

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM

आयकर अपीलसं./IT(SS)A No.15 & ITA No.619/SRT/2018

(निर्धारणवर्ष / Assessment Years: (2011-12 & 2014-15)

(Virtual Court Hearing)

Shri Kalubhai Dulabhai Golaviya B/1-2, Jalaram Society, B/h. Gurunagar Society, Varachha Road, Surat	Vs.	Deputy Commissioner of Income-tax, Central Circle-2, Aaykar Bhavan, Majura Gate, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABLPP 5116 A		
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Ashwin K Parekh, C.A.

राजस्व की ओर से Respondent by : Shri Ashok B.Koli, CIT-DR &
Shri Vinod Kumar, Sr-DR

सुनवाईकी तारीख/ **Date of Hearing** : **27/02/2023**

घोषणाकी तारीख/**Date of Pronouncement** : **30/03/2023**

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned two appeals filed by the assessee, pertaining to the assessment year(s) (AY) 2011-12 and 2014-15, are directed against the separate orders passed by the Learned Commissioner of Income Tax(Appeals)-4, Surat [for short 'CIT(A)'] dated 02.07.2018 & 13.07.2018 respectively, which in turn arise out of separate assessment orders passed by the Assessing Officer ('AO' for short) u/s 143(3) r.w.s. 153A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide orders dated 20.03.2015 and 26.12.2016 respectively.

2. Since both these appeals relate to one assessee, identical and common issues are involved, therefore these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity. The facts as well as grounds of appeals narrated in IT(SS)A No.15/SRT/2018 for assessment year 2011-12 have been taken into consideration for deciding both these appeals *en masse*.

3. Grounds of appeal raised by the assessee in lead case in IT(SS)A No.15/SRT/2018, are reproduced below:

“1. The learned CIT(A) has grievously erred in law and on facts in taxing gain from sale of land as business income instead of Long Term Capital Gain disregarding the evidences and facts on record. The gain of Rs.3,99,10,520/- be treated as Long Term Capital Gain instead of Business Income.

2. The learned CIT(A) has grievously erred in law and on facts in not allowing deduction u/s 54F of the Act for investment in residential unit out of Long Term Capital Gain, despite of the facts that all conditions as per law are satisfied. The deduction of Rs.31,33,611/- should be allowed.

The assessee reserves the right to add, alter, modify, amend or withdraw any of the grounds of appeal before hearing.”

4. Succinctly, the factual panorama of the case is that assessee before us is an individual. A search action u/s 132 of the Act was carried out on 17.07.2012 in the group cases of Dalia (Badshah)-Babariya Group of Surat and assessee is one of the said group. A notice u/s 153A of the Act was issued on 22.01.2013 and served upon the assessee. In response thereto the assessee furnished return of income on 12.04.2013 declaring total income at Rs.3,65,74,570/-. Subsequently a notice u/s.143(2) was issued and served on 07.07.2014 on assessee. The assessee in his return of income filed for the year under consideration has shown long term capital gains of Rs.3,97,08,181/- and also claimed deduction u/s 54F of the Act at Rs.31,33,611/-. The assessee has shown profit on sale of land to M/s Gangotri Enterprise at Rs.2,36,82,767/- and profit on sale of plots of Rs.1,60,25,414/- under the head long term capital gains. Based on these facts, the assessing officer issued a show-cause notice dated 27.02.2015, wherein the assessee was asked to explain the transaction in respect of capital gain that why the income should not be taxed as business income instead of capital gain.

5. In response to the above show cause notice, the assessee has filed a reply vide letter dated 13.03.2015, which is reproduced below:

“The assessee has transferred block No.,201 of Mota Varachha in a firm Gangotri Enterprise. As per the provisions section 45(3) of the Act, the consideration recorded in the books of account of the firm is the capital receipt in the case of partner. The Kalubhai has disclosed income of

Rs.2,38,70,302/- in A.Y 2011-12 from capital gain from part of the land block No.201 transferred to Gangotri Enterprise as per Partnership Deed. The assessee had sold remaining part by carrying out plotting on land by arranging a society known as "Sabari Dham". From the plots sales, the assessee earned capital gains of Rs.,1,62,11,034/- in A.Y 2011-12 and Rs.86,46,452/- in A.Y 2012-13. The entire capital gains of Rs.4,87,27,788/- has been offered to tax and capital gain returned by assessee cannot be taxed as business income since:

