

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH VC 'A', JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 71/JP/2020
निर्धारण वर्ष/Assessment Year : 2015-16.

Commissioner of Income-tax, Circle – 6, Jaipur.	बनाम Vs.	Shri Ashok Agarwal HUF 25, Dayal Nagar, Narayan Niwas, Gopalpura Bypass, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AADHA 1232 M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

Cross Objection No. 01/JP/2020
(Arising out आयकर अपील सं./ITA No. 71/JP/2020)
निर्धारण वर्ष/Assessment Year : 2015-16.

Shri Ashok Agarwal HUF 25, Dayal Nagar, Narayan Niwas, Gopalpura Bypass, Jaipur.	बनाम Vs.	Commissioner of Income-tax, Circle – 6, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AADHA 1232 M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by:

Shri Amrish Bedi (CIT)

निर्धारिती की ओर से / Assessee by :

Shri Vijay Goyal (CA)

सुनवाई की तारीख / Date of Hearing :

21.07.2020.

घोषणा की तारीख / Date of Pronouncement :

30/07/2020.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the revenue and cross objection by the assessee are directed against the order dated 20th November, 2019 of Id. CIT (A)-2, Jaipur for the assessment year 2015-16. The revenue has raised the following grounds of appeal :-

“ Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs. 3,15,70,809/- made by the AOA u/s 56(2)(vii)(b)(ii) of the Act without appreciating that during the course of Assessment proceedings A.R of the assessee in his defense only disputed the DLC rate applied by the AO and the plea that the lands were held as business asset was never taken before AO and that the assessee has also shown land/plots as investments and there are no developmental expenses as such debited/claimed in the year.”

“The appellant craves its rights to add, amend or alter any of the grounds on or before the hearing.”

2. Due to the prevailing situation of COVID 19 pandemic, the hearing of the appeal was concluded through Video Conference. The assessee is a HUF engaged in the business of real estate and developers. The assessee filed its return of income on 27.08.2015 declaring loss of Rs. 51,44,443/-. During the course of assessment proceedings, the AO noted that the assessee has purchased some immovable properties during the year under consideration and the consideration shown by the assessee is less than the value for stamp duty purpose. Therefore, the AO proposed to make the addition under section 56(2)(vii) of the IT Act on account of difference between the

purchase price shown by the assessee and the DLC rate of the land in the area. The AO finally made an addition of Rs. 3,15,70,809/- under section 56(2)(vii) of the Act, apart from disallowance of interest expenses which is the issue involved in the Cross Objection filed by the assessee. The assessee challenged the action of the AO before the LD. CIT (A) and objected to the DLC rate adopted by the AO particularly on the ground that the lands in question were in the nature of private Khatedari and the stamp duty valuation for the purpose of registration of Lease Deed to be executed by the JDA is very less than the DLC rate for the purpose of transfer of the land thereafter. The assessee has filed a report of the Sub Registrar showing the valuation of the land in question at Rs. 5,76,20,075/- as against the value adopted by the AO at Rs. 7,69,10,670/-. The assessee also raised an objection that since these lands are shown as stock-in-trade in the books of account of the assessee, the AO has not disputed the nature of the asset and treatment given by the assessee in the books of account being stock-in-trade, therefore the provisions of section 56(2)(vii) would not be applicable on this transaction which is classified as stock-in-trade. The LD. CIT (A) called for a remand report from the AO and after considering the remand report of the AO, has deleted the addition made by the AO, particularly on the ground that the land in question is not a capital asset as the assessee has purchased the land as stock-in-trade and, therefore, the provisions of section 56(2)(vii)(b) of the IT Act are not applicable. Aggrieved by the impugned order of LD. CIT (A), the revenue has filed the present appeal.

3. Before us, the Id. D/R has submitted that the AO has made the addition on account of difference in the purchase price of various plots of land purchased by the assessee during the year under consideration in comparison to the DLC rate of the land in the area. The assessee has not raised any objection against the applicability of the provisions of section 56(2)(vii) of the Act during the assessment proceedings but has contested the DLC rate adopted by the AO on the ground that the fair market value of the properties in question is much less than the DLC rate. The LD. CIT D/R has further submitted that even before the LD. CIT (A) the assessee has originally contested the adoption of DLC rate for the purpose of making addition under section 56(2)(vii) of the Act and thereafter raised an additional issue of non applicability of provisions of section 56(2)(vii) on the ground that the land purchased by the assessee is stock-in-trade and not a capital asset. Thus the LD. CIT D/R has contended that this is an after-thought stand taken by the assessee that the lands in question are stock-in-trade and not capital asset. He has further submitted that even otherwise in the subsequent year the assessee has returned these lands to the seller and claimed that the transaction is cancelled. Therefore, these are not a genuine transaction but only a paper transaction to divert the fund to the sellers who are related party. Thus the LD. CIT D/R has submitted that once the assessee has not disputed the applicability of provisions of section 56(2)(vii) during the assessment proceedings, then the said objection raised before the LD. CIT (A) cannot be accepted. Hence the LD. CIT (A) has committed an error while deleting the addition by accepting the objection raised by the assessee. He has relied upon the order of the A.O.

4. On the other hand, the Id. A/R of the assessee has submitted that the assessee has filed all the documents before the AO including the books of account, copy of purchase account which tallies with the figures shown in the trading account. In Schedule-G of the Balance Sheet, these plots of lands are shown as part of the closing stock. Therefore, the plots of land purchased by the assessee are not the capital asset but are stock-in-trade of the assessee and were part of the closing stock shown in the Balance Sheet as well as Profit & Loss account. The AO has raised an objection that since the assessee has not incurred any development expenditure, therefore, it cannot be considered as stock-in-trade. The Id. A/R has submitted that the development expenditure is debited in the year in which it is incurred and not in the year of purchase itself. Therefore, he has submitted that non incurring development expenditure during the year would not change the nature of asset being stock-in-trade to a capital asset. He has further contended that all these facts were available before the AO and part of the assessment record, therefore, this is not a new fact brought on record by the assessee before the LD. CIT (A). Since the AO has not raised any query to the assessee regarding the nature of asset, therefore, there was no occasion for the assessee to raise this objection. The Id. A/R has further submitted that even otherwise this is a legal issue and goes to the root of the matter and the LD. CIT (A) has coterminous power of the AO to consider a legal ground taken before him. The legal ground raised before the LD. CIT (A) is inheritance of the assessee and, therefore, the LD. CIT (A) has rightly considered and accepted the legal ground raised by the assessee. In support of his contention, he has relied upon the Judgment of the Hon'ble

Supreme Court in case of Jute Corporation of India vs. CIT, 187 ITR 688 (SC). The Id. A/R has further submitted that once these plots of lands in question are in the nature of stock-in-trade, then the provisions of section 56(2)(vii) are not applicable. He has referred to clause (b) of section 56(2)(vii) and submitted that the term "immovable property" used in the said clause is further defined in the explanation that it should be a capital asset. He has also referred to the Circular No. 1 of 2011 dated 06.04.2011 issued by the CBDT and submitted that CBDT has clarified in para 13.4 of the said Circular that provisions of section 56(2)(vii) are applicable only to the property which is in the nature of a capital asset of the recipient and this provision would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient. Thus the Id. A/R has submitted that the legal proposition on this issue is even accepted by the department as clarified by the CBDT in the said circular and, therefore, the LD. CIT (A) has rightly deleted the addition made by the AO under section 56(2)(vii) of the Act. In support of the contention, he has relied upon the following decisions :-

1. Shri Satendra Koushik C/o M/s. S.S. Properties vs. ITO in ITA No. 392/JP/2019 order dated 23.04.2019.
2. Mubarak Gafur Korabu Malewadi-Akluj Tal Malshiras vs. ITO In ITA No. 752/PUN/2018 order dated 05/04/2019.
3. Shri Prem Chand Jain vs. ACIT in ITA No. 98/JP/2019 order dated 08.06.2020.

5. We have considered the rival submissions as well as the relevant material on record. The dispute in the revenue's appeal is regarding the addition made by the AO

under section 56(2)(vii) on account of difference of purchase price shown by the assessee and the DLC rate of the land in the respective area. In the assessment order, the AO has simply applied the DLC rate without even examining the issue whether the provisions of section 56(2)(vii) of the Act are applicable or not in respect of the property which is in the nature of stock-in-trade of the assessee. Therefore, the assessment order is silent about this fact which is otherwise manifest from the books of account of the assessee wherein the assessee has shown these plots of lands as stock-in-trade. We note that as per Schedule-G to the Balance Sheet, assessee has shown these plots of lands as part of the closing stock. The summary of these properties show that these are group housing plots purchased by the assessee bearing nos. GH-6, GH-7, GH-9 and GH-10 in Shree Ram Vatika. The AO has given the details of these plots at page 3 of his order as under :-

S.No.	Address of the property	Date of transaction	Area of property	Value adopted by the assessee
1	Plot No. GH-10, Shree Ram Vatika, Rampura Baas, Devliya, Sanganer, Jaipur.	26.03.2015	6008.24 sq. yd	1,21,07,700/-
2	Plot No. GH-7, Shree Ram Vatika, Rampura Baas, Devliya, Sanganer, Jaipur.	26.03.2015	6078.53 sq. yd	1,22,46,300/-
3	Plot No. GH-6, Shree Ram Vatika, Rampura Baas, Devliya, Sanganer, Jaipur.	26.03.2015	6100 sq. yd.	1,11,77,100/-
4	Plot No. GH-9, Shree Ram Vatika, Rampura Baas, Devliya, Sanganer, Jaipur.	26.03.2015	6019.66 sq. yd.	1,10,28,600/-
		Total :	24206.43 sq. yd.	4,65,59,700/-

Therefore, there is no dispute regarding the fact that these plots of lands are shown by the assessee as part of the closing stock as on 31st March, 2015 in the Profit & Loss account as well as in the Balance Sheet. The purchase price is also debited to the Profit & Loss account and, therefore, there is no quarrel on the fact that the plots of land in question are in the nature of stock-in-trade of the assessee who is engaged in the business of real estate and developer. The AO in the remand report has not admitted this fact that the property in question is part of the stock-in-trade as per the books of account of the assessee, however, raised the objection in the remand report that the assessee had never taken this contention during the assessment proceedings. The relevant part of the remand report has been reproduced by the LD. CIT (A) in para 2.3 as under :-

"2.3. The relevant extract of the remand report dated 27.09.2019 reproduced as is as under:-

"Assessment order and submission of the assessee have been perused. During the assessment proceedings due opportunity was provided to the assessee for filing reply/explanation which was not availed. However, without prejudice to the above, considering the submissions filed during appellate proceedings, it is seen that:

1. The addition u/s 56(2) of the IT Act, 1961 was made in the assessment order after verification of DLC rate of the area of the land in question which is situated at GH-6, GH-7, GH-9 & GH-10 Shri Ram Vatika, Rampura Bass, Sanganer, Jaipur having total area of 20,239.65 Sq. Yards from the Sub-registrar, Sanganer vide its report dated

28.11.2017(copy enclosed). Thus the assessee's contention that no such verification of DLC rate was made is not a matter of fact and even not supported with evidence.

Thus as per the provisions of section 56(2)(vii)(b)(ii) of the IT Act, 1961, the property in question was purchased in less than the stamp duty value of the property, thus the difference amount of Rs.3,03,50,970/- was considered as deemed gift/ income from other sources in the hand of the assessee.

2. The assessee vide his letter dated 08.04.2019 has claimed the property in question is a part of stock in trade, thus as per the circular issued by the CBDT dated 01/2011 para 13.4, the provisions of section 56(2) of the IT Act, 1961 are not applicable on the business transactions made by him.

In view of the above claim of the assessee it is submitted that the assessee had never taken this contention during the course of assessment proceedings that the property in question was purchased for business purpose and have to be treated as stock in trade. It is also pertinent to mention here that no such claim was even made to the CIT(A)-2 along with the letter dated 10.12.2018 of the assessee for admission of additional documents.

Therefore it is an afterthought of the assessee to evade tax in disguise by making such demand.

Thus the provision of section 56(2) of the IT Act, 1961 are squarely applicable to the property in question."

Thus the AO has not disputed the legal proposition as clarified by the CBDT in Circular No.1 of 2011 but he has taken objection that this contention was not raised during the course of assessment proceedings which is hyper technical. Once the fact itself is emanating from the assessment record being books of account, then this being a legal plea can be raised at the appellate stage. We further note that during the assessment proceedings the AO has proceeded on the premises that if the property purchased by the assessee is an immovable property, then the provisions of section 56(2)(vii) are attracted irrespective of the said property is stock-in-trade or not. Therefore, the AO has made the addition having an impression that since land purchased by the assessee is an immovable property, therefore, the provisions of section 56(2)(vii) are applicable. It is pertinent to note that though the provisions of section 56(2)(vii) contemplates certain income shall be chargeable to income-tax under the head Income from Other Sources including the shortage of consideration for purchase of an immovable property in comparison to the stamp duty value of such property, however, as per the explanation to the said provision the property has been defined which means the capital asset of the assessee as specified under clause (d) of the said explanation. For ready reference, we quote provisions of section 56(2)(vii) as under :-

"56. (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

⁶⁵[(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009 ⁶⁶[but before the 1st day

of April, 2017],—

- (a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;
- ⁶⁷[(b) any immovable property,—
- (i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;
 - (ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;]

- (c) any property, other than immovable property,—
- (i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;
 - (ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

Provided further that this clause shall not apply to any sum of money or any property received—

- (a) from any relative; or
- (b) on the occasion of the marriage of the individual; or
- (c) under a will or by way of inheritance; or
- (d) in contemplation of death of the payer or donor, as the case may be; or
- (e) from any local authority as defined in the *Explanation* to clause (20) of section 10; or

- (f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or
- (g) from any trust or institution registered under section 12AA ^{67a}[or section 12AB]; ⁶⁸[or]
- ⁶⁸[(h) by way of transaction not regarded as transfer under clause (vicb) or clause (vid) or clause (vii) of section 47.]

Explanation.—For the purposes of this clause,—

- (a) "assessable" shall have the meaning assigned to it in the *Explanation* 2 to sub-section (2) of section 50C;
- (b) "fair market value" of a property, other than an immovable property, means the value determined in accordance with the method as may be prescribed⁶⁹;
- (c) "jewellery" shall have the meaning assigned to it in the *Explanation* to sub-clause (ii) of clause (14) of section 2;
- (d) "property" ⁷⁰[means the following capital asset of the assessee, namely:—]
 - (i) immovable property being land or building or both;
 - (ii) shares and securities;
 - (iii) jewellery;
 - (iv) archaeological collections;
 - (v) drawings;
 - (vi) paintings;
 - (vii) sculptures; ⁷¹[***]
 - (viii) any work of art; ⁷²[or]
 - ⁷²[(ix) bullion;]
- ⁷³[(e) "relative" means,—]
 - (i) in case of an individual—
 - (A) spouse of the individual;
 - (B) brother or sister of the individual;
 - (C) brother or sister of the spouse of the individual;
 - (D) brother or sister of either of the parents of the individual;
 - (E) any lineal ascendant or descendant of the individual;
 - (F) any lineal ascendant or descendant of the spouse of the individual;
 - (G) spouse of the person referred to in items (B) to (F); and

- (ii) in case of a Hindu undivided family, any member thereof;]
- (f) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;]"

Therefore, the term 'Property' used in sub-clause (b) of clause (vii) of sub-section (2) of section 56 is the capital asset and that too specified property as per clause (d) of explanation. The term 'capital asset' has been defined in section 2(14) of the IT Act and as per clause (a) of section 2(14) any stock-in-trade, consumable stores or raw material held for the purpose of business or profession is excluded from the definition of 'capital asset'. Thus the stock-in-trade falls in the exclusion clause of the definition of 'capital asset' provided under section 2(14) of the IT Act. This position has been clarified by the CBDT vide its Circular No. 1 of 2011 and the para 13.4 of the said circular reads as under :-

"13.4 The provisions of section 56(2) (vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income. The provisions were intended to extend the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. Therefore, the definition of property has been amended to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient

and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient."

Therefore, once the properties in question are not falling in the definition of 'capital asset' then the same would not fall in the definition of 'property' as per provisions of section 56(2)(vii)(b) and explanation thereto and consequently the provisions of section 56(2)(vii) would not be applicable on such transaction of plot of land being part of stock-in-trade of the assessee. The assessee in his return of income filed under section 139(1) of the Act has duly declared these properties as part of its closing stock. The copy of the return of income is placed at pages 121 to 150 of the paper book. The nature of business is specified in the return of income and as per the particulars given in the return of income under the head Application of Funds and under the head Current Assets, the assessee has shown the inventories/closing stock of Rs. 5,58,06,126/- which included the cost of acquisition of these 4 (four) Group Housing Plots. This Tribunal has considered this issue in various decisions as relied upon by the Id. A/R of the assessee and this Bench in the case of Shri Prem Chand Jain vs. ACIT (supra), the Tribunal has again considered this issue as under :-

"16. We have heard the rival contentions and perused the material available on record. The relevant provisions of section 56(2)(vii)(b) which are under consideration read as under:

"(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or

persons on or after the 1st day of October, 2009 but before the 1st day of April, 2017,—

- (a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;
- (b) any immovable property,—
 - (i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;
 - (ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;

- (c) any property, other than immovable property,—
 - (i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;
 - (ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of [section 50C](#), the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of [section 50C](#) and sub-section (15) of [section 155](#) shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

Provided further that this clause shall not apply to any sum of money or any property received—

- (a) from any relative; or
- (b) on the occasion of the marriage of the individual; or
- (c) under a will or by way of inheritance; or
- (d) in contemplation of death of the payer or donor, as the case may be; or
- (e) from any local authority as defined in the Explanation to clause (20) of [section 10](#); or
- (f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of [section 10](#); or
- (g) from any trust or institution registered under [section 12AA](#); or
- (h) by way of transaction not regarded as transfer under clause (vicb) or clause (vid) or clause (vii) of [section 47](#).

Explanation.—For the purposes of this clause,—

- (a) "assessable" shall have the meaning assigned to it in the Explanation 2 to sub-section (2) of [section 50C](#);
- (b) "fair market value" of a property, other than an immovable property, means the value determined in accordance with the method as may be prescribed;
- (c) "jewellery" shall have the meaning assigned to it in the Explanation to sub-clause (ii) of clause (14) of [section 2](#);
- (d) "property" means the following capital asset of the assessee, namely:—
 - (i) immovable property being land or building or both;
 - (ii) shares and securities;
 - (iii) jewellery;
 - (iv) archaeological collections;
 - (v) drawings;

- (vi) *paintings;*
 - (vii) *sculptures;*
 - (viii) *any work of art; or*
 - (ix) *bullion;*
- (e) *"relative" means,—*
- (i) *in case of an individual—*
 - (A) *spouse of the individual;*
 - (B) *brother or sister of the individual;*
 - (C) *brother or sister of the spouse of the individual;*
 - (D) *brother or sister of either of the parents of the individual;*
 - (E) *any lineal ascendant or descendant of the individual;*
 - (F) *any lineal ascendant or descendant of the spouse of the individual;*
 - (G) *spouse of the person referred to in items (B) to (F); and*
 - (ii) *in case of a Hindu undivided family, any member thereof;]*
- (f) *"stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;"*

17. The above provisions thus provide that where an individual receives in any previous year, from any person or persons on or after the 1st day of October, 2009 but before the 1st day of April, 2017, any immoveable property for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration shall be income chargeable to tax under the head "Income from other sources".

18. *In the instant case, the assessee has purchased two plots of land during the year under consideration. The sale consideration as per the respective sale deeds amounts to Rs 5,50,000/- and the stamp duty value of such properties as determined by the Stamp duty authority amounts to Rs 8,53,636/- and therefore, there is difference to the tune of Rs 3,03,636/- between the sale consideration as per the sale deeds and the stamp valuation determined by the Stamp Valuation Authority. To this extent, the facts are not disputed and have been accepted by both the parties. The limited point of dispute is the nature of immoveable property which has been purchased by the assessee. The assessee's contention is that which he has purchased are two plots of agricultural land and the same doesn't fall in the definition of capital asset as per the provisions of Section 2(14) of the Act and provisions of section 56(2)(vii)(b) cannot be invoked. The Revenue's contention is that the provisions of Section 56(2)(vii)(b) talks about any immoveable property and thus even an agriculture land falls under the definition of an immoveable property and the provisions of Section 56(2)(vii)(b) are clearly attracted.*

19. *On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property. Further, provisions of section 56(2)(vii)(c) refers to any property, other than an immovable property. The meaning of the term "property" has been provided in Explanation (d) to section 56(2)(vii) where the term "property" has been defined to mean capital asset of the assessee namely immoveable property being land or building or both. It has been contended by the Id AR that all immovable properties of any nature are not covered in the definition of property. Only those immovable properties which are held as capital assets and is in nature of land or building or both are only covered u/s 56(2)(vii). We agree with the contention of the Id AR that where the term "property" has been defined*

to mean a capital asset as so specified and where an immoveable property as so specified being land, building or both is not held as an capital asset, it will not be subject to the provisions of section 56(2)(vii)(b) of the Act. In the instant case, therefore, where the agricultural land doesn't qualify as falling in the definition of capital asset, provisions of section 56(2)(vii)(b) cannot be invoked.

20. In the instant case, whether agriculture land so acquired falls in the definition of capital asset or not, one has to refer to the provision of section 2(14) which exclude agriculture land in India subject to certain exceptions. However, there are no findings of the lower authorities in this regard. Therefore, we deem it appropriate to set-aside the matter to the file of the AO for the limited purposes of examining whether the two plots of agricultural land so acquired falls in the definition of capital asset or not. Where it is so determined by the Assessing officer that the agricultural land so acquired doesn't falls in the definition of capital asset, difference in the DLC value and sales consideration cannot be brought to tax under the provisions of section 56(2)(vii)(b) of the Act and relief should be granted to the assessee.

21. In a scenario, where it is so determined by the Assessing officer that the agricultural land so acquired falls in the definition of capital asset, the provisions of section 56(2)(vii)(b) of the Act would be applicable. In this regard, the contention of the Id AR is that during the course of assessment proceedings, the assessee has objected to the DLC value adopted by the Assessing Officer and therefore before applying the DLC value, the matter should have been referred to the DVO for determination of fair market value.

22. We note that during the course of assessment proceedings, the assessee was issued a show cause as to why the difference of Rs.3,03,596/- may not be added u/s 56(2)(vii) of the Act. In reply thereof, the assessee has submitted that the assessee purchased the land on 22.04.2013 for a consideration of Rs 5,50,000/- only and provisions of section 56(2)(vii) are applicable from 01.04.2014, so no addition should not be made in this case. The AO considered the submissions of the assessee but held that provisions of section 56(2)(vii) are applicable from the A.Y 2014-15 and the case of the assessee is squarely covered by the provisions of section 56(2)(vii) of the I.T. Act, 1961 as amended by the Finance Act, 2013. However, we find that the AO has not appreciated the objection of the assessee regarding adoption of DLC value as against the sale consideration. Therefore, where the assessee has objected to the stamp duty valuation, as per the provisions of section 50C(2) of the Act which are equally relevant for the purpose of provisions of section 56(2)(vii)(b)(ii) of the Act, the matter should have been referred by the Assessing Officer to the DVO for determination of fair market value. Therefore, in the instant case, where it is so determined by the Assessing officer that the agricultural land so acquired falls in the definition of capital asset, he has to refer the matter to DVO to further determine the fair market value of the two plots of agricultural land and thereafter, decide the matter afresh.

23. The matter is accordingly set-aside to the file of the AO who shall decide the same as per the aforesaid directions after providing reasonable opportunity to the assessee."

Therefore, in the facts and circumstances of the case when the properties in question are undisputedly shown in the books of account of the assessee as stock-in-trade and part of the closing stock, then the same would not fall in the ambit of the property as defined in explanation to section 56(2)(vii) of the Act and consequently the provisions of section 56(2)(vii) will not be applicable in the case of the assessee. Hence we do not find any error or illegality in the impugned order of the Id. LD. CIT (A).

5.1. As regards the contention of the LD. CIT D/R this is only a paper transaction, we note that the AO has not doubted the transaction either during the course of assessment proceedings or during the course of remand proceedings. Therefore, such a plea cannot be considered or accepted which is contrary to the stand of the AO. Even otherwise, the LD. CIT D/R can only support the order of the AO and cannot improve the same. Further, if the transaction itself is not a genuine transaction, then the question of applying the provisions of section 56(2)(vii) does not arise.

6. **In the Cross Objection**, the assessee has raised the following grounds :-

- “ 1. On the facts and in the circumstances and in law the LD. CIT (A) erred in confirming the finding of the Id. AO that M/s. Tajraj Cold Storage Pvt. Ltd. is party covered under section 40(a)(2)(b) of the Act while this company is no way related with the assessee.
2. On the facts and in the circumstances and in law the LD. CIT (A) erred in partly confirming the action of the AO regarding disallowance of interest on the ground that the assessee diverted interest bearing funds to related parties in the shape of interest free advance more so when the advances were given for business purposes and in support to that the documentary evidence was also filed.

3. The appellant craves leave to add, alter, amend, any of the grounds of appeal at or before the time of hearing of appeal.”

7. The only dispute in the Cross Objection of the assessee is regarding the disallowance of interest of Rs. 4,51,039/- on account of diversion of interest bearing funds to the related party which was confirmed by the LD. CIT (A). The Id. A/R of the assessee has submitted that the AO has disallowed the interest @ 12% on the total advance of Rs. 4,55,30,000/- which comes to Rs. 54,63,600/-. However, since the assessee has debited the interest expenditure of Rs. 41,46,848/- in the Profit & Loss account, the AO has restricted the disallowance to the said amount of Rs. 41,46,848/-. Since the dispute before us in the Cross Objection is only regarding the disallowance of interest of Rs. 4,51,039/-, therefore, the other disallowances made by the AO are not relevant. The LD. CIT (A) has confirmed the disallowance of said amount on the ground that the assessee has executed the Agreements with M/s. Triveni Land Mark Pvt. Ltd. as well as M/s. Tajraj Cold Storage Pvt. Ltd. and these two parties are covered under section 40A(2)(b) of the Act, therefore, assessee was in a position to make arrangement with them and hence it is only a device to divert the interest bearing funds to the related party.

8. Before us, the Id. A/R of the assessee has submitted that as regards the advance given to M/s. Triveni Land Mark Pvt. Ltd., the said amount was given in the month of March, 2015 itself and that too for the purpose of purchase of Group Housing Plots in the Scheme Shree Ram Vatika. The Id. A/R has referred to the agreement and

submitted that the assessee deducted TDS of Rs. 4,20,000/- under section 194 IA of the Act on this advance payment. The subsequent cancellation of the deal in the next year subject to the compensation of Rs. 10,00,000/- cannot be doubted. Thus the Id. A/R has submitted that the assessee was compensated Rs. 10,00,000/- on account of cancellation. He has referred to the ledger copy at page 73 of the paper book and submitted that this amount of Rs. 10,00,000/- received on account of cancellation of agreement was duly offered to tax in the next year. Since the advance was given for purchase of the property which is stock-in-trade, therefore, no disallowance of interest is called for on the ground that the assessee has given the interest free advance. Further, the Id. A/R has pointed out that the assessee's own interest free funds as well as interest free loans from the family members are more than the amount given in advance for purchase of the land and, therefore, the interest bearing funds are not utilized for such purposes. He has further pointed out that the interest bearing loans are all term loans and the same cannot be used other than the purposes for which the loans were taken. Similarly, M/s. Taj Raj Cold Storage Pvt. Ltd. is not a related party and the advance of Rs. 33,00,000/- was given under the Agreement for purpose of land at Harchandpura. He has referred to the copy of the agreement at pages 75 to 77 in paper book and submitted that the advance was given for purchase of property which is part of the stock-in-trade and, therefore, this was given in the ordinary course of business of the assessee. The Id. A/R has referred to the details at page 20 of the impugned order of LD. CIT (A) and submitted that the LD. CIT (A) has accepted the fact of advance to M/s. Triveni Land Mark Pvt. Ltd. was given from 20th March 2015 to

29th March, 2015. Accordingly, the AO was directed to calculate the interest for the period during which these advances remained outstanding with these parties. However, considering the parties as covered under section 40A(2)(b) is factually incorrect as M/s. Taj Raj Cold Storage Pvt. Ltd. is not a related party in terms of said provision. He has relied upon the decision of Hon'ble Jurisdictional High Court in case of CIT vs. Vijay Solvex Ltd. 113 DTR 382 (Raj.). Even otherwise, when the advance was given under the business transaction, then no disallowance of interest is justified. The Id. A/R has pointed out that the assessee was having interest free funds of Rs. 8.8 crores, hence he has pleaded that the disallowance confirmed by LD. CIT (A) may be deleted.

9. On the other hand, the Id. D/R has relied upon the orders of the authorities below and submitted that the Id. LD. CIT (A) has considered all these facts and aspects of the matter that the advance given during the end of the month of March, 2015 will attract the disallowance only for the short period during which the advance remained with the party. Therefore, a substantial relief was granted by the LD. CIT (A) to the assessee.

10. We have considered the rival submissions as well as the relevant material on record. Though the AO and LD. CIT (A) has considered M/s. Taj Raj Cold Storage Pvt. Ltd. as a related party covered under section 40A(2)(b) of the Act, however, the assessee has pointed out that this is not a related party and covered under section 40A(2)(b) as none of the conditions provided for related party or specified person are satisfied. Without going into the controversy of commercial transaction as well as the

related party transaction, at the outset we note that the interest expenditure debited by the assessee in the Profit & Loss account is towards the secured loans and, therefore, it is unlikely to use the secured loans other than the purposes for which the loan was taken. Further, as per the Balance Sheet, assessee is having Rs. 7.66 crores as interest free loans under the head Unsecured Loan from the Karta of the HUF and member of the HUF, the details of which are as under :-

Name of creditor	Amount
Ashok Agarwal	7,64,88,029.50
Renu Agarwal	1,26,702.50
Total :	7,66,14,732.00

Once the unsecured interest free loan amount is more than the alleged amount of advance given to these parties, then the disallowance of interest is not justified. The Hon'ble Jurisdictional High Court in the case of `CIT vs. Vijay Solvex Ltd. (supra) has considered this issue in para 15 to 17 as under :-

" 15. The Allahabad High Court in the case of CIT vs. Motor Sales Ltd. (2008) 304 ITR 123 (Allahabad) has held that it was finding of fact as found in the case that respondent-assessee had capital/reserve/surplus of Rs. 6.10 crores on which no interest was being paid and therefore interest free advances made by it are covered and ultimately held that there is no question of any disallowance of notional interest on loan taken by it. It was further held that the Tribunal had also recorded a finding that the assessee had not diverted any borrowed fund on which interest was paid for non-commercial purposes and therefore, there is no question of disallowance of interest out of the interest paid by the assessee.

16. *In view of the authoritative pronouncement of the Hon'ble Apex Court and other judgments referred supra, in our view, the assessee admittedly had its own funds, as referred to earlier, and admittedly such funds/reserves being substantially higher than, even otherwise, the advances to the debtors, no notional interest or hypothetical interest could have been disallowed on such facts. The revenue has failed to prove nexus. In our view, the ITAT has correctly appreciated the facts and law.*

17. *In view of our observations herein above, the ITAT was correct in deleting the notional interest, disallowed by the AO at Rs. 5,80,215/- and accordingly the appeal is decided against the revenue and in favour of the assessee. No costs."*

Accordingly, in the facts and circumstances of the case and following the decision of Hon'ble Jurisdictional High Court, the disallowance confirmed by the LD. CIT (A) on account of interest expenditure is deleted.

11. In the result, appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order is pronounced in the open court on 30/07/2020.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राँव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 30/07/2020.

Das/

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

1. The Appellant- Shri Ashok Agarwal HUF, Jaipur.
2. The Respondent – The DCIT Circle-6, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 71/JP/2020)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar