IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE Ms. SUCHITRA RAGHUNATH KAMBLE, JUDICAL MEMBER
&
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 1132/Ahd/2014

(**निर्धारण वर्ष /** Assessment Years : 2004-05)

Satya Sankalp Villa (Ellisbridge) P. Ltd. Dharmadev House, Shyamal Cross Road, Satellite, Ahmedabad, Gujarat 380015	**बनाम**/ Vs.	**The Income Tax Officer** Ward – 8(1), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAICS2707B		
(**Appellant**)	..	(**Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Mahesh Chhajed, A.R.
प्रत्यर्थी की ओर से/**Respondent by :**	Ms. Saumya Pandey Jain, Sr. DR

Date of Hearing	05/06/2024
Date of Pronouncement	24/06/2024

O R D E R

PER SHRI NARENDRA PRASAD SINHA, AM:

This appeal is filed by the assessee against the order of Commissioner of Income Tax (Appeals)-XIV, Ahmedabad (in short 'the CIT(A)'), dated 16.01.2014 for A.Y. 2004-05.

2. This is second round of appeal before this Tribunal. Before we adjudicate the grounds taken by the assessee in this appeal, it will be relevant to recapitulate the facts of the case.

3. The facts as culled out from the records are that the assessee had filed its return of income for A.Y. 2004-05 on 18.03.2005 declaring Nil income. A search under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') was carried out in Dharmadev Builders Group of cases on 09.02.2005. In the course of search, certain papers relating to the assessee company were found, which were forwarded by the DCIT, Central Circle-1, Ahmedabad to AO of the assessee along with the satisfaction note. Based on this information, proceeding under Section 153C r.w.s. 153A of the Act was initiated in the case of the assessee and a notice was issued on 23.05.2007, in response to which, the assessee filed Nil return on 13.09.2007. The assessment was completed under Section 143(3) r.w.s. 153C of the Act on 29.12.2008 wherein addition of Rs.1,07,69,939/- was made by the AO. The assessee had filed an appeal before the First Appellate Authority and the Ld. CIT(A) vide order dated 17.04.2009 had partly allowed the appeal of the assessee. The Revenue had contested the order of the ld. CIT(A) before this Tribunal which was decided vide order in ITA No. 1937/Ahd/2009 dated 16.09.2011. The order of the Ld. CIT(A) on the issue of addition of Rs.72,55,000/- in respect of sale of land to SEWA, deleted by the ld. CIT(A), was set aside and the matter was restored to the file of the AO for fresh adjudication after allowing an opportunity of being heard to the assessee.

4. The set aside proceeding was completed by the AO vide order under Section 143(3) r.w.s. 254 of the Act dated 29.01.2013 and addition of Rs.72,55,000/- in respect of sale of land to SEWA was once again made by the AO. The assessee preferred appeal before the CIT(A) against this order which has been decided vide the impugned order and the addition made by the AO was partly confirmed. The ld. CIT(A) allowed relief to the assessee

to the extent of Rs.26,16,000/- and balance addition of Rs.46,39,000/- was confirmed. The assessee is now in appeal before us.

5. The assessee has taken following grounds in this appeal:

> *"1. The Learned Commissioner of Income Tax (Appeals) has erred in not quashing the assessment since the same was in violation of the specific directions of the Hon'ble Income Tax Appellate and this fact has also been admitted in Para 5.6. of his Order.*
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> *2. The learned Commissioner of Income Tax (Appeals) has erred in working out total income from the sale of land to M/s. SEWA at Rs. 46,39,000/- treating the same as Business Income & adopting the cost of said property at Rs. 26,16,000/- only*
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> *3. The Learned Commissioner of Income Tax (Appeals) has erred in not granting deduction of Rs 26,28,038- (Rs.17,50,000/- + 9,28,038/-) being the amount paid for eviction of tenants in spite of evidences furnished as per the direction of the Hon'ble Income Tax Appellate Tribunal.*
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> *4. The Learned Commissioner of Income Tax (Appeals) has erred in not granting deduction of payment made to tenants by arbitrarily holding that the tenants are confined to Sub- Plot 526/1 and Common Plot retained by the Appellant himself ignoring the fact that the Sub Plots comprises of the plot purchased by the Appellant and without disputing the existence of the tenants therein."*

6. The assessee has also taken the following additional grounds:

> *"1. The proceedings initiated U/S 153C of the Act is void & illegal as no satisfaction note was recorded by the assessing officer of the assessee before assumption of jurisdiction U/S 153C f the Act.*
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> *2. Assessment order passed by the Ld. A.O. is bad and illegal as addition is made without any incrementing material."*

7. At the outset, justifying the additional grounds, Shri Mahesh Chhajed, Ld. AR for the assessee submitted that the assessee was entitled to raise additional ground challenging the jurisdiction of the AO in the second round of litigation. In support, he relied upon the decisions of Hon'ble Gujarat High Court in the case of *P. V. Doshi vs. CIT, [1978] 113 ITR 22 (Guj)* and *CIT vs. Jolly Fantasy World Ltd., [2015] 57 taxman.com 80 (Guj.)*. He

explained that additional ground raised by the assessee challenges the validity of assessment order passed under Section 143(3) r.w.s. 153C of the Act. He submitted that the assessment order passed by the ITO, Ward-8(1), Ahmedabad was in contravention to the Instruction No. 08 dated 14.08.2002 of CBDT, as per which it was mandatory that all the search cases should be centralized in central charges, which was not done in this case. He further contended that the proceeding initiated under Section 153C of the Act was void and illegal as no satisfaction note was recorded by the AO of the assessee before assumption of jurisdiction under Section 153C of the Act. In this regard, he has brought on record a copy of the reply in response to RTI application vide order dated 11.03.2022, wherein the AO has stated that the satisfaction note recorded by the Jurisdictional AO was not available. He relied upon the decision of *Hon'ble Supreme Court in the case of Super Malls (P.) Ltd., [2020] 115 taxmann.com 105 (SC)* for his contention that it was mandatory for the AO of the assessee to record his satisfaction before initiating proceeding under Section 153C of the Act. The Ld. AR also contended that order passed by the AO was bad and illegal as the addition was made without any incriminating material. According to the Ld. AR, no addition could have been made in the unabated/completed assessment where no incriminating material was found during search. In support, he relied upon the decision of *Hon'ble Supreme Court in case of PCTI vs. Abhisar Buildwell (P.) Ltd., [2023] 149 taxmann.com 399 (SC).* On merits, the Ld. AR submitted that the addition as confirmed by the Ld. CIT(A) was not correct. He explained that the assessee had received Rs.72,55,000/- from SEWA on account of sale of the land as the confirming party. Out of the amounts so received as sum of Rs.26,16,000/- was paid to the land lord and the balance amount was paid to the tenants. The ld. CIT(A) has deleted the addition in respect of payment made to the landlord, but he did not allow the

claim of the assessee in respect of payment made to tenants. The Ld. AR submitted that the payment made to the tenants was backed by proper agreement and the proof of payment to the tenants was also brought on record.

8. Per contra, Ms. Saumya Pandey Jain, the Ld. Sr. DR submitted that assessee was not entitled to raise the additional ground on the issue of jurisdiction at this stage, as the order under contest now was not the original order under Section 143(3) r.w.s. 153C of the Act, but it was the order passed by the AO in the set aside proceeding pursuant to the direction of the ld. ITAT, which was passed under Section 143(3) r.w.s. 254 of the Act. The Ld. Sr. DR submitted that there is no existence of original order and the order dated 29.01.2013 which has been contested now was not passed under Section 153C of the Act. According to the Ld. SR. DR, the assessee cannot challenge the jurisdiction of the original order after 9 years of filing of appeal. She vehemently contested that the assessee had not established that the AO inherently lacked the jurisdiction to pass the order. Regarding CBDT Circular No. 24/2015 dated 31.12.2015 in respect of recording of satisfaction, the Ld. Sr. DR explained that the said Circular was only clarificatory in nature and was issued much later after the original assessment was completed in this case. She relied upon the decision of the *ITAT, Delhi in case of Tanvir Collections (P.) Ltd. vs. ACIT, [2015] 54 taxmannc.om 370 (Delhi - Trib)* and submitted that at the relevant point of time only the AO of searched person was required to record the necessary satisfaction before handing over the seized documents and that the AO of the other person was not required to record any satisfaction before initiating proceeding under Section 153C of the Act. In respect of the 2nd additional ground raised by the assessee, the Ld. Sr. DR submitted that the original assessment was based on

the incriminating material and this fact was already referred in the assessment order itself. Therefore, the contention of the assessee that the addition was not based on incriminating material was not correct. She has also drawn our attention to Para 5.4 and Annexure X-2 of the Ld. CIT(A)'s order wherein the reference of the materials seized during the search and the explanation of the assessee thereon is mentioned. On merits, the Ld. Sr. DR strongly supported the order of the Ld. CIT(A). She explained that evidences filed by the assessee were critically examined by the Ld. CIT(A) and only thereafter the addition to the extent of Rs.46,39,000/- was confirmed.

9. We have carefully considered the rival submissions and the materials available on record. Before we take up the original grounds taken by the assessee, it is relevant to consider the additional grounds which are legal in nature and go to the root of jurisdiction. The Ld. AR has contended that he was entitled to raise this additional ground in the 2nd round of litigation for which reliance has been placed on the decision of Jurisdictional High Court in the case of *P. V. Doshi (supra).* We find that in the case of *P. V. Doshi (supra)*, the ground regarding validity of notice for re-assessment was raised in the first round of litigation but was not pressed before the Ld. AAC. The Tribunal had remanded the matter back to the AO to re-examine the matter and then complete the assessment. It was in the 2nd round of litigation that the legal ground was pressed by the assessee, which was rejected by the Tribunal. It was in consideration of this peculiar fact that the Hon'ble High Court had held that merely because the legal ground was initially raised and not pressed, it could not be considered as waived by the assessee and that he was entitled to re-agitate the same. In the instant case, however, no such legal ground was raised in the first round of appeal, but the assessee has taken this ground only in the 2nd round of appeal. Thus, the decision of the Hon'ble

Jurisdictional High Court in the case of *P. V. Doshi (supra)* is not found applicable to the facts of the present case. In the case of *Jolly Fantasy World Ltd. (supra)* the proceeding u/s 158BC was challenged on the ground that no warrant of authorization was issued in the name of the assessee and the Hon'ble jurisdictional High Court had held that jurisdictional authority of the AO can be challenged even in the second round of appeal. In this case there is no such challenge of the jurisdictional authority of the AO. We are also not convinced about the timing of these additional grounds which have been raised after nine years of filing of this appeal and such inordinate delay has not been explained by the assessee and that the assessee is not free to raise legal ground at any time without proper explanation. Nevertheless, since the additional grounds raised by the assessee goes to the root of the proceeding u/s 153C of the Act, we deem it proper to adjudicate the same.

10. The first additional ground taken by the assessee is regarding recording of satisfaction by the AO. It is contended that the AO did not record satisfaction before initiating proceeding under Section 153C of the Act. The provision of Section 153C of the Act at the material point of time was as under:

> *"153C.Assessment of income of any other person.- (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A:"*

It is crystal clear from the above provision that the AO of the "searched person" had to record a satisfaction that any money, bullion, jewellery, books of account, documents etc. seized or

requisitioned, belong to a person other than searched person and, thereafter, such assets or documents was acquired to be handed over to the AO of the "other person". After receipt of such assets/documents from the AO of the "searched person", the AO of the "other person" was required to proceed against such other person to assess or re-assess his income. It is, thus, evident from the bare reading of the provisions that satisfaction was to be recorded by the AO of the "searched person", from whose possession of assets or documents were found and seized. Only on recording of such satisfaction by the AO of the "searched person" and handing over of the assets/documents to the AO of the "other person", proceedings under Section 153C of the Act can be initiated by the AO of the "other person".

11. The Ld. AR has relied upon the decision of Hon'ble Supreme Court in the case of *Super Malls (P.) Ltd. (supra*). In that case, a satisfaction was recorded by the AO of the "other person" and no satisfaction was recorded by the AO of the "searched person". Thus, the basic requirement of recording of satisfaction by AO of the "searched person" was not fulfilled in that case. However, the AO of the searched person and the AO of the other person was the same in that case and on that basis, Hon'ble Supreme Court had held in that case that the satisfaction that documents seized from searched person belonged to the other person was fulfilled and the proceeding under Section 153C of the Act was rightly initiated. In fact the manner of recording of satisfaction and handing over the seized documents was explained by the Hon'ble Court in that case as under:

> ***"6.*** *This Court had an occasion to consider the scheme of Section 153C of the Act and the conditions precedent to be fulfilled/complied with before issuing notice under section 153C of the Act in the case of Calcutta Knitwears (supra) as well as by the Delhi High Court in the case of Pepsi Food (P.) Ltd. (supra). As held, before issuing notice under section 153C of the Act, the Assessing Officer of the searched person must be "satisfied" that, inter alia, any document seized or requisitioned "belongs to" a person other than the searched person. That thereafter, after recording such satisfaction by the Assessing Officer of the searched person, he may transmit the records/documents/things/papers etc. to the Assessing Officer having jurisdiction over such other person. After receipt of the aforesaid satisfaction and upon examination of such other documents relating to such other person, the jurisdictional Assessing Officer may proceed to issue a notice for the purpose of completion of the assessment under section 158BD of the Act and the other provisions of Chapter XIV-B shall apply.*
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> ***6.1*** *It cannot be disputed that the aforesaid requirements are held to be mandatorily complied with. There can be two eventualities. It may so happen that the Assessing Officer of the searched person is different from the Assessing Officer of the other person and in the second eventuality, the Assessing Officer of the searched person and the other person is the same. Where the Assessing Officer of the searched person is different from the Assessing Officer of the other person, there shall be a satisfaction note by the Assessing Officer of the searched person and as observed hereinabove that thereafter the Assessing Officer of the searched person is required to transmit the documents so seized to the Assessing Officer of the other person. The Assessing Officer of the searched person simultaneously while transmitting the documents shall forward his satisfaction note to the Assessing Officer of the other person and is also required to make a note in the file of a searched person that he has done so. However, as rightly observed and held by the Delhi High Court in the case of Ganpati Fincap Services (P.) Ltd.(supra), the same is for the administrative convenience and the failure by the Assessing Officer of the searched person, after preparing and dispatching the satisfaction note and the documents to the Assessing Officer of the other person, to make a note in the file of a searched person, will not vitiate the entire proceedings under section 153C of the Act against the other person. At the same time, the satisfaction note by the Assessing Officer of the searched person that the documents etc. so seized during the search and seizure from the searched person belonged to the other person and transmitting such material to the Assessing Officer of the other person is mandatory."*

In the present case the Assessing Officer of the "searched person" was different from the Assessing Officer of the "other person" and the manner of recording of satisfaction as explained by the Apex Court in the case of *Super Malls (P.) Ltd. (supra*) was followed. The Hon'ble Court had held that the satisfaction of AO of the searched person that the documents etc. so seized during the search and seizure from the searched person belonged to the other

person and transmitting such material to the Assessing Officer of the other person was mandatory. Such satisfaction was recorded by the AO of the "searched person" in this case and the documents were transmitted to the AO of the assessee, based on which he had rightly initiated the proceeding u/s 153C of the Act.

12. The Ld. AR has contended that no satisfaction was recorded by the AO in terms of Circular No.24/2015, dated 31.12.2015 issued by the CBDT. This Circular was issued pursuant to judgment of Hon'ble Supreme Court in the case of *M/s. Calcutta Knitwears* given in the context of provision of Section 158BD/158BC of the Act. The Hon'ble Court had held that for the purpose of section 158BD (equivalent to section 153C) recording of a satisfaction note was a prerequisite and the satisfaction note must be prepared by the AO before he transmits the record to the other AO who has jurisdiction over such other person under Section 158BD of the Act. Thus, in that case also the requirement of satisfaction note by the "AO of the searched person only" was upheld by the Apex Court. The CBDT vide the referred Circular had issued guideline for recoding of satisfaction u/s 158BD/153C considering that the provision of Section 153C of the Act was pari-materia to the provisions of Section 158BD of the Act. It was clarified that the guidelines of Hon'ble Supreme Court in the context of section 158BD of the Act will apply to the proceedings under Section 153C of the Act. It was further clarified that even if the AO of the "searched person" and the AO of the "other person" is one and the same, then also, a satisfaction note is required to be recorded. It is, thus, evident that the requirement as per the provisions of the Act as well as the judicial pronouncements was to record the satisfaction only by the AO of the "searched person" and there was no requirement for recoding of satisfaction by the AO of the "other person".

13. The above position had, however, changed after the amendment of provision of Section 153C of the Act w.e.f. 01.10.2014 which required that the AO of the other person has to be satisfied that the books of accounts of documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person. This aspect was dealt by the ITAT, Delhi in the case of *Tanvir Collections (P.) Ltd. (supra)* and the relevant portion of the order is reproduced below:

> *"18. At this stage, it is relevant to note that the legislature has substituted the latter part of section 153C(1) by the Finance (No.2) Act, 2014 w.e.f. 1.10.2014. The hitherto part of sub-section (1) :"and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person .....referred to in sub-section (1) of section 153A.' has been substituted as under : -*
>
> > *'and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section.'*
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> *19. The above substitution has the effect of now making it mandatory for the AO of the 'other person' also to record satisfaction that the books of account or documents, etc., have a bearing on the determination of the total income of such 'other person' before embarking upon the exercise of his assessment or reassessment. Therefore, now under the law, w.e.f. 1.10.2014 it has become obligatory not only for the AO of the person searched to record satisfaction before handing over books of account or documents, etc., to the AO of the 'other person', but, such AO of the 'other person' is also required to record satisfaction that the books of account or documents, etc. have a bearing on the determination of the total income of such other person. In the pre-substitution era of the relevant part of sub-section (1) of section 153C covering the period under consideration, the jurisdictional condition remains that the satisfaction is required to be recorded by and in the case of the person searched so as to enable the AO of the 'other person' to start with the proceedings for making assessment or reassessment."*

It is, thus, apparent from the above discussions that there was no requirement to record satisfaction by the AO of the "other person" prior to 01.10.2014. Therefore, **the additional ground No-1 as taken by the assessee is dismissed.**

14. The second additional ground pertains to assessment order being not based on any incriminating material. After the decision of Hon'ble Supreme Court in the case of *Abhisar Buildwell (P.) Ltd. (supra)*, there is no dispute to the fact that no addition can be made in unabated / completed assessments in the absence of any incriminating material. The assessee has not brought any evidence on record to establish that the case for A.Y. 2004-05 was an unabated assessment. No reference of any past assessment is appearing in the original assessment order under Section 143(3) r.w.s. 153C of the Act dated 29.12.2008. Further, it is found that the original assessment was made on the basis of seized material as categorically mentioned in para 3 of the order dated 29.12.2008, which is reproduced below:

> *"3. As mentioned earlier, a search u/s 132 of the I.T.Act was carried out in the Dharamdev Builders group of cases. During the course of search action, certain papers relating to the assessee company were found and seized. The same were transferred to the office of the undersigned. Thereafter copies of seized materials relating to M/s Satya Sankalp Villa (Ellisbridge) Pvt Ltd, which were received from the office of the DCIT, Central Circle 1(1), Ahmedabad, were given to the assessee for its explanations/comments on each paper. The assessee furnished explanation on each paper vide its reply dated 14.08.2008 which was received in the office of the undersigned on 22/08/2008. On verification of the seized papers and the assessee's reply/explanation on these papers, further points emerged on which the explanation of the assessee was required. Therefore vide letter dated 08.12.2008, the assessee was once again requested to furnish its details/clarifications on the points mentioned therein. Each of points raised and the assessee's reply in respect of such points and the facts and the decision that emerged out of it is discussed in following Paragraphs."*

15. Further, the addition of Rs.72,55,000/- was made on the basis of seized documents, which was referred in Para 6 of this original assessment order as under:

> *"ADDITION ON ACCOUNT OF SALE OF LAND*

6. It is noticed that seized papers contain a copy of sale deed entered between Swashrayi Women Sewa Sangh (SEWA) as Purchaser Party, Mr Vadilal Champaklal and other as Seller party, M/s Netra Owners Association as 1st Confirming Party and M/s Satya Sankalp Villa(Ellisbridge) Pvt Ltd as 2nd confirming party. The sale deed is in respect of a land at TP Scheme No, 3/5, FP No.526 at City taluka, Chhadwad, Ellisbridge of 2680 Sq yard or 3205 Sq Mts. Vide this sale deed, M/s SEWA has purchased the land from Mr. Vadilal & others. The sale deed has been made for Rs. 72,55,000/-. As per the said sale deed, an amount of Rs. 26,12,000/- was to be paid to M/s Satya Sankalp Villa (Ellisbridge) Pvt Ltd on behalf of Mr. Vadilial & others as the said amount has already been paid to them by our assessee. It further says that the balance amount of Rs.46,39,000/-has been paid to M/s Satya Sankalp Villa (Ellisbridge)Pvt. Ltd on 12/12/2003 vide cheque No. 126098. The assessee was requested to explain about the sale deed and about the receipt of the money from SEWA. In its reply dated 15.11.2008, the assessee stated that the amount of Rs.46,39,000/- received by it from M/s SEWA as a confirming party has been returned to the original land owners. Therefore, the assessee was requested to furnish the proof of the same. The assessee was also requested to give reason as to why it has given the money back to the land owners when the same has been received as a confirming party. From the details and facts mentioned above, it is very obvious that being a confirming party, the assessee has received the amount on which it should have paid income-tax. Therefore, vide letter dated 08.12.2008, the assessee was requested to explain as to why the same should not be treated as its income and taxed accordingly."

16. The Ld. Sr. DR has also referred to Annexure X-2 to the order of Ld. CIT(A) wherein the explanation of the assessee with reference to seized documents is appearing. It is crystal clear from the above evidences that not only the incriminating/seized material pertaining to the assessee was found but the addition, which has been contested in this appeal, was also based on the incriminating/seized material found during the search. We, therefore, don't find any merit in the 2nd additional ground as taken. The assessee was well aware of the facts that incriminating/seized materials were found, explanation pertaining to which was also furnished by the assessee in the

course of assessment proceeding and that the addition was also based on the incriminating/seized material; still this additional ground has been taken with an intention to mislead us and to derive undue benefit by taking this legal ground, which is not at all available to the assessee. Therefore, **the second additional ground as taken by the assessee is also dismissed.**

17. We now proceed to decide the original grounds taken by the assessee in this appeal. All the grounds are found to be connected with income from sale of land to SEWA. Before we discuss the grounds on merit, it will be relevant to go through the direction given by this Tribunal while setting aside the order of the ld. CIT(A) in the first round of appeal vide order dated 16.09.2011. The relevant portion of the direction was as under:

> *"…We are of the considered opinion that neither the action of the A.O. is justified to tax the gross receipt nor the order of Ld. CIT(A) is sustainable that no income is taxable in the present year. We find that entire payment was made to the land owner as per the submission of the assessee and regarding the dispute also, we find that majority of the same was resolved in the present year and an amount of Rs.17.50 lacs was already paid to the tenants and only a sum of Rs.9.28 lacs is claimed to have been paid to the tenants in the next year. Sale deed has been executed and the possession was handed over to the buyer and hence, we feel that the income on account of this transaction is liable to tax in the present year but the same should be after allowing the deduction in respect of the cost of the property as well as payments to tenants etc. Hence, we set aside the order of Ld. CIT(A) on this issue and restore the matter back to the file of the A.O. for a fresh decision. The A.O. has to first decide as to whether the assessee is a dealer in the property and the income on this account is taxable as business income or the amount is taxable as capital gain and whether the capital gain is a short term capital gain or long term capital gain. The A.O. should also find the actual cost incurred by the assessee for purchase of the property in question and deduction should be allowed for the same. In addition to this, the A.O. has to examine the claim of the assessee that the assessee incurred the expenses of Rs.17.50 lacs in the present year and Rs.9.28 lacs in the next year on account of payments to tenants for getting the property vacated as per the terms of agreement. If it is found that these payments are in fact for the purpose of getting the property in question vacated as per the terms of the agreement then the deduction should be*

allowed on account of those payments also irrespective of the fact as to whether the payments were made in the present year or in the next year and net income after allowing, both the deductions should be brought to tax in the present year. The A.O. should pass necessary order as per law after allowing adequate opportunity of being heard to the assessee. Ground No.2 of the revenue is allowed for statistical purposes."

18. The seized document based on which the addition was made in this case was a copy of sale deed dated 12.12.2003 entered between Swashrayi Women Sewa Sangh (SEWA) as Purchaser Party, Mr Vadilal Champaklal and nine others as Seller party, M/s Netra Owners Association as 1st Confirming Party and M/s Satya Sankalp Villa (Ellisbridge) Pvt Ltd (the assessee) as 2nd confirming party. As per this sale deed, sub-plot No.526/2 admeasuring 664.72 sq. mtrs. i.e 795 sq. yards, which was a sub-division of Plot No. 526, was sold for a consideration of Rs.72,55,000/-. The Sellers had earlier decided to sell the property to the 1st confirming party Netra Owners Association and had executed five agreements to sell the same in the year 2001. Thus the right to purchase the plot number 526 was with the first confirming party. Subsequently, the first confirming party had decided to sell the said property to the 2nd confirming party i.e. the assessee and had executed an agreement (Banakhat) dated 7.10.2002 in this regard. By virtue of this agreement, the second confirming party had got the rights to purchase this property. In view of these previous agreements the sale deed dated 12.12.2003 was signed by the first confirming party and the second confirming party.

19. It is found from clause-18 of this sale deed that out of the total property, the rental lease rights of the land admeasuring 2405 sq. yards was

sold by the Sellers, with the consent of the 1st confirming party, to the second confirming party vide 14 different sale deeds dated 11.09.2003. The second confirming party i.e. the assessee was in possession, enjoyment, and ownership of 2405 sq. yards of land, including construction thereon and their rental lease rights.

20. As per clause-20 of the sale deed the property of plot number 526 having area of 2667 sq. mt. was sub divided into three sub plots: (i) sub-plot 526/1 of 1730 sq. mt. (ii) sub-plot 526/2 of 664.72 sq. meter and (iii) common plot of 325.52 sq. mt. In the present sale deed sub-plot 526/2 was subject matter of sale. As per clause-31 & 32 of the sale deed the property of plot number 526/2 was sold by the sellers and the second confirming party for a consideration of Rs.75,55,000/-and the vacant possession of the property was given to the purchasers. As per clause-37, the sale consideration was divided between the sellers and the second confirming party as under:

(i) Rs. 26,16,000/- was received by the Sellers in lieu of Agreement to Sell dated 09.08.2001 with the first confirming party.

(ii) Rs.46,39,000/- was paid to the second confirming party in lieu of the Agreement to Sale.

Accordingly, the sale consideration of Rs.46,39,000/- was paid to the assessee by SEWA which was in consideration of Banakhat entered into by the assessee with the 1st confirming party and the balance amount of Rs.26,16,000/- was paid to the owners. In essence, the amount of Rs.46,39,000/- was received by the assessee for relinquishment in its right in the property which was acquired vide Banakhat. So, the real dispute in this appeal is

about taxability of this amount of Rs.46,39,000/- received by the assessee.

21. The assessee has contended that out of the amount of Rs.46,39,000/- received by the 2nd confirming party, Rs.26,16,000/- was paid to tenants for eviction of the property which should be allowed as deduction. The assessee had itself admitted that the net income in respect of transaction of sale of property to SEWA worked out to Rs.19,60,962/- only (sale consideration of Rs.72,55,000/- less cost of acquisition Rs.26,16,000/- and payment made to the tenants Rs.26,78,038/-). Thus, **the assessee itself in the written submission made before the ld. CIT(A) had admitted that its income from sale of property to SEWA was Rs.19,60,962/-** ***(page-59 of the paper book)*** **and, therefore, there is no dispute to the addition to this extent. Accordingly, the addition to the extent Rs.19,60,962/- is confirmed.**

22. The real dispute in this case is in respect of claim of payment of Rs.26,78,038/- made to the tenants. The assessee had produced a copy of the agreement in respect of the payments made to the tenants which was examined by the Ld. CIT(A). The findings given by the CIT(A) in this regard is found to be as under:

> *"5.3 In reference to payment to tenants and appellant claim, the following facts from notarized agreement requires consideration:*
>
> *(A) Agreement dt. 11.09.03 between Lucky Decorators owner Rajesh Gunvantlal Sariya and Shri Umang Thakkar "Dhararndev Builders" They Agreed for sale agreement between owners of plot No. 526 and Shri Umang Thakkar, for which out of the sale*

consideration from Shri Umang Thakkar to owners Rs. 10,00,000 paid as follows:

4,00,000 D.D.No. 12625 dt. 11.09.03

4,00,000 Cheque no. 058360 dt. 11.09.03 of Mahila Vikas co. op. Bank Ltd.

2,00,000 Cash dt. 11.09.03

The appellant capitalized the same in view of sub plot 526/1 & common plot for Hotel business.

(B) Agreement Dt. 13.02.04 between Shri Yogesh Bhavsar and appellant.

In view of sale agreement dt. 11.09.03 vide Registered deed No. 3228 to 3241 the appellant purchased land from owners. Shri Yogesh Bhavsar was tenant for shop No. 526/10 admeasuring 435 sq.ft. For vacating the same Rs. 7,00,000 was paid to Shri Yogesh Bhavsar. As per ledger a/c (page 99 of P.B.) Rs. 7,00,000 debited to Shri Umang Thakkar and credited to Shri Rameshbhai Manubhai & others on 06.02.04. (After sale deed agreement dt. 12.12.03)

(C) Agreement dt. 20.02.04 between Shri Mohanbhai Agarwal and appellant.

In view of appellant being "owner" because of sale deed dt. 11.09.2003 Regd. No. 3228 to 3241, for vacating shop no. 526/14 admeasuring 339 sq. ft. Rs. 50,000 cash received in part part by Shri Mohanbhai Agarwal.

(D) Agreement dt. 12.04.04 between Shri Dheeraj Somchand and appellant.

In view of appellant being 'Owner' because of sale deed dt. 11.09.03 Regd. No. 3228 to 3241, for vacating shop no. 526/6 admeasuring 340 sq. ft. Rs. 1,00,000 cash received in part part by Shri Dheeraj Somchand.

(E) Agreement dt. Nov. 2004 between Shri Mahipal Haribhai Jat, Shri Dharampal Haribhai Jat, Smt. Soneriben Haribhai Jat and appellant.

In view of appellant being 'owner' because of sale deed dt. 11.09.03 Regd. No. 3228 & 3241, for vacating shop no. 526/8 admeasuring 300 sq. ft Rs. 5,50,000 in cash received in part part by all these three persons.

(F) Agreement dt. 23.09.2004 between Smt. Sushilaben Pravinchand Vadhni, Shri Harshad Pravinchand Udhni, and Shri Paresh Pravinchand vdhavani and appellant.

In view of appellant being 'owner' because of sale deed dt. 11.09.03 Regd. No. 3228 & 3241, for vacating shop no. 526/12 admeasuring 300 sq. ft Rs. 75,000 in cash received in part part by these three persons.

(G) Agreement 03.11.04. between Shri Amirchand Udhani and appellant.
In view of appellant being 'owner' because of sale deed dt. 11.09.03 Regd. No. 3228 & 3241, for vacating shop no. 526/7 admeasuring 325 sq. ft. Rs. 1,50,000 in cash received in part part by Shri Amichand.

(H) Agreement dt. 14.03.05 between Shri Dheeraj Pravinchand Udhani and appellant.

In view of appellant being 'owner' because of sale deed dt. 11.09.03 Regd. No. 3228 & 3241, for vacating shop no. 526/13 admeasuring 310 sq. ft Rs. 25,000 in cash received by Shri Dheeraj.

It is therefore, in the case of M/s Lucky decorators when payment of Rs. 10 lac was made before sale deed with SEWA (dt 12 12.03) the same was capitalized. All other agreement & payment for vacating shops are after the sale deed dt. 12.12.03, As explained in earlier para, these agreement clearly reflect that in view of sale agreement dt. 11.09.03 Regd. Vide no. 3228 to 3241 (14 nos of agreement) the appellant being owner paid such money. These sale deed (14 in nos) were related to sub plot 526/1 and common plot land which appellant retained for his hotel business and has nothing to do with plot 526/2 which was sold to M/s SEWA. Therefore such payments to tenants cannot be attributed to tenants related to subplot 526/2. The total payment is for Rs. 10,00,000 for M/s Lucky Decorators and Rs. 16,50,000 (7,00,000+ 50,000 + 1,00,000+ 5,50,000+75,000 + 1,50,000 25,000). As mentioned in agreement most of the payment is made in cash that too in part part.

5.4 In the impugned asstt.order, there is a reference of search proceedings and finding of loose paper file relevant to appellant. In this regard, it is important to have a look on the explanation given by appellant before A. O. vide letter dt. 14.08.08 (received by A.O. on 22.08.08) explaining cash & every such page of loose paper file. It is because of this file there was a question about sale of land to SEWA as well as there are reference about payment to tenant for vacation of land / premises. This reply is annexed with this order a Annexure X-2 for ready reference. Various submission/contention of

the appellant does not match with the explanation so given by appellant for these papers.

5.5. In view of discussion at para 5.2 to 5.4 above, the answer to various question / directions as per Hon'ble ITAT directions are as follows [Refer para 5.1(A))

5.1(A)(a) The income & liability of tax on the sale transaction of property as evidenced by seized sale deed dt. 12.12.03 to M/s SEWA is required to made in impugned previous year. It is therefore the same is considered here.

5.1.(A)(b) The assessee is dealing in real estate with group concerns of 'Dharmdev builders'. Shri Umang Thakkar being main person of such group and director of appellant company entered into various transactions of purchase of land of plot 526 from its various owners and subdivided the plot into sub plot 526/1, 526/2 and common plot as detailed in sale deed.

It is the sub plot 526/2 which was subject matter of sale to M/s SEWA, while other sub plot 526/1 and common plot kept by appellant for his hotel business. The purchase were made through various sale deed dt. 11.09.03 and 'Banakhat' for all these land including the plot no. 526/2 and the same is sold to M/s SEWA. <u>These activities of purchase, plotting & sale is business activity hence the income so arised from this transaction has to be taxed under the head "Business income".</u>

5.1.(A)(c) <u>The actual cost for purchase of land as evidenced by sale deed dt. 11.09.03 is Rs. 26,16,000 only which was paid by appellant to owners in terms of "Banakhat" (which was neither submitted nor produced, but referred in sale deed)</u>. In reference to payment to various tenants, there are agreements (notarized) produced / submitted by appellant except in two case of M/s Malkeshwar Mahadev Trust and Shri Firoj. <u>The examination of sale deed dt. 12.12.03 clearly reflect that appellant purchased land from different owners vide sale deed dt. 11.09.03 Regd. With nos, 3228 to 3241</u> (Fourteen in nos., not produced /submitted) <u>related to land falling under</u> subplot 526/1 and common plot. The payment made before 12.12.03 was duly capitalized by appellant because the land failing under subplot 526/1 and common plot were to be used by appellant for construction of Hotel. It is in this reference, <u>all the tenants to whom appellant paid for vacating the premises were related to this plot of land and therefore no deduction can be allowed for such payment.</u> The appellant failed to substantiate or demonstrate that any of such payment irrespective of paid in A.Y. 03-04 or A.Y. 04-05 is related to tenant for the plot (subplot) 526/2 which was sold to M/s SEWA. <u>Therefore the cost of property is taken at Rs. 26,16,000,</u>

> *5.1 (A) (d) <u>The payments to tenants were made as per agreement but the same were not related to impugned property of subplot 526/2. The appellant also failed to substantiate the same.</u> Further, the appellant kept with it the other subplot 526/1 and common plot for which payment made to owners, tenement, architect were capitalized by appellant for his hotel project.*
>
> *In view of above discussion, the total income from the sale to M/s SEWA work out to Rs. 46,39,000 (7255000-2616000).*

23. It is, thus, found that the Ld. CIT(A) had critically examined the evidences brought on record by the assessee for payment made to the tenants and has given categorical finding in this regard in the appeal order. After examining the agreements, he had found that these documents pertained to Sub-Plot No.526/1 and the common plot of land which was retained by the assessee for his hotel business and that the payments made to the tenants was not in respect of plot No.526/2 which was sold to SEWA. In fact the assessee had capitalized the payment of Rs. 10 lakh made to Lucky Decorators to sub plot 526/1 & common plot for Hotel business. The other payments were in respect of eviction of tenants from their shops. In the sale deed there was no reference of any shop being in existence on the sub-plot No.-526/2. From the sale deed dated 12.12.2003 it is found that Plot No.526/2 was sold without any encroachment thereon and the vacant possession of the property was given to the purchasers which is evident from Clause 31 of the sale deed which is reproduced below:

> *"31. The property on the eastern side admeasuring 664.72 sq. meters i.e. 795 sq. yards i.e. said property of plot No. 526/2, being derived due to sub-division of the property of final plot No. 526, is hereby being sold at a lumpsum consideration by the sellers as well as the Second Confirming Party, both combined to you the purchasers and also hereby give its practical, vacant possession to*

purchasers and for the said purpose, we the sellers do hereby execute this Sale Deed in favour of the purchasers and we the First Confirming Party, in lieu of the Agreement to Sell dated 9-8-2001, have become one of the parties hereto for the purpose of giving our consent in this Sale Deed."

24. From the above evidences, it is crystal clear that the payments made to the tenants was not in respect of Plot No.526/2 as sold by the assessee as 2nd confirming party. The assessee has not brought on record any evidence to controvert the findings as given by the Ld. CIT(A). We have, therefore, no reason to interfere with the findings as recorded by the Ld. CIT(A) and to differ with his decision. Accordingly, the addition of Rs.46,39,000/- on account of sale of property as business income of the assessee, as upheld by the ld. CIT(A), is confirmed and all the grounds as taken by the assessee are rejected.

25. In the result, appeal preferred by the assessee is dismissed.

This Order pronounced on 24/06/2024

Sd/-	Sd/-
(SUCHITRA RAGHUNATH KAMBLE)	(NARENDRA PRASAD SINHA)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 24/06/2024

S. K. SINHA *True Copy*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad