

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

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

आयकरअपीलसं./ITA No.297/SRT/2023

(निर्धारणवर्ष / Assessment Year: (2018-19)

(Virtual Court Hearing)

Assistant Commissioner of Income-tax, Circle-2, Surat, Room No.503, 5 th Floor, AAYakar Bhawan, Majura Gate, Surat- 395001	Vs.	Shri Jayantibhai Virjibhai Babariya, K-801, River View Heights, Pedar Road, Mota Varachha, Surat-394101
स्थापीलेखासं./जीआइआरसं./PAN/GIR No.: AFHPB 0820 M		
(अपीलार्थी /Appellant)		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Assessee by : Shri Ashwin K Parekh, AR

राजस्व की ओर से /Respondent by : Shri Ashok B. Koli, CIT-DR

सुनवाईकीतारीख/ **Date of Hearing** : 10/07/2023

घोषणाकीतारीख/**Date of Pronouncement** : 11/09/2023

आदेश / O R D E R

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

Captioned appeal filed by the Revenue, pertaining to assessment year 2018-19, is directed against the order passed by the Learned Commissioner of Income-Tax (Appeals)-4, Surat ['Ld.CIT(A)' for short], dated 14.02.2023, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act'), dated 07.05.2021.

2. The grounds of appeal raised by the Revenue are as follows:

"1. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.3,28,68,000/-, made by the AO u/s 69 of the I T Act despite the facts that addition has been made on the basis of incriminating details/document showing unaccounted land transactions carried out by the assessee, found and seized during the course of search proceedings.

2. On the facts and circumstances of the case and in law, the ld. CIT(A) has failed to appreciate that the assessee could not bring on record any cogent explanation in respect of 'Saudha Chitthi' being not a live evidence and therefore, the admission of Shri Manoj C. Patel regarding the entirety of the transaction and

involvement of on-money in the land transaction in question has to be given full effect to.

3. In addition to the ground No.1 & 2 on the facts and circumstances of the case and in law, the ld. CIT(A) has failed to appreciate that the subsequent retraction of his statement by Shri Manoj C Patel was only an afterthought for the purpose and convenience of the parties involved in the whole land transaction and such retraction should not have been a guiding factor for the appellate authority for ignoring of the clinching evidences brought on record by carrying out search and seizure action.

4. In addition to the ground No.1 & 2 on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition relying upon the decision of the Hon'ble ITAT in assessee's own case for the AY 2017-18 in which it is observed that an opportunity for cross-examination was not granted to the assessee which whereas the assessee was granted ample opportunity by the Investigating Officer before preparation of appraisal report as also by the Assessing Officer during the course of assessment proceeding.

5. In addition to the ground No.1 & 2 on the facts and circumstance of the case and in law, the ld. CIT(A) has erred in not appreciating the fact that one of the co-owners of the property has admitted that he has sold his share of land to Shri Vasantrai A Modi for a consideration of Rs.85,00,000/- even though the property was standing in the name of the assessee himself in the Revenue records and no registered sale deed has been even executed which shows that the land transactions in real estate business are taking place on the basis of 'Saudha Chitthi' and hence, the basis that the land in question has not been transferred to purchaser has not merit at all.

6. In addition to the ground Nop.1 & 2 on the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.3,28,68,000/- without appreciating the facts that in real estate market like in Surat, to evade the taxation, the transactions are made on Plain papers/satakhat without registration of sale deed.

7. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not exercising the powers conferred on him as per the provisions of section 251(1)(a) and (aa) and Explanation thereof to strengthen the addition made by the Assessing Officer on the basis of clinching evidences found and seized during the course of search proceedings and thereby erred in placing heavy reliance on the Valuation Report of the DVO prepared on mere estimates and assessment order passed for the subsequent year by a lower authority.

*8. Without prejudice to and in addition to the grounds No.1 to 7, on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the Assessing Officer ignoring the principles of "**Human Probability Test**" i.e., preponderance of probabilities which is applicable for Income Tax proceedings.*

9. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-4, Surat ought to have upheld the order of the Assessing Officer.

10. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that the AO may be restored to the above extent.”

3. When this appeal was called out for hearing, Learned Counsel for the assessee, invited our attention to the order dated 22.11.2022 in ITA Nos. 110 and 195/SRT/2021, passed by the Division Bench of this Tribunal in assessee’s own case for assessment year (A.Y.) 2017-18, *whereby* the issue relating to addition made by the Assessing Officer based on the “sauda Chithi” and based on the statement of Shri Manoj C. Patel, have been discussed and adjudicated in favour of assessee. Learned counsel for the assessee submitted that the present appeal is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench.

4. The Ld. CIT-DR for the Revenue, nevertheless defended the order passed by Assessing Officer. The Ld. CIT-DR for the Revenue heavily relied on Ground No.5 raised by Assessing Officer, wherein the statement of Shri Vasantrai A. Modi has been mentioned. The Ld. CIT-DR therefore stated that assessee’s case is not fully covered. Therefore, Ld. CIT-DR prayed the Bench that the addition made by the assessing officer may be upheld.

5. We see no reason to take any other view than the view so taken by the Division Bench of this Tribunal in assessee’s own case (*supra*) vide order dated 22.11.2022, *wherein* the Tribunal has *inter alia* observed as follows:

“4. Now, we shall take Revenue’s appeal in ITA No.195/SRT/2021, for AY.2017-18, wherein the Grounds of appeal raised by the Revenue are as follows:

“1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.41,67,45,000/- without appreciating the fact the addition was made on the basis incriminating documents, showing unaccounted land transactions carried out by the assessee, found and seized during the course of search proceedings.

2. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in treating the incriminating documents in the form of duly

written and signed "Saudha Chithi" found and seized during the course of search and seizure action carried out by the Department as dumb documents without appreciating the fact that the same carries an evidentiary value and the person from whom the same was found and seized has admitted that the same was found from his possession in the statement recorded on oath and the contents therein were also clearly explained as to be pertaining to the unaccounted transactions of the land in question as also the said document was received by him from the assessee, Shri - Jayantibhai Virjibhai Babariya through Whatsapp message.

3. On the facts and circumstances of the case and in law, the Ld.CIT(A) has failed to appreciate that the assessee could not bring on record any cogent explanation in respect of 'Saudha Chitthi' being not a live evidence and therefore, the admission of Shri Manoj C. Patel regarding the entirety of the transaction and involvement of on-money in the land transaction in question has to be given full effect to.

4. On the facts and circumstances of the case and in law, the ld. CIT(A) has failed to appreciate that the subsequent retraction of his statement by Shri Manoj C Patel was only an after thought for the purpose and convenience of the parties involved in the whole land transaction and such retraction should not have been a guiding factor for the appellate authority for ignoring of the clinching evidences brought on record by carrying out search and seizure action.

5. On the facts and circumstances of the case and in law, the Ld.CIT(A) has failed to appreciate the fact that the Valuation Report of the DVO was mere estimates on the basis of sale instances of the locality as per their Jantri Value without taking into consideration the incriminating and corroborative evidences in respect of the very land in question, found and seized during the course of search proceedings and the overall development of the area in which the land in question was situated which includes the Dream City project.

6. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in observing that an opportunity for cross examination was not granted to the assessee which is baseless as the assessee was granted ample opportunity by the Investigating Officer before preparation of appraisal report as also by the assessing officer during the course of assessment proceeding. The assessee, however, chose not to avail them for the reason best known to him thereby leading to the erroneous observation of the Ld. CIT(A) and eventually granting relief to the assessee by deleting the addition of Rs.41,67,45,000/- made in the assessment order.

7. On the facts and circumstance of the case and in law, the ld. CIT(A) has erred in not appreciating the fact that one of the co-owners of the property has admitted that he has sold his share of land to Shri Vasantrai A Modi for a consideration of Rs.85,00,000/- even though the property was standing in the name of the assessee himself in the revenue records

and no registered sale deed has been even executed which shows that the land transactions in real estate business are taking place on the basis of 'Saudha Chitthi' and hence, the observation of the ld. CIT(A) that the land in question has not been transferred to purchaser has no merit at all.

8. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not exercising the powers conferred on him as per the provisions of Section 251(1)(a) and (aa) and Explanation thereof to strengthen the addition made by the Assessing Officer on the basis of clinching evidences found and seized during the course of search proceedings and thereby erred in placing heavy reliance on the Valuation Report of the DVO prepared on mere estimates and assessment order passed for the subsequent year by a lower authority.

9. It is, therefore, prayed that the order the Ld. CIT(A)-4, Surat may be set aside and that of the AO may be restored to the above extent.

10. The assessee craves leave to add, alter, amend and/or withdraw any round(s) of appeal either before or during the course of hearing of the appeal.”

5. Succinct facts are that assessee is engaged in the business of development of land and derived income from various partnership firms as a partner and interest income during the year under consideration. The assessee was issued notice u/s 142(1) of the Act on 31.12.2017 and in response to the same, he filed the return of income on 26.03.2018 declaring total income at Rs.50,33,500/-. Notice u/s 143(2) of the Act was issued on 16.08.2018 which was duly served upon the assessee. During the course of search proceedings on 18.03.2017 at the office premises of M/s Hallmark Tour, Samsung mobile of Shri Manoj C. Patel was seized and later on mirror image of the mobile phone was taken. During the post search enquiries, the ITO (Inv.), Surat has analyzed data retrieved from the said mobile. Page No. 10 of the file containing printout of data having details regarding sale of land situated at Survey No.203, Khajod, Surat. It is an agreement for sale of land (saudha chithi) containing details of location of land, rate of land, area of land, term & conditions for payment, signatures of seller & purchaser with date. The ITO (Inv.) Surat confronted Shri Manoj C. Patel regarding the notings found in the said page. Shri Manoj C. Patel as a partner of Hallmark tour admitted in the statement recorded on oath dated 28.06.2017 that this page no. 10 is regarding land situated at Survey No.203, Khajod, Surat admeasuring 9.45 Bigha, which is an agricultural land of "Juni Sharat". The decoded rate is written as 8.82 per Bigha which means Rs.8,82,00,000/- per Bigha. Therefore, the entire transaction amount of the land works out at Rs.83,34,90,000/- (8,82,00,000 x 9.45). Though location of the said piece of land, rate and other terms and conditions can be ascertained from plain reading of the said saudha chithi, however identity of buyers and sellers is not legible.

6. Shri Manoj C. Patel also admitted that this page was received on whatsapp from Shri Jayantibhai Babariya of 'Avadh Group', Surat i.e. the assessee. On conducting enquiries with the Dy. Mamlatdar, City Taluka, Surat to ascertain present status of land situated at Survey No. 203, Khajod, Surat, the ITO(Inv.),

Surat found that the land is standing in the name of Apurva Vikrambhai Pal HUF, Shri Pravin Dahyabhai Umrigar and Shri Prabodhchandra Jayantilal Patel. The statement of the assessee was recorded on oath u/s. 131 of the Act on 10.12.2018. The Assessing Officer held that the assessee, Shri Jayantibhai Babariya is buyer of the land under consideration, as Shri Manoj C. Patel stated to have received this sauda chithi on whatsapp from the assessee. Accordingly, the Assessing Officer considered Rs.83,34,90,000/- as unaccounted investment of the assessee in the above mentioned land and out of same, Rs.41,67,45,000/- i.e. 50% added in the A.Y.2017-18 and remaining amount of Rs.41,67,45,000/- stated to be pertained to the AY.2018-19. With these facts, the Assessing Officer issued show cause notice dated 11.12.2018 to the assessee that why Rs.41,67,45,000/- should not be considered as unaccounted investment for the A.Y. 2017-18. The assessee filed reply vide letter dated 14.12.2018 in response to the above mentioned show cause notice, which was not found satisfactory by the Assessing Officer. The submission of the assessee has been reproduced by the Assessing Officer on page no. 3 & 4 of the assessment order. The Assessing Officer stated that it is not necessary in the land transactions that the property is transferred to the buyer and transactions are carried out by the parties other than the seller & buyer in between and sale deed is made by the sellers in the name of the last buyer. The in-between people involved in such transactions are either become confirming party or their names are not mentioned in the sale deed at all. Thus, the investment made by them remains unaccounted. The Assessing Officer further stated that the details of the land as mentioned in "saudha chithi" is exactly matching with the land owned by the persons mentioned above. Statement of Shri Apurva Vikrambhai Pal, one of the owner of the above mentioned land was recorded on 14.12.2018, in which he has admitted that he has sold 96% of his share to Shri Puranbhai Chandwani, Shri Shankerbhai Uttamani & Others but their names have not been registered in the land record yet, which prove that in land transactions, the names of many people who are involved in the transactions are not mentioned and such people exit from the transactions after earning profit.

7. The Assessing Officer further stated that the land under consideration is situated near to Surat Diamond Bourse (SDB), therefore the rates of the land are going to be higher in future. During the course of assessment proceedings, the assessee requested for cross-examination of Shri Manoj C. Patel, whose statement was recorded by the Authorized Officer but the Assessing Officer rejected the same by stating that the cross-examination dates were fixed by the Authorized Officer, however, the assessee sought adjournments. So now the request for cross-examination of Shri Manoj C. Patel was not justified, hence it was rejected. The Assessing Officer passed the assessment order on 28.12.2018 and made additions of Rs.41,67,45,000/- to the returned income considering unexplained investment under section 69 of the Act.

8. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has deleted the addition made by Assessing Officer, observing as follows:

“...6.7 The submission of the assessee, facts mentioned in the assessment order, the statement recorded during the assessment & search proceedings, the report of District Valuation Officer and the assessment order for A.Y. 2018-19 made by the Assessing have been carefully gone

through. It is undisputed fact that additions have been made by the Assessing Officer on the basis of sauda chithi found during the course of search on 18.03.2017 at the premises of M/s. Hallmark Tour after taking mirror images of Samsung mobile phone of Shri Manoj C. Patel. This mirror image was taken after few months of search and statement of Shri Manoj C. Patel was recorded on this issue first time on 28.06.2017. In the statement, Shri Manoj G. Patel stated that the said sauda chithi has been sent to him on whatsapp by Shri Jayantibhai Babariya of Avadh Group i.e. assessee. In the above sauda chithi, signature of buyers & sellers are there but these are not legible and from the sauda chithi itself, it cannot be ascertained that who is the buyer and who is the seller of land. Therefore, the Assessing Officer made enquiries from Dy. Mamlatdar Officer, Surat about the ownership of land i.e. plot no. 203 Khajod, Surat and found that land is in the name of these persons namely Apurva Vikrambhai Pal HUF, Pravinchandra Dahyabhai Umrigar and Shri Prabodhchandra Jayantilal Patel. These facts clearly shows that the sauda chithi which has been made the basis for these additions was found at the premises of third party and not at the premises of assessee, therefore presumption of section 132(4) and section 292(C) are not available against the assessee. The above mentioned sauda chithi is neither in the hand writing of the assessee nor it is signed by the assessee. Moreover, the sauda chithi does not contain the name of the assessee. Statement of the assessee, who has been stated by Shri Manoj C. Patel as sender of the said sauda chithi through whatsapp on his mobile, was also recorded by the Assessing Officer on 10.12.2018 i.e. during assessment proceedings. In the said statement, the assessee stated that he did not enter in to transactions to purchase the land mentioned in the said sauda chithi. He did not make any payment for purchase of said land. He further stated that he did not send the said sauda chithi to Shri Manoj C. Patel through whatsapp, as phone no. 98251-00858 does not have whatsapp facility. Shri Manoj C. Patel in the statement recorded on 28.06.2017 stated that the assessee sent me this sauda chithi through whatsapp from mobile no. 98251-00858 but the assessee stated that on this mobile no.98251-00858, whatsapp is not activated at all. Moreover, that mobile number has not been found registered in the name of the assessee. Statement of Shri Pravinchandra Dahyabhai Umrigar and other two co-owners of the land was recorded by the Assessing Officer on 14.12.2018, who confirmed their ownership in the land mentioned in the sauda chithi. He further stated that he had sold part of his share in the said land to Vasantraj Modi and Smt. Shilpa Patel for which he received advance amount and the same has been shown in his regular books of accounts. As the buyers have not paid full agreed consideration, he did not get registration made in the name of buyers. He did not name assessee as buyer/investor. He further stated that he has not entered in to any transactions as written in the said sauda chithi. He has also stated that the rate I written in the sauda chithi cannot be the price of the land mentioned, as it is too high keeping in view the prevailing market rates. Statement of Shri Prabodhchandra Jayantilal Patel was also recorded u/s. 131 of the Act by the Assessing Officer on 14.12.2018, in which he stated that he has not sold his share in the land written in the said sauda chithi to anyone and did not receive any amount as mentioned

*in the sauda chithi. He stated that he is seeing the sauda chithi first time & he does not know who has signed the said sauda chithi. Statement of Shri Apurva Vikrambhai Pal, other co-owner was also recorded by the Assessing Officer on 14.12.2018 u/s. 131 of the Act, who confirmed the 1/3rd ownership in the land written in the sauda chithi, but he stated that he is seeing this sauda chithi first time and totally unaware about the other details written on the said sauda chithi. He also stated that he has agreed to sale his 96% of share in the land to Shri Puranbhai Chandwani & Shri Shankerbhai Uttamani and Others but transactions has not yet completed, as the land could not be converted in to N.A. The advance received by him from the proposed buyers is reflected in the regular books of accounts. Apart from these statement recorded by the Assessing Officer of all the related parties, Shri Manoj C. Patel from whose possession, the said sauda chithi was found & seized, filed retraction on 13.12.2018 before the Assessing Officer which is notarized & on stamp paper stating that his statement about receipt of said sauda chithi from the assessee on his mobile phone through whatsapp recorded on 18.06.2017 is not true & correct and thus, he is retracting from that statement. These facts clearly prove that the sauda chithi is a dumb document as far as the assessee is concerned. Hence, the additions cannot be made on the basis of such dumb documents. The assessee's case has been found covered by the judgment of Hon'ble Supreme Court of India in the case of Common Cause (A Registered Society) & Others Vs. Union of India & Others (2017) 98 CCH 0028 (SC) and CBI Vs. V.C. Shukla AIR 1998 SC 1406. As the additions has been made by the Assessing Officer on the basis of dumb documents, these additions deserves to be deleted) hence these are **deleted** for this reason.*

6.8 Moreover, it is undisputed fact that the additions has been made by the Assessing Officer before receipt of report from the DVO. The matter was referred to the DVO by the Assessing Officer vide letter dated 24.12.2018 and the DVO submitted report on dated 29.12.2018 which was received by the Assessing Officer on 31.12.2019. In the above mentioned valuation report, the DVO has valued the property at Rs.6,57,36,000/- instead of Rs.83,34,90,000/-. The Assessing Officer has passed the assessment order for A.Y.2018-19 in the case of the assessee vide order dated 07.05.2021 and the valuation made by the DVO has been accepted by the Assessing Officer. The Assessing Officer has made additions of Rs.3,28,68,000/- in the assessment order passed for A.Y.2018-19 and did not made the additions of Rs.41,67,45,000/- as made in the assessment order under consideration. These facts clearly prove that the additions made by the Assessing Officer only on the basis of sauda chithi are not justified. Hence, deserves to be deleted. The DVO's report further prove that the rate of per bigha mentioned in the said sauda chithi is about 12 times higher than the value determined by the DVO which prove that the contents of the said sauda chithi are not reliable. On this basis too, the additions made by the Assessing Officer are found unjustified and hence deserves to be deleted.....”

9. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us.

10. Learned DR for the Revenue pleads that decision of the Ld. C.I.T.(A), is not acceptable as in the assessment order, the AO has very well rebutted the points raised by the assessee during the assessment proceedings. The AO in the assessment order has also mentioned in para 6(ii) of the assessment order that Shri Manoj C Patel stated that the transaction was undertaken by Shri Jayantibhai Babariya in the land under consideration. Merely because the sauda chitthi does not contain the name of the assessee nor having signature and it is not written in hand writing of the assessee, the document cannot be treated as dumb. Further, at the time of cross examination, Shri Manoj C Patel and Shri Jayantibhai Babariya appeared before the assessing officer and this finding has been incorporated by the AO in para 6(iii) of the assessment order. So the contention of the assessee that the opportunity to cross examine was not given is not tenable. There are ample other facts on record which indicate that there is involved on the unrecorded investment made by the assessee. During the course of search and post search various enquiries made and statements recorded of various sellers / buyers of the property. Had it been the dumb document, such specific contentions would not be there from the co-owner of this land. Considering all these facts, the decision of the ld. CIT(A) is not acceptable and therefore addition made by the assessing officer may be sustained.

11. On the other hand, Ld. Counsel for the assessee defended the order passed by the ld. CIT(A).

12. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. We note that issue under consideration is squarely covered by the Judgment of the Coordinate Bench in the case of Shri Pravinchandra Dahyabhai Umriger, in ITA No.134 to 137/SRT/2021, order dated 10.05.2022, wherein the Tribunal has observed *inter alia*, as follows: "14. We note that there are three components of a taxing statute, viz., subject of the tax, person liable to pay the tax and the rate at which the tax is levied (*State of Kerala v. Alex George* (2005) 1 SCC 299 p. 306). If there be any real ambiguity in respect of any of these components which is not removable by reasonable construction, there would be no tax in law till the defect is removed by the legislature (*Mathuram Agarwal v. State of Madhya Pradesh* AIR 2000 SC 109). In terms of Article 265 of Constitution of India, all Acts relating to the imposition of tax providing, *inter alia* for the point at which the tax is to be collected, the rate of tax as also the recovery must be carried out in accordance with law (*Corporation Bank v. Saraswati Abharansala* (2009) 1 SCC 540 15). If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of '**unjust enrichment**', the excess tax realized must be refunded to the assessee.

The Hon'ble Supreme Court in *ITO Vs. CH. Atchiaiah* (1996) 218 ITR 239 (SC) has held that the income should be assessed on the right person, right year and it should be on the right income. From the aforesaid decision of the Hon'ble Supreme Court only the right person and the right person alone is liable to be taxed and not the wrong person. We note that 'sauda chitthi' does not pertain to the assessee. The assessing officer made addition based on the said 'sauda

chithi’ which was found from third party, Shri Manoj C. Patel. **The said ‘sauda chithi’ does not contain the name of the assessee.** We note that Shri Manoj C. Patel did not say that said ‘sauda chithi’ pertains to assessee. No opportunity for cross examination of Shri Manoj C. Patel was provided to the assessee. Therefore, we are of the view that said ‘**sauda chithi**’ is not a relevant document to fasten the tax liability on the assessee and to collect tax from the assessee.

15. We note that capital gain arises in the hands of assessee, provided there is transfer of capital asset during the previous year relevant to assessment year under consideration, that is, assessment year 2017-18. During the assessment year 2017-18, the assessee was owner of land, it was not sold. That is, the land has not been transferred to any one by registering the sale deed and it is in the name of the assessee and other two co-owners which is seen even from the report of DVO submitted on 29.12.2018. These facts prove that the transfer of the land under consideration has not taken place, as no sale deed has been registered. The possession of the land is also with the assessee, hence it is not a case of part performance as covered by section 53A of Transfer of Property Act. In this case, there is no proof that the assessee has received any consideration on sale of this land. Keeping in view of these facts, as narrated above, we are of the view that no any income by way of capital gain, has accrued in the hands of the assessee. Lord Macnaghten, in the case of *London County Council v Attorney-General* 1901 AC 26, 35-6 (HL), 4 TC 265, 293, held that:

“Income Tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct.”

The Constitution of India is the supreme law of the land, and all other laws, including the Income tax Act, are subordinate to the Constitution and must be read and interpreted in the light of the constitutional provisions. (*CIT v Tlarijan Nigam* 226 ITR 696.) In *India Cements Ltd v State of Tamil Nadu*, 188 ITR 690, 699 (SC), a seven-judge Bench of the Hon`ble Supreme Court observed that the Constitution is the mechanism under which the laws are to be made. One of the most important provisions of the Constitution relating to taxation is Article 265, which provides: “No tax shall be levied or collected except by authority of law”. Therefore, not only the levy but also the collection of a tax must be under the authority of some law. **We note that section 2(47) of the Act defines ‘transfer’ in relation to a capital asset, which includes: sale, exchange, relinquishment, extinguishment, compulsory acquisition etc. In assessee’s case, the assessee is owner of the asset in the assessment year 2017-18, he did not sale his asset (land), hence, the Revenue does not have authority to collect the capital gain tax from the assessee.**

16. At the cost of repetition we state that during the assessment proceedings, the Assessing Officer referred the matter to District Valuation Officer (DVO) to determine the fair agriculture land at Survey No. 203, Khajod, Surat vide letter dated 24.12.2018 u/s 55A of the Income Tax Act, 1961. As the valuation report from the DVO was pending, therefore, Assessing Officer made additions of Rs.13,86,85.279/- considering unexplained capital gain as mentioned in the ‘sauda chithi’ found from the third party premises. **The DVO, Surat has submitted his report dated 29.12.2018 which was received by the Assessing**

Officer on 31.12.2019, in which the total value of the land under consideration has been determined at Rs.6,57,36,000/- and the assessee's share i.e. 1/3rd in the above mentioned property was determined by the DVO at Rs.2,19,12,000/-. The Assessing Officer while passing the assessment order of the assessee for A.Y.2018-19, immediate subsequent year vide order dated 07.05.2021, has accepted the value determined by the DVO and made the additions of Rs.1,07,19,318/- only i.e. 50% in the assessment order instead of Rs.13,86,85,279/- as made for the year consideration. This addition was after allowing cost of acquisition and indexation. From these facts, it is clear that Assessing Officer himself has accepted the valuation report which determined value of the total land at Rs.6,57,36,000/- instead of Rs.83,34,90,000/-. The assessee's 1/3rd share has been accepted by the Assessing Officer A.Y.2018-19 at Rs.2,19,12,000/- instead of Rs.27,78,30,000/- while passing the assessment order for assessment year 2018-19. The ld Counsel pleaded that the 'sauda chithi' has been found from the possession of a third party i.e. Shri Manoj C. Patel, who did not say that the said seized 'sauda chithi' pertains to the assessee and therefore the presumptions on the basis of unnamed 'sauda chithi' found from third persons u/s. 132(4)/292(C) is not available against the assessee. The ld Counsel further stated that the seized 'sauda chithi' neither mentioned the assessee's name nor having his signature and it is not in the hand writing of the assessee. **It does not contain name of the purchaser or seller, hence the 'sauda chithi' cannot be relied upon to make the additions for undisclosed capital gains on sale of land in the hands of the assessee. Moreover, there is no statement i.e. either Shri Manoj C. Patel from whose possession the aforesaid 'sauda chithi' was found or Shri Jayantibhai Babariya, who has said to have sent the 'sauda chithi' on whatsapp to Shri Manoj C. Patel that the seized 'sauda chithi' pertains to the assessee. There is no evidence of receipts of any money by the assessee. The assessee also contended that sale of the land under consideration has not been made, because, as on date the said agriculture land still stands registered in the assessee's name with other two co-owners and the possession also rests with the assessee, which prove that the transfer has not been taken place. Thus, there is no question of earning any undisclosed capital gain. In support of all these contentions, the ld Counsel cited several case laws of Higher Judicial Authorities in which it has been held that additions on the basis of documents found at third party premises cannot be sustained only on the basis of surmises and conjectures. The assessee further contended that the additions were made by the Assessing Officer before receipt of valuation report from the DVO. The DVO submitted his report on 29.12.2018, which was received by the Assessing Officer on 31.12.2019 and in the above mentioned valuation report, the DVO has valued the price of land at Rs.6,57,36,000/- instead of Rs.83,34,90,000/- as written in the 'sauda chithi,' which itself prove that the rate mentioned in the sauda chithi is not clear at all. The DVO has valued the property at about 8% of the price written in said 'sauda chithi'. Therefore, such 'sauda chithi' cannot be relied upon for making the additions in the assessee's case.**

17. We note that ld Counsel also contended that cross-examination of Shri Manoj C. Patel and Shri Jayantibhai Babariya whose statements were recorded by the Investigation Wing and also by the Assessing Officer, was requested from the Assessing Officer. However, the same has been denied by the Assessing Officer stating that the request for cross-examination has been submitted at the flag end

of the year. The assessee stated that the assessment under consideration was not getting barred by limitation of time on 31st December, 2018 and the Assessing Officer had one more year to complete the assessment u/s 143(3) of the Act. Therefore, the contention of the Assessing Officer that request has been submitted at the flag end of the year is factually incorrect. Thus, we note that assessee has requested for cross examination of Shri Manoj C. Patel and Shri Jayantibhai Babariya as mentioned in the para 8.9 of the assessment order, that is, Statement of these two persons were recorded by the Authorized Officer and the Assessing Officer, during the course of search and during the course of assessment proceedings respectively. The Assessing Officer has relied upon the statement of Shri Manoj C. Patel for making these additions. However, the opportunity of cross examination was not provided by stating that it has been submitted at the flag end of the year. It is settled law that any additions made in absence of providing opportunity of cross examinations of persons, whose statement has been relied upon for making the additions is in violation of natural justice, hence cannot be sustained. The Hon'ble Supreme Court of India, in the case of *Krishnachand Chelaram Vs. CIT 125 ITR 713 (SC)* and *Andaman Timber Industries Vs. Commissioner of Central Excise (2015) 281 CTR 0241 (SC)* has held that additions without providing the opportunity of cross examination is in violation of natural justice.

We also note that not allowing the assessee to cross examine the witness by the adjudicating authority though the statements of those witness were made the basis of the impugned order is a serious flaw which makes the order nullity. We note that same view was expressed by the Hon'ble Calcutta High Court in the case of *Eastern Commercial Enterprises 210 ITR 103 (Cal)*, wherein it was held that it is a trite law that cross examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against the party unless the party is put on notice of the case made out against him. Therefore, the addition made by the assessing officer based on the statement of Shri Manoj C. Patel, is not sustainable in law, as the assessing officer did not provide an opportunity to the assessee to cross examine the statement of Shri Manoj C. Patel, therefore addition made by the assessing officer has rightly been deleted by ld CIT(A).

Keeping-in view these binding judgments of the Hon'ble Supreme Court of India, the additions made by the Assessing Officer are not found justified on this ground too hence, we are of the view that ld CIT(A) has rightly deleted the addition.

18. The ld Counsel further contended that the additions has been made by the Assessing Officer in the A.Y. 2017-18 however, the land has not been sold till date as stated above and as per legally settled principle, the transfer of capital asset takes place in the year, in which the sale deed is registered, in this case, the sale deed has not been made till date and possession of the property is with the assessee. Therefore, additions are legally not justified on this count too. It is undisputed fact that additions have been made by the Assessing Officer on the basis of 'sauda chithi' found during the course of search on 18.03.2017 at the premises of M/s, Hallmark Tour after taking mirror images of Samsung mobile phone of Shri Manoj C. Patel. This mirror image was taken after few months of search and statement of Shri Manoj C. Patel was recorded on this issue first time on 28.06.2017. In the statement, Shri Manoj C, Patel stated that the said 'sauda chithi' has been sent to him on whatsapp by one Shri Jayantibhai Babariya of

Avadh Group. In the above 'sauda chithi', signature of buyers and sellers are there but these are not legible and from the 'sauda chithi' itself, it cannot be ascertained that who is the buyer and who is the seller of land. Therefore, the Assessing Officer made enquiries from Dy. Marnlatdar Officer, Surat about the ownership of land i.e. plot no. 203 Khajod, Surat and found that land is in the name of the assessee and two other persons namely Apurva Vikrambhai Pal HUF and Pravinchandra Dahyabhai Umrigar. The assessee has 1/3rd share in the above mentioned land. Shri Manoj C. Patel also did not mention the name of the assessee, while recording his statement u/s 132(4) of the Act on 28.06.2017. These facts clearly shows that the 'sauda chithi' which has been made the basis for these additions was found at the premises of third party and not at the premises of assessee, therefore presumption of section 132(4) and section 292(C) are not available against the assessee. The above mentioned 'sauda chithi' is neither in the hand writing of the assessee nor it is signed by the assessee. The 'sauda chithi' was found from the mobile phone of Shri Manoj C. Patel who did not identify the assessee as party involved in the above mentioned transactions. Moreover, the 'sauda chithi' does not contain the name of the assessee at all.

19. The Id CIT(A) observed that Statement of Shri Pravainchandra Dahyabhai Umrigar, other co-owner of the land was also recorded by the Assessing Officer on 14.12.2018, who also confirmed his ownership in the land mentioned in the 'sauda chithi'. Shri Pravainchandra Dahyabhai Umrigar, further stated that he has not entered into any transactions as written in the said 'sauda chithi'. Statement of the assessee was also recorded u/s 131 of the Act by the Assessing Officer on 14.12.2018, in which he stated that he has not sold his share in the land written in the said 'sauda chithi' to anyone and did not receive any amount as mentioned in the 'sauda chithi'. He stated that he is seeing the sauda chithi first time and he does not know who has signed the said 'sauda chithi'. Statement of Shri Apurva Vikrambhai Pal, other co-owner was also recorded by the Assessing Officer on 14.12.2018 u/s 131 of the Act, who confirmed the 1/3rd ownership in the land written in the 'sauda chithi', but he stated that he is seeing this 'sauda chithi' first time and totally unaware about the other details written on the said 'sauda chithi'. Apart from these statement recorded by the Assessing Officer of all the related parties, Shri Manoj C. Patel from whose possession, the said 'sauda chithi' was found and seized, filed retraction on 13.12.2018 before the Assessing Officer which is notarized and on stamp paper stating that his statement about receipt of said 'sauda chithi' from Shri Jayantibhai Babariya on his mobile phone through whatsapp recorded on 18.06.2017 is not true and correct and thus, he is retracting from that statement. These facts clearly prove that the 'sauda chithi' is a dumb document as far as the assessee is concerned. Hence, the additions cannot be made on the basis of such dumb documents. The Id CIT(A) relied on the judgment of Hon'ble Supreme Court of India in the case of Common Cause (A Registered Society) & Others Vs. Union of India & Others (2017) 98 CCH 0028 (SC) and CBI Vs. V.C. Shiukla AIR 1998 SC 1406. As the additions has been made by the Assessing Officer on the basis of dumb documents, these additions deserves to be deleted.

20. The Id CIT(A) observed that land has not been transferred to any one by registering the sale deed and it is in the name of the assessee and other two co-owners which is seen even from the report of DVO submitted on 29.12.2018. These facts prove that the transfer of the land under consideration has not taken

place, as sale deed has not been registered and as per the binding judgment of Hon'ble High Court of Gujarat in the case of CIT vs. Ashaland Corporation (1992) 133 ITR 55 (Guj.) in which it has been held that the transfer of the immovable property take place on the date, sale deed is registered. The assessee's case is further found covered by the judgment of Hon'ble Supreme Court of India in the case Alapati Venkatararniah vs. CIT (1965) 57 ITR 185 (SC), in which it has been held that title to immovable assets could not pass till conveyance was executed and registered. The possession of the land is also with the assessee; hence it is not a case of part performance as covered by section 53A of Transfer of Property Act. In the assessee's case, there is no proof that the assessee has received any consideration on sale of this land. Keeping in view of these binding judgments, the ld CIT(A) deleted the addition. We have gone through the findings of ld CIT(A) and noted that there is no infirmity in the order of ld CIT(A). That being so, we decline to interfere with the order of ld. CIT(A) in deleting the aforesaid additions. His order on these additions are, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

21. Since the facts and circumstances in the lead case ITA Nos.37/SRT/2021 for assessment year 2017-18 in the case of Shri Prabodhchandra Jayantilal Patel, are identical and similar with other assessee's, therefore our decision in the lead case in ITA Nos.37/SRT/2021, shall apply mutatis mutandis to other appeals also. Accordingly, other appeals of Revenue are also dismissed.

22. In the result, appeals filed by the Revenue (in ITA nos. 134 to 136/SRT/2021) are dismissed.”

13. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of this Tribunal in in the case of Shri Pravinchandra Dahyabhai Umrigar (supra). As the issue is squarely covered in favour of the assessee by the decision of the Coordinate Bench(supra) and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the Coordinate Bench (supra). We find no reason to interfere in the said order of the Coordinate Bench, therefore, respectfully following the binding judgment of the Coordinate Bench, we dismiss the appeal of the Revenue.”

6. As the issue is squarely covered in favour of the assessee, by the decision of the Co-ordinate Bench of this Tribunal, in assessee's own case (supra). There is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the Co-ordinate Bench (supra). Therefore, respectfully following the binding judgment of the Co-ordinate Bench (supra), we dismiss the appeal of Revenue.

7. Before parting, we note that Ld. CIT-DR for the Revenue, heavily relied on Ground No.5, raised by Assessing Officer, wherein the statement of Shri Vasantrai A Modi has been mentioned and on that basis, Ld. CIT-DR has tried to distinguish the order of the Tribunal. However, we note that said issue has also been considered by the Tribunal in assessee's own case (supra). Therefore, we do not find any merit in the submission of Ld. CIT-DR for the Revenue.

8. In the result, the appeal of the Revenue is dismissed.

Order is pronounced on 11/09/2023 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat/दिनांक/ Date: 11/09/2023
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