1. The assessee was not indulged in the activity of either construction or dealing in plots or land. From A.Y 2007-08 to A.Ys 2010-11, the assessee carried out following activity:
2007-08 : Agriculturist
2008-09 : Agriculturist and income from other sources
2009-10 : Agriculturist and income from other sources
2010-11 : Agriculturist and income from other sources
2. First time A.Y 2011-12 the assessee arrange plotting on his own land purchased in A.Y 2004-05. For the entire land, the buyer was not available and whenever available the consideration offered was less than value determined by State Stamp Duty Valuation Authorities. The assessee was therefore compelled to covert part of the land into Partnership Firm since other partners were ready to take only that part of the land. For remaining part no one offered the expected prices. The assessee had not developed the plots into houses or is not dealing in Real Estate. The intention of the assessee is not in the nature of "Adventure in the Nature of trade but land was held with an intention to construct farm house". However, later on the city limit was increased and it was not allowed to construct Farm House on this land due to implementation of town planning scheme. When the land was purchased the assessee never intended to sell plots or to convert the land into partnership firm. The consideration of entire facts ipso facto prove the intention of the assessee to hold the land as capital assets.
3. This was the sole transaction of plotting in view of the decision of ITAT in *M. Ramanamma vs. CIT* reported at 255 ITR 467, *Vesta Investment & Trading Co. reported at 70 ITD 200* and *Vinodkumar vs. Additional CIT reported at 91 TTJ 460.*"

6. However, the Assessing Officer rejected the contention of the assessee and held that intention of the assessee was to enter into trade of purchase and sale of land, therefore, the long term capital gain worked out by the assessee in computing his total income and deduction claimed u/s 54F were rejected by the Assessing

Officer and income earned was computed by the Assessing Officer under the head “income from business.”

7. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A), who has confirmed the action of Assessing Officer. The Ld CIT(A) has just reiterated the findings of the Assessing Officer and confirmed the addition made by the Assessing Officer. Therefore, assessee is in further appeal before us.

8. Shri Ashwin K Parekh, Learned Counsel for the assessee, pleads that assessee under consideration has been doing agriculture activities since last six years, therefore such a farmer should not be treated as businessman. In the return of income filed by the assessee, the assessee has been showing agricultural income. That is, the assessee had not indulged in the activity of either construction or dealing in plots or land. From assessment years 2007-08 to assessment year 2010-11, the assessee carried out agriculture activities and had income from agricultural and other sources as per return of income. The assessee had not developed the plots into houses or is not dealing in Real Estate. The intention of the assessee is not in the nature of “*Adventure in the Nature of Trade but land was held with an intention to construct farm-house*”. However, later on, the city limit was increased and it was not allowed to construct Farm House on this land due to implementation of town planning scheme. When the land was purchased, the assessee never intended to sell plots or to convert the land into partnership firm. The consideration of *entre facts ipso facto* proves the intention of the assessee to hold the land as capital assets.

9. It was also contended by Ld Counsel that assessee had claimed the deduction under section 54F of the Act, at Rs.31,33,611/-, on account of investment of Rs.40,00,000/- in residential house out of sale proceeds of plot of land. Since, all the conditions of section 54F are satisfied, the assessee was entitled to deduction under section 54F of the Act. The assessee had transferred the block no. 201 of Mota Varachha, Surat to the firm M/s Gangotri Enterprise as the capital contribution of a

partner. This amount was disclosed as income from LTCG as per the partnership deed. He had sold the remaining part of the land by carrying out plotting on land by arranging a society known as “Shabridham” and the sales amount from the plots was disclosed as capital gain of Rs.1,62,11,034/- in A.Y. 2011-12 and Rs.86,46,452/- in A.Y 2012-13 and the entire capital gain has been offered to tax. The assessee had contended that he had not indulged in any activity of construction for dealing in plots or land from A.Ys 2007-08 to 2011-11 as per the return of income. It was only in A.Y 2011-12 that the assessee made the plotting on his own and converted part of the land into partnership firm since other partners were ready to take only part of the land. The intention of the assessee was not in the nature of adventure in trade but was planning to construct a farm-house. Therefore, Id Counsel prays the Bench that income of the assessee should be assessed under the head “capital gain” and not under the head “business income”.

10. On the other hand, Learned DR for the Revenue argued that even a single transaction can be treated as ‘business’. No doubt, the assessee under consideration has been engaged in agricultural activities since last six years, however, the assessee has sold the agricultural land, in the assessment year under consideration to do the business, therefore, assessee’s income should be assessable under the head “Business Income” instead of under the head “Capital Gain”. Consequently, the deduction claimed by the assessee under section 54F of the Act, should not be allowed.

11. We have given our thoughtful consideration to rival contention. We have perused case file as well as paper books furnished by assessee with the able assistance of Learned Counsel for the assessee and Learned CIT-DR, representing the Revenue. We find that one key issue arises for our apt adjudication in the instant *lis*, which is, whether income of the assessee should be assessed under the head “Capital Gain” or should be assessed under the head “Business Income”? We note that basic facts of the assessee are that assessee under consideration had purchased

agriculture land bearing Block No. 201 by a Registered Purchase deed dated. 26.10.2004. Copy of purchase deed is enclosed. (vide paper book Page 10 to 22). Thereafter, on 19.05.2010, the land was converted into non-agriculture land. Therefore, from 26.10.2004 to 19.05.2010 i.e. for 6 years, the assessee was holding entire land as agriculture land and he was doing agricultural activities. Therefore, we note that assessee was not indulged in the activity of either construction or dealing in plots or land. From A.Ys. 2007-08 to A.Y. 2010-11, the assessee was carried out following Activities:

2007-08	Agriculturist
2008-09	Agriculturist and income from other sources
2009-10	Agriculturist and income from other sources
2010-11	Agriculturist and income from other sources

To prove this fact, that assessee was solely engaged in agricultural activities, the assessee submitted before the Assessing Officer, the copy of Return of Income of all the years from assessment years 2007-08 to assessment year 2010-11, which are placed in assessee`s paper book (vide paper book Page 79 to 86). Therefore, the assessee, who was farmer for the period of 6 years (from 26.10.2004 to 19.05.2010) cannot be treated as businessman (trader), hence, the “Capital Gain” shown by the assessee cannot be taxed as “Business Income”.

12. We note that later on, the entire area of land of assessee, was merged and the Municipal limits of Surat Municipal Corporation and Town Planning Scheme was implemented by Surat Municipal Corporation being T.P. Scheme No. 24 approved by State Government. Since, Road was passed from the land, the assessee was allotted two final plots being Final Plot No.61/A and Final Plot No.61/B. Since the government road was passed from the assessee`s land and therefore assessee was allotted two final plots. So assessee cannot do agricultural activities on different plots, as it was inconvenient, therefore assessee made plan to sale these plots.

13. The assessee transferred Plot No. 61B as a Capital Assets to the firm M/s Gangotri Enterprise in which he is a partner by a Registered Partnership Deed executed on 15.04.2010. Copy of Registered Partnership Deed is enclosed. (vide paper book Page 23 to 39). We note that this transfer is squarely covered by the provisions of section 45(3) of the Act. After that, assessee has sold his remaining land. Therefore, Capital Gain from both the transactions cannot be covered as business income. We note that the word "**business**" has been defined under section 2(13) of the Income Tax Act, 1961, which includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. An isolated transaction or activity can also be part of business, but to consider the question of business, there must be regular activity of purchasing and selling, which is absent in the assessee's case under consideration. In the assessee's case, there is nothing on record to show that the land was purchased for the purpose of selling or to do the trade. In this case, there is nothing on record to show that the land was purchased for the purpose of selling into plots also. Hence intention of the assessee under consideration is not to do business, therefore, assessee's income can not be taxed under the head "Business Income".

14. The simplest method of determining whether an item of property is "stock-in-trade" or a "capital asset is by applying the functional test. If the property is an item which is "**traded**" by the assessee, it would be "stock-in-trade" but if the property constitutes the 'means' through which he carries on his business, the same cannot be his "stock-in-trade" and hence, by default, it would constitute his "capital asset". Reliance is also placed on the decision of Hon'ble Gujarat High Court in the case of H Mohmed & Co v. CIT (1977) 107 ITR 637(Guj).

15. We note that Coordinate Bench of ITAT Mumbai in the case of M/s Neel Siddhi Developers in ITA No 30/Mum/2020 order dated 28.10.2022, held as follows:

“Business Income Vs. Capital Gain:

7. The first ground of the Revenue is that the sale of land at Nagpur by the Assessee is a transaction in the nature of adventure in trade and hence, liable to be taxed

under the head "Income from Business and Profession" and not under the head "Capital Gain" as offered by the Assessee. The reasons provided by the AO in his assessment order are summarised hereunder:

a. The said land was shown as "Stock in trade" in the balance sheet of the Assessee;

b. The Assessee is engaged in the business of development of real estate and without land no development can start. Hence, the argument of Assessee that it is not dealing in buying and selling of land is incorrect;

c. As per partnership deed, the Assessee is in the business of developing real estate (Copy of Partnership Deed is at Page 208 211 of PB).

d. Intention at the time of acquisition of land is more important than subsequent non utilization of said land,

e. The Assessee was aware of the various problems and difficulties which lay ahead and hence, it cannot be accepted that the said land was not developable

8. Before the CIT (A), the Assessee made detailed submissions which form part of paper book filed before us and appear at page 01 to 25 of the PB. The Assessee's submission are summarised hereunder:

a. The Assessee is a partnership firm engaged in the activity of construction and development of real estate. For this purpose, the Assessee acquired a parcel of land at Nagpur for a total consideration of Rs.25 crores as evidenced by Sale Deed executed on 31.12.2007. The Assessee could not develop the said land due to procedural and legal tangles as have been chronicled. There is no finding by Id AO nor there is any evidence to lead that the Assessee was engaged in any manner in "trading" of land. A copy of partnership deed was submitted which at para 5 enlists the activities for the purpose of which the Assessee firm was constituted.

b. In this case, the Assessee had acquired the said land for the purpose of development and not for trading. The Assessee was also desirous of holding a large part of constructed premises for its own use and/ or leasing the constructed premises as per the object clause of the deed of partnership. Hence, it cannot be presumed that the Assessee would have disposed of the said land along with the construction thereon. This fact was also observed by the AO in his show cause notice dated 22.01.2014 which is appearing at pages 223 to 226 of the PB. Therefore, there is no dispute to the fact that there was no intention for the Assessee to trade in the said land so as to treat it as "stock-in-trade". However, the activity of development could not commence due to legal and procedural issues. Thus, the said land remained in the dormant state in which it was acquired.

c. The Assessee had reclassified the said land as "investment" as on 01.04.2010. This fact has not been controverted by the AO in his order.

Hence, even if it is assumed the classification of the land in books is an important criteria, yet the said land stood classified as "**investments**" as on 01.04.2010. This fact is borne out from the copy of ledger account submitted before the AO for its verification.

d. The definition of the term "**capital asset**" as laid down u/s. 2(14) of the Income-tax Act, 1961 states that a "capital asset" means: "property of any kind" held by the assessee whether or not connected with his business or profession....." Therefore, even if the land is purchased for the purpose of business (**and it is not to be traded in**) then it will be capital asset. The expression "stock-in-trade" as referred to in section 2(14) per force implies the existence of a business. In this case, though the Assessee was in the real estate development business, the development of the said land in question could not commence due to litigation and procedural difficulties. Hence, the Assessee had to sell the said land as such without starting the development activity, the purpose for which it was acquired having failed.

e. The simplest method of determining whether an item of property is "stock-in-trade" or a "capital asset" is by applying the functional test. If the property is an item which is "**traded**" by the assessee, it would be "stock-in-trade" but if the property constitutes the 'means' through which he carries on his business, the same cannot be his "stock-in-trade" and hence, by default, it would constitute his "capital asset" Reliance is placed on the decision of Hon'ble Gujarat High Court in the case of H Mohmed & Co v. CIT (1977) 107 ITR 637(Guj) wherein it has been held that what an assessee deals in is his "stock-in-trade" and what he deals with is "capital asset".

f. The contention of the AO that the land was a business asset and hence, the gain on its sale is taxable under the head "Business income" is contrary to the decision of Hon'ble Supreme Court in the case of CIT vs. Express Newspapers Ltd. (SC) [1964] 53 ITR 260. It has been held by Apex Court that:

"...The fact that the capital gains are connected within the capital assets of the business cannot make them the profit of the business. They are only deemed to be income of the previous year and not the profits or gains rising from the business during that year".

g. The stand of the AO is also contrary to the scheme of Income Tax Act, 1961. Section 50 of the Income Tax Act taxes gain on sale of business assets of the assessee under the head "Capital Gain" even though it is depreciable asset used for the purpose of business. Therefore, to say that the gain on sale of business asset is taxable under the head "business income" is contrary to provisions of section 50 and if accepted, it would render section 50 nugatory.

h. The AO's contention that there is no connection between asset becoming sterile and capital gain. This is in contrast to decision of supreme court in the case of Universal radiators vs. CIT (1993) 201 ITR 800 (SC).

i. Further, the AO has not appreciated the facts correctly. A perusal of the chronology of the events reveal that a litigation as regard the title of the land commenced after the Assessee had acquired the land on 31.12.2007. Kindly refer letter dated 26.09.2008 written by the Assessee to the Commissioner Nagpur Municipal Corporation wherein this fact is highlighted. Since the litigation on title would have had impact on the permissions and future development, there was no sense in commencing the project. Therefore, the partners mutually decided to abandon the project and move out instead of being tied up in litigation and especially in Nagpur a different city far from Navi Mumbai.

j. The stand of the AO is contradictory as he has himself accepted the books of accounts wherein the land stood classified as "**investment**" as on 01.04.2010 much prior to payment of advance tax in December, 2010.

k. The Mumbai ITAT has in the case of Rajesh Builders for A.Y. 2004 05 upheld the gain on sale of land as taxable under the head "**Capital Gain**". Therefore, the decision of AY 2004-05 in Rajesh Builders case which has attained finality may kindly be followed in view of rule of precedence has laid down by Mumbai High Court in the case of Bank of Baroda vs. HC Shrivastava (2002) 256 ITR 385 (Bom.)

l. It is important to mention that the Assessee did not deal in past or in subsequent years and is a solitary transaction of the purchase and sale of land.

9. The CIT(A) has in Para 6.2 from page nos. 7-22, summarised the arguments of the Assessee and thereafter, allowed the claim of the Assessee as per reasoning provided in **para 6.5** of the appeal order being impugned before us which are stated hereunder:

a. The provisions of section 2(14) of the Act defines the term "**capital asset**". It states that property "**whether connected to business or not**" is "**capital asset**". Hence, even if an asset is connected to business, the gain on the sale is "**capital gain**". Even section 50 of the Income Tax Act lay down that the gain on the sale of depreciable asset used for the purpose of business is to be taxed under the head "**capital gain**" Therefore, according to the CIT(A), the AO had taken a myopic view of the matter by holding that merely because an asset is a business asset, the gain on its sale will be taxed as business income.

b. The AO has himself recorded a finding that the said land was classified as "**stock in trade**" in the books of the Assessee in the earlier years. The question is whether such classification in books is be all and end all of the matter. Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT (1959 35 ITR 594 (SC) held that all attendant facts and circumstances of the case is to be seen to determine whether the income is capital gain or business income No one test or formula can be applied as a thumb rule. The same sentiment has been echoed by the Mumbai High Court in the case of Fort Properties (P) Ltd vs. CIT (1994) 208 ITR 232 (Bom.) wherein the

Hon'ble Mumbai High Court treated the loss on sale of property classified as "stock in trade" as "capital loss" instead of "business loss". In the present case, the Department had taken a stand that even if the asset was classified as "stock in trade" yet the loss on its sale is not "business loss" but is a "capital loss". The Department had contended that the Assessee was though a real estate company, yet it did not carry out the business on the said land and hence, mere classification in books of accounts as "stock in trade" is not final. In the impugned case, the AO has contended exactly the opposite which is against the law laid down by the Bombay High Court in the case of Fort Properties (1994) 208 ITR 232 (Bom). Therefore, mere fact that the said land was classified as "stock in trade" in books in earlier years is not determinative of the fact that the gain on its sale is to be taxed as business income.

c. The AO has himself admitted the fact that the said land was acquired for the purpose of development and not sale as such. The said land could not be developed for various reasons as highlighted by the Assessee. Therefore, it cannot be said that the business of development was carried out by the Assessee or that the income earned is from the business of development of real estate.

d. The AO has also not countered the claim of the Assessee that this is a solitary transaction of sale of land by the Assessee and that they have never sold the land in past.

e. The AO has relied upon the ITAT decision in the case of Rajesh Builders for A.Y. 2005-06 wherein the hon'ble ITAT has held that the gain on sale of development rights is taxable as business income and not capital gain. On the other hand, the Assessee has produced the decision of hon'ble ITAT in the same case for A.Y. 2004-05 wherein the hon'ble ITAT has held that even in the case of real estate developer, the land acquired for the purpose of development shall be capital asset, if it is sold without development and the gain on such sale is taxable as "capital gain". In fact, the said decision of the jurisdictional ITAT is on all fours with the facts of the Assessee's case.

10. Before us, the Id. DR challenged the action of the CIT(A) and relied on the order of the AO. He reiterated what is stated by the AO in the order. His main contention is that since the Assessee is a real estate developer, any purchase and sale of land is a business, transaction and hence, liable to be taxed under the head business income.

11. In her counter the Ld AR for the Assessee submitted that a businessman can have same asset as a "trading asset" and also as an "investment" The Id AR further submitted that the sale of land by the Assessee as an isolated transaction which was triggered as multiple impediments arose and hence, the Assessee had to shelve the idea of developing the said land Thus, the asset acquired by the Assessee became sterile She stated that even if the intention at the time of acquisition is to be seen, then too the assessee never intended to sell the said land after development but retain the same for earning rental income Hence, the purpose of acquiring the said land was always to hold the said land as "investment". She further relied upon the

Resolution dated 01.06.2007 appearing on page 227 of the PB, passed by the partners of the Assessee detailing the reasons for acquiring the said land.

12. She further argued that since the facts remain undisputed by the Revenue, the decision on head of income as determined by CIT (A) cannot be interfered with. She also placed reliance on the decision of Bombay High Court in the case of Fort Properties (supra) wherein the hon'ble High Court has held that all attendant circumstances has to be seen before one can draw a conclusion whether the gain was assessable as "**business income**" or "**capital gain**". Merely because the Assessee had shown the asset as "stock in trade", it cannot be said that the gain was taxable under the head "Income from Business". She further pointed out the decision of the Hon'ble Delhi High Court in the case of D.L.F. Hsg & Constn. P.Ltd. v. GIT (1983) 141 ITR 815-824 (Delhi) as mentioned in the submission filed before the CIT(A) and reproduced in the said order at sub para (p) on page no. 16 The hon'ble Delhi High Court has held as under:

"The expression "in the nature of trade" as used in s.2(4) of the Act apparently postulates the existence of certain elements in the adventure which, in law, would invest it with the character of a trade or business and the answer to the question whether a particular transaction is in the nature of trade cannot be decided on the basis of any single test or formula. The burden of proving that a particular transaction is in the nature of trade shall be, in the case of agricultural land, on the Revenue and not on the assessee. It bears repetition that in the instant case the assessee did not take any step to develop the lands in question on the normal lines of its business with a view to parcel it out into plots as sites for houses and commercial buildings".

12. She further took us through the CIT(A) order wherein the decision of Pune ITAT in the case of Shanti Builders vs JCIT (Pune) (2004) 88 TTJ 519 is mentioned holding that even if the land was acquired for the purpose of development and because of its sterilization it cannot be developed, the gain on sale has to be treated as capital gain and not as business income. The Pune ITAT held a under:

*"At the outset, we are not impressed by the arguments of the learned commissioner in the impugned order as well as of the learned Departmental Representative during the course of hearing before us that the Assessee being a firm the income was required to be brought to tax under the head "Profits and gains of business or profession" and not under the head "capital gains". The thrust of the arguments in this respect is that the firm is essentially constituted to carry on business and, therefore, any asset acquired by the firm cannot be anything but business assets. **This argument overlooks the basic fact that business asset held by a firm can be in the form of a capital asset as well.** For example, if a firm acquires plant and machinery for the purpose of its manufacturing activity such plant and machinery would be capital asset in the hands of the firm and any subsequent sale of such plant and machinery by the firm would only amount to transfer of a capital asset. **The fallacy in the arguments of revenue in this respect lies in the fact that it is assumed that a business asset has to be a trading asset only which is not the correct position under the well established principles of accountancy.** A business asset whether in the*

*hands of the firm or an individual or a company or any other entity carrying on business can comprise of capital assets as well as trading assets. Where the transfer is of a capital asset it would give rise to income chargeable to tax under the head capital gain and where the transfer is of a trading asset such receipts are to be considered under the head "Profits and gains of business or profession. **What is, therefore, required to be determined in the instant case is not as to whether the land in question was a business asset of the firm but whether it was a capital asset or a trading asset in the hands of the firm.**"*

13. *She further relied upon the decision of Mumbai ITAT in the case of Rajesh Builders for AY 2004-05 which is mentioned in sub para (r) on page 17 of the CIT(A) order. The Id AR also referred to various judgments on the issues of "capital asset vs. stock in trade" and "capital gain vs business income", specifically Bagmane Developers (P) Ltd. [2017] 392 ITR 379 (Karnataka).*

Decision

14. *We have considered the submissions of the Ld. DR and the counter arguments of the Ld. AR of the Assessee and perused the assessment order and the CIT (A) order as well as material referred to before us. We find that the AO has in his order made contradictory observations. On one hand, he has stated that the business of the Assessee was that of "development" of the land and on the other hand, accepted the fact that the said land was sold as such without any development. In an earliest decision, while deciding the head of income, the Apex Court has in the case of G Venkataswami Naidu & Co. vs. CIT (1959) 35 ITR 594 (SC) held that all attendant facts and circumstances of the case is to be seen to determine whether the income is "capital gain" or "business income"*

15. *The CBDT too has in their Circular no. 4/2007 date 15.06.2007 accepted that a businessman can have two separate portfolios, one as a "trading portfolio" and another for "holding investments"*

16. *Thus, when we look at all attendant facts which remain undisputed that:*

- a. the land was purchased with the intention of development for the purpose of leasing out constructed area and not sale land,*
- b. the land could not be developed due to various impediments listed by the AO and CIT(A) in their order,*
- c. the land was purchased by the Assessee with its own funds a not borrowed funds,*
- d. the land sale is an isolated transaction,*
- e. the land was classified as "investment" in the books of account as on 01.04.2010 which is accepted by the AO.*

Thus, we do not find any reason to differ from the view taken by the CIT(A). The assessee has used its capital to purchase the said land and what is recovered is the

said capital. The transaction cannot be treated to be an adventure in the nature of trade since the transaction of sale was forced upon the assessee due to circumstances which are enlisted hereinabove. This transaction cannot be classified as an adventure in the nature of trade. It was not a transaction which was actively intended at the time of acquisition of land.

17. The judgments of courts relied upon by the Id. AR for the Assessee is squarely applicable to the facts of the case on hand. The Ld. DR of the Assessee has not brought on record any contra decision or shown that the decisions relied upon by the Assessee and as relied upon by the CIT (A) are overruled. Further, the Id. DR has neither raised any additional argument other than what the AO has stated and already dealt with by the CIT (A) in an elaborate order nor stated as to why the findings and reasoning of CIT(A) is incorrect either on facts or in law. Hence, we uphold the order of CIT(A) on this ground and hold that the Assessee has rightly offered the gain on sale of Nagpur land under the head "Capital Gain"

16. Thus, taking into account the entire facts, as narrated above, we note that assessee was farmer for six years and he sold the land due to compulsion and pressure since, government made a **Road** in the assessee's land. The assessee was holding the land as an investment activity / portfolio. We observed that a Road was passed from the land, and the assessee was allotted two final plots being Final Plot No.61/A and Final Plot No.61/B. Since the government **Road** was passed from the assessee's land and therefore assessee was allotted two final plots. So, assessee cannot do agricultural activities on different plots, as it was inconvenient for him, therefore assessee decided to sale the land, due to compulsion, hence assessee cannot be treated as a trader in land and therefore his income cannot be assessed under the head "Business Income". Hence, these above facts prove, that intention of the assessee is to hold the land as Capital Assets, therefore, we direct the assessing officer to assess the assessee's transaction under the head capital gain. Thus, ground No.1 raised by the assessee is allowed.

17. So far ground No.2 is concerned, it relates to disallowance of deduction under section 54F of the Act. Since, we have allowed ground no.1 of the assessee, holding the assessee's transaction falls under the head capital gain, therefore assessee is entitled to claim the deduction under section 54F of the Act. We note that assessee had claimed the deduction of Rs.31,33,611/- on account of investment of Rs.40,00,000/- in residential house out of sale proceeds of plot of land. Since, all

the conditions of section 54F of the Act are satisfied, the assessee is entitled for deduction under section 54F of the Act. As evident from the enclosed Balance Sheet for A.Y.2011-12, the assessee had invested Rs. 40,00,000/- in purchase of flat at River Heaven Building. The following evidence are furnished by the assessee before assessing officer:

- (i) The copy of Registered purchase deed of Flat No. 201 and 202 of River Heaven Building. (vide paper book Page 111 to 154)
- (ii) The copy of Ledger Account of Flat in River Heaven Building is enclosed. (vide paper book Page 155)
- (iii) Copy of Photographs of Flats for evidence that two units of flats were merged as a single residence (vide paper book Page 156).
- (iv) Copy of Plan of Flats for evidence that two units of flats were merged as a single residence (vide paper book Page 157).

Based on this factual position, we direct the Assessing Officer to allow deduction under section 54F of the Act. Ground No.2 raised by the assessee is allowed.

18. In the result, assessee's appeal is allowed.

19. Now we shall take assessee's appeal ITA No.691/SRT/2018, wherein the grounds of appeal raised by the assessee are as follows:

"1. The learned CIT(A) has grievously erred in law and on facts in confirming the addition of Rs.15,00,000/- u/s 68 of the Act simply on the ground of denial by one depositor and non compliance of notice u/s 133(6) by another depositor without appreciating the evidences of name, address, PAN, confirmation, balance-sheet, bank statement, computation of income and acknowledgment of I.T. Return of depositors submitted by assessee. The addition of Rs.15,00,000/- should therefore be deleted."

20. Succinct facts *qua* the issue are that during the course of assessment proceedings, the Assessing Officer issued notices u/s 133(6) of the Act on 28.11.2016 to eight (8) parties from whom the assessee had taken unsecured loans. In response to the notice u/s 133(6) of the Act, one Shri Navneet Haribhai Pimpale attended the office of the assessing officer and denied the transaction with assessee. The Assessing Officer also noted that one Shri Madanbhai Bhagwanbhai Dangi,

who had given the unsecured loan of Rs.5,00,000/- had not submitted any details before the Assessing Officer in response to the notice u/s. 133(6) of the Act. Therefore, Assessing Officer made the addition of Rs.15,00,000/- u/s 68 of the Act.

21. On appeal, Ld.CIT(A) confirmed the action of the Assessing Officer.

22. Aggrieved, the assessee is in appeal before us. Learned Counsel for the assessee submitted before us that assessee submitted before the Assessing Officer the name, address, PAN, confirmation, bank statement and the acknowledgment of IT return of the two depositors. It was submitted that the two depositors in response to the notice u/s. 133(6) of the Act had submitted their reply confirming the transactions with the assessee on 29.11.2016. The assessee was asked by the Assessing Officer to produce the two depositors on 30.11.2016 but the assessee had requested the Assessing Officer to issue summons to the depositors to enforce their attendance. But the Assessing Officer did not issue summons and therefore, depositors could not be produced. Therefore, ld Counsel contended that addition made by Assessing Officer may be deleted.

23. On the other hand, the Ld. CIT-DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

24. We have heard both the parties. We note that it is an established proposition of law that onus is never static but goes on shifting as and when the two contesting parties lay down evidence in support of their stand. The law in section 68 puts burden of proof, which is fixed on the assessee, to prove nature and source of credit appearing in its books. The Courts have explained the nature and source as identity of the creditor, his creditworthiness and genuineness of the transaction. If assessee is able to discharge the initial onus by submitting evidence to prove the identity of the creditor, and his creditworthiness and genuineness of the transaction then onus will shift to the Assessing Officer to put material on record to the effect that in spite of identity of the creditor and its creditworthiness being proved the transaction is

still not genuine. If the Assessing Officer does so, then the onus will again shift back on the assessee to prove the genuineness of the transaction by rebutting the material brought on record by the Assessing Officer. If assessee fails to do so, then the burden placed by section 68 cannot be said to be discharged by the assessee and it could not be held that the assessee had explained the credits satisfactorily. Under these circumstances, the Assessing Officer can make addition of the amount credited u/s 68. However, neither the nature and extent of material required to be brought on record by a party, nor the circumstances under which it should be brought are fixed, they will vary according to the issue involved, the nature of the evidence required to be produced, the time period elapsed since the event generating evidence took place, and the position and competence of the parties required to produce the evidence. Looking to this aspect of vulnerability of discharge of onus the law has given enough discretion to the Assessing Officer by putting the word "May" and not "Shall" before he draws any adverse inference against the assessee. Merely because an assessee is not able to discharge the onus shifted back on him should not make the Assessing Officer to jump to the conclusion that addition is required to be made. He has to give weightage to the underlying circumstances under which the assessee is not able to discharge the onus. Hon'ble Supreme Court in CIT v. Smt. P.K. Noorjahan [1999] 103 Taxman 382 held that word "shall" was substituted by the word 'may' on the recommendation of the Select Committee. "This clearly indicates that the intention of the Parliament in enacting section 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory".

25. The Same principle applies to section 68. For taxing loan creditors u/s 68, the assessee is required to prove: (a) Identity of creditor (b) Genuineness of transaction; and (c) Creditworthiness of creditor. Once an assessee has submitted the documents such as (i) PAN, (ii) income-tax returns of creditors, (iii) the details of bank accounts through and to which the loan amount has passed, (vi) confirmations of creditors etc., then initial onus lying on the assessee would stand

discharged. It is so held in several judgments such as CIT v. Dwarkadhish Investment (P.) Ltd. [2010] 194 Taxman 43 (Delhi), CIT v. Sophia Finance Ltd. [1994] 205 ITR 98 / [1993] 70 Taxman 69 (Delhi), CIT v. Kundari Investment Ltd. [2003] 263 ITR 626/130 Taxman 689 (Cal.) and CIT v. Rathi Finiease Ltd. [2008] 215 CTR 429 (M.P.). The Creditworthiness or financial strength of the creditor can be proved by producing the bank statement of the creditor showing that it had sufficient balance in its accounts to enable it to advance money to the assessee. The genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said creditor and it came from the coffers of that very creditor. The Division Bench of Delhi High Court in the case of CIT vs. Kamdhenu Steels and Alloys Ltd. 361 ITR 220 (Del.) held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Once these documents are produced, the onus cast on the assessee can be said to have been satisfactorily discharged. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents, to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the Assessing Officer, and he cannot go into the realm of suspicion. The Assessing Officer cannot burden the assessee with tax liability merely on the ground that summons issued to the creditors were returned back with the endorsement not traceable.

26. Thus, we note that once the assessee had produced all documents establishing the identity and capacity of creditors and genuineness of transactions, the initial onus cast upon the assessee was discharged and the onus shifted to the assessing officer to bring material on record to the effect that in spite of identity and creditworthiness of the creditor being proved, the transaction was still not genuine. However, the Assessing Officer has not made any further inquiries and has not brought any material on record to controvert the documentary evidence submitted by the assessee. Therefore, considering the legal and factual matrix of the case, as stated above, we delete the addition.

27. In the result, ground raised by the assessee is allowed.

28. In combined result, both appeals filed by the assessee are allowed.

A copy of the instant common order be placed in the respective case file(s).

Order pronounced on 30/03/2022 by placing the result on the notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat/दिनांक/ Date: 30/03/2022
Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat