

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 07/Ahd/2019
Assessment Year 2015-16**

Bhanuprasad Maganlal Patel, 30, Manikamal Soc-1, Nr. Surdhara Cross Road, Thaltej, Ahmedabad-380054 PAN: ABVPP8960A (Appellant)	Vs	The Dy. CIT, Circle-3(3), Ahmedabad (Respondent)
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**Assessee Represented: Shri S. N. Divatia, A.R.
Revenue Represented: Ms. Saumya Pandey Jain, Sr.D.R.**

Date of hearing : 17-10-2023
Date of pronouncement : 12-01-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Assessee as against the Appellate order dated 26.11.2018 passed by the Commissioner of Income Tax (Appeals)-3, Ahmedabad arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2015-16.

2. The brief facts of the case is that the assessee is an individual and Partner in four Partnership Firms and showing income from business, Long Term Capital Gain and other sources. For the Assessment Year 2015-16, the assessee filed his Return of Income and then filed Revised Return declaring total income of Rs.68,15,980/-. The return was taken up for scrutiny assessment. The Assessing Officer noticed that the assessee has shown Long Term Capital Gain of Rs.1,37,97,873/- and claimed Rs.75,16,000/- as deduction u/s. 54F of the Act and remaining Rs.62,81,873/- for taxation under the head LTCG. On further verification, it was noticed that the assessee along with other seven co-owners had purchased the immovable property on 02-01-2006 for a total consideration of Rs.6,00,000/- in which assessee's share was 18%. The assessee along with the very same seven co-owners established a Partnership Firm on 15-03-2010 in the name and style of M/s. Ashirvad Infrastructure with the same shareholding as that in the land purchased by the assessee with the seven co-owners. It is thereafter the same set of co-owners entered into Development Agreement dated 30-11-2011 with M/s. Ashirvad Infrastructure to develop the lands for construction into 18 Bungalows. The AO found that the chain of facts clearly proved that the land was purchased only for business purpose by developing it as a commercial project, therefore Ld. A.O. issued a show cause notice dated 20-11-2017 as to why not to treat the capital gains offered by the assessee has to be treated as his "business income" and also deny claim of deduction u/s. 54F of the Act.

3. The assessee replied that the development and construction of Bunglows were taken place over a period of two Assessment Years. For the Assessment Year 2014-15 the assessee offered LTCG of Rs. 25,86,928/- and paid capital gain tax, which was accepted by the Revenue. For the present Assessment Year 2015-16 assessee offered LTCG of Rs. 1,26,80,990/- and also claimed exemption u/s. 54F of Rs. 75,16,000/- and paid appropriate taxes on the balance capital gains. The assessee being an individual and the Partnership firm is a different entity in the eyes of law, the activity carried out by the assessee in his individual capacity was shown as capital gain and the activity carried out by the partnership firm is shown as “business income”. Thus the assessee has not entered into any activity which can be termed as ‘adventure in nature’ and “day to day activity with profit motive”. The assessee further stated that under the provisions of capital gain also, a person can convert his personal capital assets into stock-in-trade and vice versa. Thus the assessee strongly objected to the proposed treatment of Long Term Capital Gain to “business income” stating that merely because the assessee is holding same percentage of land as his holding in the Partnership firm.

3.1. The above objection was considered by the Assessing Officer and held that the Partners of the Firm are same as that of the ownership in the land and share of profit of the Firm are the same as that of the land holding. So it clearly proves that the Partnership firm was established to divert the profit, which the stakeholders are expecting from developing the land. Further the assessee has not filed the Wealth Tax return, when he received an amount of Rs.

9,21,52,500/- vide Development Agreement dated 29.12.2011 as his share. This clearly proves that the assessee was treating the above land parcel as “Stock-in-Trade” acquired for single motive to earn profit by developing it at later stage and the transaction is to be treated as “adventure in nature”. Further the assessee bought another parcel of land for a total consideration of Rs. 7.12 crores on 09.09.2014 along with seven other co-owners and constituted another Partnership firm namely M/s. Sudarshan Developers on 06.05.2014 with the same land owners as the partners and engaged in the business of land development, which clearly establish the motive, intention and interest of the assessee which is a business activity.

