

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI “SMC” BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

**ITA No.746/Del/2019
[Assessment Year : 2013-14]**

Vaijanti Jain, C-407, 2 nd Floor, Saraswati Vihar, Pitampura, Delhi-110034. PAN-AAAFPJ5260J	vs	ITO, Ward-40(3), New Delhi.
APPELLANT		RESPONDENT
Appellant by		Ms.Rano Jain, Adv. & Ms. Mansi Jain, CA
Respondent by		Shri Sumesh Swani, Sr.DR
Date of Hearing		06.12.2022
Date of Pronouncement		30.01.2023

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2013-14 is directed against the order of Ld. CIT(A)-14, New Delhi dated 18.12.2018.

The assessee has raised following grounds of appeal:-

1. *“On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad, both in the eye of law and on the facts.*
2. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and in law, in confirming the action of A.O. in holding the capital gain arising on sale of investment by the assessee to be income assessable under the head ‘business and profession’.*
3. *That the above said has been held despite the fact that the properties, which were sold, were being held by the assessee as investment and there was no intention to deal in those as her business.*
4. *Without prejudice to the above, Id. CIT(A) has erred both on facts and in law, in confirming the action of the A.O. in computing the gain*

on sale of properties at Rs. 46,29,992/- as against Rs.3,91,539/- declared by the assessee.

5. *The appellant craves leave to add, amend or alter any of the grounds of appeal.”*

2. The only dispute in this case is related to the treatment of surplus fund out of the sale of properties whether it should be the business income as treated by the Assessing Authority or the capital gain as claimed by the assessee.

BRIEF FACTS OF THE CASE

3. Facts giving rise to the present appeal are that the assessee e-filed return of income declaring total income of Rs.3,55,190/- on 31.03.2015 for the year under consideration. The case was selected for scrutiny assessment. The Assessing Officer (“AO”) observed that the assessee had claimed capital gain out of sale of the properties. However, looking to the facts, same ought to have been treated as income from business. The AO after considering the material available on record, computed the business income as under:-

“Looking to the facts of the case it is clearly established that the assessee is during business of real estates and wrongly claimed the short term capital gain and long term gain in the computation of income annexed with the return of the income for the assessment year 2013-14.

Perusal of title deed in respect of assessee for property bearing No E-4/ 14 was purchased for a sum of Rs. 71,76,000/- which comprises of ground floor, first floor and second floor alongwith roof title. Assessee has claimed to sold third floor in this property which shows that assessee has constructed four floors after demolition of old building. Thus cost of purchase has to be divided in four parts. Hence cost of purchase is taken

at Rs. 17,94,000/- (71,76,000 / 4) instead of Rs. 47,84,000/- as claimed by the assessee.

As regards property C-339, Saraswati Vihar, the same was purchased for a sum of Rs.91,35,000/- in which assessee is having 1/3rd share only. Thus cost of purchase for assessee comes to Rs.30,45,000/-. This property comprises of ground floor and first floor. Assessee has claimed to sold second floor in this property which shows that assessee has constructed four floors after demolition of old building. Thus cost of purchase has to be divided in four parts. Hence cost of purchase is taken at Rs 7,61,259/- (30,45,000 / 4) instead of Rs. 14,59,000/- as claimed by the assessee.

After considering the facts as putforth above, the income from sale of properties is worked out as under:

1.	E-4/ 14, Model Town, Delhi - 3rd floor		
	Sale consideration		Rs.84,00,000/-
	Less. Purchase as discussed above	Rs.17,94,000/-	
	+ cost of improvement	<u>Rs.33,75,728/-</u>	<u>Rs. 51,69,728/-</u>
	Profit		Rs.32,30,272/-
2.	C-339, Saraswati Vihar, Delhi - 2nd floor		
	Sale consideration		Rs. 29,00,000/-
	Less Purchase as discussed above	Rs.7,61,259/-	
	+ cost of improvement	<u>Rs.12,82,578/-</u>	<u>Rs.20,43,837/-</u>
	Profit		Rs.8,56,163/-
3.	A-5/ 10 Pocket 10 Narela		
	Sale consideration		Rs.57,50,000/-
	Less. Purchase without indexation	Rs.6,69,043/-	
	+ cost of improvement	<u>Rs.45,37,400/-</u>	<u>Rs.52,06,443/-</u>
	Profit		Rs. 5,43,557/-
	Business profit (1 + 2 + 3)	32,30,272 + 8,56,163 + 5,43,557 =	Rs. 46,29,992/-

4. Aggrieved by the action of Assessing Authority, the assessee carried the matter before Ld.CIT(A), who after considering the submissions, sustained the addition and dismissed the appeal of the assessee.

5. Aggrieved against the order of Ld.CIT(A), the assessee preferred appeal before this Tribunal.

6. Ld. Counsel for the assessee reiterated the submissions as made in the synopsis. The relevant contents of the synopsis are reproduced as under:-

1. *“This is an appeal filed by the assessee against the order of the CIT(A)-14 dated 18.12.2018 wherein the additions of Rs. 46,29,992/- made by the AO in his order dated 30.03.2016 has been confirmed by the CIT(A).*

2. *During the year under consideration, the assessee has sold three properties on which income under the head capital gains had been declared. The AO considered the sale of such properties to be the business income of the assessee solely on the basis of findings concluded in the assessment proceedings for AY 2012-13 and accordingly computed the business profits to be Rs. 46,29,992/-. (Page 3 of the assessment order).*

3. *The Ld. CIT(A) without considering the facts of the case dismissed the appeal filed by the assessee by merely quoting the findings of the CIT(A) as recorded in the order of the AY 2012-13. The observation of the CIT(A) in the instant case is reproduced as under:*

“5. During the present appellate proceedings, the assessee filed written submission contesting that the corresponding profit should be assessed under head capital gains only. The assessee’s contention is not accepted for the reasons discussed in the order of the CIT(A) in A.Y. 2012-13 of my predecessor.

6. Therefore, the appeal filed by the assessee is dismissed and all the 3 grounds of appeal which relate to the same addition are treated as dismissed. ”

4. *The details of capital gains on sale of properties as declared in the return of income filed for the year under consideration are at PB page 3.*

The sale deeds of the properties are placed at PB page no. 10-22, 23-29 and 55-67.

The period of holding of such properties is tabulated as under:

Particulars	E-4/14, Model Town (3rd Floor)	C-339, Saraswati Vihar (2nd Floor)	A-5/12, Pocket 10, Narela
Date of Purchase	23.06.2011	26.05.2010	17.08.2006
Date of Sale	24.09.2012	22.10.2012	23.07.2012
Period of Holding	15 Months	29 Months	71 Months

5. *The assessee has sold only 3 properties during the year under consideration which were held*for a period ranging from 2 to 6 years. The holding period clearly establishes the fact that there were no frequent purchase and sale of properties and the said properties were held only for the primary purpose of investment. Further, during the course of assessment proceedings, it was duly submitted before the AO that the properties were held only for the investment purpose and were sold after realizing the capital appreciation.*
6. *The AO in his assessment order has placed reliance on the assessment order of the earlier year i.e. AY 2012-13 (PB page no. 136-139) wherein the only apprehension in the mind of the predecessor AO was that since the assessee was in possession of many properties and also purchased properties during that year, therefore, the gain on sale of them to be treated as business income and not capital gains and this finding was later on confirmed by the CIT(A) (PB page no. 151).*
7. *Another imperative fact which needs to be highlighted here is that, no properties have been purchased during the year under consideration and only three immovable properties already held by*

the assessee were sold during the year under consideration. (PB page no. 107)

8. *It is a settled law that if the property is held with the intention of investment purpose, the gain arising on the sale of such property be treated as Income under the head Capital Gains and not business income.*
9. *The issue is squarely covered from a number of decisions of various Courts and Tribunals. Reliance can be placed on the following decisions:*

High Court of Bombay in the case of Indian Human Pipe Co. Ltd. vs. CIT 195 ITR 386 (Bom) observed that surplus realized on sale of properties cannot be assessed as business profits where they were not purchased with an intention to trade but as investments of surplus investible funds.

The present case of the assessee is squarely covered by the decision of Hon'ble ITAT Delhi in the case of Raghu Nath Arora vs. JCIT ITA No. 5494/Del/2013 dated 22.11.2018 wherein Hon'ble Tribunal explicitly held that it is immaterial that the history of the assessee involves various transactions of purchase and sale of immovable properties. When an assessee held the property for more than 3 years without borrowing funds and classified the same in its books of accounts, it cannot be said that the assessee is not an investor. The relevant extract of the said decision is as under:

“6 the whole controversy is on the sale of first plot of land, which was purchased in 2007 and sold in 2010 after holding for three years. The learned assessing officer has held that there was no intention of the assessee to hold as an investor but as a trader but there was no material put by the learned AO to substantiate his finding the learned CIT appeal upheld the addition on the issue of substantial investment and intention of the assessee. Both these criteria as are not

relevant for deciding unless substantiated by the evidence. Even otherwise, the substantial investment cannot distinguish a particular purchase of land between a trader and investor. Merely because the assessee has entered into few transactions of purchase and sale of plot of land in past, during the year it cannot be said that assessee has sold the property is a trader. It was stated by the learned authorised representative that the assessee acquired the land out of its own fund, the agricultural income was also shown on that agricultural plot of land, disclosed as investment in books of accounts and not stock in trade, and therefore all these factors go to show that the assessee is an investor. These facts have not been denied by the learned departmental representative. Because of the above reasons and facts placed on record, we are of the view that when assessee held land for more than three years without borrowing funds and classified the same in its books of accounts, it cannot be said that assessee is not an investor. It is immaterial that the history of the assessee shows the various transactions of the purchase and sale of land, it may be the issue in that particular year. Accordingly, we reverse the finding of the lower authorities and direct the learned AO to treat the profit shown by the assessee of Laxmipurpatti Land of Rs. 5.32 lakhs as long-term capital gain and Jaitpur Ghoshi land profit of Rs. 5.60 lakhs as short term capital gain. In view of this ground number one of the appeal of the assessee is allowed. ”

In the case of CIT v. Kasturi Estates (P.) Ltd. reported in [1966] 62 ITR 578 the Madras High Court held as follows:

"If a land-owner developed his land, expended money on it, laid roads, converted the land into house sites and with a view to get a better price for the land, eventually sold the plots for a consideration yielding a surplus, it could hardly be said

that the transaction is anything more than a realisation of a capital investment or conversion of one form of assets into another. Obviously, the surplus in such a case will not be trading or business profit because the transaction is one of realisation of asset in investment rather than one in the course of trade carried on by the assessee or an adventure in the nature of trade The transaction involved no risk or speculation; nor can it be truly said that it is a 'plunge in the waters of trade'. It is a transaction which any prudent owner of land will engage in and which is, therefore, no more than realization of capital investment, conversion of land into money, not a venture in the nature of trade. Having regard to the nature of the property, length of its ownership and holding, actual conduct of the assessee in respect of it all along and all other facts including absence of evidence of any trading activity or speculative venture, we are of the view, therefore, that the Tribunal was right in its conclusion that the surplus from sale of the land did not result from any trade or business in land carried on by the assessee or from any transaction which may properly be described as an adventure in the nature of trade."

Commissioner of Income-Tax Versus Smt. Saraswati Jaiswal, [2003] 264 ITR 358, the hon'ble Madhya Pradesh High Court held as under:

"Taking into consideration the totality of facts and circumstances of the case, we are of the considered view that in the case at hand, the Tribunal has addressed itself to the factual situation and arrived at the conclusion that the assessee was entitled to be assessed under the head of capital gain and not under the head of profit arising from adventure. We are disposed to think that the whole analysis is based on appreciation of facts and it has been clearly held

by the apex court in G. Vankataswami Naidu's case [1959] 35 ITR 594, that it would depend upon all the relevant facts and circumstances. In the case at hand, principally as questions of fact are involved, we are not inclined to call for the statement of facts from the Tribunal.”

Further reliance is also placed upon:

i. CIT vs. Smt. Bilkishbai 225 ITR 570 - High Court of Madhya Pradesh

“The Tribunal thus concluded : “the assessee never engaged herself in any systematic business activity in land.” This finding of the Tribunal is obviously based on the appreciation of facts as unfolded by the material on record. It is well-settled that findings of fact based on appreciation of evidence do not give rise to any referable question of law. In the instant case also, we are satisfied that the findings of the Tribunal are findings of fact and do not, therefore, give rise to any referable question of law.”

ii. ITO vs. Sh. Gagandeep hardwaj ITA No. 155/Chd/2010, 1355/Chd/2010 dated 17.04.2012 - ITAT Chandigarh

iii. Kaur Singh v. CIT [1983] 144 ITR 756 - Punjab and Haryana High Court

“ The assessee admittedly had purchased the property in the year 1967. The Revenue has not at all brought any circumstance or evidence on the record to show that at the time of the purchase of the property in the year 1967, the assessee had an intention to sell the property. Merely carving out plots in a portion of the land, without proof of anything more, cannot give rise to the conclusion that the transaction is an adventure in the nature of trade. Our attention was pointedly drawn by the learned counsel for the Revenue to a Division Bench judgment of this Court in Harbans Singh v. CIT

[1981] 132 ITR 77. But that decision is of no assistance to the Revenue as the facts of that case are entirely different and on the facts found in that case, the view -was rightly taken that it was an adventure in the nature of trade. There can be no gainsaying that even a single venture may be regarded as a trade or business, but there have to be circumstances which may give rise to such a conclusion. As earlier observed, in this case the Tribunal has fallen in error in holding the venture as trade or business merely on the ground that 42 plots were carved out, out of which 7 were disposed of in the year in question. In this view of the matter, in the circumstances of the case and on the facts found, the Tribunal was not right in law in holding that the income derived by the assessee from the sale of plots was from an adventure in the nature of trade. Consequently, the answer to this question is returned in favour of the assessee and against the Revenue. ”

10. *Therefore, in view of the above circumstances and further considering the settled position of law in this regard, the gain on sale of properties should not be treated as business income as the intention of the assessee was to hold the properties for investment purpose only.”*

7. On the other hand, Ld. Sr. DR opposed these submissions and supported the orders of the authorities below. He submitted that looking to the facts of the present case and in view of the fact that the assessee is regularly involved in sale and purchase of the immovable properties. Therefore, it cannot be inferred that the assessee is making investments and earning capital gain out of the transactions.

8. In re-joinder, Ld. Counsel for the assessee pointed out that it is the intent of the seller which should be the basis whether a particular transaction

is for business purpose and it is an investment. Ld. Counsel for the assessee relied on the judgement of the Hon'ble Bombay High Court rendered in the case *Indian Human Pipe Co.Ltd. vs CIT 195 ITR 386 (Bom.)*. It is also pointed out by the Ld. Counsel for the assessee that in the Assessment Year 2018-19, the AO himself has treated the transaction of investment and accepted the capital gains offered by the assessee.

9. I have heard Ld. Authorized Representatives of the parties and perused the material available on record. The short question that arises for consideration is whether the Assessing Authority justified to treat the transaction under the different head of income. The assessee claimed it as gain arising out of transfer of capital asset. On the other hand, the AO treated it as business receipts arising from real estate business. Ld. Counsel for the assessee laid great stress on intent of the assessee. Considering the fact that the properties in quantum were held for considerable longer period of time, it is not the case where the properties have been sold within a short span of time after their acquisition. Coupled with the fact that the assessee is not engaged into any systematic real estate business activity. I therefore, respectfully following the binding precedents as cited by the Ld. Counsel for the assessee hold that the authorities below erred in treating the transaction as real estate business transaction under the facts and circumstances of the present case. I therefore, hereby direct the AO to delete the impugned addition. Thus, grounds raised by the assessee are allowed.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 30th January, 2023.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(Appeals)
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