IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

<table>
<tr><td colspan="3">ITA No. 1854/H/2018
Assessment Year: 2010-11</td></tr>
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<tr><td>Income-tax Officer,
Ward – 11(5), Hyderabad.</td><td>Vs.</td><td>Suresh Babu Vasireddy,
Hyderabad.

PAN – ADNPV 4393H</td></tr>
<tr><td>(Appellant)</td><td></td><td>(Respondent)</td></tr>
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<tr><td>Revenue by:</td><td colspan="2">Shri Rohit Mujumdar</td></tr>
<tr><td>Assessee by:</td><td colspan="2">Shri Ravi Bharadwaj</td></tr>
<tr><td></td><td colspan="2"></td></tr>
<tr><td>Date of hearing:</td><td colspan="2">14/06/2021</td></tr>
<tr><td>Date of pronouncement:</td><td colspan="2">17/06/2021</td></tr>
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O R D E R

PER L.P. SAHU, A.M.:

This appeal filed by the Revenue is directed against CIT(A) – 5, Hyderabad's order dated 25/07/2018 for AY 2010-11 involving proceedings u/s 143(3) rws 147 of the Income Tax Act, 1961 ; in short "the Act" on the following grounds:

"1. The learned CIT(A) has erred both in law and on facts of the case.

2. The learned CIT(A) erred in treating the income of the assessee as business income instead of Short Term Capital Gains.

3. The CIT (A) erred in arriving at rationale that the assessee Is into the business of buying and selling of properties and treating the property sold as stock-in-trade instead of Capital asset.

4. The learned CIT(A) erred in treating the income of the assessee as business income basing on the number of transactions done by the assessee without appreciating the fact that the number of transactions are very few.

5. The learned CIT(A) erred in treating the income of the assessee as business income, and, if so, the assessee was liable to file an audit report uls 44AB since his turnover would have been more than the statutory limit prescribed, even though the assessee failed to furnish audit report.

6. The learned CIT(A) erred in ignoring the fact that the assessee took over the possession of the property, with respect to which the addition u/s SOC was made, which shows that he was not merely a facilitator between the vendor and vendee but has actually acquired the property from one person and then sold it to a third person.

7. The learned CIT(A) erred in ignoring the fact that the assessee did not produce any details of parties, Bank Account statements, purchase and sale deeds, etc in support of his claim that he earned commission income during that financial year.

8. The learned CIT(A) erred in allowing the appeal of the assessee without calling for evidences to substantiate its claims and Without calling for a remand report from the Assessing Officer.

9. Any other ground(s) that may be urged at the time of hearing."

2. Brief facts of the case are that the A.O. was in receipt of information that the appellant has sold immovable property vide document no. 3291/2009 dated 05.10.2009 for a total consideration of Rs. 4,52,40,000/- (5OC value) and that the said property was purchased by the appellant vide document no. 1967/2209 for a consideration of Rs. 1,60,00,000/-. As the assessee did not file any return of income, the A.O. issued notice u/s. 148. The assessment was completed vide order u/s. 143(3) r.w.s. 147 dated 29.12.2017 arriving at total assessed income of Rs. 2,93,82,560/- which included STCG of Rs. 2,92,40,000/ -.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) and the CIT(A) after considering the submissions of the assessee, which were extracted in his order at pages 5 to 8 directed the AO to treat the transaction of sale and purchase of property under the head business income and not under the capital gains as treated by the AO, by observing, inter-alia, as under:

"The AO vide order sheet dated 29.12.2017 noted as under:

"The assessee filed a confirmation letter from Mr. T. Narendra Choudary wherein Mr T. Narendra Choudary confirmed that during F. Y. 2009-10, he gave an amount of Rs. 1,60,00,000/- to the assessee towards purchase of land which was returned back by the assessee during the year itself. Further the assessee has also filed P & L account for the year ended 31.03.2010 showing commission income and stated that the said property Was stock-in-trade and Provisions of section 5OC is not applicable. Considering the assessee's submission, the sources of purchases is found to be acceptable, however, the claim of the assessee that the said property falls under stock-in-trade is not acceptable for want Of proper documentary and corroborative evidence. Hence it is treated that the assessee has sold capital assets and liable for capital gain as short term capital gain."

The AO has accepted that the appellant has borrowed funds for purchase of property; the documentation states that the property is held for less than 4 months, the AO accepts that the appellant derives commission income from the sale purchase of property.

The AO feels that there is no documentary and corroborative evidence to state the same as stock-in-trade. The documents state that the property was held for a short period of time and there is no prima facie corroborative evidence which is required to be filed by the appellant for the same to be called stock-in-trade, which can only be shown in the return of income. The appellant has not filed the return of income and the said default cannot change the nature of the transaction into taxability of the transaction under a different head of income.

The taxation of a transaction depends on the nature of transaction and the duration of holding the same. It is important to note that the appellant derives commission income from the sale and purchase of *property, which has been accepted by the AO and further the appellant has also filed the details of other two properties which were purchased and sold by the appellant, giving the appellant small incomes as compared to the quantum of transaction as brought out in the chart above. The duration of holding those two properties ranged between 4 days and 8 months and the same generated incomes commensurate to commission.*

The above did not result in any adverse inference by the AO at any point in time. The transaction which has been taxed as capital gains is similar to the said two transactions filed before the AO and only fortifies the activity of the appellant, that it being involved in such transaction over and above the fact of getting commission income on such transactions.

As highlighted in bold in sl. no. 3 which is the property under consideration for taxation as capital gains, the appellant stated that as per document the profit was Rs. 45,400/-, the appellant however made a total profit of Rs. 3,11,000/ - (inclusive of Rs. 45,400/-) and the same was reflected as commission.

The commission income made on the transaction on property at s1. no. 1 was Rs. 77,200/- and on property at s1. No.2 was Rs. 15,000/-(the document difference shows a loss of Rs. 3,02,950/- however, the transactions as stated before the AO were not routed through the bank account of the appellant). The total gross commission made on these three transactions was Rs. 4,03,200/which has been accepted by the AO.

In view of the above facts, that the sources of the funds were borrowed and were repaid on the sale of property under consideration at s.l. No.3, the duration of holding the property was less than 4 months which is a short period of time, the appellant draws commission income on the transactions related to property which has been accepted by the AO and also the fact that the appellant *has cited two transactions of similar nature before the AO, which did not attract any negative inference to tax the same under a different head than offered by the appellant, therefore, the transaction of sale and purchase of property should be taxed under the head Business Income on the basis of actual sale and purchase price (as section 43CA was effective only on 01.04.2014) and not under the head Capital Gains.*

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

5. Before us, the ld. DR contended that the assessee was engaged in the business of executing real estate transactions and getting commission income is not acceptable as assessee has failed to produce any corroborative evidence in support of the same. The AO, therefore, treated that the assessee has sold capital assets and accordingly brought to tax the consideration under capital gains. He submitted that the CIT(A) wrongly treated the income of the assessee as business income on the number of transactions done by the assessee without appreciating the fact that the number of transactions are very few.

6. The ld. AR, on the other hand, relied on the order of the CIT(A).

7. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The assessee is basically engaged in the business as a real estate agent in Hyderabad deriving commission income. The modus operandi of the business activity is that of identifying properties for sale in Hyderabad and simultaneously identify the interested buyers and sell the properties with a marginal profit. Further, the assessee is also engaged in sourcing properties for commercial lease to derive commission income. The assessee sold a property for a consideration of Rs. 4,52,40,000/-,which was purchased by him at Rs. 1,60,00,000/-. The said consideration was treated by the AO as short term capital gains on the ground that the assessee has failed to produce any corroborative evidence in support of that he is engaged in the business of executing real estate transactions and getting commission income. The CIT(A) directed the AO to treat the sale consideration received by the assessee on the sale of property under the head business income for giving detailed findings cited supra. Therefore, we do not find any infirmity in the order of the CIT(A) in directing the AO to treat the transaction of sale and purchase of property should be taxed under the head business income and upholding the order of CIT(A), we dismiss the grounds raised by the revenue on this issue.

8. In the result, appeal of the revenue is dismissed.

Pronounced in the open court on 17th June, 2021.

Sd/-	**Sd/-**
(S.S. GODARA)	**(L. P. SAHU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 17th June, 2021.

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3	*CIT(A) – 5, Hyderabad.*
4	*Pr. CIT – 5, Hyderabad*
5	*ITAT, DR, Hyderabad.*
6	*Guard File.*