

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 299 to 301/JP/2023
निर्धारण वर्ष/Assessment Years : 2009-10 to 2011-12

Shankar Lal Maheshwari B-223, Kirti Nagar, Tonk Road, Jaipur	बनाम Vs.	Income Tax Officer, Ward-6(2), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AJIPM 3514 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. S. L. Poddar
राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 16/08/2023
उदघोषणा की तारीख / Date of Pronouncement: 12/09/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These three appeals are filed by assessee and is arising out of the order of the National Faceless Appeal Centre, Delhi dated 27.04.2023 [here in after Id. NFAC/CIT(A)] for assessment year 2009-10, 2010-11 and 2011-12 which in turn arise from the order dated 09.12.2016 passed under section 143(3) of the Income Tax Act, 1961 [here in after to as Act] by ITO, Ward 6(2), Jaipur.

2. Since the issues involved in all the appeals of the assessee for all different three years and relates to the same assessee involving identical facts, issues and even the grounds of the assessee being similar in these three appeals were heard together with the agreement of the parties and are being disposed off by this consolidated order.

3. At the outset of the hearing the Id. AR of the assessee submitted that the facts are identical in all the three years and therefore, the same be heard together and the Id. DR did not object to the request of the Id. AR of the assessee. As requested by the Id. AR of the assessee the matter in ITA no. 299/JP/2023 for A.Y 2009-10 taken as a lead case for discussions as the issues involved in the lead case are common and inextricably interlinked or in fact interwoven and the facts and circumstances of different years are identical except the difference in the amount in other assessment year. The Id. DR did not raise any specific objection against taking that case as a lead case. Based on the above arguments we have also seen that for these three appeals grounds are similar, facts are similar and arguments were similar and therefore, were heard together these appeals and are disposed by taking lead case facts, grounds, and arguments from

the folder in ITA No. 299/JP/2023 and our findings will equally applicable in the case in ITA nos. 300 & 301/JP/2023.

4. Before moving towards the facts of the case we would like to mention that the assessee has assailed the appeal in ITA No. 299/JP/2023 on the following grounds;

“1. In the facts and circumstances of the case the learned CIT(A) has erred in confirming the order of the Learned AO passed u/s 143(3)/147 of the IT Act 1961 without considering the submission of the assessee that the due procedure of law was not followed.

2. In the facts and circumstances of the case the learned CIT(A) erred in confirming the addition of Rs. 7,00,000/- by not giving the credit of opening cash balance of Rs. 7,95,000/- after submitting detailed explanation in this regard.

3. In the facts and circumstances of the case the learned CIT(A) erred in confirming the addition of Rs. 10,22,900/- on account of short term capital gain without considering the purchase cost of land paid subsequently.

4. The assessee craves your indulgence to add amend or alter all or any grounds of appeal before or at the time of hearing.”

5. The fact as culled out from the records is that on the basis of information available on record for the year under consideration, it was gathered that the assessee has made huge cash deposits. Further the assessee has also sold plot No. 63, Teelawas for consideration of Rs.9,45,000/- for which the Sub Registrar has adopted the value at Rs.16,20,000/-. But the assessee has not filed return of income for the year

under consideration. Thus the assessee has failed to disclose fully and truly all facts necessary for his assessment. Therefore, proceedings u/s 147 was initiated in this case after prior approval from Competent Authority. Notice u/s 148 was issued on 28.03.2016. Notice u/s 148 was issued on 28.03.2016. Notice u/s 142(1) was issued on 01.07.2016. Notices u/s 143(2) and 142(1) were issued thereafter.

5.1 The return of income was filed in response to notice u/s 148 on 25.08.2016 declaring total income of Rs. 3,01,339/-. On being asked reason provided to the assessee on the basis of which proceeding u/s 147 was initiated. During the year under consideration the assessee has shown his income from short term capital gain and interest. Apart from it, the assessee has shown agricultural income. The assessee was asked to furnish the details and documentary evidence in respect of income shown and source of cash deposits.

5.2 In the assessment proceeding the Id. AO noted that the assessee has deposited cash of Rs. 1,35,000/- in the UCO bank account maintained by the assessee. The assessee has also deposited cash in succeeding years. The assessee was asked to explain the source of cash deposited into the

bank account. The assessee filed the details and furnished the cash book. From the cash book Id. AO noted that the assessee has shown opening cash of Rs. 7,95,000/-. As the assessee is not filling the return of income regularly the assessee was asked to furnish justification for opening cash balance of Rs. 7,95,000/-. The assessee filed reply dated 07.12.2016 contending that the assessee is dealing in land transactions and also owner of agricultural land and the cash upon sale of crop was kept in hand for the past years. The assessee also filed the copy of balance sheet dated 01.04.2008 and 31.03.2009 to support the opening cash balance shown in the cash book filed. The Id. AO consider the reply of the assessee but not found tenable the explanation and consider the opening cash of Rs. 95,000 only and Rs. 7,00,000/- was considered as unexplained cash credited in the cash book.

5.3 In the assessment proceeding the Id. AO also noted that the assessee has shown short term capital gain of Rs. 2,04,000/- wherein the cost of purchase was shown at Rs. 13,91,000/- which the Id. AO has considered only to the extent of Rs. 3,68,100/-. The relevant part of the computation as claimed by the assessee and as considered by the Id. AO is computed is reproduced here under:

Table-A

Capital gain	Computed by assessee	Computed by Id. AO
Sales Consideration	9,45,000	
Value as per section 50C	16,20,000	16,20,000
Less : Transfer Expenses	25,000	25,000
Total	15,95,000	15,95,000
Less: Cost of purchase	13,41,000	
Cost of construction made	50,000	
Purchase cost [900 sq. mt. Residential 900 x 409]		3,68,100
Net gain	20,4000	12,26,900
Less: Already shown by assessee	-	2,04,000
Addition made by AO		10,22,900

Thus, as against the returned income of Rs. 3,01,339/- the income was assessed at Rs. 20,24,239/-.

6. Aggrieved from the order of the assessment, assessee preferred an appeal before the Id. CIT(A). Apropos to the grounds so raised the relevant finding of the Id. CIT(A) is reiterated here in below :

“4.3 Decision

4.3.1. At the time of assessment the AO observed that the appellant is has made cash deposits of Rs. 1,35,000/- in his Bank A/c with UCO bank. Further, on perusal of the Cash book it was observed that the appellant has shown an opening cash balance of Rs. 7,95,000/-. Based on the submission of the appellant, the AO allowed an amount of Rs. 95,000/- and added the balance amount of Rs. 7,00,000/- as unexplained cash.

The appellant submitted that he was owner of agriculture land and he has sold his agriculture crops in 2007-08 & 2008-09; therefore the cash balance of Rs. 7,95,000/- on 01.04.2008 was out of those sale proceeds.

4.3.2. The appellant apart from the written submissions, did not provide any evidence of the agricultural land available, crops grown, sale receipts, calculation of agricultural income etc to support his statement. Simply stating that cash was available out of crops sold does not evidence availability of cash. Further, agriculture renders incurring of expenses too and entire sale proceeds cannot simply be lying with the appellant who will have to keep using the money to fund the agricultural expenses.

4.3.3 Therefore, the opening cash balance is unexplained by the appellant, of which Rs. 1,35,000/- is deposited in the bank account. Since the unexplained cash credit in the books of accounts is added by the AO, the same falls in the provisions of section 68 which reads as under-

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year".

4.3.4. In respect of the addition u/s 68, the Honorable Supreme Court's judgement in case of NRA Iron and Steel 103 taxmann.com 48 (2019) is relevant. The Apex Court laid out as under:

"As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer:

- *Proof of identity of the creditors:*

- *Capacity of creditors to advance money, and*
- *Genuineness of transaction.*

This Court in the land mark case of Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC) and Roshan DiHatti v. CIT [1977] 107 ITR 938 (SC) laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source."

4.3.5 The court also discussed numerous judgements-

"10. On the issue of unexplained credit entries /share capital, we have examined the following judgments:

i. In Sumati Dayal v. CIT [1995] 80 Taxman 89/214 ITR 801 this Court held that: "if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, vis, the receipt of money, and if he fails to rebut the same, the said evidence being un rebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably"

ii. In CIT v. P. Mohankala [2007] 161 Taxman 169/291 ITR 278 this Court held that:

"A bare reading of section 68 of the Income-tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee: (a) such credit has to be a sum of money during the previous year; and

(iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books

maintained by the assessee. The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature." (emphasis supplied)

iii.

iv.*This Court in Roshan Di Hatti v. CIT (1992) 2 SCC 378, held that if the assessee fails to discharge the onus by producing cogent evidence and explanation, the AO would be justified in making the additions back into the income of the assessee.*

4.3.6. In the present case, the appellant apart from filing a cash book, has not provided any evidence and has not filed ROI in previous year. Thus, initial onus was not discharged and the AO is justified in making the additions. Accordingly, addition of an amount of Rs. 7,00,000/- as unexplained cash made by the AO is hereby confirmed in terms of unexplained cash credit under section 68."

5.3 DECISION:

5.3.1. Smt. Mangali was in possession of Agricultural lands measuring 12275 Square mtr situated at Newta, Sanganer. The land was acquired by a JDA and for which 2455 sq. mtr. Residential land and 613 sq meter commercial land was allotted to 613 sq meter Smt. Mangali. The allotted land was purchased from Smt. Mangali by the appellant, through sale deed dated 29.03.2007 for a consideration of Rs. 15,03,000/- Thereafter 2007 for in August 2008, through lottery the appellant was allotted the specific plot numbers i.e. Plot No 63(900Sq Mtr, Resi., Tilawas), Plot No. 505(50Sq Mtr. Resi., Paldi Parsa), Plot No 1310(600Sq Mtr, Resi., Paldi Parsa), Plot No 608(900 Sq Mtr, Resi., Khatwada), Plot No 970(54 Sq Mtr, Commer., Paldi Parsa), and Plot No 1078(550 Sq Mtr., comer., Tilawas).

Out of the above properties the following were sold by the appellant over the FY 2008-09 to 2010-11:

Type	Address	Sale year	Area (In Sq. mt)	Purchaser	Sale consideration (In Rs)
Residential	Plot No. 63 (Tilawas)	2008-09	900 Sq mtr	Shakuntla Devi Bansal	9,45,000
Residential	Plot No.608 (Khatwada)	2009-10	900 Sq mtr	Vijaylaxmi Dhaddha	16,20,000
Commercial	Plot No.1078	2009-10	550 Sq	Sunita Parwal	30,25,000

	(Tilawas)		mtr		
Residential	Plot No.1310 (Paldi Parsa)	2010-11	600 Sq mtr	Savitri Devi	14,85,000

Hence, it can be seen that the appellant has sold a total of 2400 Sq Mtr of Residential lands and 550 Sq Mtr of commercial lands by FY 2010-11. Only plot numbers 505 and 970 amounting to 50 sq mtrs residential and 54 sq mts commercial remained unsold.

5.3.2. The appellant has not been filing his return of Income. The appellant's case was reopened for scrutiny u/s 147 and in response to notice u/s 148, the appellant filed the ROI on 25.08.2016 declaring his total income at Rs. 3,01,339/-. The appellant submitted that he has sold 200 Sq Mtr of Residential plot and 50 Sq Mtr of commercial plot to Sri Anil Kumar Maheshwari and 560 Sq Mtr of Residential plot and 140 Sq Mtr of commercial plot to Sri Deepak Malpani through sale deed dated 15.10.2007. The appellant further added that both the buyers started creating nuisance regarding the ownership and hence the appellant made an oral agreement to buyback the property. Another sale deed was executed on 30.09.2013 where the appellant repurchased the sold properties for a consideration of Rs. 11,10,000/- from Anil Maheshwari and Rs. 31,00,000/- from Shri Deepak Malpani.

5.3.3. For the AY 2009-10, the appellant has sold the land at Plot No 63 (Tilawas) to Smt Shakuntala Devi Bansal for a consideration of Rs. 9,45,000/- for which the Sub Registrar adopted the value at Rs. 16,20,000/-. The AO based on the cost of the total property purchased from Smt Mangali (12275 Sq Mtr) amounting to Rs. 15,03,000/- calculated the rate of Residential plot at Rs. 409 per Sq Mtr and commercial plot at Rs. 818 per Sq Mtr. The AO calculated the purchase cost of the Plot No 63 (Tilawas) measuring 900 Sq Mtr at Rs. 3,68,100/- and arrived at a Short Term capital Gains of Rs. 12,26,900/- for the AY 2009-10.

5.3.4 The appellant submitted that the identification of land was provided to the appellant in 2008-09 but before the identification letter was issued, the assessee has already sold the land out of above allotted area to Shri Anil Kumar Maheshwari and Shri Deepak Malpani, However, on allotment of plots it was found that none of the above plots matched with the plot sold to Anil Kumar Maheshwari and Deepak Malpani. Therefore the appellant was forced to buyback the plot/area sold to them, The appellant's contention was that the cost of acquisition of the property sold by the appellant should include the expenses made for the purchases made from Shri And Maheshwari and Deepak Malpani.

5.3.4 The explanation provided by the appellant appears to be faulty, irrational and raises suspicion on many grounds.

Firstly, how was the appellant able to sell the plots when no proper identification/allotment was provided by the JDA. Even when we refer to the sale deeds dated 15.10.2007 and 30.09.2013, it says that "560 Sq Mtr out of 2455 Sq Mtr of Residential plot and 140 Sq Mtr out of 613 Sq Mtr of commercial plot was sold by the first party to the second party. The sale deeds do not provide proper identification and demarcation of the plots being sold. No sane person in his right state of mind would buy properties without proper identification.

Secondly, the appellant has sold a total of 760 Sq Mtr of Residential plot and 190 Sq Mtr of commercial plots to Shri Anil Kumar Maheshwari and Shri Deepak Malpani on 15.10.2007. Then how was the appellant able to sell another 2400 Sq Mtr of Residential plots and 550 Sq Mtr of commercial plots to other buyers during FYS 2008-09 to 2010-11. And if the plots measuring 2400 Sq Mtr of Residential and 550 Sq Mtr of commercial plots were already sold by FY 2010-11 how was the appellant able to repurchase 760 Sq Mtr of Residential plot and 190 Sq Mtr of commercial plots from Shri Anil Kumar Maheshwari and Shri Deepak Malpani on 30.09.2013, when they had no rights over any plot of land.

From the contentions put forth by the appellant the sale and purchase transactions made with Shri Anil Kumar Maheshwari and Shri Deepak Malpani point towards fraudulent and shady transactions. Either of the following conclusions can be drawn in this case:

(a) The appellant has sold land without any actual ownership rights and same land was sold to multiple parties. The appellant simply paid money to settle litigation arising out of fraud. There is no repurchase of land as land sold to Deepak Malpani and Anil Kumar Maheshwari was not specified and when 're-purchased', they had no rights to sell.

(b) These are just sham transactions to increase the cost of purchase of property and what is sold and 're-purchased' not being specified in the sale deeds with no identification of the property given.

In both scenarios, there is no implication to income of the appellant or the calculation of capital gains.

5.3.5 Coming to the issue of calculation of capital gains, the same is provided under section 48 of the Act, which states that:

"The income chargeable under the head "Capital gains shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:-

- (i) expenditure incurred wholly and exclusively in connection with such transfer*
- (ii) the cost of acquisition of the asset and the cost of any improvement"*

From the above, it is evident that only two kinds of amounts can be reduced from sale proceeds received for calculating capital gains - cost of purchase of property and amounts incurred for transfer of property. Since the 'repurchase agreement' does not specify what property or piece of land the money is for, it cannot be taken against the specific properties/plots sold in the year concerned. The amount being paid in FY. 2013-14, the same cannot be said to incurred for transfer of property as the transfer of property already happened.

5.3.6. Section 48 does not specify the period of income and expenditure incurred, hence, reference can be made to Section 4 of the Act that deals with the chargeability of Income Tax. Section 4 states that *"(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person*

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act

Based on the provisions of the Section 48 and 4, it becomes clear that capital gains arising in the previous year, in this case being P.Y. 2008-09 is to be brought to tax. Therefore, even if appellant's contention on repurchase is considered, since the appellant repurchased the properties from Shri Anil Kumar Maheshwari and Shri Deepak Malpani in FY 2013-14, the expenses made in FY 2013-14 to buyback the property cannot be taken into account for calculating the Income for AY 2009-10.

5.3.7 The appellant sold the plots to Shri Anil Kumar Maheshwari and Shri Deepak Malpani on 15.10.2007 without proper identification and demarcation of lands. The

appellant had to buyback those properties later as none of properties sold matched with the properties allotted to the appellant by JDA. Hence, the transactions done with Shri Anil Kumar Maheshwari and Shri Deepak Malpani in FY 2013-14 to buyback the properties were actually done to settle the disputes and cannot be related to sale and purchases of lands and calculation of income for AY 2009-10 to 2011-12.

5.3.8. In this case, even if the transactions are not sham or fraudulent, without specific property being sold, they come about as advances received and given back. These do not relate to determination of income for the year concerned. What appellant does with the income earned, whether settles advances or litigation, is not the context to be considered by the department. When the sale consideration from the transaction done on 15.10.2007 is not brought to tax as income in that year, to consider the returning back of that money as cost for income earned, retrospectively, is devoid of any logic. The appellant has returned the advances based on the indexed value of money received plus extra. Even if that is interest, the same cannot be allowed as deduction in calculation of capital gains, for the same is personal expenditure not related to the property or falling in ambit of section 48 and not incurred to earn any income from other sources.

5.3.9 The AO has made a fair assessment based on values adopted by the SRO and calculated the land rates accordingly. The contentions put by the appellant point towards illegal and fraudulent transaction. The appellant has not been filing his ROI and hence has not shown the Capital gains accrued earlier. Hence, the appellant's appeal on this ground is dismissed and the addition made by the AO is upheld.”

7. As the assessee did not find any relief from the order of the Id. CIT(A) and feeling dissatisfied with the order of the Id. CIT(A) the assessee has preferred the present appeal on the grounds as raised by the assessee as reiterated here in above. To support the various grounds so raised by the assessee, the Id. AR appearing on behalf of the assessee has placed their written submission which is reiterated here in below;

“The assessee is an individual and earned income from capital gain during the year under consideration. In response to notice issued u/s 148 on 28/03/2016, return was filed on 25.08.2016 declaring the total income of Rs. 3,01,399/- . The learned Assessing Officer completed the assessment u/s 147/143(3) of the Income Tax Act, 1961 on 09.12.2016 determining total income at Rs. 20,24,239/- inter-alia making the following additions –

- (i) Addition of Rs. 7,00,000/- made by treating the opening cash balance as unexplained u/s 68.
- (ii) Addition of Rs. 10,22,900/- on account of short term capital gain.

Aggrieved with the order of the Learned Assessing Officer, the assessee preferred appeal before the learned CIT(A) who has unfortunately dismissed the appeal of the assessee and confirmed all the additions without considering the submission of the assessee.

Aggrieved by the order of the Learned CIT(A), the assessee has preferred appeal before your honor. With this background the individual grounds of appeal are taken as under:-

Ground No. 1 –

In the facts and circumstances of the case the learned CIT(A) has erred in confirming the order of the Learned AO passed u/s 143(3)/147 of the IT Act 1961 without considering the submission of the assessee that the due procedure of law was not followed.

Not pressed.

Ground No. 2 –

In the facts and circumstances of the case the learned CIT(A) erred in confirming the addition of Rs. 7,00,000/- by not giving the credit of opening cash balance of Rs. 7,95,000/- after submitting detailed explanation in this regard.

1. Facts of the case: -

The assessee was dealing in land transactions and also owner of agriculture land. He was also having agriculture income. On account of agricultural operations in the earlier years, the assessee has accumulated savings to tune of Rs. 7,95,000/- as on 31/03/2008. As such, opening balance as on 01/04/2008 was disclosed at Rs. 7,95,000/- in the regular books of account maintained by the assessee. Copy of cash book were submitted before the learned AO. The closing cash balance as on 31/3/2009 was Rs. 9,75,100/-. The assessee has not used the opening cash balance. So there is no question of any addition. The assessee is showing correct cash position as per

books of accounts. Copy of balance sheet as on 01.04.2008 and 31.03.2009 were also made available before the learned AO. But the learned AO has not considered the submission of the assessee and made the addition of opening cash balance of Rs. 7,00,00/- as unexplained on the ground that assessee is not filing return earlier, therefore opening cash balance shown by the assessee is not verifiable. Copy of reply submitted before the learned AO along with all evidences are placed on paper book page no. 1 to 9.

The Learned CIT(A) has confirmed the action of the Learned Assessing Officer without considering the submission of the assessee and facts of the case. The action of the Learned CIT(A) is unlawful, illegal and unjust. The same is assailed as under :-

(a) Brought forward cash balance as on 01/04/2008 cannot be treated as unexplained and added in ASSESSMENT YEAR 2009-10

It is submitted that opening balance in the cash book as on 01/04/2008 is of Rs. 7,95,000/-. The same has been carried forward from the earlier year. The opening balance as on 01/04/2008 is closing balance of 31/03/2008. In other words, it means that the amount of Rs. 7,95,000/- was in existence as on 31/03/2008. There was no fresh credit in the books of account as on 01/04/2008. It is submitted that the amount of Rs. 7,95,000/- could not be considered for addition u/s 68 in ASSESSMENT YEAR 2009-10 as the same relates to ASSESSMENT YEAR 2008-09. It is further clarified that the amount of Rs. 7,95,000/- shown as opening balance in the cash book maintained by the assessee was utilized to the extent of Rs.1,35,000/- as deposit in UCO bank. There was no other utilization of the opening cash balance as on 01/04/2008. The Learned Assessing Officer has accepted only Rs. 95,000/- as unexplained and the existence of the balance amount of Rs., 7,00,000/- has been denied by the Learned Assessing Officer. Once the Learned Assessing Officer is holding that the availability of cash as on 01/04/2008 was not verifiable as the assessee was not filing return of income, he has accepted availability of cash of Rs. 95,000/- only and the existence of the balance amount of Rs. 7,00,000/- is not accepted by the Learned Assessing Officer, then there was no question of any addition on account of unexplained credits. The Learned Assessing Officer has erred in making the addition. The Learned Assessing Officer has treated the opening balance as bogus to the extent of Rs. 7,00,000/-, as such, there was no question of any addition of this amount being not in existence. It is not the case of the Learned Assessing Officer that the amount of Rs. 7,00,000/- was used in any way. Therefore, the addition deserves to be deleted as it does not fulfil the conditions of Sec. 68. The primary condition of Sec. 68 is that there has to be a credit entry in the books of account of the relevant assessment year. In this

case, it is submitted that the credit on account of opening cash balance of Rs. 7,95,000/- is only a carried forward entry and, therefore, same could not be considered in the year under consideration, i.e. ASSESSMENT YEAR 2009-10. The following case laws are quoted in support :-

(1) CIT Vs. P. Mohankala

Hon'ble Supreme Court of India

(2009) 291 ITR 278

It is true that even after rejecting the explanation given by the assessee if found unacceptable, the crucial aspect whether on the facts and circumstances of the case it should be inferred the sums credited in the books of the assessee constituted income of the previous year must receive the consideration of the authorities provided the assessee rebut the evidence and the inference drawn to reject the explanation offered as unsatisfactory. It needs be noticed that s. 68 itself provides, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income-tax as the income of the assessee of the previous year if the explanation offered by the assessee about the nature and source of such sums found credited in the books of the assessee is in the opinion of the AO not satisfactory. Such opinion formed itself constitutes a prima facie evidence against the assessee, viz., the receipt of money, and if the assessee fail to rebut the said evidence the same can be used against the assessee by holding that it was a receipt of an income nature. In the case in hand the authorities concurrently found the explanation offered by the assessee unacceptable. The authorities upheld the opinion formed by the AO that the explanation offered was not satisfactory. The assessee did not take the plea that even if the explanation is not acceptable the material and attending circumstances available on record do not justify the sum found credited in the books to be treated as a receipt of an income nature. The burden in this regard was on the assessee. No such attempt has been made before any authority. The AO found that all the so-called gifts came from A and S. The assessee did not declare that they are the alias of SP. It is only an afterthought they have come forward with the said plea. The AO also found that the gifts were not real in nature. Various surrounding circumstances have been relied upon by the AO to reject the explanation offered by the assessee. The CIT(A) confirmed the findings and conclusion drawn by the AO. The Tribunal speaking through its Senior Vice President concurred with the findings of fact. The findings are based on the material available on record and not on any conjectures and surmises. They are not imaginary as sought to be contended. The findings of fact arrived at by the authorities below are based on proper appreciation of the facts and the material available on record and surrounding circumstances. The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The

transactions though apparent were held to be not real ones. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence. No question of law much less any substantial question of law had arisen for consideration of the High Court. The High Court misdirected itself and committed error in disturbing the concurrent findings of facts.—Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124 : 1995 Supp. (2) SCC 453 relied on; A. Rajendra & Ors. vs. Asstt. CIT (2006) 204 CTR (Mad) 9 set aside.

(2) *KOHINOOR ENTERPRISES vs. ASSISTANT COMMISSIONER OF INCOME TAX AND ORS.*

HIGH COURT OF JAMMU AND KASHMIR

ALI MOHAMMAD MAGREY & M.K. HANJURA, JJ.

(2019) 175 DTR 0043 (J&K), (2019) 307 CTR 0154 (J&K), (2019) 410 ITR 0153 (J&K)

Income—Cash Credits—Unexplained unsecured loan—Assessee was a partnership firm and filed its return of income for relevant AY declaring income of Rs. 15,26,210/-, which was supported by audited balance sheet and, audited P&L account—During assessment proceedings, assessee claimed that a sum of Rs. 1,50,00,000/- represented unsecured loan raised from M/s Himachal Futuristic Co. Ltd. (HFCL)—That loan was raised in FY 2001-02 and remained outstanding even at close of current AY—It was also submitted that a sum of Rs. 18,30,000/- was an advance received from a customer, namely, Ghulam Nabi in FY 2005-06, which was repaid during current AY—However, AO computed income of assessee firm at Rs.48,56,210/- u/s 143(3)—He made an addition of Rs. 15,00,000/- on account of alleged unexplained unsecured loan u/s 68 and Rs. 18,30,000/- on account of alleged unexplained expenditure u/s 69C—On appeal, CIT(A) set aside decision of AO—However, on further appeal by Revenue, Tribunal reversed decision of CIT(A) and held in favour of Revenue—Therefore, being aggrieved, assessee approached High Court—Held, so far as addition of Rs 15,00,000/- was concerned, since amount was regularly reflected in Balance Sheet, it could be treated as an unexplained cash credit within the meaning of s. 68—Such loan had been continuously carried forward from AY 2001-02 and, in fact, amount of such loan was not Rs.15,00,000/-, but Rs.1,50,00,000/-, which fact escaped attention of AO—It was clear beyond any shadow of doubt that said loan did not related to AY 2007-08 and, in no case, it could be considered as an addition in AY 2007-08

(b) Agricultural income of Rs. 120000/- disclosed in ASSESSMENT YEAR 2009-10 stands accepted.

It is submitted that in the return of income filed for the ASSESSMENT YEAR 2009-10, the assessee had disclosed agricultural income of Rs. 1,20,000/-. The same has been accepted by the Learned Assessing Officer. Similar agricultural income has been

disclosed at Rs. 1,20,000/- in ASSESSMENT YEAR 2010-11 and 2011-12. This establishes that assessee was having income around Rs. 1,20,000/- in earlier years also. Keeping these facts in view, it was wrong on the part of the Learned Assessing Officer to accept only Rs. 95,000/- and disbelieve the balance amount of Rs.7,00,000/- shown as on 01/04/2008 as opening cash balance accumulated out of agricultural income of earlier years. In view of this, it is submitted that the Learned CIT(A) also failed to appreciate the existence of agricultural income in ASSESSMENT YEAR 2009-10 to 2011-12 for purposes of earlier years savings on this account. It is submitted that had the Learned CIT(A) considered the factual position of agricultural income, then the savings of Rs. 7 lacs would stand explained and no addition would be warranted u/s 68. In view of this, the Hon'ble Tribunal is requested to delete the addition.

Ground No. 3 –

In the facts and circumstances of the case the learned CIT(A) erred in confirming the addition of Rs. 10,22,900/- on account of short term capital gain without considering the purchase cost of land paid subsequently.

The vital facts of the case for consideration are as under :-

(i) One Smt. Mangli W/o Sh. Chotu resident of Newta was having agricultural land measuring 12275 Sq. mt. under khasra No.145 to 170, 174 to 182, 171/2516, 172/2517 and 193/2518. This land was acquired by the Jaipur Development Authority (JDA) under State Government Notification dated 27/10/2005 for Special Economic Zone (SEZ). As such, the land was surrendered by Smt. Mangli Devi to State Govt. of Rajasthan and in lieu of this land, JDA allotted 2455 Sq. mt. residential land and 613 Sq. mt. commercial land to Smt. Mangli, Vide letter dated 22/2/2007. These facts are verifiable on page 2 of the sale deed executed by Shri Shanker Lal Maheshwari on 01/10/2018 in favour of Smt./ Shakuntla Devi Bansal. Copy of this sale deed is available on Page 11-14 of the Paper Book.

(ii) Immediately on getting residential and commercial land, Smt. Mangli sold the same to the assessee on 29/03/2007 for a total consideration of Rs. 15,03,000/-. These facts are undisputed and are verifiable from the assessment order. At this stage of purchase of land by the assessee, no specific plot number etc. were given by the JDA.

(iii) The assessee, being in need of money, out of this land, immediately sold some part of it as under :-

(a) To Anil Kumar Maheshwari on 15/10/2007 : 200 Sq.mt residential area and 50 Sq.mt commercial area for a total sum of Rs.1,75,000/-. However, no specification was

mentioned in the sale deed and land was sold as undivided because no specification had been received from JDA. Copy of the sale deed is available on Page 15-24 of the Paper Book.

(b) To Deepak Malpani on 15/10/2007 : 560 Sq.mt residential area and 140 Sq. Sq.mt commercial area for a total sum of Rs.4,90,000/-. However, no specification was mentioned in the sale deed and land was sold as undivided because no specification had been received from JDA. Copy of the sale deed is available on Page 15-24 of the Paper Book.

Thus, the assessee had sold aforesaid undivided land to Shri Anil Kumar Maheshwari and Shri Deepak Malpani for a total consideration of Rs. 6,65,000/-. The land was sold as the assessee was in urgent need of money.

(iv) Vide letter dated 22/8/2008, the J.D.A. specified the area and also allotted Plot numbers to the land given in lieu of acquired land. The specifications are as under :-

S.No	Nature of land	Plot No	Area (In Sq. Mt)	
1	Residential	63	900	
2	Residential	505	50	
3	Residential	1310	600	
4	Residential	608	900	
	Total			2450 Sq.mt
5	Commercial	970	54	
6	Commercial	1078	550	
	Total			604 Sq.mt

It would be seen from the specifications and plot number allotted that there is no plot either of residential nature or commercial nature measuring 200 Sq. mt and 560 sq. mt residential and 50 sq. mt and 140 sq mt commercial which already stood sold on 15/10/2007 to Svs. Anil Kumar Maheshwari and Deepak Malpani. The plots sold to Anil Kumar Maheshwari were 200 sq. mt residential and 50 sq. mt commercial. There was no size of these plots allotted specification numbers. In other words, the plots sold to Anil Kumar Maheshwari gave him a right as undivided plots in the other remaining plots which were now given specifications and plot numbers. Similarly, plots sold to Sh. Deepak Malpani were of the size of 560 sq. mt residential and 140 sq. mt commercial. The size of these plots did not match with any of the plots which were given specifications and plot number by the JDA. This again gave a right to Shri Deepak Malpani in the undivided plots. The purpose of this discussion is that plots were sold to Shri Anil Kumar Maheshwari and Deepak Malpani earlier to allotment of specification

and plot number and their sizes. The subsequent specifications and sizes allotted by the JDA created a mismatch with the plots already sold.

(v) The allotment of plot No. and area specification created problems to the assessee. Both Shri Anil Kumar Maheshwari and Deepak Malpani started agitating and claiming front part of the land. Further, the plots numbers allotted by JDS were not having any plot of the size sold to Anil Kumar Maheshwari and Deepak Malpani either in the residential category or in the commercial category. The assessee was in a fix and not able to sale any other plot because of this problem. Shri Anil Kumar Maheshwari and Shri Deepak Malpani virtually got a lawful right to create problems to the assessee in selling other plots. As the plots sold to Shri Anil Kumar Maheshwari and Deepak Malpani were not having any specification or plot number and further the size of their plots did not match with any of the plots for which specifications and plot numbers were given. Therefore, they had a real and legal nuisance value. The assessee was not in a position to conduct sale of any other plots as both of them pressed first to solve their problem in getting the desired land. As there were no plots of the sizes sold to them, the only way out was to purchase the land sold earlier to Shri Anil Kumar Maheshwari and Deepak Malpani. Thus, an oral understanding was arrived at and agreement was made that assessee would purchase back the land sold on 15/10/2017 to Shri Anil Kumar Maheshwari and Deepak Malpani. The assessee, as per oral understanding, agreed to pay them out of the sale proceeds of other plots, for which both Shri Anil Kumar Malpani and Deepak Malpani would not raise any objection. It was with this understanding that the assessee started conducting sale of the remaining plots. Shri Anil Kumar Maheshwari and shri Deepak Malapni gave oral permission to the assessee to sale the land only on the condition that the assessee would repurchase the land sold to them for a price agreed as under. This price was to be paid soon on the sale proceeds received by the assessee in conducting the sale of land, although the registration may follow later. It would also be seen that the assessee subsequently purchased land from Shri Anil Kumar Maheshwari and Deepak Malpani on Sept. 2013, but payments for such land were made as early as in Feb. 2012. This is evident from the registered sale deeds of land purchased by the assessee from Shri Anil Kumar Mahshwari and Deepak Malapni. Copy of the sale deeds are available on Paper Book Page No.25-38. Copy of Page No. 4 of sale deed dated 30/09/2013 of land purchased from Shri Anil Kumar Maheshwari is scanned below :-

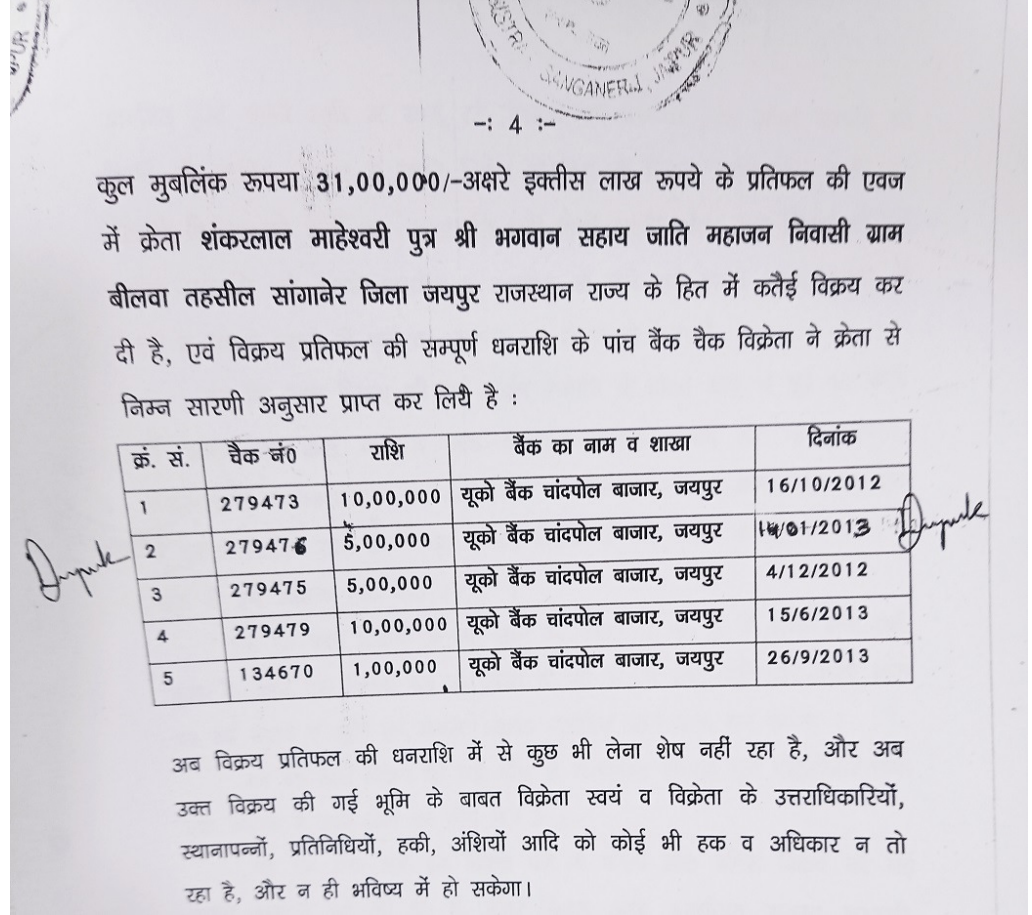
-: 4 :-

कुल मुबलिक रुपया 1,10,000/-अक्षरे ग्यारह लाख दस हजार रुपये के प्रतिफल की एवज में क्रेता शंकरलाल माहेश्वरी पुत्र श्री भगवान सहाय जाति महाजन निवासी ग्राम बीलवा तहसील सांगानेर जिला जयपुर राजस्थान राज्य के हित में कतैई विक्रय कर दी है, एवं विक्रय प्रतिफल की सम्पूर्ण धनराशि के तीन बैंक चैक विक्रेता ने क्रेता से निम्न सारणी अनुसार प्राप्त कर लिये है :

क्र. सं.	चैक नं०	राशि	बैंक का नाम व शाखा	दिनांक
1	279464	5,00,000	यूको बैंक चांदपोल बाजार, जयपुर	6/2/2012
2	279468	3,75,000	यूको बैंक चांदपोल बाजार, जयपुर	27/4/2012
3	134669	2,35,000	यूको बैंक चांदपोल बाजार, जयपुर	26/9/2013

अब विक्रय प्रतिफल की धनराशि में से कुछ भी लेना शेष नहीं रहा है, और अब उक्त विक्रय की गई भूमि के बाबत विक्रेता स्वयं व विक्रेता के उत्तराधिकारियों, स्थानापन्नो, प्रतिनिधियों, हकी, अंशियों आदि को कोई भी हक व अधिकार न तो रहा है, और न ही भविष्य में हो सकेगा।

The perusal of the aforesaid page reveals that payment was made by the assessee of Rs. 5,00,000/- on 06/02/2012, Rs. 3,75,000/- on 27/04/20212, although the deed was executed and registered on 30/09/2013. Similarly, in respect of land purchased from Shri Deepak Malpani, copy of the relevant page 4 of the registered deed also registered on the same date, i.e. 30/09/2013, is scanned below :-



The aforesaid page also discloses that assessee paid payment of Rs. 10,00,000/- on 16/10/2012, Rs. 5,00,000/- on 04/12/2012, Rs. 5,00,000/- on 14/01/2013 and Rs. 10,00,000/- on 15/06/2013, although registration was done on 30/09/2013. The payments made earlier to registration establishes the fact that an agreement was reached between these persons and the assessee to purchase the land back and make payments on receipt on sale proceeds of other plots.

(vi) The details of land sold by the assessee are as under :-

Type	Address	Sale year	Area (In Sq. mt)	Purchaser	Sale consideration (In Rs)
Residential	Plot No. 63 (Tilawas)	2008-09	900	Shakuntla Devi Bansal	9,45,000
Residential	Plot No.608 (Khatwada)	2009-10	900	Vijaylaxmi Dhadha	16,20,000
Commercial	Plot No.1078 (Tilawas)	2009-10	550	Sunita Parwal	30,25,000

Residential	Plot No.1310 (Paldi Parsa)	2010-11	600	Savitri Devi	14,85,000
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It would be seen that out of the allotted land, almost the entire land was sold. The assessee was allotted 2450 Sq. mt. of residential land. Out of this assessee has sold 2400 sq. mt (900 (Plot No.63), + 900 (Plot No. 608) + 600 (Plot No.1310). The assessee was left with only 50 sq. mt of residential land. Obviously, the land sold included the land earlier sold to SH. Anil Kumar Maheshwari (200 yd) and Deepak Malpani (560 yd). The land pertaining to Anil Kumar Maheshwari and Deepak Malpani could not have been sold without reaching an understanding with them, although the purchase was registered later on on 30/09/2013 whereas the land has been sold much earlier. This could happen only on having a tri-party agreement between the assessee and Shri Anil Kumar Maheshwari and Deepak Malpani. Similarly, out of the total commercial land allotted to the assessee measuring 604 Sq. mt, the above table discloses that 550 sq. mt commercial land was sold to Smt. Sunita Parwal. Only 54 sq mt of commercial land was left with the assessee. Again the commercial land earlier sold 140 sq. mt to Deepak Malpani is included in this sale of commercial land. This also establishes that there was a clear cut understanding of the assessee with Shri Deepak Malpani also to conduct sale of commercial land of 140 Sq mt. earlier sold to him on 15/10/2017 and re-purchased on 30/09/2013. The purpose of submission of these facts is that the assessee conducted sale of the aforesaid plots only after reaching an understanding or an agreement with Shri Anil Maheshwari and Deepal Malpani after re-purchasing their land for Rs. 42,20,000/- (Rs.11,10,000 from Anil Kumar Maheshwar and Rs. 31,10,000/- from Deepak Malpani). In these circumstances, the land sold above form assessment 2009-10 to 2011-12 included the land re-purchased by the assessee from Sh. Anil Kumar Maheshwari and Shri Deepak Malpani and registered subsequently on 30/09/2013. Therefore, the assessee was fully justified to include the cost of Rs.42,20,000/- in the cost of land sold from ASSESSMENT YEAR 2009-10 to 2011-12. Therefore, the assessee was fully justified in working out the cost of residential land at Rs.1490/- per sq. met and of commercial land Rs.2980/- per sq. mt. The working of the same is as per letter dated 23/09/2021 submitted before the Learned Assessing Officer. The relevant part is quoted below :

Total cost of the above property (Annx- 'A')	Rs.15,03,000/-
Registration Cost	Rs.1,25,000/-
Miscellaneous Expenses	Rs.23,000/-
Total Cost	Rs.16,51,000/-
Land sold on 15.10.2007 (Annx- 'B')	

Particulars	Amount
Total area sold by the assessee Plot no. 63 of 900 sq.mtr	
Sales consideration	945000
Value u/s 50C	1620000
Less: transfer expenses	-25000
Net sale consideration	1595000
Less: cost – 900 sq.mtr × 1490 (rate as per above chart)	-1341000
Cost of boundary wall	-50000
Net short term capital gain	204000

Therefore the assessee has lawfully and correctly calculated the short term capital gain income. But the learned AO did not consider this submission of the assessee in right perspective and calculated the cost of acquisition only on the basis of first purchases made by the assessee. The subsequent event and the cost incurred by the assessee for improvement of title of land was not considered by the learned AO which is totally unjustified because the assessee cannot realize the actual value of the land without improving the title and settle the disputes arises due to sale of undivided portion of land allotted by JDA. The learned AO was not justified in disallowing the claim of improvement cost on this account and thereby making an addition of Rs. 8,18,900/- on this account. We rely on the following case laws for this issue of improvement cost:-

- (i) 298 ITR 268 (Karn) Mrs. June Perrett v. Income-tax Officer
Capital gains-deductions-expenditure incurred wholly and exclusively in connection with transfer-sale of property received under will-expenditure incurred on obtaining probate, travel expenses of executors and expenditure on evicting illegal tenant-deductible-income- tax act, 1961, "
- (ii) 241 CTR 364 (Mad.) V. LAKSHMI REDDY Vs. INCOME TAX OFFICER "Capital gains-Deduction under s. 48-Amount spent for rectifying the defects in the title to the property and removing encumbrance to transfer-Is expenditure incurred in connection with the transfer for the purpose of computation of capital gains as per s. 48.

Therefore if any cost is incurred for improving title and settle the dispute the cost is deductible while computing the capital gain income. Therefore the addition deserves to be deleted.

Erroneous decision of the Learned CIT(A)

The aforesaid facts are quite logical and deserved to be accepted by the Learned CIT(A). However, the Id CIT(A) questioned the action of the assessee on the following grounds and rejected the submissions of the assessee made before him. The Learned CIT(A) failed to appreciate the facts which were fully substantiated by the sale deeds of land sold and purchased. However, without bringing any material on record, the Learned CIT(A) has rejected the submission of the assessee on the basis of guess work and conjectures.

(a) The Learned. CIT(A) has questioned that it was improbable on the part of Svs. Anil Kumar Maheshwari and Deepak Malpani to purchase land on 15/10/2007 when the land was not having any specifications. In this regard, it is submitted that both the assessee and Shri Anil Kumar Maheshwari and Deepak Malpani could not foresee and visualize the action of JDA in allotting various numbers and sizes of plots. The action of the assessee is beyond doubt as the same is supported by registered deeds available on Paper Book cited supra.

(b) The second issue raised by the Learned CIT(A) is regarding the strategy adopted by the assessee in re-purchasing the land from Anil Kumar Maheshwari and Deepak Malpani later on on 30/09/2013 whereas the land was sold earlier to other persons. In this regard, it is submitted that land which was sold to Anil Kumar Maheshwari and Deepal Malpani on 15/10/2007 was not having any specification and plot number. The assessee legally was free to sell land which was allotted with specifications and plot numbers. The registration authority did not question the sale of plots having specification and plot numbers. In view of this, the issue raised by the Learned CIT(A) is totally irrelevant. Further, the assessee has done the right thing and the put the matter beyond doubt by purchasing the land sold earlier to Shri Anil Kumar Maheshwari and Deepak Malpani . Besides this, there was no other practical way to come out of the problem. The assessee has not violated any of the provisions of the Income Tax Act and has rather come clean by disclosing the entire facts truthfully. There is no material on record to doubt the facts submitted by the assessee or to find any fault with them. There is no case of any manipulation and fraud as alleged by the Learned CIT(A). The transactions have taken place in good faith and have been witnessed by the State Registration authorities. There is no rumbling of any kind between the assessee, the purchasers and Sh. Anil Kumar Maheshwari and Deepak Malpani. When the parties to the transactions were not related to each other and have executed the transactions

before the registration authority do not entertain any fraud or illegality in the matter , the Learned CIT(A) is not justified in terming the transactions as unlawful. It is reiterated that the assessee sold plots bearing numbers and the same was perfectly in order. However, the land was the same which was sold without bearing plot numbers earlier to Shri Anil Kumar Maheshwari and Deepak Malpani, which were re-purchased to avoid any manipulation. The assessee took full caution and care to avoid any allegation of mischief, misrepresentation and fraud. In view of this, the Learned CIT(A) was not justified in rejecting the transactions of sale conducted by the assessee. In fact, the assessee had done his best to regularize the affairs in the facts and circumstances of the case. What was required on the part of the Learned CIT(A) was to have considered the facts in right perspective without conjecturing and raising doubts about the genuineness of the same. It is settled position of law that suspicion and doubt however strong cannot take the place of evidence. The action of the Learned CIT(A) lacks reason and evidence. It is based on mere suspicion, doubt and conjectures. The following case laws are quoted in support :-

- (i) Uma Charan Shaw & Brothers 37 ITR 271 (SC)
- (ii) CIT vs. Anupam Kapoor 299 ITR 179 (P&H)
- (iii) CIT vs. Dhiraj Lal Girdhari Lal 26 OTR 736
- (iv) Dhakeshwari Cotton Mills 26 ITR 775 (SC)
- (v) State vs. Gulzari Lal Tondon 1979 AIR 1382 (SC)
- (vi) J.A. Naidu vs. State of Maharashtra 1979 AIR 1537 (SC)

Conclusion

In view of the facts of the case and the case-laws cited above , the Learned. CIT(A) was not justified in rejecting the appeal of the assessee. He has not disputed the re-purchase of land by the assessee from Shri Anil Kumar Maheshwari and Shri Deepak Malpani. He had also not disputed the payments made by the assessee for the re-purchase of land from these persons. No inquiry has been conducted in the matter from these persons. The appeal has been dismissed on flimsy grounds. The Hon'ble Tribunal is requested to kindly consider the facts of the case in right perspective and allow the appeal of the assessee.

Ground No. 4 –

The assessee craves your indulgence to add amend or alter all or any grounds of appeal before or at the time of hearing.

Not pressed

Your Honor is requested to decide the appeal in favor of the assessee by considering the above submission and oblige.”

8. In addition to the written submission, the Id. AR of the assessee submitted that the assessee has produced cash book and claimed that the cash of Rs. 7,95,000/- reflected as opening balance in the year under consideration is out of savings and accumulated amount earned out of agricultural income and looking to the holding of the agricultural land of the assessee and the fact that the assessee in the year under consideration and subsequent year also earned the agricultural income the cash holding for an amount of Rs. 7,95,000/- be considered as cash on hand. As the revenue has not challenged the claim agricultural income of the assessee, cash of Rs. 7,95,000/- should be considered as out of agricultural income and saving of the assessee and there is no separate addition for the year under consideration is required to be made as even merely showing the cash on hand does not attract any addition in the year under consideration. Even if the explanation of the assessee is not considered the addition to be made not in the year under consideration but in the previous year from where the cash balance is carried over in support of this contention, the Id. AR of the assessee relied upon the copy of trial balance, copy of cash book and copy of balance-sheet. All these records were produced and were not

rejected. No mistake is also observed by the lower authority on these evidences so produced. The only reason for not granting the benefit of opening balance is that the assessee in past has not filed the income tax return but at the same time Id. AO considered arbitrarily 95,000/- only as opening cash balance with the assessee and Rs.7,00,000/- was considered as unexplained cash. The Id. AR of the assessee relying on the judgment of Hon'ble Supreme Court in the case of Mohan Kala, submitted that the primary onus casted upon the assessee is duly discharged by the assessee and the addition is required to be deleted.

8.1 As regards the issue of short-term capital gain and the cost of acquisition not considered by the Id. AO, the Id. AR of the assessee submitted that the assessee on the basis of the allotment made of the purchased piece of land on 29.03.2007 for a consideration of Rs. 15,03,000/-. This purchase is not disputed by both the parties. After the purchase of these lands, as the assessee was in need of money immediately in 6 to 7 month, sold part of the land at measuring 2000 Sq. mt residential area and 50 Sq. mt commercial area for a consideration of Rs. 1,75,000/- to Mr. Anil Kumar Maheshwari on 15.10.2007. Similarly, he has also sold 560 Sq. mt residential area and 140 Sq. mt. commercial area for a

consideration of Rs. 4,90,000/- to Mr. Deepak Malpani on 15.10.2007. Both the sale agreement is duly registered with the state revenue authority and this fact is also not disputed. The Jaipur Development Authority (JDA) vide letter dated 22nd August 2008 specified plot number to the land and details of these specifications made by the JDA is as under:-

S.No	Nature of land	Plot No	Area (In Sq. Mt)	
1	Residential	63	900	
2	Residential	505	50	
3	Residential	1310	600	
4	Residential	608	900	
	Total			2450 Sq.mt
5	Commercial	970	54	
6	Commercial	1078	550	
	Total			604 Sq.mt

The Id. AR of the assessee fairly submitted that since the assessee was need of money, he has in October, 2007 i.e. before JDA specifies the exact details of land allotted to the assessee, he sold the property to Mr. Deepak Mal Malpani and Anil Kumar Maheshwari. Since the assessee after allotment of plot number by JDA on 22nd August, 2008 was left with no option but to rebuy those plots so as to make them marketable conditions. The assessee has repurchased plots again by way of registered purchase deed in September, 2013 and the dispute in this appeal is whether on these repurchase of land, the cost of acquisition for repurchase amount paid by the assessee in 2013 granted to the assessee in the year under

consideration in respect of sale of plot undertaken by the assessee which is supported by the deed duly registered with the state revenue authority.

9. Per contra, the Id. DR submitted that how can assessee sold the plot of land to the respective seller in absence of the specific demarcation of area and demarcation on the property of the sold. The assessee is asking for the benefit of cost of the price that has been paid, subsequently and there is no proof that repurchase were made by the assessee and based on these arguments, the Id. AR of the assessee heavily relied upon the finding of the lower authorities on the issue of computation of short term capital gain is concerned.

9.1 As regards, the Ground No. 2, regarding addition of Rs. 7,00,000/-, the assessee has in earlier years not filed any return of income and even in the year under consideration, the assessee has voluntarily but has written only on issue has sent notice u/s 148 of the Act. Based on the detailed finding of Id. CIT(A), the Id. DR submitted that the assessee failed to prove opening cash balance available with the assessee. As regards the case laws cited by the Id. AR of the assessee, same were on the different fact not applicable in the present case.

10. We have heard the rival contentions and perused the material placed on record. At the outset of the hearing the Id. AR of the assessee stated at bar that he is not pressing the ground no. 1 raised by the assessee, which is for challenging the re-opening proceedings in this case. Based on these averments the ground no. 1 raised by the assessee is dismissed.

10.1 So far as the ground no. 2 is concerned, we note that the assessee has deposited cash of Rs. 1,35,000/- in UCO Bank account and therefore, the Id. AO as for the source of cash deposited into the bank account. In the proceeding before the lower authority the assessee submitted copy of trial balance, copy of cash book and copy of balance-sheet. All these records were produced and were not rejected by the assessing officer. There is no finding in the order of the lower authority pin pointing any mistake in the records produced by the assessee. The only observation is that the assessee in past not filling the ITR and therefore, holding of cash of Rs. 95,000/- only was considered as justified and addition of Rs. 7,00,000/- made as unexplained cash of the assessee which the assessee is clamming to have accumulated out of the past agricultural income and savings and the assessee also substantiated the holding of agricultural land and income. Before us the Id. DR did not controvert the evidence filed by the assessee. Based on the arguments of the rival parties and upon

consideration of the documents filed on record we are in agreement with the contention of the Id. AR of the assessee that the assessee is holding the agricultural land and considering the fact that the assessee is earning income from the agricultural activity in the past and also the holding the agricultural land. The bench noted that on the same set of facts Id. AO has rejected the claim of the assessee that the assessee has in past has not filed any return and in the succeeding year deposited cash and to justify that action the opening cash was disbelieved. Based on the evidence and arguments advanced we see no reason to disbelieve the justification of holding of cash by the assessee to the extent of the Rs. 7,95,000/- and therefore, we vacate the addition of Rs. 7,00,000/-. In the result the ground no. 2 raised by the assessee is allowed.

10.2 In the ground no. 3 raised by the appeal discord is that whether the cost of repurchase of the plots sold by the assessee is to be considered as cost of acquisition or improvement while computing the short-term capital gain of the assessee or not. The brief facts of the case are that the assessee based on the allotment made by the Jaipur Development Authority (JDA) purchased piece of land on 29.03.2007 for a consideration of Rs. 15,03,000/-after the purchase/allotment of these lands, as the assessee was in need of money immediately in 6 to 7 month, sold part of

the land at measuring 2000 Sq. mt residential area and 50 Sq. mt commercial area for a consideration of Rs. 1,75,000/- to Mr. Anil Kumar Maheshwari on 15.10.2007 by a registered sale deed. Similarly, he has also sold 560 Sq. mt residential area and 140 Sq. mt. commercial area for a consideration of Rs. 4,90,000/- to Mr. Deepak Malpani on 15.10.2007 by a registered sale deed. The JDA vide letter dated 22nd August 2008 specified plot number to the land and details of these specifications made by the JDA is as under:-

S.No	Nature of land	Plot No	Area (In Sq. Mt)	
1	Residential	63	900	
2	Residential	505	50	
3	Residential	1310	600	
4	Residential	608	900	
	Total			2450 Sq.mt
5	Commercial	970	54	
6	Commercial	1078	550	
	Total			604 Sq.mt

As submitted that before the specification done by the JDA the assessee in October, 2007 i.e. before JDA specifies the exact details of land allotted to the assessee, sold the property to Mr. Deepak Mal Malpani and Anil Kumar Maheshwari. Since the assessee after allotment of plot number by JDA on 22nd August, 2008 was left with no option but to rebuy those plots so as to make the remaining part of the land as marketable. The assessee has

repurchased plots again by way of registered purchase deed in September, 2013. On this issue the relevant observation of the Id. AO is as under:

“I have considered the reply and the calculation filed but not found tenable. The assessee is claiming the benefit of cost of property in the year 2013-14. However the immovable property transactions were taken place in 2008-09 and as per the deed the possession was given by the assessee to the purchaser. Further all the payment was received during the year 2008-09 for which the capital gain arise in the year 2008-09. Further the expenses made in the succeeding year if any claiming by the assessee not allowable to the assessee.”

Simliarily on the issue the finding of the Id. CIT(A) is reproduced here in below:

5.3.8. In this case, even if the transactions are not sham or fraudulent, without specific property being sold, they come about as advances received and given back. These do not relate to determination of income for the year concerned. What appellant does with the income earned, whether settles advances or litigation, is not the context to be considered by the department. When the sale consideration from the transaction done on 15.10.2007 is not brought to tax as income in that year, to consider the returning back of that money as cost for income earned, retrospectively, is devoid of any logic. The appellant has returned the advances based on the indexed value of money received plus extra. Even if that is interest, the same cannot be allowed as deduction in calculation of capital gains, for the same is personal expenditure not related to the property or falling in ambit of section 48 and not incurred to earn any income from other sources.

5.3.9 The AO has made a fair assessment based on values adopted by the SRO and calculated the land rates accordingly. The contentions put by the appellant point towards illegal and fraudulent transaction. The appellant as not been filing his ROI and hence has not shown the Capital gains accrued earlier. Hence, the appellant's appeal on this ground is dismissed and the addition made by the AO is upheld.”

Thus, we find from the finding of both the authority below that they have denied the benefit to the assessee merely on the ground that the cost paid

by the assessee in 2013-14 cannot be considered while considering the capital computed in the year 2008-09. The bench noted that the assessee has not filed the return of income and the assessment is reopened by issue of notice and the assessee in the return filed in response to the notice filed the return of income based on the set of information and proof of cost admissible to the assessee. The revenue has not disputed the first sell made by the assessee and repurchase of the same land by the assessee by paying the higher sum by the assessee. It is also not in dispute the veracity of both the sale and repurchase documents. The only dispute that whether the assessee upon allotment and before demarcation of the land area allotted to the assessee sold part of the area and upon allotment the assessee to make the remaining area of land to be marketable the assessee has repurchased those sold plots be considered as part cost of the same land allotted by the JDA or not. The bench noted that the assessee has sold in the year of allotment of land by JDA sold part of the land at measuring 2000 Sq. mt residential area and 50 Sq. mt commercial area for a consideration of Rs. 1,75,000/- to Mr. Anil Kumar Maheshwari on 15.10.2007 by a registered sale deed. Similarly, he has also sold 560 Sq. mt residential area and 140 Sq. mt. commercial area for a consideration of Rs. 4,90,000/- to Mr. Deepak Malpani on 15.10.2007 by a registered sale

deed. The JDA vide letter dated 22nd August 2008 specified plot number to the land and details of these specifications made by the JDA is as under:-

S.No	Nature of land	Plot No	Area (In Sq. Mt)	
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4	Residential	608	900	
	Total			2450 Sq.mt
5	Commercial	970	54	
6	Commercial	1078	550	
	Total			604 Sq.mt

As submitted that before the specification done by the JDA the assessee in October, 2007 i.e. before JDA specifies the exact details of land allotted to the assessee, sold the property to Mr. Deepak Mal Malpani and Anil Kumar Maheshwari. Since the assessee after allotment of plot number by JDA on 22nd August, 2008 left with no option but to rebuy those plots so as to make the remaining part of the land as marketable and therefore, the assessee has repurchased plots again by way of registered purchase deed in September, 2013 and become the part of the total cost of purchase of the land allotted by the JDA to the assessee, as the cost is duly supported by the registered purchase deed. Merely the assessee is clamming the cost of purchase made in the year 2013-14 while considering the capital gain in the year 2008-09 the assessee cannot be denied the legitimate cost of

acquisition based on the registered documents and therefore, the denial of cost benefit to the assessee denied by the lower authority for an amount of Rs. 10,22,900/- is uncalled for and the same is vacated. Based on these observations the ground no. 3 raised by the assessee is allowed.

10.3 The ground no. 4 raised by the assessee is general in nature and does not require any adjudication.

10.4 Based on these observations the appeal of the assessee in ITA no. 299/JP/2023 is partly allowed.

11. The fact of the case in ITA Nos. 300 & 301/JP/2023 is similar to the case the facts of the case in ground no. 3 raised by the assessee in ITA No. 299/JP/2023 and we have heard both the parties and persuaded the materials available on record. The bench has noticed that the issues raised by the assessee in this appeal Nos. 300 & 301/JP/2023 in ground no. 2 are equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA No. 299/JP/2023 for ground no. 3 for the Assessment Year 2009-10 shall apply mutatis

mutandis in the case of Shankar Lal Maheshwari in ITA Nos. 300 & 301/JP/2023 for the Assessment Year 2010-11 & 2011-12 for ground no 2.

11.1 The assessee has not pressed ground no. 1 therefore, the same is dismissed and ground no. 3 being general in nature does not require any adjudication.

In the result appeal of the assessee in ITA No. 299/JP/2023 to 301/JP/2023 are partly allowed.

Order pronounced in the open court on 12/09/2023.

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 12/09/2023

*Ganesh Kumar, PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shankar Lal Maheshwari, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward-6(2), Jaipur
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 299 to 301/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar