

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री विजय पाल राव, 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.152/JP/2019
निर्धारण वर्ष/Assessment Year : 2013-14

ACIT, Circle-02, Kota	ब्लाम Vs.	Sh. Ijyaraj Singh, Raj Bhawan Road, Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACZPS6028F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 91/JP/2019
निर्धारण वर्ष/Assessment Year : 2013-14

Sh. Ijyaraj Singh, Raj Bhawan Road, Kota	बनाम Vs.	ACIT, Circle-02, Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACZPS6028F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से/ Assessee by : Shri B. V. Maheshwari (CA)
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (JCIT)

सुनवाई की तारीख/ Date of Hearing : 13/03/2020
उद्घोषणा की तारीख/ Date of Pronouncement : 18/06/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are cross appeals filed by the Revenue and the assessee against the order of Id. CIT(A), Kota dated 26.11.2018 wherein the respective grounds of appeal are as under:-

Grounds of Revenue's appeal:

"i) Whether on the facts and in circumstances of the case, Ld. CIT(A) has erred in restricting the addition up to Rs. 2,44,03,979/- made by the AO on account of Long Term Capital Gain of total Rs. 4,21,69,213/-.

ii) Whether on the facts and in circumstances of the case, the Ld. CIT(A) has erred in allowing the proportionate expenses to the extent of Rs. 4,55,953/- out of the total expenses of Rs. 8,45,000/- as claimed by the assessee towards brokerage and other expenses claiming as connected with sales of Land & structure and development charge etc.

iii) Whether on the facts and in circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO of Rs.3,50,536/- on account of various expenses wrongly claimed by the assessee against the interest & remuneration received from various firms.

iv) Whether on the facts and in circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO of Rs.14,32,160/- on account of expenses wrongly claimed by the assessee u/s 57 of the Act for earning interest income."

Grounds of assessee's appeal:

"1. That the Ld. AO grossly erred in not accepting the value of wells, Baories, Roads & boundary wall and there by AO have not considered the index value of these things which are situated on the Land. And the Ld. CIT(A) also erred in not accepting the value of wells Baories, Roads as on 01.04.1981 & there by not allowed the cost of Rs. 27,50,000/- and proportionate indexed cost Rs. 1,25,19,756/- in calculation of LTCG on sale of Land & there by sustained the addition in Long Term Capital Gain on sale of Land by Rs. 1,25,19,856/-.

2. That the Ld. AO Grossly erred on law facts in not considering the genuinely incurred expenses amounting to Rs. 24,48,450 (8,45,000 +

2,83,680 + 13,19,770) & there by enhanced the LTG by the said amount.

That the Ld. CIT(A) also erred in sustaining the addition by not allowing the expenses relating to Legal & other expenses Rs. 16,03,450/- & its proportionate expenses on sale of Land Rs. 8,65,205/-."

2. Firstly, we take up the matter relating to transfer of land and related computation of long term capital gains, and the respective grounds of appeal taken by both the parties.

3. Briefly stated, the facts of the case are that the assessee in the original return of income filed u/s 139(1) reported long term capital gains of Rs. 2,51,85,149/- in respect of sale of agricultural land situated at Ummed Vilas Akashwani Colony, Kota. Thereafter, during the course of assessment proceedings, the assessee filed revised return of income wherein the income under the head "long terms capital gain" was revised to Rs. 1,10,18,918/- as against Rs. 2,51,85,149/- shown in the original return of income. As per assessee, out of three sale deeds, two sale deeds of land executed with Shri Rajeev Singh are invalid sale deeds, no transfer took place and hence, no capital gains arises in respect of two invalid sale deeds and the Hon'ble Rajasthan High Court has also granted stay on the sale deeds executed by the assessee. However, the Assessing Officer didn't agree with the assessee's submissions and the computed long term capital gains wherein he considered the full value of consideration including two sale deeds which have been stated to be invalid sale deeds as per the assessee, and computed the full value of consideration u/s 50C at Rs.22,33,80,189/-. Further, the AO didn't allow cost of boundary

wall, Baories, wells, roads, development expenses as cost of acquisition/improvement and other legal expenses as expenses incurred in connection with transfer, as claimed by the assessee, against the full value of consideration and computed long term capital gains as under:

	<i>Amount</i>
<i>Full Value of consideration u/s 45 for land only</i>	<i>22,33,80,189/-</i>
<i>Less : Cost of Acquisition as on 01.04.1981 for land only -</i>	
<i>which have indexed 8.52 times i.e. for 13.64 hectors i.e.</i>	
<i>84.22 bighas @ 2,10,473/- per bigha and total value as</i>	
<i>on 01-04-1981 of Rs. 1,77,26,036 x 8.52 indexed</i>	<u><i>15,10,25,827/-</i></u>
<i>Long term CG on transfer of land</i>	<i>7,23,54,362/-</i>
<i>Less: Investment in bonds u/s 54E</i>	<u><i>50,00,000/-</i></u>
<i>Taxable Long term capital gains on transfer of land</i>	<u><i>6,73,54,362/-</i></u>
<i>Less: LTCG declared by the assessee in ROI filed</i>	<i>2,51,85,149/-</i>
<i>Additions on account of LTCG on Land</i>	<i>4,21,69,213/-</i>

4. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who accepted the revised return and the revised computation of income, and granted partial relief to the assessee whereby the transaction in respect of two invalid sale deeds were held not chargeable to capital gains tax and secondly, against the third transaction of sale of land, the relief was granted in respect of cost of boundary wall, development and legal expenses and the disallowance in respect of other matters as done by the AO were, however, sustained. Now, both the parties are in cross appeal before us against the said findings of the Id CIT(A). The Revenue is in appeal against the relief

granted by the Id CIT(A) and the assessee is in appeal against the disallowances sustained by the Id CIT(A).

5. Firstly, coming to the dispute relating to two sale deeds executed between the assessee and Shri Rajeev Singh which are claimed as invalid sale deeds by the assessee and the said claim been allowed by the Id CIT(A) whereby the said transactions have been held as not chargeable to capital gains tax against which the Revenue is in appeal before us.

6. In this regard, the Id DR has taken us through the findings of the AO and the relevant findings are contained at para (i) page 31-33 of the assessment order which read as under:-

"(i) The assessee transferred his immovable property i.e land vide valid and legal contract which is as per laid down procedure of law on the land for transfer of any immovable property.

The transfer of land was as per valid contract which is clearly covered within the meaning of transfer of capital assets as defined u/s 2(47) of the I.T Act, 1961 and which is also (valid transfer u/r of the transfer of property Act 1882. The assessee voluntarily agreed for sales consideration and voluntarily registrar the transfer deed before the register of properties, in the names of transferees. As per registered deeds of transfer of land, these were written and agreed voluntarily by both the parties for voluntarily agreed consideration for contract for transfer of land. On the date of registration of land on transfer and completion of registered deed there was no any dispute

between the transferor and transferee. There was no any dispute on the full value of consideration also on the day of execution of valid contract which was registered with the registrar of properties. So, the contract for transfer of land was fully voluntary, legal accepted and valid from both sides and the sales consideration was also mutually agreed, accepted and deemed to be received before signing and registering the deed before and with the registrar for transfer of properties. As per registrar for transfer of property the transfer deed valued for three transfer deeds as follows:-

<i>Seller the assessee</i>	<i>Buyer's Name</i>	<i>Land Area</i>	<i>Sales deed value</i>	<i>DLC Value</i>
<i>Sh. Ijyaraj Singh</i>	<i>Sh. Neeraj Suwalka</i>	<i>7.36 Hectare</i>	<i>10,00,00,000</i>	<i>12,09,77,056</i>
<i>Sh. Ijyaraj Singh</i>	<i>Sh. Rajeev Singh</i>	<i>2.52 Hectare</i>	<i>3,40,00,000</i>	<i>4,14,21,492</i>
<i>Sh. Ijyaraj Singh</i>	<i>Sh. Rajeev Singh</i>	<i>3.71 Hectare</i>	<i>4,63,00,000</i>	<i>6,09,81,641</i>
<i>Total</i>		<i>13.59 Hectare</i>		<i>22,33,80,189</i>

All the above three registered deeds have been certified by registrar as "प्रतिफल राशि रु० मेरे समक्ष प्राप्त करना स्वीकार किया "उक्त निष्पादन कर्ता की पहचान प्रत्येक sale deed (conveyance deed) के लिए दो-दो गवाहों ने तस्दीक करवाया जिनके हस्ताक्षर व अंगूठा के निशान भी मेरे समक्ष लिये गये हैं।" All these facts are as per back sided official and formal writing on every sales deed by the registrar of property transfer.

Hence, as per provisions of section 50C of the I.T. Act, 1961, full value of consideration is of Rs. 22,37,80,189/- for all the three transfer deeds. As per provisions of section 45 etc, the expression, full value means the whole price without any

deduction what so ever and it cannot refer to the adequacy or inadequacy of the price bargained for. Neither has it any reference to the market value of the capital asset which is the subject matter of transfer. Even if the full value of consideration agreed upon is received in installments in different years, the entire value of consideration has to be taken into account for computing the capital gain which become chargeable in the year of transfer. Thus, capital gains arise on accrual basis as held by the Hon'ble Chennai High Court in the case of T.V. Sundaram Iyengar & Sons Ltd. V/s CIT (1959) 37 ITR 26 (Madras).

Hence, in the instant case of the assessee the full value of consideration on transfer of land is of 22,33,80,189/- and reduction deduction for not receiving any part of sales consideration in the future not acceptable under the provisions of the I.T. Act, 1961."

7. In light of aforesaid findings of the AO, the Id. DR submitted that where the transfer of land is duly supported by the registered sale deed, the said transfer of land is clearly chargeable to tax under the head long term capital gains. It was submitted that the subsequent development in terms of dishonor of cheques cannot invalidate the transfer of the land and liability towards capital gains tax. The Id DR accordingly supported the findings of the AO.

8. Per contra, the Id AR supported the findings of the Id CIT(A) wherein he has held that although the document was registered in the name of the purchaser Sh. Rajeev Singh but such sale could not be

considered as a valid sale and the gain as per the document was not 'Real' because neither was the full consideration received by the seller, nor was the possession handed over to the purchaser. The relevant findings of Id. CIT(A) read as under:-

"Coming to the issue wise findings in the appeal, the first issue to be decided is how the sales consideration is to be taken when not realized fully as per the above discussion. The common thread would be the commitment of the owner of the property to convey to the purchaser the right, title and interest in such property upon the purchaser paying the agreed consideration in agreed manner. It is only after such bilateral obligations are discharged that the execution of the sale deed would take place and it is this sale deed, which is compulsorily registrable under section 17 of the Registration Act, 1908, upon being registered, would transfer the right, title and interest in the property in question into the purchaser. Although the document was registered in the name of the purchaser Sh. Rajeev Singh (22 bighas or 3.71 hectares) as per sale deed dated 24.12.2012 but such sale could not be considered valid due to the following reasons:-

- (i) No consideration was passed in the deal with Sh. Rajeev Singh except Rs. 63 lakhs which at best due to breach of terms of the "Contract" entered into for sale, is only an advance.*
- (ii) The cheques for consideration mentioned in the sale deed were dishonoured & being contested under appeal in Negotiable Instruments Act in a civil court. Thus sections 45 & 48 remained not fully complied with.*

(iii) Possession of the said land was never handed over & land is still in the possession of appellant himself. Even more so, mere delivery of possession accompanied by realisation of sale consideration does not divest the vendor of the ownership of the property and, therefore, it continues to belong to the vendor and can be included in his net wealth (Nawab Sir Osman Ali Khan - 162 ITR 888 SC)

(iv) The sale deeds itself were under litigation for cancellation due to breach of contract.

(v) The appellant has filed a suit & obtained a stay from Rajasthan High Court for cancellation of the sale deed & registrations on transfer of land which would mean that no gain has arisen on the sale & such asset which is never parted with. The gain as per the document was not 'Real' because neither was the full consideration received by the seller, nor was the possession handed over to the purchaser."

9. Further, the Id. AR submitted that the appellant is an individual who has filed his return declaring income of Rs. 2,68,56,000/- including LTCG of Rs. 2,51,85,149/-. In course of assessment proceedings, the appellant informed to the A.O. that out of the said sale of 85 Bigha land & its periphery, the assessee has not received the payment towards part of Land hence the said deal was cancelled & appraised the Ld. A.O. to treat the return revised to that extent but the Ld. A.O. instead of treating the return on factual basis did the assessment by theoretical basis & made various additions.

10. It was submitted that the appellant owned land and structures measuring 85 bighas (approx.) land, two baories, three wells, roads and surrounding entire boundary wall situated at village Rampura, near Rastriya Raj Marg, Kota. That the appellant has executed three deeds in respect of alleged sale of land & structure viz. (1) One Deed of 7.36 hectare (45 Bigahs approx) to Shri Neeraj Suwalka dated 02.01.2013 for consideration of Rs. 10.00 crores (DLC 12.10 crores); (2) Two Deeds of 2.52 hectare (15 Bigahs approx.) and 3.71 hectare (22 Bigahs approx.) to Shri Rajeev Singh on 02.01.2013 & 24.12.2012 for Rs. 3.40 crores and Rs. 4.65 crores (8.05) (DLC value 4.14 and 6.09 crores respectively totaling to Rs. 10.24 crores). It was submitted that in respect of sale deeds executed with Sh. Rajeev Singh, full consideration was not received and the cheques were dishonored and money could not be realized and thus these two sale deeds became invalid sale deeds.

11. It was submitted that there was a breach of contract, thus, no valid contract and no transfer of impugned land. It was further submitted that under section 54 of the Transfer of Property Act, 1982, there is no effective sale till full consideration is received. It was submitted that the assessee has filed an application for cancellation of sale deeds before the Addl. District Judge, Kota. It was further submitted that Hon'ble Rajasthan High Court in SB Civil First Appeal No. 72/2013 vide stay order dated 11.02.2013 has directed to maintain status quo as regards possession, transfer, alienation and sale of the suit property. Further, the Hon'ble Rajasthan High Court vide order dated 19.07.2013 has restricted any

party from approaching UIT for conversion of the impugned property or issue of Patta. The assessee also filed a legal case U/s 138 of the Negotiable Instrument Act against Shri Rajeev Singh for dishonor of cheques issued by him.

12. It was submitted that given that the full consideration has neither been received nor accrued to the assessee, then as per Section 45 & 48, no capital gain could be computed under the law. It was submitted that under the scheme of taxation, the real gain is to be taxed, not the notional gain which has not been received or accrued to the assessee. This has been laid down by the Hon'ble Supreme Court of India in the case of K.P. Verghese vs. ITO 131 ITR 597 (SC). It was accordingly submitted that when full consideration has not been received or accrued, capital gain cannot be computed in the hands of the assessee.

13. It was submitted that the appellant revised his return of income during the course of assessment proceedings given that the amount of consideration has not been received and the sale deeds have become invalid sale deeds and stay has been granted by the Hon'ble Rajasthan High Court. It was submitted that it is a settled legal position that the legal claim can be taken at any stage of the proceedings as held in case of CIT Vs. Britannia Industries Ltd. 396 ITR 677 (Cal.). As such, revising of return, while at the time of proceedings before the A.O. is valid and, therefore, the claim made by the assessee has wrongly been disallowed by the AO which have however been appreciated by the Id CIT(A) and necessary relief granted by him.

14. Further, in support of his contentions, the Id AR has relied on the Co-ordinate Bench decision in case of ITO vs. Ajit Kumar Arya 25 ITD 37 (JP), the decision of authority for advance ruling in case of Jasbir Singh Sarkaria [2007] 294 ITR 196/164 Taxman 108 (AAR-New Delhi) and the decision of the Hon'ble Patna High Court in case of Smt. Raj Rani Devi Ramna vs CIT (1992) 201 ITR 1032 (Pat.). He accordingly supported the findings of the Id CIT(A).

15. We have heard the rival contentions and purused the material available on record. There are two sale deeds which have been executed by the assessee with Shri Rajeev Singh which are under consideration before us. The case of the Revenue is that the transfer of land has been done through these two registered sale deeds wherein the sales consideration was mutually agreed upon, accepted and deemed to be received before signing and registering the sale deed before the Registering authority and deduction for not receiving any part of sales consideration in the future is not acceptable from the full value of consideration under the provisions of Act and the transaction is subject to levy of capital gains tax.

16. The case of the assessee is that there being a breach of contract in terms of non-discharge of the sale consideration and thus, no valid contract and no transfer of impugned land. It was submitted that full consideration was not received as the post dated cheques mentioned in the two sale deeds were dishonored and money could not be realized and thus these two sale deeds have become invalid sale deeds and under the scheme of taxation, the real gain is to be taxed, not the notional gain which has not accrued or arisen

to the assessee. Further, it was submitted that the matter has been contested under the Negotiable Instruments Act for dishonor of cheques and separately before the Civil Court for cancellation of sale deeds due to breach of contract and stay order has also been issued by the Hon'ble Rajasthan High Court directing the status quo in relation to impugned land.

17. The question that arises for consideration is where the full value of consideration has not been discharged by the purchaser of the impugned land as per the sale deed and there is violation of terms of the sale deed, whether the impugned transaction would still qualify as transfer and liable for capital gains tax given that the same is evidenced by the registered sale deed.

18. Firstly, we refer to relevant provisions of the Act. Section 2(24) of the Act defines the word "income". The definition is inclusive and covers any "capital gains" chargeable under section 45. Section 4 is the charging section and it provides that income-tax shall be charged in respect of the total income of the previous year of every person. Section 5 of the Act defines the scope of "total income" by providing that the total income of the previous year of a person who is resident shall include all income from whatever source derived which is received or is deemed to be received in India in such year by him or on his behalf or accrues or arises or is deemed to accrue or arise to him in India during such year or accrues or arises to him outside India during such year. Section 45 provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income-tax under the head "Capital gains" and shall

be deemed to be the income of the previous year in which the transfer took place. Section 2(47) defines the term "transfer" in relation to transfer which list down various modes of transfer. The mode of computation of capital gains is laid down in section 48 of the Act which provides that the income chargeable under the head "Capital gains" shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, two amounts, namely, (i) expenditure incurred wholly and exclusively in connection with such transfer; and (ii) the cost of acquisition of the capital asset and the cost of any improvement thereto. What is therefore relevant to examine is whether there is a transfer of a capital asset effected in the previous year in the instant case and any profits and gains have arisen from such transfer whereby the full value of the consideration received or accruing as a result of the transfer of the capital asset can be brought to tax.

19. We now refer to the decision of the **Hon'ble Punjab & Haryana High Court** in case of **Hira Lal Ram Dayal vs CIT** reported in 122 ITR 461 wherein the question for consideration before the Hon'ble High Court was "whether it is open to the assessee to prove that the sale transaction evidenced by the registered sale deed was sham transaction and no sale in fact took place." The Hon'ble High Court while answering the said question held that the Tribunal fell in legal error where it says that it cannot ignore a document which is duly executed and registered with the Sub-Registrar and the findings of Hon'ble High Court read as under:

"It is no doubt true that the evidentiary value has to be attached to a registered document but the said document cannot be a final word in the matter. It has to be remembered that capital gains accrue only if there is a sale or any other transfer of the capital asset and if the assessee is able to prove that in fact no sale took place in that case no capital gain accrued which could be assessed to income-tax. If the assessee, even in the face of the registered sale deed, is able to prove by cogent evidence and satisfy the Tribunal that no sale in fact took place, in that case, the Tribunal has to come to the conclusion that there was no capital gain. As is apparent from the observations made in the order of the Tribunal, the Tribunal was under the misapprehension that the registered sale deed was final and, therefore, refused to look into the other material produced by the assessee with a view to prove its case that the sale transaction was a sham transaction. It is, however, a different matter that the Tribunal may not feel convinced that the sale transaction was a sham transaction and refuse to rely on the material produced by the assessee for good reasons, but the said material had to be taken into consideration and could not be ignored. As already observed, the enquiry before the Tribunal was to be directed to find out whether there had been a sale and if the Tribunal comes to the conclusion that the sale had taken place, in that case, the capital gains tax would become payable. The matter can be viewed from another angle. It is a matter of daily happening that people, who want to avoid

payment of tax, would sell the property by getting the sale deeds registered at an under-estimated value. If it is held that the sale deed is final, in that case, the Income-tax authorities will be debarred from looking into as to how much sale consideration passed under the transaction, which is not the law. The factum of sale and the sale proceeds are the real questions to be determined by the Income-tax authorities. From what has been stated above, it is clear that the Tribunal fell into an error in refusing to examine the material put forth by the assessee to prove that the sale was a sham transaction."

20. We refer to the decision of the **Hon'ble Patna High Court** in case of **Smt. Raj Rani Devi Ramna vs CIT** (Supra) where the questions framed for consideration before the Hon'ble High Court read as under:

"(1) Whether, on the facts and in the circumstances of the case, the learned Income-tax Officer was justified in including the sum of Rs. 42,000 pertaining to three deeds of sale in the gross receipts for the purposes of computation of capital gains?

(2) Whether, on the facts and in the circumstances of the case, the learned Income-tax Officer was legally correct in coming to a finding that once the sale deed was registered, the transfer was complete and any stipulation in the deed of sale to the contrary was irrelevant ?

(3) Whether by mere execution of a deed of sale and registration thereof, there could be transfer of an immovable property without effective conveyance of the same to the transferee ?

(4) Whether, 'transfer' according to section 2(47) of the Income-tax Act, 1961, must mean effective conveyance of the capital asset to the transferee ?"

And the findings of the Hon'ble High Court read as under:

"After hearing learned counsel for the parties, I have no hesitation in holding that the properties do not necessarily pass as soon as the instrument is registered, for the true test is the intention of the parties. Registration is prima facie proof of an intention to transfer, but it is no proof of an operative transfer if there is a condition precedent as to the payment of consideration or delivery of the deed. Thus the seller may retain the deed pending payment of price and, in that case, there is no transfer until the price is paid and the deed is delivered.

To substantiate my above view, I may first refer to a Bench decision of the Calcutta High Court in the case of Nitai Chandra Naskar v. Smt. Champaklata Debi reported in [1919] 29 CLJ 250, wherein while referring to section 54 of the Transfer of Property Act, it has been held that, "sale is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised. The true test is, what is the intention of the parties to the transaction. If the intention is that title should

pass immediately, even though the consideration has not been paid, title passes, that is, failure to pay the consideration for a conveyance does not defeat the conveyance except where there is an agreement that it should take effect only if the consideration is first paid." In the case of Panchoo Sahu v. Janki Mandar, reported in AIR 1952 Patna 263, it has been held that title does not pass on the mere execution and registration of the sale deed and the answer to the question regarding passing of the title lies in the intention of the parties, which is to be gathered from the sale deed itself. A similar view has been taken in the case of Shiva Narayan Sah v. Baidya Nath Prasad Tiwary, reported in AIR 1973 Patna 386. There is a catena of decisions of this court as well as of other High Courts taking a similar view.

The relevant provisions under the Act for the present purpose are sections 45 and 2(47). Section 45, inter alia, provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall, subject to certain exceptions, be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. The word "transfer" has been defined under section 2(47) of the Act which provides that, in relation to a capital asset, transfer includes the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law.

In the present case, we are concerned with the transfer of an immovable property by way of sale. In the absence of any provision to the contrary, the concept of sale of an immovable property which is included in the expression "capital asset" as defined under section 2(14) of the Act, has to be gathered from section 54 of the Transfer of Property Act, 1882. In the present case, from the statement of case itself as drawn up and sent to this court by the Tribunal, it is apparent that the parties had clearly intended that despite the execution and registration of sale deeds, transfer by way of sale will become effective only on payment of the entire consideration amount and in this background of facts, it has to be held that there was no transfer of land covered by the three sale deeds in question during the period under consideration making the assessee liable for capital gains tax under section 45 of the Act.

Keeping in view the discussions made above, question No. 4 is answered in the affirmative, that is to say, the transfer under section 2(47) of the Act must mean an effective conveyance of the capital assets to the transferee. Questions Nos. 1, 2 and 3 are answered in the negative and in favour of the assessee. In the facts and circumstances of this case, there shall be no order as to costs."

21. The legal proposition which emerges from reading of aforesaid decisions is that that a registered sale deed does carry an evidentiary value. At the same time, where the assessee is able to prove by cogent evidence brought on record that no sale has in fact taken

place, then, in such a scenario, the taxing and appellate authorities should consider these evidences brought on record by the assessee and basis examination thereof, decide as to whether sale has taken place or not in the given case. Further, it has been held that the title in the property does not necessarily pass as soon as instrument of transfer is registered and the answer to the question regarding passing of title lies in the intention of the parties executing such an instrument. The Registration is no proof of an operative transfer and where the parties had intended that despite execution and registration of sale deed, transfer by way of sale will become effective only on payment of the entire consideration amount, then in such a scenario, the transfer will be effected only on payment and receipt of full sale consideration and not at the time of execution and registration of sale deed.

22. Applying the above legal proposition in the facts of the present case, we find that the first sale deed dated 24.12.2012 is for transfer of 3.71 hectares of land situated at village Rampura, Tehsil Ladpura, Kota district, Rajasthan for a sale consideration of Rs 4.63 crores. The sale consideration has been stated to be discharged by issue of cheque no. 912806 for Rs 63 lacs, cheque no. 912807 dated 2.01.2013 for Rs 2 crores and cheque no. 912808 dated 2.01.2013 for Rs 2 crores drawn on Punjab National Bank. The assessee received the first payment of Rs 63 lacs through RTGS on 31.12.2012. However, the other two cheques were returned unpaid by the bank on 25.03.2013 stating that the payment has been stopped by the issuer of the cheque i.e, Shri Rajeev Singh and basis his instructions of stop-

payment, the cheques have not been cleared and returned unpaid to the assessee. What is therefore relevant to note is that out of total consideration of Rs 4.63 crores as stated in the aforesaid sale deed, no payment has been actually made to or received by the assessee either prior to or at the time of execution of the sale deed. What has been apparently done at the time of execution of the sale deed is thus, the handing over the three cheques to the assessee and that too, post dated cheques which could not have been encashed at the time of execution of the sale deed. The intention of the parties which is therefore gathered and is clearly discernable from the reading of the sale deed and the conduct of the parties is that the operative transfer of the property shall happen only on encashment of all the three post-dated cheques and not at the time of execution and registration of the sale deed. Out of three cheques, one cheque has been cleared through RTGS on 31.12.2012 and other two cheques have however been returned back unpaid by the bank on 25.03.2013. Therefore, mere handing over the post dated cheques which have been subsequently dishonored and returned unpaid to the assessee cannot be held to be discharge of full sale consideration as intended and agreed upon between the parties and there is clearly a violation of the terms of sale deed by Shri Rajeev Singh where he has failed to discharge the full sale consideration so agreed and stated in the sale deed. Further, the matter has been contested under the Negotiable Instruments Act for dishonor of cheques and separately before the Civil Court for cancellation of sale deed due to breach of contract which further proves that at the time of entering into the sale deed,

the intention was that the transfer of title in the land will be effective only on receipt of the full sale consideration.

23. Similar fact pattern is observed in respect of second sale deed dated 02.01.2013 for transfer of 2.57 hectares of land situated at village Rampura, Tehsil Ladpura, Kota district, Rajasthan for sale consideration of Rs 3.40 crores. The sale consideration has been stated to be discharged by issue of cheque no. 912809 dated 02.01.2013 for Rs 40 lacs and cheque no. 912810 dated 02.01.2013 for Rs 3 crores drawn on Punjab National Bank. Both these cheques were presented for clearing by the assessee and returned unpaid by the bank on 25.03.2013 stating that the payment has been stopped by the issuer of the cheque i.e, Shri Rajeev Singh and basis his instructions of stop-payment, the cheques have not been cleared and returned unpaid to the assessee. What is therefore relevant to note is that out of total consideration of Rs 3.40 crores as stated in the aforesaid sale deed, no payment has been actually made to or received by the assessee either prior to or at the time of execution of the sale deed. What has been apparently done at the time of execution of the sale deed is thus, the handing over the two cheques to the assessee which have been returned back unpaid by the bank on 25.03.2013. The intention of the parties which can therefore be gathered from the reading of the sale deed and the conduct of the parties is that the effective transfer of title in the land shall happen only on encashment and clearance of both the cheques and not at the time of execution and registration of the sale deed. Therefore, mere handing over the cheques which have been subsequently dishonored

and returned unpaid to the assessee cannot be held to be discharge of full sale consideration at the time of execution of the sale deed and there is clearly a violation of the terms of sale deed by Shri Rajeev Singh where he has failed to discharge the full sale consideration so agreed and stated in the sale deed. Further, the matter has again been contested under the Negotiable Instruments Act for dishonor of cheques and separately before the Civil Court for cancellation of sale deed due to breach of contract which further proves that at the time of entering into the sale deed, the intention was that the transfer will be effective only on receipt of the full sale consideration.

24. We are therefore of the considered view that though the sale deed has been registered, given that the terms of the sale deed and the intention of the parties at the time of entering into the said sale deed have not be adhered to whereby full sale consideration has not been discharged, there is no transfer of the impugned land and no income accrues and consequently, no liability towards capital gains tax arises in the hands of the assessee. This brings us to the concept of real income which can only be brought to tax and there cannot be any levy of tax on hypothetical income which has neither accrued/arisen or received by the assessee and useful reference can be drawn to the decision of the **Hon'ble Supreme Court** decision in case of **CIT V/s. Shoorji Vallabhdas & Co.** [1962] 46 ITR 144 (SC) wherein it was held as follows:

"Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the

substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income, which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

25. And the latter decision of **Hon'ble Supreme Court** in case of **CIT vs. Balbir Singh Maini** (2017) 398 ITR 531 where the Hon'ble Supreme Court has reiterated the principle of real income in context of section 45 and 48 and has held as under:-

"24. The matter can also be viewed from a slightly different angle. Shri Vohra is right when he has referred to Sections 45 and 48 of the Income Tax Act and has then argued that some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset.

25. This Court in E.D. Sassoon & Co. Ltd. v. CIT AIR 1954 SC 470 at 343 held:

"It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt

owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro; See W.S. Try Ltd. v. Johnson (Inspector of Taxes) [(1946) 1 AER 532 at p. 539], and Webb v. Stenton, Garnishees [11 QBD 518 at p. 522 and 527]. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."

26. This Court, in *CIT v. Excel Industries* [2013] 358 ITR 295/219 Taxman 379/38 taxmann.com 100 (SC) at 463-464 referred to various judgments on the expression "accrues", and then held:

'14. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In CIT v. Shoorji Vallabhdas and Co. [CIT v. Shoorji Vallabhdas and Co., (1962) 46 ITR 144 (SC)] it was held as follows: (ITR p. 148)

"... Income tax is a levy on income. No doubt, the Income Tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in bookkeeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

15. The above passage was cited with approval in *Morvi Industries Ltd. v. CIT* [Morvi Industries Ltd. v. CIT, (1972) 4 SCC 451 : 1974 SCC (Tax) 140 : (1971) 82 ITR 835] in which this Court also considered the dictionary meaning of the word

"accrue" and held that income can be said to accrue when it becomes due. It was then observed that: (SCC p. 454, para 11)

"11. ... the date of payment ... does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

16. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount".

17. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

18. Insofar as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement passbook, there was no corresponding liability on the Customs Authorities to pass on the benefit of duty-free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is, therefore, not the income of the assessee.'

27. In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there

is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.

28. In the present case, the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assessee by the developers and therefore, the assessee has not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act."

26. In the instance case, given that the sale transaction fell through in view of non-fulfillment of the terms of sale deed whereby cheques have been dishonored by Sh. Rajeev Singh and he has failed to discharge the full sale consideration, there is no transfer and no income which has accrued or arisen to the assessee besides the fact that there is no receipt of sale consideration, thus no real income in hand of the assessee and in absence thereof, the assessee is not exigible to capital gains tax. Similar view has been taken by the **Coordinate Bench** in case of **Appasaheb Baburao Lonkar vs ITO** [2019] 176 ITD 115 (Pune) and the relevant findings reads as under:

"9. From the perusal of above said facts, it is clear that though an agreement was entered into between the parties on 16.09.2010 which was also registered with the authorities, but admittedly total consideration was not paid to the assessee as the cheques which were handed over by the purchaser, were stopped for payment. The dispute arose between the parties, wherein the sellers i.e. assessee and his family filed an

Injunction against the purchaser restraining him from creating any third party interest in the suit property till the decision of suit and an interim order was passed, which was challenged and subsequently, Civil Suit between the parties was decided, under which the suit of assessee and co-owners for cancellation of sale deed was dismissed. The co-owners of the property filed an appeal before the Hon'ble Bombay High Court. In the said appeal, it has been clearly mentioned that the possession of immovable property had not been parted with till the date and also the assessee had not received complete consideration for the purported sale transaction. Though the case of purchasers was that they had entered into sale transaction with the understanding that the assessee would get no objection from the other co-owners and for this reason, sale deed was executed and the cheques were handed over. The claim of purchasers before the Civil Courts was that they were put in possession since they had handed over the cheques, however, the said cheques were stopped for payment by the purchasers only, as it is clear from the communication placed on record by the assessee.

10. The issue which arises in such circumstances is that in view of the dispute between the parties, can it be said that the assessee has completed sale transaction and hence is eligible for assessability of capital gains in his hands.

11. Section 2(47) of the Act lays down that transfer in relation to capital asset includes various modes of transfer in which

under clause (v) it involves a transaction wherein allowing of possession of any immovable property is taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. Under section 53A of the Transfer of Property Act, where any person contracts to transfer for consideration any immovable property in writing, from which the terms necessary to constitute the transfer can be ascertained and the transferee has in part performance of the contract, taken possession of the property or any part thereof, and the transferee has performed or is willing to perform his part of contract, then it is called 'Part Performance'. So, in part performance, there has to be willingness to perform his part of contract by the transferee and the transferee should have been put in possession in such part performance of the contract and the transferor has agreed to transfer the property for consideration. However, in the facts of the case before us, though there is a contract in writing between the parties but there is dispute between the parties as to the possession of the said property, wherein the transferor claims that possession has not been given and the transferee claims that the possession has been given but the said possession was subject to encashment of cheques which were issued by the transferee. Since the transferee had stopped payment of cheques issued by him, then the parties approached the Court to decide differences arising between them and the matter is pending before the Hon'ble High Court of Bombay in this regard. In such

scenario, it cannot be said that part performance of the contract has been completed.

12. The Hon'ble Apex Court in CIT v. Balbir Singh Maini [2017] 86 taxmann.com 94/251 Taxman 202/398 ITR 531 and bunch of other appeals arising from the order of Hon'ble High Court of Punjab & Haryana CIT v. Balbir Singh Maini [2015] 123 DTR 49 has deliberated upon the relevant sections i.e. section 53A of the Transfer of Property Act and sections 2(47), 45 and 48 of the Income Tax Act and also took note of the provisions of section 2(47)(vi) of the Act and vide para 27 held that the income from capital gains on a transaction which never materialized was at best, a hypothetical income. In the facts of the case before the Apex Court, the entire transaction of development envisaged in the JDA fell through because of want of permission and hence, the Apex Court in such circumstances, held that In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.

13. The assessee in the affidavit explaining the delay in filing the appeal late before the Tribunal has also mentioned the factual aspects and the legal dispute and has stated on oath that sellers had never parted with the possession of said land, for which litigation was pending before the Hon'ble High Court. In such circumstances, where the assessee has not received

sale consideration and where the possession of land having not been transferred to the purchasers, provisions of section 45 of the Act are thus, not attracted.

14. Now, applying the ratio laid down by Apex Court to the facts of present case, wherein the initial contract was between the parties on the ground that the assessee would get permission of other co-owners numbering about 13 so as to transfer immovable asset to the purchasers. This was the basic condition of the said agreement between the parties. Admittedly, the said permission could not be obtained by the assessee and though sale deed was registered, transaction could not be culminated. It is further evidenced by the fact that only sum of Rs. 15 lakhs was paid as against total consideration of Rs. 2,75,73,600/- settled between the parties. As per sale deed, sale consideration was to be paid as per Schedule A to the said agreement, for which postdated cheques were issued, which were to be encashed as per the conditions mentioned for encashment of cheques. As per clause 8 of the sale deed, the purchasers had given postdated cheques to sellers and it was their responsibility to see that the postdated cheques get cleared for payment. In view of the said cheques being stopped for payment and the dispute arising between the parties and even the dispute being who is in possession of the said property, reflects that even part performance of the contract has not been settled. In such circumstances, we find guidance from the ratio laid down by the Apex Court in Balbir Singh Maini (supra) that where the

transaction has not materialized, then no profit or gain which arises from the alleged transfer of capital asset could be brought to tax under section 45 r.w.s. 48 of the Act. We hold so. The grounds of appeal raised by assessee are thus, allowed."

27. This brings us to another aspect of the matter as to whether the provisions of Section 2(47)(v) are attracted in the instant case which provides that the transfer includes "any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882" and the latter provisions reads as under:

"53A. Part performance.— Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

28. In order that the provisions of Section 53A of the Transfer of Property Act are attracted, there are two essential conditions. Firstly, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of Section 53A can be said to be attracted on the facts of a given case. In the instant case, as we have noted above, the Id CIT(A) has returned a finding that "possession of the said land was never handed over & land is still in the possession of appellant himself" and Hon'ble Rajasthan High Court in SB Civil First Appeal No. 72/2013 vide stay order dated 11.02.2013 has directed to maintain status quo as regards possession, transfer, alienation and sale of the suit property. Further, the Hon'ble Rajasthan High Court vide order dated 19.07.2013 has restricted any

party from approaching UIT for conversion of the impugned property or issue of Patta. Thus, the transferee, Shri Rajeev Singh has not taken possession of the property. Secondly, he has not discharged the sale consideration nor there is any willingness on his part to discharge the sale consideration as can be gauged by the fact that he himself has ordered and instructed his bank for stop-payment of cheques issued earlier by him towards the sale consideration in respect of both the sale deeds. Therefore, in the instant case, the transferee has not taken possession of the land and also, he has neither performed nor there is any willingness to perform his part of the sale deed and thus, the provisions of section 55A of the Transfer of the Property Act cannot be attracted and there is no transfer even in terms of section 2(47)(v) of the Act.

29. In light of aforesaid discussions and in the entirety of facts and circumstances of the case and following the decisions referred supra, we hereby affirm the findings of the Id CIT(A) and the matter is decided in favour of the assessee and against the Revenue. In the result, the ground no. 1 of Revenue's appeal is dismissed.

30. In Ground No. 2, the Revenue has challenged the action of Id. CIT(A) in allowing the proportionate expenses amounting to Rs.4,55,993/- out of total expenses of Rs. 8,45,000/- claimed by the assessee towards brokerage and other expenses while computing the long term capital gains in respect of third transaction of sale of land measuring 7.36 hectare to Shri Neeraj Suwalka vide sale deed dated 02.01.2013 for consideration of Rs. 10.00 crores.

31. During the course of assessment proceedings, the AO examined the details of development expenses, material, cement charges and other development expenses incurred by the assessee and the same were not found allowable by the AO and the relevant findings of AO are contained at pages 54-56 of the assessment order which reads as under:-

"The assessee has shown & claimed structure and development charges etc. including brokerage expenses of Rs. 8,45,000/- and response to show cause notice dated 04-02-2016 he filed a list of expenses for the month Jun, July, August, Sept. & Oct. 2012 etc. containing expenses of labour for levelling of land, stone supplying charges, JCB Charges, Sand supply charges, cement bags, gitti supply, cement plaster charges etc. said to have incurred for development using material, cement & other development charges. In the above list of expenses no any mention for brokerage charges hence the claim for brokerage expenses seems to be fictitious claim for transfer of land for which no evidences of paying such expenses with details of receiving persons tiled as narrated in above para. In respect of above mentioned other expenses of structures and development charges what and which type of construction work was done on the transferred land during the whole rainy season no any where mentioned and no any evidence of any construction work which was completed on the land and for what purposes, filed & produced. Merely claiming deductions for expenses by enlisting in the name of construction of any

pucca work, do not prove the facts of cost or improvement of the land property' transferred which is/are not existed on the land as per the transferred deed agreed and registered. Paras 1 to 8 of the sale deed mentioned as "यह कि उक्त आराजी सिंचित है जा मुख्य सड़क पर स्थित नहीं है, मुख्य सड़क से 500 मीटर से अधिक दूरी पर स्थित है जिसमें कोई निर्माण कार्य नहीं हो रहा है।"So, no any deduction for expenses as cost of improvement allowable which is not confirmed and denied by the mutually agreed and registered document before the registrar for transfer of properties in the presence of two witnesses. Hence, these expenses claimed of Rs. 8,45,000 are not in the nature of cost of acquisition and/or cost of improvement or cost of transfer of property transferred, as envisaged u/s 48 of the I.T. Act 1961. Since, these expenses neither incurred as cost of improvement nor cost of transfer and as per deed there were no existence of such expenses said to have incurred just before transfer of the land property. These expenses no any way form the part of capital expenditure of the land transferred. The only bare land was transferred as per sale deed and consideration for only land was agreed and receivable by the assessee and no any cost compensation or sales consideration other than land transfer was receivable by the assessee on transfer of land. Thus, the expenses claimed by the assessee of Rs. 8,45,000/- in the name of transfer expenses and structure, brokerage and development expenses etc. not allowable expenses u/s of section 48 of the I.T. Act, 1961."

32. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has allowed proportionate claim of Rs. 4,55,953/- in view of the details submitted by the assessee regarding development related expenses towards cost of improvement. Against the said findings, the Revenue is in appeal before us.

33. During the course of hearing, the Id. DR relied on the finding by the AO.

34. Per contra, the Id. AR submitted that necessary details have been duly submitted before the AO as well as the Id. CIT(A) and these expenses are in nature of development expenses which includes leveling, stone supply charges, machine charges, repairs of boundary walls and wells etc which were incurred within the said premises and were required before the sale of land as the property was required to be put in saleable condition. It was submitted that Id. CIT(A) has gone through the details submitted by the assessee and rightly appreciated the nature of the expenses as claimed. It was accordingly submitted that the findings of the Id. CIT(A) be confirmed.

35. We have heard the rival submissions and perused the material available on record. The DVO has acknowledged the existence of roads, wells, Baories and boundary walls on the impugned land and therefore, the factual position is that the land has been transferred along with these constructed structures. The claim of the assessee is towards the development expenses in relation to these structures as well as leveling of land which has been examined by the Id CIT(A) and we donot see

any infirmity in the said findings of the Id CIT(A) where he has allowed these expenses towards cost of improvement. In the result, the ground of appeal is dismissed.

36. In Ground No. 3, the Revenue has challenged the deletion of addition of Rs. 3,50,536/- on account of various expenses claimed by the assessee against the interest and remuneration received from various firms wherein the assessee is a partner.

37. Briefly stated, facts of the case are that the assessee has received interest and remuneration from various partnership firms amounting to Rs. 5,88,407/- during the year under consideration and against the said receipts, he has claimed expenses totaling to Rs. 3,50,536/- and the net receipts of Rs 2,37,871/- have been offered to tax as business income by the assessee while filing his return of income. During the course of assessment proceedings, the matter was examined by the Assessing Officer and a show cause was issued and after considering the submission of the assessee, the expenses amounting to Rs 3,50,536/- were disallowed and brought to tax in the hands of the assessee.

38. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id. CIT(A) has stated that in the earlier years, the issue has been contended at higher appellate forums on similar facts and the claim of the assessee has been found acceptable in those years. Therefore, following decisions taken by the higher appellate authorities in earlier years in assessee's own case, the claim of the

expenses has been allowed. Against the said findings, the Revenue is in appeal before us.

39. During the course of hearing, the Id. DR relied on the findings of the Assessing officer

40. Per contra, the Id. AR supported the findings of the Id CIT(A). The Id AR submitted that the assessee has received interest and remuneration receipts from various firms in which he is a partner and which has been offered to tax as business income u/s 28 of the Act and against the said receipts, the assessee has claimed business expenditure of Rs. 3,50,536/- incurred under various heads such as salary & wages to staff, postage, Travel & conveyance and legal fees etc. for earning such business income. It was further submitted that similar expenditure were claimed and allowed by the Department in earlier years namely A.Y 2010-11, 2011-12 and 2012-13 respectively. It was further submitted that in assessee's own case for A.Y 2010-11, the Co-ordinate Bench (*in ITA No. 350/JP/2015 dated 22/07/2016*) has held that such expenditure is wholly allowable.

41. We have heard the rival contentions and perused the material available on record. We find that the assessee has earned interest and remuneration from various partnership firms amounting to Rs. 5,88,407/- during the year under consideration and against the said receipts, he has claimed expenses totaling to Rs. 3,50,536/- and the net receipts of Rs 2,37,871/- have been offered to tax as business income by the assessee while filing his return of income. It is the claim of the

assessee that he had received such interest and remuneration in earlier years as well and against the same, had claimed various expenses incurred in respect of such business income and which have been allowed by the Revenue in earlier years. We find that the Coordinate Bench had an occasion to examine the same claim of the assessee in A.Y 2010-11 and the relevant finding of the Co-ordinate Bench are contained at Para 3.4 of its order which reads as under:-

"3.4 We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. There is no dispute with regard to the position of law that powers conferred under section 263 can be invoked if the Id. CIT finds that the order passed by the AO is erroneous and prejudicial to the interests of the revenue. It is also settled position of law that absence of any of these conditions would make the order under section 263 as unjustified and illegal. In the case in hand, the first ground of invoking provisions of section 263 is that the assessee claimed expenditure of Rs. 4,33,718/- on account of salary and allowances, postage, telephone & stationery and traveling, car, vehicle and conveyance, bank charges, other business office expenses, legal expenses and fees, depreciation. The explanation of the assessee before the AO vide his letter dated 5th November, 2012 in point no. 10 has stated that interest has been received from M/s. Madho Associates, Kota, Brijraj Bhawan Palace Hotel, Mayur Service Station, Kota and Toshakhana, besides interest remuneration from M/s. Mahalaxmi Association, Kota and Toshakhana. All these firms are old firms and assessed to tax since a long time. The same partnership deed

continued. From that it is clear that the assessee has stated that he was partner in various partnership firms. In respect of the expenses, the assessee also stated in that reply about the expenditures incurred and deduction claimed. The AO after considering the submissions allowed the claim of the assessee in respect of deduction/expenditure. Now the question arises is whether the AO erred in allowing the expenditure. The Id. Counsel for the assessee has placed reliance on the judgment of the Hon'ble Jurisdictional High Court rendered in the case of CIT vs. Jabarmal Dugar (supra). We find that the Hon'ble High Court has held that the expenditure was allowable. The Hon'ble Calcutta High Court in the case of CIT vs. S.B. Ghose, 124 ITR 674 (Cal.), after considering various judgments held that – When the income of a partnership is allocated to the different partners of a firm, the partners are entitled to have their income assessed in accordance with law, that is to say, under section 28 of the I.T. Act, 1961. In making that assessment, a partner of the firm, being an assessee, is entitled to all the deductions allowable under the Act. In order to earn the income as a partner of a firm, a partner of a firm has to do some work and he has to incur certain expenses, e.g., holding consultation for the work of the firm at one's residence or acts done in order to facilitate or earn the income as a partner of the firm. Such expenditure was allowable. In view of these judgments, the act of the AO cannot be termed as erroneous. Therefore, on this ground invoking of provisions of section 263, in our considered view was not justified."

42. We find that the question before the Coordinate Bench was whether the AO erred in allowing the expenditure against the interest and remuneration earned by the assessee and relying on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Jabarmal Dugar 84 ITR 452 and Hon'ble Calcutta High Court in the case of CIT vs. S.B. Ghose 124 ITR 674 (Cal.) held that the expenses are duly allowable. Though the decision of the Coordinate Bench was in the context of proceedings u/s 263, the Coordinate Bench has upheld the decision of the AO in allowing such expenditure following the aforesaid rulings, therefore, the ratio of the said decision continues to apply in the instant case. Given that there is no change in the facts and circumstances of the case and in absence of any contrary authority brought to our notice, following the rule of consistency, the action of the Id CIT(A) in allowing the expenditure is upheld. In the result, the ground of appeal is dismissed.

43. In Ground No.4, the Revenue has challenged the deletion of the addition amounting to Rs. 14,32,160/- on account of expenses claimed by the assessee u/s 57 of the Act for earning interest income.

44. Briefly stated facts of the case are that during the year under consideration, the assessee has earned interest income from saving and fixed deposits maintained with various banks amounting to Rs.22,30,250/-. Against the said income, the assessee has claimed expenses amounting to Rs. 14,32,160/- which were examined during the course of assessment proceedings and after issuing a show cause to the assessee, were disallowed by the AO as per provisions of section 57.

As per the AO, these expenses are neither incurred nor expended wholly and exclusively for the purpose of making or earning interest income. Moreover, there is no nexus between the expenditure incurred and income earned by the assessee. Accordingly, the addition of Rs.14,32,160/- was made in the hands of the assessee.

45. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has allowed the said expenditure holding that the matter has been found acceptable by the higher appellate authorities in the earlier years and following the same, he has allowed the claim of the assessee for the year under consideration. Against the said findings, the Revenue is in appeal before us.

46. During the course of hearing, the Id. DR relied on the findings of the Assessing Officer and submitted that the findings of the Id CIT(A), where he has stated that the matter has been found acceptable by the higher appellate authorities in the earlier years, is not correct and he has decided the matter without any specific findings.

47. Per contra, the Id. AR submitted that the assessee has earned interest income amounting to Rs. 22,30,250/- and has incurred expenditure of Rs. 14,32,160/- for earning such income. The assessee has maintained regular books of accounts, expenditure incurred and claimed were entered in such books of accounts which were duly examined by the AO and no discrepancy was pointed out. It was further submitted that none of the expenditure includes any personal expenditure which can be disallowed. These expenses were incurred for

running regular office maintained for finance, bank, accounts and other related work and the expenses are in the nature of salary and wages to staff, postage and telephone expenses, car and conveyance expenses, bank charges, legal fees, other office expenses etc. It was further submitted that in the past such expenditure were fully allowed by the Revenue in A.Y 2011-12 and 2012-13 respectively and therefore, following principle of consistency, the expenses should be allowed for the year under consideration. It was further submitted that the Co-ordinate Bench in assessee's own case in ITA No. 305/JP/2015 dated 22/07/2016 has held that expenditure incurred on taxable income included in total income is allowable and the said decision has been accepted by the Department. It was accordingly submitted that the expenditure of Rs. 14,32,160/- is genuine expenditure incurred for earning the taxable income of Rs. 22,30,250/- and the same is fully allowable and rightly allowed by the Id. CIT(A) which should be confirmed.

48. We have heard the rival contentions and perused the material available on record. We find that the Id CIT(A) while allowing relief to the assessee was apparently guided by the fact that the assessee has incurred total expenses of Rs 17,82,696/- and out of which, Rs.3,50,536/- has been claimed under the head "business income" and remaining expenses of Rs 14,32,160/- has been claimed under the head "Income from other sources" and relied on the order of the Coordinate Bench for A.Y 2010-11, as we have noted above, wherein the issue was related to allowability of expenditure under the head "business income" against the interest and remuneration from the partnership firms.

49. Section 57(iii) allows expenditure which has been laid out or expended wholly and exclusively for the purpose of making or earning such income whereas section 37(1) allows the expenditure which has been laid out or expended wholly and exclusively for the purposes of business or profession and there is thus a finer distinction which should be kept in mind while applying the decisions rendered in the context of section 37(1) of the Act in the facts of each case and we don't see whether the same has been examined in the instant case. In the instant case, the assessee has offered interest income from his savings and fixed deposits maintained with various banks under the head "Income from other sources" and has claimed expenses in the nature of salary and allowances, postage, telephone, travel, car and conveyance, bank charges, other business expenses, legal expenses, depreciation, and other misc. expenses. The question for consideration is whether these staff, office and other related expenses have been incurred wholly and exclusively for the purpose of making or earning such interest income. The AO has stated that there is no need for establishing and operating office for earning such interest income from bank and thus, these expenses have no nexus with the making or earning of such interest income. In our mind, mere passive nature of income can't be a sole criteria for disallowance of expenses and before arriving at such a conclusion, there are certain matters which need appropriate consideration such as pool of funds which have been invested in multiple savings and fixed deposits accounts maintained by the assessee with banks in Delhi and Kota, the periodicity of transactions and period of holding such deposits, current occupation and availability of the assessee to personally manage such funds and his desire and

need to appoint a person with appropriate skill and functional knowledge of banking and allied areas who can handle and monitor the deployment of such funds on his behalf. A parallel may be drawn to family offices set up by HNI individuals where these individuals appoint a group of finance and accountancy professionals who are entrusted with managing the funds of these individuals. The assessee may be a conservative investor and may not have invested in mutual funds, stock market or private equity, however, the same cannot be held against him unless the considerations as stated above are examined in detail. Given that these considerations have not been taken into consideration and examined by the lower authorities, we deem it appropriate to remand the matter back to the file of the Assessing officer to examine the same afresh including the decision of the Coordinate Bench referred supra, after providing reasonable opportunity to the assessee. In the result, the ground is allowed for statistical purposes.

50. In the result, the appeal of the Revenue is disposed off in light of aforesaid directions.

ITA No. 152/JP/19

51. Now coming to assessee's appeal. In Ground No.1, the assessee has challenged the action of Id. CIT(A) in not accepting the value of wells, Baories and roads as on 01.04.1981 and thereby not allowing the cost of Rs. 27,50,000/- and corresponding indexed cost while computing the capital gains in respect of third transaction of sale of land measuring

7.36 hectare to Shri Neeraj Suwalka vide sale deed dated 02.01.2013 for consideration of Rs. 10.00 crores.

52. Briefly stated, the facts of case are that the assessee has claimed the cost of acquisition on the basis of registered valuer's report dated 20.03.2013 wherein the registered valuer has taken the value of the property as on 01.04.1981 and value so estimated by the registered valuer includes the market value of two baories, three wells and other structures said to have existed on the land which was transferred. During the course of assessment proceedings, the matter relating to cost of acquisition was examined by the Assessing Officer and show cause was also issued to the assessee. The AO held that the assessee transferred bare land without any construction work as per registered sale deed and thus full value of consideration was only for transfer of land excluding any consideration for boundary wall, baories and road etc for which no separate consideration was mutually agreed upon by both the parties nor receivable by the assessee and payable by the transferees. Hence, fully value of consideration was only for bare land transferred, hence, indexed cost of acquisition of land only deductible u/s 48 of the Act.

53. Being aggrieved, the assessee carried the matter in appeal before Id. CIT(A). The Id. CIT(A) stated that though the Assessing Officer referred the matter for valuation to the DVO u/s 55A of the Act. However, given that the report of the DVO was not received prior to passing of the AO, the same was not taken into consideration. Further, the Id. CIT(A) has stated that the DVO in his draft report has

acknowledged the existence of roads, 3 wells, 2 baories and boundary wall also. However, at the same time, the Id. CIT(A) has returned a finding wherein he has only allowed the cost of boundary wall as part of the cost of acquisition as on 01.04.1981. Against the said findings, the assessee is in appeal before us.

54. During the course of hearing, the Id. AR submitted that the AO took the valuation of land as on 01.04.1981 and he ignored the value of roads, wells, Baories, boundary wall stating that nothing is mentioned in the registered sale deed about such construction. It was submitted that the said findings of the AO is not factually correct as it is very well mentioned in the site plan submitted to the AO, the valuation report given by the registered valuer and the draft valuation's report given by the DVO. It was submitted that in the sale deed, the description of item is never been given, even on the sale of house, the area of Land or in some cases construction area is mentioned, but what is there in the house is not mentioned, that in India if the base (Land) is sold than all the things on said Land is sold or transferred, the things which are attached with the Land are automatically transferred with the said Land, thus there is no reason or purpose to mention about these things in the sale deed. However, on valuing the sold property, the valuer has to consider all the things, there are houses of poor construction, solid construction, light, Flooring, etc, hence the cost of respective Land or house may differ from others. In the present case, the land was transferred along with these structures and the assessee considered the value of wells, Baories, road, Boundary wall etc. as these were attached to the Land which

has been transferred and the assessee has not retained any title or possession over such structures.

55. It was further submitted that Id. CIT(A) accepted the boundary wall but ignoring other items that too without any basis and submitted that existence of this item are beyond doubt, these are mentioned by the registered valuer, also stated in the site plan and also acknowledged by the DVO in his draft report. However, the Id. CIT(A) though ignoring this fact have gone by the findings of the AO and have ignored and all these material documents available on record. It was accordingly submitted that the cost of wells, baories and roads amounting to Rs. 27,50,000/- after indexation should be allowed to the assessee.

56. Per contra, the Id. DR has relied on the findings of the AO and submitted that the sale deed is silent about the construction of this structures so claimed by the assessee and therefore, the cost thereof cannot be allowed while computing the capital gains. He accordingly supported the order of the AO.

57. We have heard the rival contentions and pursued the material available on record. The DVO has acknowledged the existence of roads, wells, Baories and boundary walls on the impugned land. Being an old construction, one may question the utility of such structures during current times and consequentially, the value to these structures which the purchaser of the property may have determined, however, the factual position is that the land has been transferred along with these constructed structures, howsoever; the insignificant value may have been attached to these structures. The assessee has also submitted an affidavit that these structures have been transferred along

with sale of land as part of the sale deed and the land area so reflected in the sale deed includes the area occupied by these structures, therefore, we find that the title and possession over the said structures along with underlying land is no more with the assessee and has been transferred to the purchaser, Shri Neeraj Sawalka. In absence of anything contrary on record, we allow the proportionate cost of these structures (after indexation) against the full value of consideration in terms of sale deed executed with Shri Neeraj Sawalka. In the result, the ground of appeal is allowed.

58. In Ground No. 2, the assessee has challenged the sustenance of disallowance of legal and other expenses amounting to Rs. 16,09,450/- which has been claimed by the assessee as expenses incurred in connection with transfer of the impugned land.

59. Briefly stated, facts of the case are that the assessee has claimed Rs. 2,83,680/- under the head legal expenses incurred for court, consultancy and advice, and other expenses and legal expenses for filing of two court cases in respect of invalid sale deeds amounting to Rs. 13,19,770/-. During the course of assessment proceedings, the matter was examined by the Assessing Officer and these expenses were found not deductible from the full value of consideration. The relevant finding of the AO reads as under:-

"(b) The assessee also claimed Rs. 2,83,680 under the head litigation legal cases expenditure fee and court expenses and legal expenses for filing of court cases in respect of invalid sale of Rs. 13,19,770/- i.e. totaling of Rs. 16,03,450/- claimed as deductible expenses out of full

value of consideration which have carefully considered and found not deductible

(i) These expenses said to have incurred in the F.Y. 2013-14 (not in the P.Y. under consideration) and mostly about one year period later than the transfer of property had completed in the months of Dec. 2012 & Jan. 2013 i.e. while the transfer of property was completed which was in the F.Y. (P.Y.) 2012-13 but expenses,. said to have incurred in the F.Y. 2013-14 , in other words theses expenses said to have incurred after the due date of filing the ROI by the assessee for the F.Y. i.e. P.Y. 2012-13. The sale deed of transfer of land was registered on 02-01-2013 the mostly legal expenses said to have incurred on 1012-2013. Hence, these expenses are post period of transfer of land property.

(ii) These expenses are not intrinsically related and connected to the transfer of the land.

(iii) These expenses were not incurred wholly and exclusively for transfer before passing of the title of transfer whereas the title of transferred was mutually inclusive, agreed and registered voluntarily and with the free consent of both the parties. As per transfer deed there was no any disagreement from any party and contract was legal & valid contract.

(iv) These expenses not covered u/s of 48 of section the I.T. Act 1961 as deductible expenditure from full value of

consideration. Since, there is no direct nexus between land transfer contract completed and these are incurred as post transfer expenses.

Thus, the expenses claimed of Rs.16,03,450/- under the head litigation legal cases fee, court fee and filing of court fee etc. in the name of expenses on transfer are hereby disallowed which were claimed as deductible expenses from full value of consideration receivable on transfer of land property by the assessee about one year ago i.e. in the preceding financial year 2012-13 and expenses said to have incurred in the F.Y. 2013-14, i.e. in the succeeding year of valid transfer of land property. Thus there is a clear cut differences of assessment year between transfer of land and expenses claimed for."

60. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has sustained the said disallowance so made by the Assessing Officer holding that the Assessing Officer has rightly denied the claim of deduction from the capital gains because first these expenses were incurred after the sale and secondly, they cannot be considered towards cost of purchase or improvement of the land. Against the said finding, the assessee is in appeal before us.

61. During the course of hearing, the Id. AR reiterated the submissions made before the lower authorities. It was submitted that the details of the legal expenses were duly submitted before the Assessing Officer as well as Id. CIT(A). It was submitted that in this case, the land dispute was going on since long. Further, stamp charges, consultancy to advocates have been incurred which are

expenses directly incurred in connection with the transfer. It was accordingly submitted that the expenses have been incurred in connection with transfer of the land and the same should be deductible while working out the full value of consideration.

62. Per contra, the Id. DR relied on the findings of the lower authorities.

63. We have heard the rival submissions and perused the material available on record. We find that the assessee has claimed stamp duty, court fee and other charges in respect of two court cases namely Case No. 1./12-13 dated 10.12.2013 and Case No. 2/12-13 dated 10.12.2013. Further, consultancy charges have been paid to Sr. Advocate and advocates for filing of suits and other related legal and miscellaneous expenses. These court cases are apparently in respect of two sale deeds entered into with Shri Rajeev Singh which the assessee claimed to be invalid sale deeds. Given our aforesaid findings in context of these two sale deeds that these transactions are not subject to capital gains tax, the corresponding expenses cannot be allowed while computing capital gains in respect of other sale transaction which has been brought to tax. In the result, the ground of appeal is dismissed.

64. Before Parting, we may add that the case was heard on 13.03.2020. However, due to extraordinary circumstances on account of COVID 19 Pandemic prevailing in the country and consequent, non-functioning of the Benches, the period of lockdown is required to be excluded in computation of the 90 days period prescribed for pronouncing the order, hence, the order is being pronounced within the

stipulated time frame as prescribed. In support of this proposition, we find support from the Coordinate bench decision in the case of DCIT Vs JSW Ltd [2020] 116 taxmann.com 565 (Mumbai).

In the result, both the appeal of the assessee and the Revenue are disposed off with the aforesaid directions.

Order pronounced in the open Court on 18/06/2020.

Sd/-

(विजय पॉल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 18/06/2020

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Sh. Ijayaraj Singh, Kota
2. प्रत्यर्थी / The Respondent- ACIT, Circle-02, Kota
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 91 & 152/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar