

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
SHRI BIJAYANANDA PRUSETH, ACCOUNTANT MEMBER

विविध आवेदन/**M.A.No.30/SRT/2023**

(*Arising out of ITA No.173/SRT/2020*)

(AY 2014-15)

(*Hybrid process hearing*)

Swastik Enterprises R.S No.130, F.P. 36, T.P, S.37, b/h Althan Gam, Althan, Surat-395007 [ <b>PAN: AAKFM 1069 M</b> ]	Vs	Deputy Commissioner of Income Tax, Circle-2(3), Surat, Room NO.612, 6 <sup>th</sup> Floor, Aayakar Bhavan, Near Majura Gate, Surat-395001
Applicant		Respondent/Revenue

Assessee by	Shri Rasesh Shah, CA
Revenue by	Shri Vinod Kumar – Sr. DR
Date of hearing	05.07.2024
Date of pronouncement	27.08.2024

**Order under section 254(2) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. This Miscellaneous Application (MA) under section 254(2) of the Income Tax Act, 1961 filed by the assessee for seeking rectification / re-calling the order dated 15.11.2022 passed in ITA No.173/SRT/2020 for assessment year 2014-15.
2. The Ld. Authorized Representative (Ld.AR) for the applicant submits while deciding the appeal, the appellate order passed by Ld. CIT(A) was reversed by holding that profit and gains for sale of land chargeable to tax as "business income" and not "capital gains". Though the Bench accepted the fact that assessee did not commence any "business activities". The Assessing Officer also accepted this fact that assessee has not started any commercial activities though it was observed that land was held for the purpose of business. The Ld. AR of the assessee submits that Assessing Officer also accepted the fact that

non commence of business does not convert the stock-in-trade into capital asset automatically. The Ld. AR of the assessee submits that when there is no business activities, income cannot assess under section 28 of the Act. Section 28 of Income-tax Act classifies income into "profit and gain from business and profession". The income chargeable under head "profit and gain for business and profession" only when business is carried out by assessee at any time during previous year as per clause-(i) under section 28 of the Act. Thus, when this fact is not disputed, by lower authorities, the impugned gain on the sale of land should have been assessed as income from "capital gains" not from "business income", as has been held by Ld. CIT(A). Reversing the order of Ld. CIT(A) by treating difference as "business income" is not in consonance with the scope of Section 28 of the Act. Thus, there is mistake in the order of Tribunal which is not justifiable under section 254(2) of the Act. So far as observation of Bench that sale deed of land was executed by the partners of assessee-firm and no capital gain was done in the hand of partners. For the reasons based known to them. The Ld. AR of the assessee submits that such view of the Bench that the assessee-firm cannot be taxed. The undisputed fact is that the assessee-firm never became legal owner of the land till the date of sale. The sale deed was executed by lawful owner Jagdishbhai Labhubhai Gadiya and Bharatbhai Vanmalibhai Patel, who were the partners of the assessee-firm. Though, the land was originally introduced by the partners of the assessee-firm as capital contribution but assessee-firm never became owner at any time. At the best, it is the distribution of asset at the time of sale from the hands of assessee-firm to the hand of the partners and therefore

Section 45(4) of the Act is applicable which deals the capital gains as "income of the firm" on the transfer of capital asset by way of distribution of capital asset. In absence of Section 45(4) of the Act the income is not chargeable at all as per the decision of Hon'ble Apex Court in the case of CIT vs. Dewas Cine Corporation [1968] 68 ITR 240; Malabar Fisheries Co. vs. CIT [1979] 120 ITR 49 and Sunil Siddharth Bhai vs. CIT [1985] 156 ITR 509. The Ld. AR of the assessee submits that entry in the books of account is not a decisive factor whether it is 'capital asset' or 'business asset'. On the observation of Bench, that no corrective steps were taken by the assessee-firm for accounting mistake in showing the land as "work-in-progress", the Ld. AR of the assessee submits that mistake was realized when the time limit for filing revised return has expired, the assessee, itself, in the course of assessment proceedings, stated that account of the firm classified the land under "working-in-progress" in response to the show cause notice issued by the Assessing Officer. Such wrong entry is also proved by the fact that assessee in the agreement in the contract of the assessee-firm i.e., on 02.10.2006 stated that land should be treated as "asset" of the firm and only on its being registered / entered in the Revenue Record in the name of firm by the partners. The land was never entered in the Revenue Record in the name of firm. Thus, the mistake by accountant is apparent in referring the land under the head "work-in-progress". The Ld.AR of the assessee submits that in view of the submission that there is mistake apparent in the order which requires to rectify and in view of the specific provisions of Section 45(4) of the Act is applicable. Therefore, the order dated 15.11.2022 may be recalled and the grounds of appeal raised by the Revenue

may be restored back to the file of Assessing Officer to pass order afresh in accordance with law by admitting the plea of assessee under section 254(2) of the Act.

3. On the other hand, Ld. Senior Departmental-Representative (Ld. Sr-DR) for the Revenue submits that there is no mistake apparent in the order passed by Tribunal and Ld.AR of the assessee argued by raising new fact in the MA filed, which was not raise at the time of making submission before Tribunal while defending the appeal. The fact pleaded in the MA and the prayer made in the submission is beyond the scope of Section 254(2) of the Act. The assessee is seeking fresh decision the same issue which is beyond the scope of Section 254(2) of the Act.
4. We have considered the rival submissions of both the parties and have gone through the content of Miscellaneous Application carefully. We have also considered the decisions relied by Id AR of the assessee. On perusal of record, we find that there is no allegation of assessee in the present application that their contention is not recorded or considered at the time of passing order. The assessee is in fact seeking review of the order by pleading new facts and legal proposition, which is not permissible under the scope of application under section 254(2) of the Act. The Id AR of the assessee has argued the present application on different set of facts and law. The Id AR of the assessee time and again accepted the facts that the land was originally introduced by the partners of the assessee-firm as capital contribution. There is no denial of the facts that the assessee-firm has claimed various expenses in the hand of assessee after introduction of the land, which includes the development

charges deposited with local authority. The assessee firm has not shown any other land in their bucket. Thus, we do not find any mistake in the order which may falls within the scope of application under section 254(2) of the Act. The assessee is seeking review of the order which is not permissible under section 254(2) hence, the application filed by the assessee is dismissed.

5. In the result, MA filed by the assessee is dismissed.

Order pronounced on 27/08/2024 in the open court.

**Sd/-**  
**(BIJAYANANDA PRUSETH)**  
**ACCOUNTANT MEMBER**

Surat, Dated: 27 /08/2024  
*DKP, Outsourcing Sr.PS*

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

Sr. Pvt. Secretary, ITAT, Surat