3.2. Further even in the hands of the Partnership firm namely M/s. Ashirwad Infrastructure, no taxes was paid by the Firm and what was the consideration received from the firm towards the land was apportioned by the assessee in the disguise of exemption u/s. 54F of the Act. Thus the Ld. A.O. held that it is apparent the partnership firm was constituted to divert the profits of the trade and relying upon Hon’ble Supreme Court judgment in CIT Vs. Durga Prasad More (82 ITR 540) wherein it is held that the taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances, to find out the reality of the recitals made in those documents. The genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness of the transaction. Accordingly

treated the capital gain as the “business income” of the assessee and also denied the exemption u/s. 54F of the Act.

4. Aggrieved against the same, the assessee filed an appeal before Commissioner of Income Tax (Appeals). The assessee submitted that the determination of character of a particular investment in immovable property or any movable property like shares and securities, whether the same is in the nature of a capital asset or a stock in trade is essential fact for specific determination. The assessee submitted Jurisdictional High Court Judgment in the case of D S Virani vs. CIT (90 ITR 255) wherein it is held that no single fact or circumstances has decisive significance and it is totality of the relevant factors and circumstances that has to be take into account for the purpose of determining the true nature of the transaction. The A.O. has applied in the present case only the test of motive or intention but incorrectly, in as much that has to be examined at the time purchase of the asset along with surrounding circumstances. Thus the A.O. failed to discharge the burden to establish that the profit earned in the transaction was in the nature of trade and business and relied upon various case laws. The above arguments were considered by the Ld. CIT(A) and dismissed the plea by passing a detailed order as follows:

(i) The appellant and co-partners have sold to the M/s Ashirwad Infrastructure an 29/12/2011 with agreed price of Rs.9,21,52,500/- for consideration as the cost of land. The property has been purchased by the appellant and co-owners and they got it developed through the firm which is solely owned and managed by appellant and co- owners. The motive to acquire the land was to earn profit through the activity of development of land and the partnership deed also showed the motive of doing business relating to land and property as builder, contractors etc. Further, the Income Tax Return of M/s Ashirwad Infrastructure has also been perused before arriving at such conclusion. The returned income to the firm for the AY 2012-13 onwards is as under:-

Sr. No.	A.Y.	Returned Income
(i)	2015-16	Loss of Rs. 34,90,952/-
(ii)	2016-17	NIL
(iii)	2017-18	NIL

From the above, it is evident that no tax has been offered to revenue and the consideration towards land has also been apportioned by the appellant in disguise of exemption u/s 54F of the Income Tax Act. This is despite the fact that the residential scheme is a bungalow scheme situated at the prime location of Thaltej, Ahmedabad and had sold 17 bungalows (approx 80% of the scheme) during AY 2015-16. Hence, it is apparent that the firm was constituted to divert the profits of this trade, which the partners were expecting

ii) no tax was offered either by the appellant by claiming exemption u/s.54F nor the partnership firm of M/s. Ashirwad Infrastructure. If land owners could have done this project in their individual capacity, they should have been liable for higher tax and will not have been eligible for claiming exemption u/s 54F of the Income Tax Act. In the instant case, the appellant has claimed major part of the profit exempt u/s 54F of the act thus evading the legitimate taxes due on the profit. The same activity has been found in all the other co-owners of the land parcel.

iii) it is noticed that the appellant is treating the land as "Stock in Trade" up to the date of development agreement, since there were no valuation and actual cost of acquisition of the land was Rs.6.00 Lakh, the appellant was not liable for any wealth tax. However, the moment, the appellant entered into development agreement with his own partnership firm i.e. M/s Ashirwad Infrastructure, the value of appellant part of the land became Rs. 1,65,87,450/-. As per the appellant's own submission, sale of the said land was effected on 31/03/2015 (Computation of Income). Then for the intermediate period between the transaction i.e. AY 2012-13, to AY 2015-16, the appellant become liable for wealth tax if the appellant was treating the same as investment. Since, the appellant has never filed Wealth Tax Return for these periods, it can be easily concluded that the appellant was treating the subject land as "Stock-in-Trade". The appellant's intention was never to hold the land as investment. Reliance is placed on decision of Hon'ble Hyderabad ITAT in the case of Vitta Kristappa V/S ITO 92 ITD 1(TM) wherein it is held as under:-

"Section 2(13), read with section 263, of the Income-tax Act, 1961-Adventure in nature of trade - Assessment year 1989-90-Assessee individual purchased land from his HUF-He applied to municipalities for approval of lay out plan to convert land into 25 plots and duly paid conversion charges and licence fee and subsequently got approval Assessee incurred expenses on levelling and demarcation and sold 7 out of 25 plots - Assessee filed its return showing capital gains accrued on sale of abovementioned plots assessee submitted that he had purchased land from HUF to

set up an oil mill as he had good experience and after purchase of said land, he came to know that that land was not suitable for starting an industry for reason that municipality did not permit setting up of industry in area as per master plan of municipalities - Assessee did not place any material on record to show that any attempt to set up oil industry on land in question was made and also no site plan or date on which action was initiated to set up industry in that plot or similar particulars relating to firm 'V' were placed on record - Whether property was purchased and sold under a well-thought out scheme to make profit, and, thus, it was a clear case of adventure in nature of trade - Held, yes."

2.7. The acquisition of agriculture land and disclosing the same in audited annual accounts as Fixed asset in the year under appeal alone cannot decide the nature of acquisition for investment but circumstantial and surrounding circumstances need to be seen while deciding the issue whether profit earned on sale of land is business income or income from capital gain. (It is pertinent to note that In the decision reported in G. Venkataswami Naidu's case & Co.'s case 35 ITR 594, the Apex Court pointed out that the question as to whether the transaction was an adventure in the nature of trade is a mixed question of law and fact, it held that when Section 2(4) of the 1922 Act referred to an adventure in the nature of trade, it clearly suggested that the transaction in question cannot properly be regarded as trade or business. It was allied to transactions that constituted trade or business, but may not be trade or business itself. In other words, it is characterized by some of the essential features that make up trade or business but not only by all of them. Thus, even an isolated transaction can satisfy the description of an adventure in the nature of trade, provided, at least some of the essential features of trade are present in the isolated or single transaction. The Supreme Court pointed out that ultimately, it is the intention with which the person deals in the particular transaction, would be the decisive factor. The Supreme Court held that relevant facts and circumstances actually determines the character of the transaction. Thus, in deciding the character of the transaction, several factors are relevant, such as, "whether the purchaser was a trader and the purchase of the commodity and its resale were allied to his usual trade or business or incidental to it the nature and quantity of the commodity purchased and resold; any act subsequent to the purchase to improve the quality of the commodity purchased and thereby make it more readily resaleable, any act prior to the purchase showing a design or purpose; the incidents associated with the purchase and resale, the similarity of the transaction to operations usually associated with trade or business; the repetition of the transaction: the element of pride of possession.") It further observed that in case where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor and unless it is offset by the presence of other factors, it would raise a strong presumption that the transaction is an adventure in the nature of

trade The facts in present case as discussed herein above clearly suggest that appellant has acquired the land for carrying out trade and not for investment as appellant has failed to establish that such land was acquired for expansion of its business.

2.8. The Authorized Representative has cited the decisions (supra). After going through the decision it is seen that Hon'ble Courts have held that burden of proving that a particular transaction was an adventure in the nature of trade is on the revenue and it can be discharged by pointing to circumstances which need to the conclusion that the transaction is an adventure in the nature of trade. It was further held that this is case of land which is not a commercial commodity and it must be shown that the purchase was made solely and exclusively with an intention to resell with a profit. The appellant has also failed to take note that facts of the referred case is different from the instant case and that too on the core issue. In referred case laws, the appellant has shown the immovable property as capital asset and had subjected the same to Wealth tax. However, in the instant case, the appellant has not maintained any records to show that the land was held as investment and he has also not paid Wealth tax even after the date of development agreement, it establishes the fact that the appellant has treated the immovable property as "Stock-in Trade". The Hon'ble Supreme Court in the case of Commissioner of Income Tax, West Vs. Durga Prasad More 82 ITR 540 observed the often quoted following relevant observation: "It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents. "That genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness, stands since settled by the apex court in Sumati Dayal v. CIT (1995) 214 ITR 801 (SC) wherein the apex court, in declaring the transaction as non-genuine, discarded a host of documentary evidences filed or relied upon by the assessee-appellant. The case laws cited by the AO in the assessment order (supra) are also quite relevant on this issue and they all strengthen the stand taken by the Department in the instant case.

2.9. As has been discussed above, the AO has proved the intention of the appellant with series of events and development which has taken place regarding the nature of land which has finally resulted into selling in profit

at opportune moment. The revenue has also clearly established that right from the beginning; the intension of the appellant was to have motive of maximizing the return from the impugned land. The intension of the appellant was to exploit the uses of land, once it is converted into non agriculture land which appellant wanted to be like that so that it could sell the land at the fantastic price as the prices within a short period of time has skyrocketed. It is very clear from that appellant sold the impugned land to the Firm at a very high price. It is proved beyond doubt that appellant's conduct and intension was right from the beginning eyeing on the commercial explosion of the land. In view of the above judicial pronouncements, the sequence of event's right from the purchase of land to the sale of the land by appellant clearly establish the fact that the appellant transaction was a business income as adventure in the nature of trade. In view of the above there is no hesitation to hold the A.O.'s view that the sale of land by appellant is business income being adventure in the nature of trade. In view of the above, the addition made by the A.O. of Rs. 1,65,87,450/- is confirmed. Since the same income has been held as business income being adventure in the nature of trade, the deduction u/s 54F of the Act is not available to the appellant of Rs. 75,16,000/- on account of purchase of residential property.. The grounds of the appellant are hereby dismissed.

5. Aggrieved against the same, the assessee is in appeal before us raising the following Grounds of Appeal:

1.1 The order passed u/s.250 on 26-11-2018 by CIT(A)-3. A'bad upholding the profit arising on sale of land as business income instead of capital gain of Rs. 1,65,87,950/- and disallowance of exemption u/s 54F of Rs. 75,16,000/- is wholly illegal and unlawful.

1.2 The La. CIT(A) has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with regard to the impugned addition.

2.1 The Ld. CIT(A) has grievously erred in law and on facts in confirming profit arising on sale of land as business income instead of capital gain of Rs. 1,65,87,950/- and disallowance of exemption u/s 54F of Rs. 75,16,000/-.

2.2 That in the facts and circumstances of the case as well as in law the Ld. CIT(A) ought not to have upheld profit arising on sale of land as business income instead of capital gain Rs. 1,65,87,950/- and disallowance of exemption u/s. 54F of Rs. 75,16,000/-.

2.3 The observations made and conclusion reached by both the lower authorities to hold the transaction as adventure in nature of trade are not admitted by the appellant.

3.1 The Ld. CIT(A) has erred in upholding disallowance of exemption u/s 54F of Rs. 75,16,000/-.

3.2 Both the lower authorities have failed to appreciate the trans capital asset had not taken place, much-less in this year se entire addition is illegal.

It is, therefore, prayed that the addition of Rs. 1,65,87,450/- as business income upheld by the CIT(A) may kindly be deleted.

6. Ld. Counsel Shri S. N. Divetia appearing for the assessee submitted that the Lower Authorities failed to consider fully and properly the fact of the case as well as submissions made by the assessee. The A.O. contention is that the Partnership firm M/s. Ashirwad Infrastructure was established to divert the profits expected from developing the land. The A.O. failed to consider the Partnership firm was a convenient and practical business modal to carry on development work. Since individual co-owners could not develop with the land, building regulation, etc., it would be administrative convenience and smooth operations relating to preparation of plans, marketing of scheme, engagement of labour, procuring raw material and hiring various agencies through the Partnership firm. Thus it was a commercially prudent decision which the A.O. cannot challenge.

6.1. The other contention of the A.O. non-filing of wealth tax returns shows intention to treat the land as stock in trade. The Ld. Counsel submitted that the chargeability of wealth tax does not decide the character of asset, but it is the intention at the time of acquiring the land and other attendant circumstances to be looked

into it. Thus the failure to file wealth tax would amount to failure under that law, but it does not raise adverse presumption. The motive and intention should be examined at the time of acquisition of the property and not at the time of sale. The partnership was formed after a gap of about five years and the business was solely to develop land. Thus there was no intention when the land was purchased for earning profit and relied upon Karnataka High Court Judgment in the case of CIT vs. Kishan House Builders Association 117 taxmann.com 687. The Ld. Counsel also further relied upon the following case laws:

- i). Hiteshkumar A Vaswani v JCIT (165 ITD 505) (Ahd)
- ii). Nathalal Dahyabhai (126 ITR 555) (Guj)
- iii). CIT v Balbir Singh Naini (398 ITR 531) (SC)
- iv). CIT v Premji Gopalbhai (113 ITR 785) (Guj)

7. Per contra, the Ld. Sr. D.R. Ms. Soumya Pandey Jain appearing for the Revenue supported the order passed by the Lower Authorities which are the concurrent findings arrived by the Revenue need not be disturbed. The Ld. D.R. further submitted that there was no assessment for the earlier assessment year 2014-15 wherein the assessee offered proportionate capital gain on the very same property but no claim of deduction u/s. 54F of the Act. Further in other Partners cases namely Champaben Natvarlal Patel and Natvarlal M. Patel where the cases were reopened u/s. 148 on the very same issue of capital gain versus business income, wherein Mr. Natvarlal M. Patel availed Vivad Se Vishwas Scheme and settled the issue. Thus considering the entire facts of the case and the conclusion arrived by the Ld. A.O. as “business income” does not require any interference and denial of exemption u/s. 54F

of the Act is valid in law. Therefore requested to dismiss the appeal filed by the assessee.

8. We have given our thoughtful consideration and perused the materials available on record including the Paper Book and Synopsis filed by the assessee. The Assessing Officer after detailed verification found that the assessee and seven co-owners in their respective shares formed a new partnership firm in the name of Ashirwad Infrastructure in 2010 with the same ratio of the land holding as their partnership shares. The above land was purchased by the co-owners on 02-01-2006 for a consideration of Rs. 6 lakhs and assessee's share is 18%. All the co-owners entered into a development agreement dated 30-11-2011 with their own partnership firm Ashirwad Infrastructure to develop the land into 18 bungalows in the prime location at Thaltej for a consideration of Rs.9,21,52,500/- and assessee's share is Rs.1,65,87,450/-. The assessee claimed for the present assessment year LTCG of Rs.1,26,80,990/- and also claimed exemption u/s. 54F of Rs.75,16,000/-. It is further seen from the assessment order, the assessee bought another parcel of land for total consideration of Rs.7.1 crores on 09-09-2014 along with seven other co-owners and constituted another partnership firm namely Sudarshan Developers on 06-05-2014 with the very same set of co-owners as the partners and engaged in the business of land development. This clearly establishes the motive, intention and interest of the assessee in doing the real estate business. Thus the motive to acquire land was to earn profit through activity of development of the land through his own partnership firm as builder, contractors

of the partnership firm also not paid taxes. Whereas the assessee herein claim the above transaction as capital gain and also claim exemption u/s. 54F of the Act. If the assessee would have done this construction project in his individual capacity, he should have been liable for higher tax and will not have been eligible for claiming exemption u/s. 54F of the Act. Thus the above transaction of the assessee is clearly to evade legitimate taxes due on the profit of the sale of the property. Further the moment when the assessee was entered into the development agreement on 30.11.2011, the value of the land belongs to the assessee became Rs.1,65,87,450/- as per assessee's own submission. In that case, the assessee was liable to file Wealth Tax Return for the A.Ys. 2012-13 to 2015-16, but the assessee never filed Wealth Tax Return for these assessment years. Thus it can be clearly construed the above piece of land was treated by the assessee as stock-in-trade and no question of capital gain arise in the above set of facts. Thus overall consideration of circumstantial and surrounding evidences, the profit earned by the assessee on sale of land is correctly treated as business income by the Lower Authorities. It is further evident in other co-owner cases, similar reopening of assessments were done and one of the co-owner as against the reassessment order settled the issue under Vivad Se Vishwas Scheme. Thus the case laws relied by the assessee clearly distinguishable to the facts of the present assessee's case. Thus we do not find any infirmity in the orders passed by the Lower Authorities. Thus the grounds raised by the assessee are found to be devoid of merits and the same are hereby dismissed.

9. In the result, the appeal filed by the Assessee is hereby dismissed.

Order pronounced in the open court on 12-01-2024

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER **True Copy**
Ahmedabad : Dated 12/01/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद