

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

ITA No. 158/Jodh/2019
(ASSESSMENT YEAR-2015-16)

Pushp Raj Bohra, M-09, Shivaji Nagar, Jalore.	Vs	D.C.I.T., Barmer Circle- Barmer.
(Appellant)		(Respondent)
PAN: AANPB 4456 C		

Assessee By	Shri Mayank Taparia & Shri Goutam Baid (CAs)
Revenue By	Shri K.C. Badhok (CIT-DR)
Date of hearing	18/03/2020
Date of Pronouncement	20/03/2020

ORDER

PER: R.C. SHARMA, AM

This is an appeal filed by the assessee against the order of the Id.CIT(A)-2, Jodhpur dated 05/03/2019 for the A.Y. 2015-16 in the matter of order passed u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act', for short].

2. The grievance of the assessee relate to explaining the scope of limited scrutiny and treating the property on sale of

capita asset as business income in place of capital gain and declined exemption U/s 54F of the Act.

3. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that exactly similar issue has been dealt by the Tribunal in the case of brother of the assessee namely Shri Ramesh Raj Bohra in ITA No. 157/Jodh/2019 dated 19/03/2020 wherein the Tribunal have deleted the addition after having the following observation:

- "2. *In this appeal, the assessee is aggrieved for taxing capital gain under the head business income and not giving benefit of exemption U/s 54F of the Act.*
3. *Rival contentions have been heard and record perused. Facts in brief are that during the year under consideration, the assessee has sold his land and offered capita gain thereon after claiming deduction U/s 54F of the Act. The AO rejecting explanation offered by assessee held that all transaction of sale of property are in the nature of business and the assessee purchase all property under consideration with business intention. Further out of expenditure being Rs.43,90,029/- claimed by assessee toward construction, the A.O. allowed Rs.21,95,015/-.*
4. *By the impugned order, the Ld. CIT(A) did not find any merit in the submission of assessee that the AO enhanced the scope of*

assessment. For income earned from transfer of assets Ld. CIT(A) upheld the finding of the AO that same is taxable as business income but the alternative plea of assessee that till the date of conversion of capital assets into business asset gain has to treated as capital gain as per provisions of section 45(2). Disallowance of expenditure was restricted to 40% by CIT(A) as against disallowance of 50% by the AO.

- 5. Against the above order of the Id. CIT(A), the assessee is in further appeal before the ITAT.*
- 6. It was argued by the Id AR of the assessee that the AO issued notice u/s 142(1) dated 07/07/2017. As per notice case has been selected for limited scrutiny for "Large deduction claimed u/s 54B, 54C, 54D, 54G, 54GA" [PB Pg 9-10]. Details of documents supporting purchase and sale of capital assets, details of transfer expenses and improvement cost, supporting documents regarding deduction u/s 54F and bank account for the year under consideration sought vide this notice. During the year under consideration assessee earned long term capital gain on sale of properties being land on different location and claimed exemption u/s 54F against such long term capital gain for purchase of house property at Bangalore. No deduction has been claimed u/s 54B, 54C, 54D, 54G, 54GA. Accordingly, it was argued that the A.O's exceeded the jurisdiction, in so far as the case was selected only for the limited scrutiny and there is no mention of case being selected with respect to the claiming of exemption U/s 54F of the Act.*
- 7. The Id AR has further contended that as per CBDT instruction No. 20/2015 dated 29/12/2015 and Instruction No. 5/2016 dated 14/07/2016 the scope of enquiry in the cases selected for limited*

scrutiny should be restricted to the issue for which case has been selected for limited scrutiny. As per said instructions where during the course of assessment proceedings in 'Limited Scrutiny' cases, if it comes to the notice of the Assessing Officer that there is potential escapement of income exceeding Rs. Five lakhs requiring substantial verification on any other issue(s), then, the case may be taken up for 'Complete Scrutiny' with the approval of the Pr. CIT/CIT concerned. Such an approval shall be accorded by the by the Pr. CIT/CIT in writing after being satisfied about merits of the issue(s) necessitating 'Complete Scrutiny' in that particular case. Such cases shall be monitored by the Range Head concerned. The AO violating CBDT instruction No 20/2015 dated 29/12/2015 and Instruction No 5/2016 dated 14/07/2016 enhanced the scope of limited scrutiny by initiating enquiry to examine whether the gain arising from sale of property by the assessee is capital gain or business income. Such enhancement of scope of limited scrutiny assessment was without any approval from Pr. CIT. That enhancing scope of limited scrutiny assessment without any prior approval of Pr. CIT is contrary to the CBDT Direction and therefore the same is without jurisdiction and any addition made beyond the scope of limited scrutiny is void ab initio.

8. *With regard to merit of addition, it was contended that the assessee was having property since last 20 years, the same held as investment therefore, eligible to claim benefit of long term capital gains and utilization of capital gains for purchase of house U/s 54 of the Act.*
9. *On the other hand, the Id DR has contended that the property on sale of land to a construction company were in the nature of business transaction, therefore, liable to tax as business income.*

10. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that during the year under consideration the assessee declared gain earned on following immovable properties under capital gain head while filing return of income:

S. No.	Property Description	Sale Consideration	Value taken by AO
1.	Fateh Royal Residency Plot G-4	13,50,000	15,72,750
2.	Fateh Royal Residency Plot A-5	10,00,000	10,41,554
3.	Fateh Royal Residency Plot B-4	10,60,000	12,18,300
4.	Fateh Royal Residency Plot B-6	10,60,000	12,18,300
5.	Fateh Royal Residency Plot G-2	17,50,000	17,50,000
6.	Fateh Royal Residency Plot G-6	17,50,000	17,50,000
7.	Fateh Royal Residency 7458 Sq Feet area through development agreement (Direct Patta in the name of Buyer) (Ld. AO taken value of Rs. 1193280/- i.e. 1/3 of 3579840/-)	35,79,840	11,93,280
8.	Fateh Hills	27,35,000	27,35,000

That out of long term capital gain arise from the transfer of above referred properties, the assessee had claimed exemption u/s 54F against the purchase of residential house at Mumbai. However, the AO while framing assessment treated transaction of sale of property referred above as business transaction and assessed accordingly.

11. From the record, we found that these properties in the name of

Fateh Royal Residency has been purchased by the assessee in the year 1995. The investment so made in property is shown as capital investment in balance sheet. Intention of assessee at the time of purchase can be clearly discern from this, moreover, a general inference can be drawn from this that why assessee purchase land with the motive of business around 20 years back, when the main stream line of family business of assessee is granites manufacturing and trading since 1986. That from the time of Purchase of land in the year 1995 till the conversion of the land for township, such land has been cultivated by the assessee and agricultural income from the same has been duly shown in the return of income filed by the assessee. Three persons whose lands were involved are family member.

- 12. The property in the name of Fateh Hills were acquired by the assessee during 2010-11. The investment so made in property is shown as capital investment in balance sheet. Three persons whose lands were involved are family member and no outside person is involved. The land was purchased by all the family persons were in the Financial Year 2010-2011. Both these properties were sold by the assessee as he was under requirement of fund for the purchase of house property. The AO discussed the issued in Para 10 to 17 at page 36 to 40. Detailed explanation on the finding so recorded was submitted before Ld. CIT(A). The Ld. CIT(A) despite holding that assets under consideration were purchased as capital asset concluded that sale of such assets was an 'adventure in the nature of trade' and not merely realization of investment in capital assets. The basis of the conclusion drawn by Ld. CIT(A) is factually incorrect. Finding recorded by CIT(A) at page 13-14 in Para 6.3.*

- 13. From the order of the A.O., we observe that to determine the*

intention at the time of purchase of property AO drawn inference only from three facts that (1) assessee has carried on construction activity before sale of property, (2) assessee is director in the company in Fateh Agro Builders Pvt. Ltd and (3) adjoining property was purchase by the family members of assessee. However, we found from the record that in case of Fateh Royal Residency all three facts present and in case of Fateh Hills no construction activity has been carried out. Intention of assessee at the time of purchase of property and Time period of holding of property not at all considered by the AO in determination of nature of transaction under consideration. Further to this AO observed that there was no urgency for the sale of the property under consideration. This fact again contrary to the facts on record. Assessee and his brother purchased different residential property at Bengalure and substantial amount has invested in this property out of sale proceed of property under consideration. It is pertinent to mention here that for the capital gain earned out of sale of these capital assets assessee claimed exemption u/s 54F for investment in residential property at Bengaluru. Further residential property purchased at Bengaluru was for personal use of assessee and not merely a capital investment.

14. *In its order, the Id. CIT(A) after holding that purchase of property as capital asset, assigned only one reason in treating the plotting of land as 'Adventure in the nature of trade' which is 'agriculture land converted in non agriculture land'. The Ld. CIT(A) had referred following judicial pronouncements.*

*(i) Rajendra Kumar Dwivedi vs. CIT [2012] 26 taxmann.com 84
(All)*

(ii) *Ramswaroop Saudagar vs ITO [ITA No 329/JP/2017]*

(ii) *CIT vs Jehangir T. Nagree [2008] 23 SOT 512 (Mum)]*

There is substantial factual difference in the case of Rajendra Kumar Dwivedi vs. CIT [2012] 26 taxmann.com 84 (All)/[2012] 349 ITR 432 and case under consideration. Though the case was decided on various factual position of that case, Ld. CIT(A) consider it appropriate to mention only one fact similar to present case (in fact even such similarity not exist). Ld. CIT(A) find that in the case of Rajendra Kumar Dwivedi (supra) "Hon'ble High Court held that since no agriculture operation were carried on, the income tax authorities rightly concluded that the capital asset was converted into stock in trade, and that sales of plots in the case of such land would be treated to be business activity to make profits." In this reference we observe that in the case under consideration agriculture activities were carried on by the assessee continually and in the year under consideration also agriculture income has been declared and same has been considered for income tax computation. Therefore reliance placed on by the Ld. CIT(A) on the judgement of Rajendra Kumar Dwivedi (supra) is uncalled for. It is pertinent to mention that Hon'ble Jurisdictional High court of Rajasthan in the case of CIT vs Sohan Khan [2008] 304 ITR 194 (Raj) held as under:

"4. The Assessing Officer found the sale to be not taxable as capital gain, but it was found to be a business income, and for that, the Assessing Officer found, that the original land is surrounded by many lands of his near relatives and family members, and if the plots would have been carved out from his land

alone, they could not have been sold for want of network of roads being available up to the adjoining lands only, and that, at some distance there is government road measuring 200 ft. Then the other circumstance is, that all the land owners had planned the sale of plots, in Nagnechi Scheme, and Vallabh Garden, together, and no land could be sold for residential purposes. Then the next ground considered is, that the purchasers were impressed by the fact that all the land belong to the same family, and is being planned, and sold together, at no stage the huge property of the assessee or his family members was used for personal purposes, and the intention was to gain profit only. Inter alia with this, it was concluded, that the transaction was in the nature of trade.

...

...

11. Coming to the G. Venkataswami Naidu and Co.'s case [1959] 35 ITR 594 (SC), the facts of that case were telling, inasmuch as, the assessee was the managing agent of the company, the mill, to whom the land was sold, and the land was situated adjoining the mill, a total land measured 5 acres 26 cents, and was purchased by four sale deeds dated October 25, 1941, November 15, 1941, June 29, 1942 and November 19, 1942, and after about 5 years it was sold in two lots to the mill, on September 1, 1947 and November 10, 1947. By this transaction, the assessee earned the profit of Rs. 43,887 and odd. On these facts the Tribunal and High Court had found the transaction in question being an "adventure in the nature of trade", correctness of which view was challenged before the Hon'ble Supreme Court. The expression "adventure in the nature of trade" is defined in section 2(4) of the Act, and the Hon'ble Supreme Court considered various judgments of House of Lords and other decisions of the

Court of Appeal etc., and then, at page 609 of 35 ITR it was held as under :

...

12. Then in final concluding para, after recapitulating the relevant facts of the case, it was found, that the purchase was the first step taken by the appellant therein in execution of the well considered plan, to acquire open plots near the mills, and the whole basis for the plan was to sell the said lands to the mills, at a profit, and then the subsequent conduct of the purchaser was considered, and after appreciating the totality of attending circumstances, it was found to be a series of transactions, undertaken by the appellant therein, in pursuance of the scheme, and it was after the appellant had consolidated its holding, that at a convenient time the land was sold. The appellant was found to be managing agent of the mill, who was in a position to influence the mill to purchase its properties, which cannot be said to be unreasonable. Thus, in our view, in view of the principle propounded therein, and on the facts of that case as considered, it is clear, that in order to arrive at a conclusion, as to whether it is to be taxed as capital gain or the transaction is to be treated to be an "adventure in the nature of trade", things cannot be put in any strait jacket formula, and it was dependent upon the facts and circumstances of each case, to be decided on the basis of relevant considerations.

13. In our view, one of the most significant considerations would be, the regularity of transaction of purchase and sale. Mere fact that there was a series of transactions of sale only, by selling the part of the whole land, purchased in one go, or purchased once upon a time, in piecemeal, would not render the activity of sale to be an "adventure in the nature of trade". In the present case, there is nothing to show

that the land was purchased with the intention to sell at a profit, or with requisite intention, to bring it within the parameters of "stock-in-trade". It is not shown that the assessee is a regular dealer in real estate. It appears, that the land was purchased in 1970, which was under cloud of land ceiling laws, and after that cloud was cleared, and other adjoining lands had been developed, and since the land was not yielding any return, it was decided to be sold in piecemeal, by earmarking plots, but then nonetheless it would remain a disposal of the capital asset only, and not a transaction of any "stock-in-trade" so as to be described as "adventure in the nature of trade". Obviously therefore, it is liable to be taxed only, as the capital gain."

15. *In the case of Ramswaroop Saudagar vs ITO [ITA No 329/JP/2017] relied on by the CIT(A) only factual similarity is that conversion of land into plots. Otherwise facts that holding period, intention of purchase and sale of property as fund were required for purchase of residential house property at Bengaluru were not at all considered by Ld. CIT(A). Further to this the Judgement in the case of Ramswaroop Saudagar vs ITO [ITA No 329/JP/2017] is contrary to the judgement of Jurisdictional High Court of Rajasthan in the case of CIT vs Sohan Khan (supra). On the similar facts as were in the case of Ramswaroop Saudagar (supra) Hon'ble Rajasthan High Court in the case of CIT vs Sohan Khan (supra) held transaction taxable as capital gain.*
16. *In view of the above discussion, we can safely conclude that the land was purchased by the assessee since long back as capita asset and was continuously hold by it for 20 years in case of Fateh Royal Residency as capita asset. There was no intention of assessee to trade for the land so purchased, contrary it was used for agricultural*

purposes continuously till the year of sale. Similarly, the Fateh Hills property was acquired long back in the year 2010-11 as capital asset and was so held as capital asset in the balance sheet. Merely conversion of the agricultural land into non-agricultural land will not give rise to the taxable event until it is actually sold. Thus, the assessee has sold the capital asset held for long term, accordingly, gain arising from sale was eligible for deduction U/s 54F of the Act. Accordingly, we direct the A.O. to treat the property on sale of land as capital gain and given the benefit of exemption claimed by the assessee U/s 54 of the Act. We direct accordingly.

- 17. The next grievance of the assessee relates to allowing deduction expenditure of Rs. 17,56,012/- as against the expenditure of Rs. 43,90,029/- claimed by the assessee.*
- 18. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the A.O. has allowed 50% of the expenditure by stating that no supporting bills of expenditure were provided to him. However, this finding of the A.O. was discarded by the Id CIT(A) after observing as under:*

"That Ld. AO on the basis of finding recorded in Para 19 & 20 disallowed half of construction cost claimed on the property transferred during the year under consideration. From the bare reading of finding recorded while disallowing claim of construction cost it appears that Ld. AO recorded finding without considering documents produced for verification and documents submitted during the course of assessment proceeding. The finding that "No bills supporting such expenditure were provided to this office despite being asked clearly." is totally incorrect as the documents relevant to construction cost has been produced during

*the course of hearing and same has been verified by the Ld. AO on test check basis. It was submitted that plot wise details has not been maintained and total construction cost incurred has been averaged and claimed accordingly against property sold. Submission made had been reproduced by the Ld. AO in the assessment order (page 16 of assessment order). Therefore finding recorded with reference to non production of documentary evidences is grossly erroneous and contrary the material available on record. With reference to non reflecting of entries in bank statement on voucher to voucher and day to day basis was that for multiple invoices/ expenditure payment was made through single cheque. A detailed submission showing each payment from bank account towards nature of expenditure and documents detail thereof **[PB 33-46 (36-38), 56-66]** were produced/ submitted before Ld. AO. Going through such detail your good self will observe that all payment referred therein are not in next year. The submission of the assessee was that payment of multiple invoices was made through one cheque and at different date than of invoice. A detailed chart about the expenditure claimed and payment thereof through bank has been submitted during the assessment proceeding."*

- 19. It is clear from the findings of the Id. CIT(A) that he has totally discarded the observed of the A.O. for non-production of documentary evidence in support of the expenditure. However, in respect of giving this fact, the Id. CIT(A) has allowed on ad hoc basis only 40% of the expenditure so claimed was genuine and incurred for developing the property, therefore, eligible to be allowed as a deduction while computing capital gains on sale of this property amounting to Rs. 43,90,029/-. Accordingly, we do not find any justification in the order of the Id. CIT(A) for sustaining disallowance of 40% against the 50% disallowance made by the*

A.O., therefore, the A.O. is directed to allow full expenditure so incurred by the assessee amounting to Rs. 43,90,029/-. We direct accordingly.

20. In the result, appeal of the assessee is allowed."

4. As the facts and circumstances in the instant case are exactly same, therefore, respectfully following the order of the Tribunal in the case of brother of the assessee Shri Ramesh Raj Bohra, we do not find any justification for the addition so made treating the capital gain as business income and not allowing deduction of expenditure so incurred.

5. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 20th March, 2020.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

Dated : 20/03/2020

*Ranjan

Copy to :

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File (ITA No. 158/Jodh/2019)

Assistant Registrar
Jodhpur Bench