

IN THE INCOME TAX APPELLATE TRIBUNAL "RANCHI", BENCH, RANCHI
BEFORE SHRI S.S. GODARA, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.243/Ran/2016

आयकरअपीलसं./ITA No.207/Ran/2017

(निर्धारणवर्ष / Assessment Year:2009-10)

Shri Ajay Kumar Kisan House Dipugarha, Hazaribagh-825301.	Vs.	ITO, Ward-2(5), Hazaribagh ITO, Ward-1(1), Hazaribagh
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AELPK 5256 P		
(Appellant)	..	(Respondent)

Appellantby :Shri M. K. Choudhry, Advocate
Respondent by :Shri Inderjeet Singh, CIT (DR)

सुनवाईकीतारीख/ **Date of Hearing** : **06/03/2020**

घोषणाकीतारीख/**Date of Pronouncement** : **08/07/2020**

आदेश / O R D E R

Per Bench:

The captioned two appeals filed by the assessee, pertaining to assessment year 2009-10, are directed against the separate orders passed by the Commissioner of Income Tax (Appeal)-Hazaribagh, Jharkhand, which in turn arises out of separate orders passed by the Assessing Officer u/s 147 / 143(3) and 271(1)(c) of the Income Tax Act, 1961 (in short the "Act").

2. First we shall take assessee's appeal in ITA NO. 243/Ran/2016 for A.Y. 2009-10.

3. The Grounds of appeal raised by the assessee are as follows:

1. *Assessing officer does not consider sale of land as business income instead of capital gain, he is also not accepted request of assessee for valuation of land, this action is against the natural justice and against the law, so addition made by assessing officer should be deleted.*

2. *Addition made on account of opening capital balance amounting to Rs. 34,38,000/- is against the natural justice because assessee produce previous years copy of returns and other relevant documents as a proof of opening capital. So addition made by assessing officer should be deleted.*

3. *That assessee has sold land for Rs. 15,00,000 and this amount was taken by assessee from purchaser through account transfer. This is not an unexplained cash deposit, so addition made by assessing officer not correct and against the law and natural justice, so should be deleted.*

4. *The case was selected for scrutiny under CASS on the basis of AIR/CIB information relating to sale of land. The scope of enquiry under CASS is defined by the board in CBDT circular no F.NO. 225/26/2006-ITAT-II(pt.) dated 08/09/2010, but assessing officer not follow the circular, so, assessment order should be quash.*

3. Brief facts qua the issue are that the assessee is engaged in liasoning business of property. In addition to this, he also does agency business of Life Insurance corporation of India. During the year, the assessee sold land at Rs. 15,00,000/- however, the Assessing Officer based on AIR information taken the sale value of land at Rs. 73,58,000/-. In the course of assessment proceedings, the assessee submitted before the Assessing Officer that Section 50C of the Act is not applicable to him, as the purchase of land was for the purpose of sale of land after developing the said land and therefore the assessee held the land as a business stock. However, the Assessing Officer did not accept the contention of the assessee and computed short term capital gain at Rs. 58,58,000/- (Rs. 73,58,000 - 11,05,585 - 2,12,000 - 1,82,415).

4. The Assessing Officer also made addition on account of unexplained opening capital balance of Rs. 34,80,000/-. The Assessing Officer noticed that the assessee had shown opening capital account at Rs. 34,80,000/-. When the assessee was asked by the Assessing Officer to explain the *bona fide* of opening capital, the assessee submitted before the Assessing Officer that the opening capital balance represents the capital which has been accumulated over years as per the return of income filed with the income tax department. However, the Assessing Officer after examination of IT Returns had given finding that assessment year 2008-09

(just before the assessment year under consideration) the capital balance in the balance sheet was shown at Rs. Nil. Therefore, Assessing Officer held that the entire amount of Rs. 34,80,000/- shown in the A.Y. 2009-10 should be treated as unexplained capital account.

5. Apart from this, the Assessing Officer also made addition of Rs. 15,00,000/- on account of unexplained cash deposits in the bank account.

6. Aggrieved by the addition so made by the Assessing Officer, the assessee carried the matter in appeal before the Id CIT(A), who has confirmed the addition made by the Assessing Officer.

7. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

8. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials available on record. As regards to the first issue of addition, the Assessing Officer has given a finding in the assessment order that the impugned land and property was purchased on 09.05.2006 for a total cost of Rs. 11,05,585/-. It was sold on 17.11.2008 for total consideration of Rs. 15,00,000/- but the stamp value of land was Rs. 73,58,000/- as per provision of section 50C of the Act. Therefore, the Assessing Officer had adopted the value of land as per section 50C(1) of the Act at Rs. 73,58,000/-. We note that during the course of assessment proceedings, the assessee submitted before the Assessing Officer as well as before the Id. CIT(A) that section 50C of the Act is not applicable to him because of the reason that purpose to purchase the land was to convert into small pieces of plots and sale the same in the market therefore the assessee held the said land as a business stock. During the assessment stage, the assessee submitted that the sale of land is a business income instead of short term capital gain (vide PB-13 to 16). We note that the assessee submitted a letter to the ITO dated 21.03.2014 stating as follows:

“Assessee purchased land dated 9th May, 2006 for the purpose of sale of land after plotting of land or lump sum basis for profit, so assessee hold land as a business stock.

But by mistake assessee shown short term capital gain instead of profit earned from business. Total profit earned by the assessee through business of sale and purchase of land Rs. 3,94,145/--.

Section 50C of Income Tax Act, 1961 is not applicable if income is taxable under Section 28, in this regard, we are also refer case Inderlok Hotels (P) Ltd. vs. ITO [2009] 32 SOT 419 (Mum).”

9. Therefore, the Id Counsel has contended before us that during the assessment stage it was submitted before the AO that sale of land should be treated as business income as object of the assessee to purchase the land to convert into small plots and then sale these small plots on profit. So there was a profit motive. However, Assessing Officer as well as Id. CIT(A) rejected the contention of the assessee and held that since the assessee's main business is to do liasoning work in the real estate property and therefore assessee is not a business man in property.

However, we note that the presumption of the Assessing Officer that since the assessee does liasoning work in the real estate transaction therefore he cannot do the business, is not tenable. We note that the business is defined u/s 2(13) of the Act. Business as contemplated by section 28 of the Act, is an activity capable of earning of profit which can be taxed. One of the ingredients of “business” is that it must be carried on with profit motive. However, while doing the business, the loss may also be incurred but the person who starts the business has always a profit motive. We note that Hon'ble Supreme Court in the case of Mercantile Corporation Pvt. Ltd. 83 ITR 700 (SC) held that the company dealing in real estate can be said to carry on business which develops a market- place, and lease out shops, sales plots. We note that in the assessee's case under consideration, the assessee is fulfilling the condition of section 28 of the Act, being a business, therefore, we direct the Assessing Officer to treat the transaction under the head income from business and compute the tax liability accordingly. The assessee is

directed to submit necessary details to compute income from business from such transaction.

10. Regarding second issue of addition, we note that the Assessing Officer has given findings in the assessment order that in the balance sheet in the current assessment year, the assessee has shown opening capital of Rs. 34,80,000/-. When the assessee was asked by the Assessing Officer to explain the basis of the opening capital, the assessee submitted before the Assessing Officer that the opening capital balance represents the capital which has been accumulated over years as per the returns of income filed with the Income tax Department. However, Assessing Officer after examination of income tax returns has given a finding that in the A.Y. 2008-09 just before the assessment year under consideration, the capital balance in the balance sheet was shown as NIL. We note that before us the assessee submitted the balance sheet and copy of return of income for A.Y. 2008-09 to 2009-10 (vide PB-1 to 12). We note that in the balance sheet the assessee has shown proprietor's capital to the tune of Rs. 34,80,000/-. The assessee contends before us that in the income tax return there was no any requirement to file the figure of the proprietor's capital account and in fact there was no column in the income tax return to show the proprietor's capital account therefore, in the income tax return, the figure of Rs. 34,80,000/- is not getting reflected. Therefore, we are of the view that this issue needs to be remitted back to the file of Assessing Officer to examine afresh the balance sheets of the assessee vis-à-vis income tax returns filed by the assessee. We direct the Assessing Officer to examine the income tax returns and the copy of the balance sheet and profit and loss account of the assessee and adjudicate this issue in accordance with law. The assessee is also directed to furnish the copy of balance sheet, profit and loss account and copy of income tax return as required by Assessing Officer. Therefore, for statistical purposes this ground is treated to be allowed.

11. So far, the assessee's third issue is concerned, the Assessing Officer has given a finding in the assessment order that on a verification of bank account of the

assessee in State Bank of India (A/c No. 11071927441), it was found that a sum of Rs. 6,00,000/-, Rs. 5,00,000/- and Rs. 4,00,000/- were deposited on 15.09.2008, 29.09.2008 and 16.10.2008 respectively. We note that before us, the assessee has submitted the bank statement copy (vide PB-18 to 20) wherein we note that the fund has been received by the assessee by way of account payee cheque vide PB-19. The assessee submitted that this amount was received by him on account of sale of land and it is not a cash deposit in the bank account. We note that before us the assessee submitted the SBI saving bank account no. 11071927441, wherein we noticed that the respective amount of Rs. 6,00,000/-, Rs. 5,00,000/- and Rs. 4,00,000/- have been deposited by way of account payee cheque and it is not a cash deposit, as wrongly admitted by the assessee during the assessment stage. The purpose of taxation law is to tax the right income in the hands of the right person and in the right assessment year. Therefore, we remit this issue back to the file of the Assessing Officer to examine the bank statement and adjudicate the issue in accordance with law. The assessee is directed to file the copy of bank statement of A/c no. 11071927441 of SBI saving bank account. For statistical purposes, the third issue is treated to be allowed.

12. Now we shall take assessee`s appeal in ITA No. 207/Ran/2017 for A.Y. 2009-10.

13. We note that by way of this appeal, the assessee requests the Bench to cancel the penalty imposed on him u/s 271(1)(c) of the Act. Since we have adjudicated the appeal of the assessee on merits and deleted some additions and we also remitted some issues back to the file of Assessing Officer to adjudicate these issues afresh. Since the quantum has been deleted by us therefore the penalty should not survive. That is, since we have deleted the additions/ issues remitted back to the file of the AO for fresh adjudication therefore penalty u/s 271(1) (c) does not survive hence we cancel the penalty U/s 271(1) (c) of the Act.

14. Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Coordinate Bench of the Mumbai Tribunal in the case of DCIT vs JCB Limited in ITA No 6264/Mum/2018 and ITA No. 6103/Mum/2018 for A.Y. 2013-14 order dated 14.05.2020.

15. In the result, the appeal of the assessee in ITA NO. 243/Ran/2016 is partly allowed for statistical purposes and the appeal of the assessee in ITA NO. 207/Ran/2017 in respect of penalty u/s 271(1)(c) is allowed.

Order pronounced in the Court on 08.07.2020

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 08/07/2020

(SB, Sr.PS)

Copy of the order forwarded to:

1. Shri Ajay Kumar
2. i) ITO, Ward-2(5), Hazaribagh
ii) ITO, Ward-1(1), Hazaribagh
3. C.I.T(A)-
4. C.I.T.- Ranchi
5. CIT(DR), Ranchi Bench, Ranchi .
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Ranchi Bench

Ajay Kumar
ITA No. 243/Ran/2016
ITA No. 207/Ran/2017
Assessment Year:2009-10