आयकर अपीलीय अधिकरण
देहरादून पीठ "डीबी", देहरादून
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अवधेश कुमार मिश्रा, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH "DB", DEHRADUN (THROUGH VIRTUAL HEARING)
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER

आअसं.68/देहरादून/2023(नि.व. 2015-16)
ITA No.68/DDN/2023 (A.Y.2015-16)

Assistant Commissioner of Income Tax,
Circle-1(1)(1), Income Tax Office, 13-A,
Subhash Road, Dehradun, Uttarakhand 248001
..... अपीलार्थी/Appellant

बनाम Vs.

Ambey Associates,
69/1, Rajpur Road, Dehradun,
Uttarakhand 2480001
PAN: AAOFA-2828-C ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri Amar Pal Singh, Sr. DR (Through VC)
प्रतिवादीद्वारा/Respondent by	:	Shri Rajiv Sahni, Chartered Accountant
सुनवाई की तिथि/ Date of hearing	:	11/02/2025
घोषणा की तिथि/ Date of pronouncement:	:	21/02/2025

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi (hereinafter referred to as 'the CIT(A)') dated 29.07.2023, for assessment year 2015-16.

2. The solitary issue raised by the Revenue in appeal is with respect to income from sale of part of property No.99, Rajpur Road, Dehradun. The assessee has

offered gain on sale of land under the head 'Capital Gains', whereas, the Revenue intends to tax the gain under the head 'Profits from business and Profession'.

3. The facts of the case as emanating from records are: The assessee is a partnership firm and is engaged in the business of real estate development. The assessee was having land/property no.99 Rajpur Road, Dehradun. The assessee had acquired said land in Financial Year 2008-09 and since the date of acquisition had shown land in the books as capital investments. During the period relevant to assessment year under appeal, the assessee had sold part of land on which shops were constructed and had offered the gain on sale of land as Long Term Capital Gain. The Assessing Officer in assessment proceedings re-characterized capital gain as business income and made addition of Rs.13,90,79,150/- under the head 'Income from Business and Profession'. Aggrieved by the assessment order dated 28.12.2017, the assessee filed appeal before the CIT(A). The CIT(A) decided the issue in favour of the assessee and held that sale of part of property bearing no. 99, Rajpur Road, Dehradun is liable to be taxed as Capital Gain. Hence, present appeal by the Revenue.

4. Shri Amar Pal Singh, representing the department vehemently supporting findings of the AO submitted that the assessee is a builder. The assessee constructed shops on land at 99, Rajpur Road, Dehradun and sold the shops. The activity of plotting, construction of shops and sale thereof, is an adventure in the nature of trade, hence, any gain on sale of such shops is liable to be taxed under the head, Income from Business and Profession. He further referred to the observations of AO in para 5.1 of the assessment order, wherein extracts from the partnership deed dated 07.06.2006 are reproduced. He pointed that the nature of

business as mentioned in partnership deed is, Business of real estate, builders, construction of shopping malls, multiplexes, restaurants, hotel, etc. Hence, activity carried out by the assessee of construction and sale of shops is purely business activity. He further submitted that it is a well settled law that entries in the books of account does not determined true nature of the activities. He asserted that the CIT(A) has erred in placing too much reliance on the books of assessee to determine nature of transaction. The CIT(A) has accepted contention of the assessee without looking at facts evident from the records.

5. Per contra, Shri Rajiv Sahni appearing on behalf of the assessee submits that the assessee had acquired land in Financial Year 2008-09 and right from the beginning intention of the assessee was to hold the land as capital investment. In support of his submissions, he referred to Balance Sheet as on 31.03.2009 at page no. 34 of the paper book, wherein Land is reflected under the head Fixed Assets and not stock in trade. The ld. AR further pointed that right from the beginning land shown in Balance Sheets of the assessee as Fixed Assets and the same was has been accepted by the AO. He further submitted that on said land shops were constructed and were let out till the time they were not sold. The rental income from letting out of the shops was offered to tax under the head Income from House Property by the assessee. The ld. AR contended that the assessee is not engaged in the business of purchase and sale of shops. The sale of shops is a onetime event. He pointed that even in subsequent assessment year i.e. AY 2017-18, the assessee had sold some shops and offered gain on sale of shops as Long Term Capital Gain. The same was accepted by the AO. To support his contention; he referred to assessment order dated 09.12.2019 passed u/s. 143(3) of the Act

for AY 2017-18 at page no. 51 to 65 of the paper book. The ld. AR of the assessee further placed reliance on Board Circular No.4/2007 dated 15.06.2007 to submit that the assessee can have two separate portfolios i.e. investment portfolio and trading portfolio. The Revenue recognizes income under investment portfolio as capital gains and income in trading portfolio, comprising of stock in trade as 'Business Income'. To further buttress his argument, he placed reliance on the decision of the Hon'ble Supreme Court of India in the case of *CIT vs. Associated Industrial Development Company Ltd., 82 ITR 586.*

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. The short issue in present appeal by the Revenue is, Whether the income earned by the assessee from sale of shops which are part of property situated at 99 Rajpur Road, Dehradun is taxable under the head 'Capital Gains' or 'Business of Income'.

7. The assessee has offered gain on sale of shops as Long Term Capital Gain, whereas, the AO has re-characterized gain on sale of shops as Business Income. It is an undisputed fact that the assessee had acquired property at 99, Rajpur Road, Dehradun during Financial Year 2008-09 and since then the assessee has held the same as investment. This fact is evident from Balance Sheets for the Financial Year ended on 31.03.2009, 31.03.2010, 31.03.2011, 31.03.2012 and the income tax returns placed on record by the assessee for corresponding assessment years at pages 34 to 48 of the paper book. This fact has not been controverted by the Revenue.

8. Further, the ld. AR of the assessee has pointed that the assessee had sold some shops during the period relevant to AY 2017-18 and had offered gain on sale of said shops as Long Term Capital Gain in the return of income. The AO while making assessment u/s. 143(3) of the Act examined the issue in detail and accepted the gain on sale of shops as Long Term Capital Gain. Once, the Revenue has accepted the property as investment and sale of part of such property as Long Term Capital Gain the principle of consistency demands that when there is no change in the nature of holding of the property in impugned assessment year, the gain on sale of part of such property cannot be re-characterized as 'Business Income'.

9. Thus, in facts of the case and documents on record, we find no infirmity in the impugned order, hence, the same is upheld and appeal of the Revenue is dismissed being devoid of any merit.

Order pronounced in the open court on Friday the 21st day of February, 2025.

Sd/-	Sd/-
(AVDHESH KUMAR MISHRA)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली / Delhi, दिनांक/Dated 21/02/2025

NV/-

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT/CIT(A)
4. विभागीय प्रतिनिधि, आय.अपी.अधि.,देहरादून /DR, ITAT,Dehradun
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar) ITAT, Dehradun