

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 2360/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-10)

Dattatray N. Sawant HUF, 103, Ghanshyam Kripa, R.B. Kadam Marg, Bhatwadi, Ghatkopar, Mumbai - 400086.	बनाम/ v.	The Income Tax Officer Ward 22(1), Mumbai
स्थायी लेखा सं./PAN : AAAHD3752N		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Vishwas V. Mehendale
Revenue by :	Shri B.S. Bist, Sr. DR

सुनवाई की तारीख /**Date of Hearing** : 02-06-2016

घोषणा की तारीख /**Date of Pronouncement** : 17.08.2016

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 2360/Mum/2013, is directed against appellate order dated 11th January, 2013 passed by learned Commissioner of Income Tax (Appeals)- 33, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2009-10, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 28th December, 2011 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) reads as under:-

“1) On the basis of circumstances and facts the learned Assessing Officer had erred in holding the exchange of plots between the appellant and Vatsalabai Dattatray Charitable Trust without any monetary consideration as transfer of capital asset and charged tax on the capital gain as per stamp duty valuation.”

3. The brief facts of the case are that it was observed by the AO during the course of assessment proceedings u/s. 143(3) read with Section 143(2) of the Act from the AIR information that the assessee had purchased immovable property of Rs. 1,30,89,000/- on 3rd June, 2008 and sold the same for Rs. 94,51,000/- on 11th June, 2008. The return of income filed by the assessee with the Revenue was not accompanied with any Profit and Loss Account, or Balance Sheet. Details were called by the AO from the assessee whereby the assessee submitted that the assessee had acquired a piece of land as stock-in-trade in the year 2000 for an amount of Rs. 4,50,000/-. The said plot was exchanged with the plot owned by a Trust namely Vatsalabhai Dattatray Charitable Trust on 3rd June, 2008 and there was no monetary consideration moved from either side, hence, there is no profit or loss which can be brought to tax under the provisions of the Act.

The A.O. observed that the facts of the case are that the assessee has claimed to have acquired a piece of land bearing Plot No.68, Bhatwadi, Village Kirol, Ghatkopar (West) now in Taluka Kurla, Mumbai (Survey no. 24, Hissa Nos 4(Part) and 6(Part) and City Survey No. 68(Part)) for Rs.4,50,000/- in the year 2000 on which school is run by Vatsalabhai Dattatray Sawant Charitable Trust on this plot of land. The Vatsalabhai Dattatray Sawant Charitable Trust owns another plot Bearing No.27, Bhatwadi, Village Kirol, Ghatkopar now in Taluka Kurla, Mumbai (Survey No. 26, Hissa No.6(Part) and City

Survey No. 27 and 27/1 to 20/20) admeasuring 500 square yards equivalent to 416.7 square meters. The AO observed that Vatsalabhai Dattatray Sawant Charitable Trust exchanged plot No. 27 whose Market value is Rs.94,51,000/- with the assessee , and in exchange the assessee had given plot No. 68 to Vatsalabhai Dattatray Sawant Charitable Trust , the Municipal valuation of which is Rs. 1,30,89,000/-. The plot received in exchange by the assessee i.e. Plot no 27 is then gifted to his son on 11th June, 2008.

The A.O. issued show cause notice to the assessee as there was exchange of plots between Vatsalabhai Dattatray Sawant Charitable Trust and the assessee during the relevant previous year and as per AO any 'exchange' of an asset is a 'transfer' of capital asset within the meaning of section 2(47) of the Act. Further as per AO the said plot of land owned by the assessee is a capital asset within the meaning of section 2(14) of the Act, hence gains arising on transfer/exchange of the plot owned by the assessee will give rise to capital gains which are chargeable to tax u/s 45(1) of the Act.

The assessee in reply to SCN issued by the AO, submitted that the plot was never acquired by the assessee as capital asset but it was considered as stock-in-trade by the assessee. It was submitted that since there was no monetary consideration, there was no taxable capital gains and hence, nothing was offered for taxation by the assessee in the return of income filed with the Revenue. The assessee submitted that it never acquired the plot as an investment and if it would have been an intention, it would not have allowed the Charitable Trust to construct a building for school activities and once this school building is erected on the land, it is very difficult to evict the said premises for various social and moral reasons, hence, the intention of the assessee was very clear that that they do not want to hold the same piece of land as investment and to earn capital gain thereon. It was also submitted by the assessee that the market value as per section 50C of the Act

considered at Rs. 1,30,89,000/- consists of the land of 136 Square meters and the structure of 387.55 square meters Hence the market value of the land of 136 square meters @ Rs. 22,680/- comes to Rs. 30,84,480/- , and the building of 387.55 square meters@ Rs. 25,815/- comes to Rs. 1,00,04,520/-, which aggregates to Rs.1,30,89,000/- . It was submitted that the Building was owned by the Trust namely Vatsalabhai Dattatray Sawant Charitable Trust which got transferred to the same trust, therefore, there is no transfer of ownership of the building as it was already owned by the said Trust which was running school on the said plot. It was also submitted by the assessee that the land which was received in exchange was with many problems such as encroachment of 20 hutments, no approach road etc. for which the cost needs to be incurred to remove the defects. The stamp duty valuation does not necessarily considered all these aspects, hence, the stamp duty valuation might not be good in law. The assessee submitted that it had not received any monetary consideration, hence, there is no income earned as per the Act. The assessee also submitted that the entire arrangement was accepted with a social and philanthropic motive that children in near vicinity should not be deprived of educational facility.

It was observed by the A.O. that the assessee has not submitted its Balance Sheet for the current year or the previous year's showing the said plot of land as its stock-in-trade. No documents have been submitted by the assessee with respect to the construction activity undertaken by it during the year or the earlier years to support its stand that the assessee purchased the piece of land for carrying out the business activity and not as an investment The assessee has merely made the statement that the assessee has acquired the land as stock-in-trade which is not enough as the assessee is not trader of land. No evidence is given by the assessee that assessee is a trader of land. Thus, the contention of the assessee is not correct and the AO observed that the said land had never been shown by the assessee as stock-in-trade . The

AO observed that the land on which school stands could not be held as 'stock-in-trade'. It was observed by the A.O. that the assessee has not acquired the plot as stock-in-trade but as an investment that is why the assessee had allowed the Charitable Trust to construct a building for school activities. The plot was held as a capital asset by the assessee u/s 2(14) of the Act. It was also observed by the AO that the exchange of capital asset by the assessee is covered as 'transfer' u/s 2(47) of the Act and any profit or gain on transfer of a capital asset gave rise to capital gain chargeable to tax u/s 45 of the Act and the capital gain has to be computed as per provisions of Section 48 to 55 of the Act. It was observed by the A.O. that in exchange for transfer of property bearing No. 68, the assessee had received property bearing No. 27 which has market value of Rs. 94,51,000/- . But as per provisions of Section 50C of the Act the market value of the property transferred should be taken as the sale value consideration . The market value of the said property is Rs. 1,30,89,000/-. The A.O. observed that the assessee's bifurcation was the market value of the land of 136 square meters @ Rs. 22,680/- per square meters which comes to Rs. 30,84,480/- and the building of 387.55 square meters @ Rs. 25,815/- per square meters which comes to Rs. 1,00,04,520/-, aggregating to Rs.1,30,89,000/- , which is not acceptable . It was observed by the AO that the basis of computation of the cost of land and building was not known. The entire property has been transferred to Vatsalabai Dattatray Charitable Trust. It was observed that even if it is assumed that only land is valued at Rs 30,84,480/- by the assessee, is transferred then in exchange the assessee has got property worth Rs 94,51,000/-, which is highly improbable. Further, the contention of the assessee that the land received in exchange has encroachments is not supported by any evidence. Hence, the A.O. treated the sale value consideration at Rs 1,30,89,00/- as per the provisions of Section 50C of the Act as long term capital gain and brought to tax by the AO vide assessment order dated 28.12.2011 passed by the AO u/s 143(3) of the Act. Without prejudice, it was held by the AO that the transfer has been an

arrangement with the sole purpose of avoiding tax payment. The assessee is main trustee of the Vatsalabai Dattatray Charitable Trust. The property received by the assessee in exchange is gifted to his son who is builder and is developing the property for which a gift deed is registered . The AO passed the assessment order dated 28.12.2011 u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 28.12.2011 passed by the AO u/s 143(3) of the Act, the assessee filed its first appeal before the learned CIT(A).

5. Before the learned CIT(A), the assessee submitted the following written submissions :-

“ FACTS

The assessee is Hindu Undivided Family (HUF) where Mr. Dattatray Namdeo Sawant is a Karta of HUF. The said HUF had agreed to purchase a piece of land in the year 1996 from Bai Zaverbai Purshottam Nathu Charitable Trust .The assessee had initially paid an amount of Rs. 1,00,000 and the balance amount of Rs.3,50,000 was paid in the year 2001. Since the seller was a trust the permission from the office of the Charity Commissioner was required. Therefore the process of sale took a long time to reduce to registration of the agreement till 2006. Subsequently the purchase agreement for the land was registered in the same year. The said plot was in the possession of the assessee.

- Janakalyan Seva Santha was a registered Trust carrying out charitable activity. The trust had purchased a piece of land measuring 416.70 Sq. Mtr. in the year 1992.The said trust was subsequently merged with Vatsalabai Dattatray Charitable Trust in 2004. The trust is carrying activity of running a school. The land*

purchased by the trust was encroached by some of the hutments. The piece of land was not having proper approach road. Hence the Trust found it difficult to develop the place and carry out its school activities.

- *Mr. D. N. Sawant (Karta) is a person who has a good social standing and he was fond of carrying out social services in nearby vicinity. He stays at Bhatwadi - Ghatkopar (West), Mumbai where there was an acute need of availability of educational facility to growing children. Hence initially he allowed the teaching to be carried out in the plot owned by his HUF. A structure was erected and the school was running from the same place. (The reference to the structure is made on page No 2 of the agreement.) Initially the structure was for ground plus one upper floor which was subsequently improvised by the trust as the place was insufficient to accommodate the students of the school. Thus there was a school building on the plot of HUF.*

- *Thus the trust was owning a plot which it could not develop for school activities due to encroachment and other problems. And HUF was owning a plot where the trust was carrying its school. Mr. Sawant and his family members were in the business of the building and development. Taking into consideration these situations it was felt appropriate to exchange the plots between the Trust and the HUF. Mr. D. N. Sawant, Karta of HUF being a philanthropic person extended his kind consent for the same. The plots were exchanged without any monetary consideration. Since the HUF had acquired the plot for development purpose, (please refer page no.4 of the agreement where it was specifically mentioned that the plot was acquired for the development*

purpose.) it was a stock in trade. As there was no monetary consideration, there was no business profit which could have offered for taxation.

- *The fact that the HUF had not acquired the plot as an investment. Hence there was no capital gain. Hence Section 50C of the Income Tax Act is not applicable.*

- *The assessing officer erred in applying section 50C for the above transaction and considering the market value as the sales value. The Market Value Specified in the exchange deed of Rs. 1,30,89,000 was considered as sales value and Long Term Capital Gains of Rs. 1,24,43,926.00 were computed by the Assessing Officer and demand of Rs.38,18,700/- was raised.*

SUBMISSION

- ***Whether the plot was purchased with the intention of business or investment?***

The assessee had purchased the piece of land for business purpose .The land was considered as stock in trade by the assessee and not as an investment. Hence section 50C would not be applicable. The following points given below support this point of view:

(A) Purchase agreement for land states for development purpose

The Agreement was registered by the HUF in the year 2006 .The Paragraph 4 of Page 4 of the purchase agreement clearly states

that this additional piece of land was purchased for the purpose of developing the plot. A copy of the agreement has been submitted for your reference. Thus the intention of the assessee to purchase the land for the purpose of business is clear.

(8) Family background

Mr. D.N. Sawant, Karta of HUF is in the business of construction is in the activity of construction and development since 1981. Mr. Dattatray Sawant is a senior citizen , at his age of 69 years. His son Mr. Rajendra Sawant is also in the similar business of builders and developers. Thus the family is in the business of Builders and Developers. When the HUF initiated the purchase of the plot Karta, Mr. Dattatray Sawant was in the same business. Hence the family background also supports the fact that the plot was purchased with the intention to develop the same for the purpose of business.

(C) HUF not carrying education or charitable activity

The HUF was not involved in education or any charitable activities. The land was purchased by the HUF only for development purpose and not with the intention of carrying out the school.

Valuation of Property

*As mentioned in the Assessment Order u/s.143(3) the Market Value of the land held by the trust was Rs.94,51,000 (Rs.22,680.59*416.70 sq mtr). However the land was with many problems such as encroachment of 20 hutments, no approach road. etc for which cost required to be incurred to remove the defects. The*

Market value for stamp duty purpose is decided on the predetermined standard rate and does not necessarily consider all these aspects.

The Exchange Deed takes a value of total property to be transferred as Rs. 1,30,89,000 as detailed below-

- 1. Land 136 Sqr. Mtr. And*
- 2. Structure 387.55 Sqr. Mtr*

Thus you will find that the area of the land is only 136 Sq Mtr which was owned by the HUF. Considering the rate Rs. 22680 per sq. Mtr. stated above the valuation works out to be Rs. 30,84,480/.

Therefore without prejudice to the fact that the land was a business asset of HUF, in case the capital gain is to be worked out, it should be on the value of the land taking into consideration the value as Rs. 30,84,480/-.

Even the process of purchase has initiated in 1996 and the entire consideration was paid in 2001. Due to some technical formalities the agreement was registered in 2006. Therefore while applying the indexation for capital gain the Assessing officer has erred in taking indexation of 2006."

The learned CIT(A) after going through the order of the A.O. and the submissions made by the assessee observed from the copy of purchase deed dated 26th April, 1993 of the land , that the Jankalyan Seva Sanstha subsequently got merged with Vatsalabhai Dattatray Sawant Charitable Trust wherein the assessee was one of the trustee along with 18 other individuals

and application was made u/s.36(1)(a) of Bombay Public Trusts Act, 1950 vide application No. 60 of 2009 by Bai Zaverhai Purushottam Nathu Charitable Trust asking for sanction order to sell immovable property i.e. Survey No.24, Hissa No 4&6, admeasuring 136 sq.mtr and right of using F.S.I of 54 square meters for consideration of Rs. 4,50,000/- to Shri Dattatray Namdeo Sawant, the appellatant of the same land bearing survey No. 24, Hissa No. 4, City Survey No. 68, admeasuring (part) of Village Kirol, Ghatkopar (W) admeasuring 100 square yards and then another piece of land with the same survey number,Hissa No. and City Survey No., admeasuring 52.39 square meters purchased by the assessee alongwith a copy of order passed u/s.36(1)(a) of Bombay Public Trusts Act, 1950 on application No. J-4/91 of 2002 passed by Joint Charity Commissioner permitting to alienate the land which was property of the trust in said application i.e. Bai Zaverbai Purshottam Nathu Charitable Trust alongwith subsequent sale deed dated 27.03.2006.

It was observed by the learned CIT(A) from old purchase deed dated 26.04.1993 of land that the assessee along with other 18 individuals , in the capacity of trustees of Janakalyan Seva Sanstha(Regd.) Public Trust ; purchased land bearing Survey no. 26 , Hissa no. 6 , City Survey no. 27(part) from vendors who are individuals. This land was taken by the assessee in exchange of land bearing survey no. 68. Then by order dated 06.05.2004 passed by Joint Charity Commissioner wherein it also confirms the fact that the assessee had constructed structure consisting of ground and one upper floor on the land belonging to another trust i.e. Bai Zaverbai Purshottam Nathu Charitable Trust and claims to be in exclusive possession thereof and the assessee has since the year 1990 permitted the said structure to be used by a primary school known as 'Dnyan Prakash Vidyalaya' run by the Trust Janakalyan Seva Sanstha, a public charitable trust where the assessee is one of the Trustee . In order to alienate , the property offer was invited by Bai

Zaverbai Purshottam Nathu Charitable Trust , whereby only offer received was from the said school run by Janakalyan Seva Sanstha Charitable Trust . The order of Charity Commissioner states that the offer given by Janakalyan Seva Sanstha Charitable Trust being reasonable was beneficial to the trust was accepted and sanctioned by the Jt. Charity Commissioner. The order of Jt. Charity Commissioner relied upon valuation report issued by Registered valuer fixing the value at Rs.3,58,350/- and since the assessee has agreed to pay total amount of Rs. 4,50,000/- , the Joint Charity Commissioner sanctioned the Bai Zaverbai Purshottam Nathu Charitable Trust with the permission to alienate the trust property to sell it to Janakalyan Seva Sanstha Charitable Trust. The assessee has sold the plot with school building constructed by it only in this plot no 68 to Vatsalabai Dattaray Charitable Trust.

The ld. CIT(A) observed that the said exchange is a transfer of land within the meaning of section 2(47) of the Act and gains arising on exchange of land is chargeable to tax u/s 45 of the Act. The ld. CIT(A) also rejected the contention of the assessee that the assessee purchased the land for the benefit of consumption of said land earmarked for the then said proposed developmental plan for the use and benefit of the School already existing on the said original plot. The existing school Dnyan Prakash Vidyalaya was run by a Janakalyan Seva Sanstha, a public Charitable Trust since 1990. It is also specified in the agreement dated 27-03-2006 that vendors i.e. Bai Zaverbai Purushottam Charitable Trust had difficulty in recovering possession and hence made application before Joint Charity Commissioner to get the sanction for alienation of property and also permission to sell for the consideration amount based on registered valuer's report for the said property. The said Mr Dattaray Namdev Sawant had without permission and / or authority of the vendor i.e. Bai Zaverbai Purushottam Charitable Trust had constructed a structure consisting of ground and one upper floor on the

said land , which said Mr Dattaray Namdev Sawant since the year 1990 permitted the said structure constructed by him on the original plot to be used by Primary School known as Dnyan Prakash Vidyalaya then run by Janakalyan Seva Sanstha . The said plot of land was then sold by the said Bai Zaveribai Purshottam Nathu Charitable Trust for lumpsum consideration of Rs.1,00,000/- whereby first agreement to sale was executed on 30-07-1996 by the said Bai Zaveribai Purshottam Nathu Charitable Trust in favour of the assessee. The said Bai Zaveribai Purushottam Charitable Trust then executed irrevocable general power of attorney in favour of Mr Dattatray Namdev Sawant and his son Mr Rajendra Dattatray Sawant on 31-07-1996 with inter-alia power and authorities to execute a deed of conveyance in respect of original plot of 83.61 square meters in favour of the assessee being purchaser for total value of Rs.1,00,000/-, while further for Rs.3,50,000/- said Bai Zaveribai Purushottam Charitable Trust further agreed to sell additional 52.39 square meters along with benefit of consumption of FSI of 54 square meters for use and benefit of school recorded in supplementary agreement dated 24-01-2001 . The intention of the assessee as per the deed is to continue the educational classes and development of educational purpose through this school, hence, it cannot be treated as stock-in-trade was the observation of the learned CIT(A) as the assessee is not found to be in business of any construction and building or real estate. Thus, the learned CIT(A) held that the land has to be taken as capital asset of the assessee. With regard to the taxation of surplus amount, it was observed by the learned CIT(A) that the assessee has not given the basis of his working , when the stamp duty valuation of Rs. 1,30,89,000/- was not objected by the assessee on which stamp duty was paid and the whole property consisting of land and structure was sold as an asset of the assessee only and the learned CIT(A) rejected the contentions of the assessee to bifurcate the same in two components i.e. land and building. Hence, the A.O.'s stand was upheld by

the ld. CIT(A) vide appellate orders dated 11.01.2013 passed by learned CIT(A).

With respect to the grievance of the assessee with respect to allowing date of acquisition to be treated in the year 2001 as the entire sale consideration was given in the year 2001 while the AO took the date of acquisition to be the year 2006, while the learned CIT(A) held that the Joint Charity Commissioner granted approval to sell land to the assessee on 06-05-2004 and hence the cost inflation index is to be allowed w.e.f. 2004 i.e. from assessment year 2005-06 and not from the year 2001 as held by the AO , as the vendors did not had right to sell the land prior to approval of the Charity Commissioner in the year 2004 and this plea of the assessee was accepted by the learned CIT(A) . Thus, in nut-shell the learned CIT(A) held that the exchange of property by the assessee was transfer liable to capital gains tax u/s 45 of the Act as the said asset was capital asset held by the assessee as defined u/s 2(14) of the Act and the exchange constitute transfer within the meaning of provisions of Section 2(47) of the Act. The indexation is to be allowed w.e.f. the year 2004 i.e. from assessment year 2005-06 on cost of acquisition of Rs.4,50,000/- for computing long term capital gains on sale consideration of Rs.1,30,89,000/- , vide appellate order passed by the learned CIT(A) vide orders dated 11.01.2013.

6. Aggrieved by the appellate orders dated 11.0.2013 passed by the ld. CIT(A), the assessee filed second appeal before the Tribunal.

7. The ld. Counsel for the assessee submitted that there is a transaction of exchange of property between the assessee and the Vatsalabhai Dattatray Charitable Trust in June, 2008 vide deed of exchange executed on 03-06-2008 and the issue is to deal with whether the exchange of these properties has to be treated as transfer for the purpose of computing capital gains

chargeable to tax u/s 45 of the Act read with Section 2(14) and Section 2(47) of the Act or not. The AO as well Id. CIT(A) rejected the contentions of the assessee by holding that the exchange of plots done by the assessee constitutes transfer within the meaning of Section 2(47) of the Act exigible to tax u/s 45 of the Act. It is submitted that Janakalyan Seva Sanstha was a registered Trust carrying out charitable activity. The trust Janakalyan Seva Sanstha had purchased a piece of land in the year 1992 admeasuring 416.70 square meters. The said plot of land was encroached by 20 hutments. The said trust was subsequently merged with Vatsalabai Dattatray Charitable Trust in the year 2004. It is submitted that it is family trust whereby coparceners being family members are trustee. The trust is carrying on activity of running a school on the plot of land owned by the assessee which was acquired by the assessee from Bai Zaverbai Purushottam Charitable Trust as set out above in preceding para's. There is a family arrangement in June 2008 to exchange the plot owned by the assessee with the plot owned by the Vatsalabai Dattatray Charitable Trust. It was submitted that the said plot of land which was exchanged by the assessee with the plot owned by the Trust, was owned by the assessee as stock-in-trade. Since the same was held as business asset being stock-in-trade, Section 50C of the Act is not applicable and the stamp duty value as determined by stamp duty authorities cannot be adopted. The valuation was done by the Registered valuer and the approval of Charity Commissioner was obtained to exchange the plots. The assessee has allowed the Trust to run school on the said property owned by the assessee which is now transferred to the Vatsalabai Dattatray Charitable Trust under exchange without any monetary consideration. The plot owned by the Trust which is now taken by the assessee under exchange was encroached by some 20 hutments. This is a family arrangement and the family members are coparceners of HUF. He submitted that the on 3rd June, 2008 the value of the property was Rs. 1,30,89,000/- being stamp duty valuation as determined by stamp duty authorities was not objected by the assessee as it

constituted land and building . If at all income is to be assessed the same can be brought to tax as business income on sale of the plot . No Balance Sheet was filed by the assessee but this is the only asset owned by the assessee which is now transferred under exchange was the contention of the learned counsel for the assessee. No income has been earned from letting of this property as school was running on this property by the Vatsalabai Dattatray Charitable Trust. It is submitted that section 2(47) is not applicable as it did not constitute transfer as contemplated u/s 2(47) of the Act as it is family settlement which is a genuine and bonafide settlement entered into to exchange the plots. As per the exchange deed dated 3rd June, 2008 total market value was considered as Rs. 1,30,89,000/- which consists of the land of 136 sq. meters and structure of 387.55 meters . It is submitted that valuation is excessive as in 2006, the value was Rs 17 lacs while in 2008 , the value is computed at Rs. 130.90 lacs. The ld. Counsel relied upon the decision of Hon'ble Madras High Court in the case of CIT v. R. Ponnammal, (1986) 54 CCH 0058(Mad.HC) and in the case of CIT v. M/s Thiruvengadam Investments Pvt. Ltd. [2010]320 ITR 345 (Mad.) . The ld. Counsel also submitted if Section 50C of the Act is invoked, then the value as per stamp duty authorities is higher and the issue can be set aside to the file of the AO for getting the property valued by DVO as stipulated u/s 50C(2) of the Act. The assessee also relied upon decision of ITAT, Agra in the case of Raj Kumari Agarwal v. DCIT in ITA no. 176/Agra/2013 orders dated 18-07-2014 reported in (2014) 150 ITD 0597(Agra Trib.). It was submitted that construction was completed before 1-10-2002 which is certified by BMC which is an additional evidence placed in paper book at page 34 of additional evidence to submit that the valuation has to be split between building and land. The learned counsel for the assessee submitted that bonafide family arrangement took place and no tax can be levied . The assessee relied upon decision of ITAT, Chennai in the case of Kay Arr Enterprises v. JCIT reported in (2005) 24CCH 0487(Chen Trib.) and submitted that it is not necessary to reduce family

arrangement in writing. It was submitted that the property owned by the assessee was having school run by the Trust and the same could never be used by the assessee and hence under family arrangement, the plots were exchanged and the Trust plot although encroached by 20 hutments was taken by the assessee so that the same can be developed, thus this family arrangement cannot be brought within the ambit of taxability under the Act. It was submitted that Karta Sh. Dattaray Namdev Sawant was engaged in business which is evident by copy of acknowledgement of return of income for assessment year 2001-02 which is placed at page 132-133 of paper book filed with the Tribunal. The learned counsel for the assessee also drew our attention to the assessment order u/s 143(3) of the Act dated 08-03-2004 passed in the case of Sh. Dattaray N. Sawant for the assessment year 2002-03 to contend that the said Sh. Dattaray N. Sawant was engaged in business which is placed in paper book page 134-135. Similarly assessment orders dated 27-12-2012 u/s 143(3) of the Act passed by the AO in case of M/s Rajendra Dattaray Sawant, partnership firm for assessment year 2010-11 is placed on record to show that the said firm is in construction of residential projects and hence the Karta of the assessee is in business of land development and builders. Thus, it was contended that it is genuine and bona-fide family settlement and no income can be brought to tax on account of exchange of plots between the assessee and the Trust. The plot of land being business asset held as stock-in-trade cannot be treated as capital asset u/s 2(14) of the Act and Section 50C of the Act has no application and it cannot be invoked. The learned counsel for the assessee reiterated the submissions which were made before the authorities below.

8. The ld. D.R. relied upon the orders of the learned CIT(A) and submitted that it is not a bona fide family arrangement/ settlement. He submitted that the plea that this exchange of properties is a family settlement has not been taken before the authorities below and this plea is taken for the first time

before the Tribunal. This plea is mixed question of fact and law and requires investigation of facts by the AO. The list of trustees of Vatsalabai Dattatray Charitable Trust has never been submitted before the authorities below and the plea that all the coparceners of the assessee are Trustee's of the Vatsalabai Dattatray Charitable Trust was never verified by the AO . The copy of Balance Sheet were not submitted before the authorities below to prove that the assessee is holding the said property as business asset as stock-in-trade. There is no evidence on record that the said plot of land and structures were held by the assessee as stock-in-trade. There is no evidence that the assessee is a builder or in land development activities. There is no evidence on record that the Trust spent money for construction of Building. In the computation of income filed by the assessee, there is no mention of any income earned by the assessee from business and it is only income from other sources declared by the assessee which mainly comprises of rental income. The assessee has also not objected to the value of the property as adopted by stamp duty authorities for stamp duty valuation purposes. The land and structure thereon was held by the assessee as capital asset and was rightly brought to tax as capital gains by the authorities below and it was also submitted that Section 50C of the Act is clearly applicable and value as computed by the stamp duty valuation authorities for stamp duty purposes was rightly adopted by the authorities below as per mandate of Section 50C of the Act. The ld. D.R. submitted that additional evidences are submitted before the Tribunal which were not submitted before the authorities below which are placed in separate paper book containing additional evidences running into 37 pages and the authorities below have not verified these additional evidences .

9. We have considered the rival contentions and also perused the material available on record including the case laws relied upon . We have observed that Sh Dattatray Namdev Sawant , Karta of the assessee

without the permission and/or authority of Bai Zaveribai Purshottam Nathu Charitable Trust (who were the lawful owner of the Plot of land at Bhatwadi , Village Karol, Ghatkopar(West) in Greater Mumbai bearing survey number 24, Hissa No. 4(part) and 6(part) and city survey number 68(part) admeasuring 100 square yards equivalent to 83.61 square meters (PB/page11) in 1990) constructed a structure consisting of ground floor and one upper floor in and around 1990(PB/page11) and thereafter permitted the said structure to be used by a Primary School known as Dnyan Prakash Vidyalaya then run by Jankalyan Sevasansta , a Public Chaitable Trust duly registered under Bombay Public Trust Act,1950 . The said Bai Zaveribai Purshottam Nathu Charitable Trust was finding difficulty in recovering the possession of the land of the said original plot being occupied by the said Mr Dattatray Namdev Sawant , Karta of the assessee without permission and authority . The said plot of land of 83.61 square meters was then sold by the said Bai Zaveribai Purshottam Nathu Charitable Trust for lumpsum consideration of Rs.1,00,000/- whereby first agreement to sale was executed on 30-07-1996 by the said Bai Zaveribai Purshottam Nathu Charitable Trust in favour of the assessee and thereafter on 31-07-1996 irrevocable general power of attorney was executed in favour of Mr Dattatray Namdev Sawant and his son Mr Rajendra Dattatray Sawant to execute conveyance deed in respect of the plot in favour of the assessee while further for Rs.3,50,000/- said Bai Zaverbai Purushottam Charitable Trust further agreed to sell additional 52.39 square meters along with benefit of consumption of FSI of 54 square meters for use and benefit of school recorded in supplementary agreement dated 24-01-2001 (PB/Page 10-19). These details are duly recorded in deed of indenture dated 27-03-2006 whereby the said Zaverbai Purushottam Charitable Trust conveyed title of the said plot in favour of the assessee. Thus, the said plot was in-fact

occupied by the Sh Dattatray Namdev Sawant, Karta of the assessee without authority of the lawful owner wherein he built structures without permission of the owner of the said land and permitted occupation of the plot along with structure comprising of ground and one upper floor to a Primary school run by Janakalyan Sevasanstha , a Charitable Public Trust registered under Bombay Public Trust Act, 1950 since 1990's while the acquisition of the plot by the assessee started in 1996 by making first payment of Rs.1,00,000/- to the original owner for acquiring plot admeasuring 100 square yards (83.61 square meters) followed by acquisition of another plot of 52.39 square meters along with benefit of consumption of FSI of 54 square meters for use and benefit of school for which payments of Rs.3,50,000/ were made in 2001. The approval from Charity Commissioner was received on 06-05-2004 while conveyance deed was registered in favour of the assessee on 27-03-2006 with respect to the plots admeasuring in aggregated 136 square meters. The assessee has not produced its Balance Sheets of the instant previous year under appeal or for the earlier years to evidence that the assessee was reflecting the said plot of land as stock-in-trade. No evidence is brought on record that the assessee was engaged in the activity of builder, trader of land or in construction business or in the real estate business, The perusal of the computation of income reveals that the sources of income of the assessee is rental income which has been shown under the head 'income from other sources' apart from nominal interest income from bank. The circumstances surrounding the acquisition of the plot of land clearly reveals that the assessee acquires the same as capital asset and not as trader or stock-in-trade or business asset as the possession of the said plot of land along with the structures thereupon (now comprising ground floor and four floors when deed of conveyance was registered in 2006) was occupied by the Primary School run by

Jankalyan Sevasanstha , a Public Charitable Trust duly registered under Bombay Public Trust Act,1950. The said Public Trust Jankalyan Sevasanstha got amalgamated with Vatsalabhai Dattatray Sawant Charitable Trust, another Public Charitable Trust registered under Bombay Public Trust Act, 1950 in the year 2004 with the approval of Charity Commissioner. Moreover, it is mentioned in the purchase agreement dated 27-03-2006 with Zaverbai Purushottam Charitable Trust that the plots were acquired by the assessee for advancement of educational purposes for running school. Under the above circumstances, it is far-fetched to assume that the assessee acquired the said property as stock-in-trade or business asset for doing any development etc rather the assessee acquired the plot which was used by the trusts whereby the coparceners of the assessee are stated to be Trustees of the Trust running the school. Thus, intentions to acquire the plots by the assessee was to bring within its fold by way of ownership of the plots of land which was earlier occupied (100 square yards plot) by the assessee without permission of the lawful owner so that the continuation of the education imparted by the school can be smoothly continued and further advanced , and we have no hesitation in holding that the said plots of land aggregating to 136 square meters so acquired by the assessee from Zaverbai Purushottam Charitable Trust was held as capital asset u/s 2(14) of the Act. It is for the assessee to have brought on record cogent evidences to disprove the contentions of the authorities below to prove that the said plot of land was in-fact acquired as stock-in-trade or business asset and in the absence of cogent material/evidences on record while the surrounding circumstances speaks otherwise , we are afraid the contentions of the assessee cannot be accepted as the onus was on assessee to bring on record cogent material/evidences to prove its contentions if it wants the Tribunal to believe its contentions that the plot was held as stock-

in-trade or business asset by the assessee. Even Balance Sheets of the assessee were never filed before the Revenue of the instant year as well of previous year's. The same is also not brought on record even during appellate proceedings before the learned CIT(A) as well before the Tribunal nor there is any evidence to prove that the assessee perse was in the construction business or in the real estate business.

The assessee has claimed that the ownership of the school building (ground and four floors existing on the plot on the date of exchange on 03-06-2008) were being vested and owned in Jankalyan Sevasansthan later amalgamated with Vatsalabhai Dattatray Sawant Charitable Trust in the year 2004, which building consisting of ground floor and four floors were existing on the said plot of land on the date of exchange on 03-06-2008. The assessee has produced certain approvals from BMC being obtained by Trust / Sh D N Sawant with respect to construction of certain floors for school building as additional evidences which need verification by the authorities below to conclusively prove and establish about the ownership of building structures as no cogent/conclusive material has been brought on record such as Balance Sheets of the Trusts , construction invoices , proof of payment vide bank statements etc to prove conclusively that the structures/building were in-fact owned by the said Trusts , in the assessment proceedings as well appellate proceedings before the learned CIT(A) as well before the Tribunal. The onus was on the assessee to bring on record cogent and conclusive material to substantiate and prove its contentions. While on the other hand perusal of the deed of exchange of properties dated 03-06-2008 (Page 96/PB) between the assessee and M/s Vatsalabhai Dattatray Sawant Charitable Trust clearly reveals that structure having area of 387.55 square meters on the property so transferred by the assessee to Vatsalabhai Dattatray Sawant Charitable Trust was

constructed by the assessee (PB/Page 96) , thus leading to presumption that the assessee was the owner of the plot along with constructed structure on ground floor and four floors admeasuring 387.55 square meters which was owned by the assessee and not the Trust unless this presumption is rebutted by the assessee with cogent material/evidences . The onus was on the assessee to bring on record cogent and conclusive material/evidences to prove that the constructed structures were owned by the Trust running the school . The assessee did not even produce its Balance Sheet as well balance Sheets of the Trust for the instant previous year or earlier years during assessment proceedings or during appellate proceedings before the learned CIT(A) or before the Tribunal to prove the sources of construction cost being incurred for school building and determination of cost of construction actually incurred towards the same and consequently to establish the ownership of school building. Thus, we are inclined to set aside this issue to the file of AO with direction to verify , examine and enquire about the claim of the assessee with respect to the construction costs incurred for building the structures on the plot of land exchanged by the assessee with Vatsalabhai Dattatray Sawant Charitable Trust and consequently the ownership status of the Building before allowing the claim of the assessee. The assessee shall be allowed by the AO to produce all relevant evidences and explanations to substantiate its contentions including additional evidences placed before the Tribunal in its defense. Needless to say that the AO shall allow proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law. Even for the sake of argument it is accepted that the school Building is owned by the trust then in that scenario the assessee has transferred land valued at Rs. 30,84,480/- and in lieu got the land from Vatsalabhai Dattatray Sawant Charitable Trust valued at Rs.94,51,000/- , the taxability of the

said consideration of Rs.94,51,000/- received by the assessee in lieu of the plot of land valued at Rs.30,84,480/- shall also be verified, examined and enquired by the AO before fastening any liability to tax on the assessee. We order accordingly.

Next issue is with respect to the contention of the assessee that the afore-stated 'exchange' of properties between assessee and Vatsalabhai Dattatray Sawant Charitable Trust vide deed of exchange dated 03-06-2008 cannot be considered as transfer within the meaning of 'transfer' as contemplated u/s 2(47) of the Act and hence not exigible to capital gains tax u/s 45 of the Act on the grounds that this a family settlement/ arrangement as coparcener of the assessee are Trustees of Vatsalabhai Dattatray Sawant Charitable Trust. We are afraid that this contentions of the assessee cannot be accepted . On the first blush this proposition advance by the learned counsel for the assessee looks very attractive but on deeper analysis soon it loses its sheen. The said Vatsalabhai Dattatray Sawant Charitable Trust is a Public Charitable Trust which is created for charitable objectives as laid down in its trust deed and is registered under Bombay Public Trust Act,1950 . The said Trust is also registered u/s 12AA(1)(b)(i) of the Act w.e.f 01-04-2006 . The said Public Trust exists for public charitable and welfare purposes and is not existing for welfare of Trustee's/ settler or their relatives or concerns in which they are interested. The Public Charitable Trust are not family enterprises/ concerns existing for the welfare of individuals who have ownership interest but are created for public welfare . There are restrictions / prohibitions with grave consequences on Public Charitable Trust on diversion of funds / properties for benefit of trustees/settler or relatives of the trustees/settler or concerns associated with the trustees/settler and funds / properties of Public Charitable Trust can only be utilized for the charitable and welfare

objects for public welfare as laid down in the object clause in the Trust deed. Even on dissolution of the Trust there is a bar on distributing the funds/properties available at the time of dissolution to settler or trustees or their relatives or the associated concerns and the remaining funds/properties on dissolution is to be disposed of as per the Laws applicable to Charitable Trust for transfer to other charitable Trust etc. and that too with the permissions of Charity Commissioner. In the instant case, the approval was obtained from Charity Commissioner who granted the approval on the grounds that the said exchange was in favour of and beneficial to the Trust. Thus, in our considered view, family settlement/arrangement is word which is alien to concept of Public Charitable Trust which solely exists for public welfare rather than welfare of the Trustees/settler or their relatives or concerns associated with the Trustees/settler. This contention of the assessee that it has entered into family settlement / arrangement with Public Charitable Trust namely Vatsalabhai Dattatray Sawant Charitable Trust to 'exchange' the properties and hence the same is not exigible to tax relying on the case laws which are not directly on the family settlements with and by Public Charitable Trusts is hereby rejected. The said 'exchange' of properties by and between the assessee and Vatsalabhai Dattatray Sawant Charitable Trust is directly hit by provisions of Section 2(47) of the Act which expressly covers 'exchange' as being contemplated under the definition of 'transfer' to be exigible to capital gains tax u/s. 45(1) of the Act. The Section 2(47) of the Act is reproduced hereunder which clearly envisaged that exchange of capital asset is duly covered within ambit of transfer of capital asset exigible to tax u/s 45 of the Act :-

“Definitions.

2. In this Act, unless the context otherwise requires,—

(47) ["transfer" in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset ; or

*****”

Next contentions of the learned counsel for the assessee was that stamp duty valuation of the property transferred by it is at Rs.1,30,89,000/-- as on 03-06-2008 i.e. the date of execution of deed of exchange by stamp duty valuation authorities for stamp duty valuation which is excessive as in the year 2006 on 27-03-2006 when the property was conveyed in favour of the assessee by Bai Zaverbai Purushottam Charitable Trust , the stamp duty valuation authorities valued the property at Rs.17,76,500/- while now on 03-06-2008 when the same property was exchanged by the assessee with Vatsalabhai Dattatray Sawant Charitable Trust the stamp duty valuation authorities valued the same property at Rs.1,30,89,000/-with in short span of period of merely 2 year, this argeument of learned counsel for the assessee suffers from basic fallacy as in the year 2006 the stamp duty valuation authorities valued the property consisting of plot of 136 square meters along with benefit of FSI of 54 square meters at Rs.17,76,500/- on 27-03-2006 which the assessee acquired from Bai Zaverbai Purushottam Charitable Trust as the said Bai Zaverbai Purushottam Charitable Trust only sold the plots admeasuring 136 square meters with benefit of FSI as we have seen earlier the construction was done by the assessee firstly as unauthorized structure in 1990 i.e. ground and one

upper floor which later was expanded to four floors as we discussed in preceding para's, while on 03-06-2008 when exchange took place the stamp duty valuation authorities valued the property consisting of plot of 136 square meters and constructed area of structure admeasuring 387.5 square meters for stamp duty purposes which aggregated to Rs.1,30,89,000/- . It is the contention of the assessee that the plot of land occupied by the Trust namely Vatsalabhai Dattatray Sawant Charitable Trust was occupied by 20 hutments and thus additional costs are to be incurred by the assessee also suffers from infirmity as the perusal of the Judgment dated 15-03-2008 delivered by Hon'ble Joint Charity Commissioner, Mumbai u/s 36(1)(a) of Bombay Public Trust Act,1950 in Appeal/Application no. J-4/62/07 vide orders dated 15-03-2008, a copy of which is placed in file , reads as under :

“4. Presently, the plot of the Trust is vacant. Earlier there were encroachments on the plot being a chawl consisting of 20 hutment which has been declared as a slum area. The inhabitants therein were vacated. The legal proceedings thereof were carried out by the owner of the adjoining plot of land.”

This clearly establishes that the plot of land was vacant and the assessee wanted to exchange the same to commercially exploit the same which is admitted by the assessee and is also borne out from the assessment order passed by the AO . The said plot of land was thereafter gifted by the assessee to son of the Karta of the assessee on 11/06/2008 which is stated by the AO in the assessment order para 3 which is not denied by the assessee and later developed by son of the Karta of the assessee. Further, the assessee has taken a plea that if it is held to be capital gain chargeable to tax u/s 45 of the Act and Section 50C is invoked, then the matter be referred to the Departmental Valuation Officer(DVO) for determining the correct valuation of

the property as the valuation adopted by the stamp duty valuation authority for stamp duty valuation authority is excessive for the reasons stated above and also that the assessee had exchanged property of value of Rs.1,30,89,000/- with the property valued at Rs.94,51,000/- and hence it exceeds the fair market value of the property on the date of transfer. In our considered view, this plea of the assessee augers well on merits and deserves to be allowed and we are inclined to set aside and restore the issue to the file of the AO to refer the determination of valuation of the property to DVO in terms of provisions of Section 50C(2) of the Act. The assessee shall be allowed to submit relevant evidences and explanation in its defense which shall be admitted and adjudicated on merits. Needless to say proper and adequate opportunity of being heard shall be provided to the assessee in accordance with principles of natural justice in accordance with law. We order accordingly.

Finally, we may reiterate that the AO shall de-novo adjudicate the issue on merits after duly considering our decisions in the preceding para's as well report of DVO, valuation of the property as determined by stamp duty valuation authorities for stamp duty purposes, relevant evidences adduced by the assessee in its defense and all other material on record in accordance with law.

10. In the result, assessee's appeal in ITA No 2360/Mum/2013 is partly allowed as indicated above.

Order pronounced in the open court on 17th August , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 17-08-2016 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 17-08-2016

I

व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "D" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई/ ITAT, Mumbai