideration has sold the impugned piece of land and the assessee declared the long term capital loss of Rs. 4,84,69,758/- on the sale of such piece of land. The calculation of such loss stand as under:

A. Sales consideration	Rs. 4,90,33,500/-
B. Less: Indexed cost of acquisition	Rs. 6,13,93,927/-
C. Less: Indexed cost of improvement	Rs. 3,61,09,331/-
D. Long term capital loss (A – B – C)	Rs. 4,84,69,758/-

3.3 As per the assessee, the impugned investment in the land was classified as fixed assets in the balance sheet and all other expenses incurred in connection with such piece of land were added to the value of the land. As such, none of the expense incurred in connection with such land was claimed in the profit and loss account by the assessee. Thus, the assessee was of the view that any loss or gain arising on the sale of impugned land is chargeable to tax under the head capital gain and not as business income.

4. However, the AO was of the view that the transaction of the sale of impugned land should be classified as business transaction for the following reasons:

- i. That the assessee is engaged in the business of real estate activities. Furthermore, the assessee has incurred various expenses on such land such as land levelling, bore-well, soil testing which strongly suggests that the assessee was intending to make a sale of the impugned land in future for the purpose of the profit.
- ii. The land cost has been classified under the head fixed assets which is not proper. It is for the reason that the items under the fixed assets are shown which are helpful in facilitating the business of the assessee. Thus, the classification of the land as fixed assets in itself is against the accounting practices and business practices.
- iii. That the assessee has used the borrowed fund for the acquisition of the land in dispute.

- iv. The Hon'ble Supreme Court in the case of G Venktaswami Naidu and Co. vs. CIT reported in 35 ITR 594 has held that even a single transaction carried out with the intention to earn profit shall be regarded as business income.

4.1 In view of the above, the AO concluded that any loss or gain arising from the sale of the land in dispute is chargeable to tax under the head business and profession. Thus the AO disallowed the loss claimed by the assessee under the head capital gain and worked out business income of on sale land for Rs. 1,78,29,700/- which was added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT-A and reiterated its submission made during the assessment proceedings.

6. The learned CIT-A after considering facts in entirety deleted the addition made by the AO by observing as under:

*"Facts of the case have been considered carefully. The plot of land under consideration was acquired in FY 2006-07 and it was placed as fixed assets under investment in the balance-sheet and the same has been categorized as fixed asset for all these years. This prove that intention of the appellant was to use this plot of land as capital asset and not as stock-in-trade. The appellant incurred interest expenses on borrowed funds to acquire this land, which has not been claimed as revenue expenditure all these years but the same has been capitalized. Although the Circular No.6 of 2016 dated 29.2.2016 issued by the CBDT, New Delhi is regarding surplus on sale of shares & securities but ratio laid down is relevant in case of transfer of other assets. The circular clearly states that if shares have been shown as stock-in-trade, irrespective of holding period, income on transfer of such shares is income from business. It is implied that if the shares are not shown as stock-in-trade in books of accounts, it is capital asset and income on sale of asset is income from capital gain. In the appellant's case, the land has been shown as fixed asset from the day one, therefore, it is not stock-in-trade, hence, it is capital asset, therefore, income arisen on sale of this land is capital gain and not business income. **Hon'ble High Court of Bombay in the case Pr. CIT v/s. Hardik Bharat Patel (2018) 100 Taxman.com410 (Bom)** held that said circular made no distinction whether investment made in shares were out of borrowed funds or out of assessee's own funds. The circular dated 29.2.2016 is binding upon revenue authorities. Even if the plot of land in considered as stock-in-trade for the sake of argument, the expenditure (interest + other) of Rs. 1,90 crore incurred by the appellant has to be allowed as business expenditure and if it is done, the appellant has loss of about Rs.8 lakh (1.90 – 1.8 cr). In any situation, there is no taxable income in the hands of the appellant. Keeping in view the discussion made above, the additions made by the AO are not found justified, hence **deleted**. This ground of appeal is **allowed**."*

7. Being aggrieved by the order of the learned CIT-A, the Revenue is in appeal before us.

8. The learned DR before us contended that the assessee is engaged in the real estate development and it has also carried out certain activities on the land which suggests that the assessee was in the business activity.

9. On the other hand, the learned AR for the assessee before us filed paper book running from pages 1 to 453 and contended that the assessee has been showing the impugned land as fixed assets since more than 10 years and this fact was not disputed by the AO. Whatever expenses were incurred in connection with the land, it was capitalized. Therefore, the same has to be treated as capital asset and any income thereon should be held as taxable under the capital gain alone. Without prejudice to the above, the learned counsel also submitted that if the impugned land was treated as stock in trade then all the corresponding expenses should be allowed as deduction but the AO has not done so which is contrary to the provisions of law.

10 Both the learned DR and the AR before us vehemently supported the order of the authorities below as favorable to them.

11. We have heard the rival contentions of both the parties and perused the material available on record. From the preceding discussion, we note that the respondent assessee in the year under consideration transferred a land property on which claimed long term capital loss for Rs. 4,84,69,758/-. However, the AO treated the proceeds from sale of impugned land as business income for the reason elaborated in previous paragraph and calculated business income on sale of such land for Rs. 1,78,29,700/- only. On appeal by the assessee, the learned CIT-A was pleased to set aside the finding of AO.

11.1 The question before us arise whether the impugned land property sold by the assessee represent stock in trade or the investment. At the outset we find that the impugned land property was acquired by the respondent assessee in the F.Y. 2006-07 after utilizing borrowed fund. The assessee right from acquisition of land

till the sale in the year under consideration i.e. A.Y. 2016-17 i.e. for almost 10 year treated such property as investment in the books of account. The interest cost of borrowing and other expenditures incurred in connection with such land property were also capitalized by the assessee. The AO merely on the reason that the assessee company is registered with the object to carry out the business of land development and said land was acquired by utilizing borrowed fund held that proceeds on sale of such property is business receipt. In this regard we are of the view note that there is no prohibition in the statute for the assessee, engaged in the business of land development, cannot hold land property as investment. Further, there is no prohibition that the capital assets cannot be acquired by utilizing borrowed fund. If a capital asset is acquired using borrowed fund, the revenue can only disallow the expenditure of interest from the business whereas, in the case on hand, the respondent assessee suo-motu treated the interest cost along with other expenditure incurred in connection with such property as capital expenditure. This fact has not been disputed by the AO. Thus, in such fact and circumstances the view of the AO does not hold good.

11.2 Before parting, it also important to highlight that the CBDT in its circular No. 06 of 2016 also clarified that whether particular shares would be treated as stock in trade or investment depends upon treatment shown by the assessee in the books of account. The above circular of CBDT is with regard to shares & securities but in our considered opinion, the principles laid down in said circular can also be imported to the issue on hand. Further, the Hon'ble Courts time and again held that the revenue authority cannot sit in the chair of business and decide particular transaction whether it is revenue or capital in nature or the particular asset should be held as stock in trade or as investment. It is the prerogative of the assessee whether to held particular asset as investment or stock in trade. In the given case the assessee throughout the holding period (i.e. almost 10 year), shown the impugned land property as investment in the books of account. In view of the above and after considering the facts in the totality we do not find any reason to interfere in the finding of the learned CIT-A. Therefore, we

hereby confirmed the same and direct the AO to delete the addition made by him.
Hence, the grounds of appeal raised by the Revenue are hereby dismissed.

12. In the result, the appeal filed by the Revenue is **dismissed**.

Order pronounced in the Court on 23/12/2022 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 23/12/2022

Manish

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आदेशकीप्रतिलिपिप्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR,
ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, अहमदाबाद / ITAT, Ahmedabad