IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM

ITA No. 145/ SRT/2017

(Assessment Year: (2011-12)

(Virtual Court Hearing)

Deputy Commissioner of Income Tax, Circle-2(1)(1), Room No.223, Aayakar Bhavan, Majura Gate, Surat-395001	**Vs.**	Shri Virendrabhai Devjibhai Patel, C-17, Sagar Industrial Estate, Nr. Community Hall, Vasta Devdi Road, Surat-395004
PAN/GIR No.: **AAMPP 3055 A**		
(Assessee)		**(Respondent)**

Assessee by : Shri Aditya B Nemani, C.A

Respondent by : Shri H.P. Meena– CIT-DR

Date of Hearing : 29/06/2022

Date of Pronouncement: 16/09/2022

O R D E R PER DR.

A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the Revenue, pertaining to assessment year 2011-12, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-3, Surat, [for short 'Ld.CIT(A)'] dated 12.07.2017, which in turn arises out of an order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act'), dated 30.03.2014.

2. The grounds of appeal raised by the Revenue are as follows:

"i) On the facts and circumstances in the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.14,78,58,450/- made on account of Long Term Capital Gain arising out of sale of two properties i.e. Revenue survey No.547, Vesu and Revenue Survey No.550, Vesu.

ii) On the facts and circumstances in the case and in law, the Ld. CIT(A) erred in determining the income from the sale of two lands as business income without appreciating the fact that the same was shown in the balance sheet as fixed assets instead of 'stock in trade' in the return of income filed for previous years.

iii) On the facts and circumstances in the case and in law, the Ld. CIT(A) erred in holding the sale of land at Survey No.550, Vesu as invalid and hence the income

is not capital gain without appreciating the fact that the assessee purchased land admeasuring 20,700 sq.Mtrs. through registry dated 04/12/2006 out of which he sold only 13,800 sq mtrs. Vide satakhat which he himself had admitted of having possession before the Civil Court vide appeal No.59/07, which clearly follows that the title was clear and hence the transfer of property was valid.

iv) On the facts and circumstances in the case and in law, the Ld. CIT(A) erred in holding the sale of land at Survey No.547, Vesu as invalid and hence the income is not capital gain without appreciating the fact that the assessee had sold the land vide Dastavej No.8552 which contained the compromise agreement between the assessee, the original land holders and 15 companies from which the assessee had purchased the said land before the court, which was subsequently registered by the sub-registrar clearly reflecting that the land was transferred after resolving all the disputes in the year 2010 and hence the sale is valid.

v) The order of the Ld. CIT(A) is perverse inasmuch as that vide para 8.5 of his order he has held that the lands cannot be treated as capital assets of the assessee as he did not incur any cost of acquisition without appreciating the fact that the both the lands were purchased vide registered documents on 04.12.2006 for Rs.7,79,000/- and Rs.10,35,000/- including stamp duty by the assessee himself vide cheques as clearly evidenced by the purchase deeds dated 04/12/2006.

vi) The Hon'ble CIT(A) erred in not appreciating the fact that the assessee had deliberately not disclosed the sale of the two lands in the original return of income when the sale was effected before the filing of the return and reflected the same as business profit in the revised return after receiving notice u/s 143(2) to avoid capital gain tax and continuously changed his stand with regard to incidence of tax without providing supporting documentary evidences.

vii) On the facts and circumstances in the case and in law, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld. CIT(A)-3 Surat may be set-aside and that of the Assessing Officer's order may be restored."

3. Briefly stated, the relevant material facts are as follows. The assessee before us is an individual and has filed his return of income on 22.11.2011 declaring total income at Rs *62*,16,890/-. Subsequently, assessee has filed revised return of income on 22.10.2012 declaring total income at Rs 65,95,420/-. The said return of income was processed under section 143(1) of the Income Tax Act accepting the income returned. In revised return, the assessee has shown the profit from sale of two plots of land amounting to Rs.3,78,533/-. The revised return has not been accepted by the assessing officer, as the original return was filed belatedly. The assessee`s case was selected for scrutiny under CASS and after issuing formal notices u/s 143(2), 142(1) along with questionnaire etc. the Assessing Officer

finalized the assessment by passing an assessment order on under section 143(3) of the Act on 30.03.2014. The assessing officer held that assessee has neither sold the land as part of AOP (Association of Persons) nor he has done any business of land trading. Therefore, assessing officer was of the view that it is the capital gain in the hands of the assessee. Besides, assessee has not disclosed this LTCG in the original return of income, hence it is undisclosed capital gain of the assessee. During the assessment proceedings, the assessee submitted its reply dated 17.02.2014 and other submissions. However, assessing officer rejected the contention of the assessee and made two additions under the head Long Term Capital Gain (LTCG) in respect of two properties one at Rs No. 547 Vesu and another property at R S no. 550 at Vesu, as follows:

(i) Undisclosed LTCG on the sale of land at Vesu-547: Rs.39,60,335

(ii) Undisclosed LTCG on the sale of land at Vesu-550: Rs.14,38,98115

Therefore, Assessing Officer made total addition to the tune of Rs.14,78,58,450/- (Rs.39,60,335 + Rs.14,38,98,115).

4. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Ld. CIT(A) who has treated the transaction in land as business income instead of Long Term Capital Gain and allowed the assessee`s appeal partly. Aggrieved, the Revenue is in appeal before us.

5. Learned Departmental Representative (ld.DR) for the Revenue argues that income derived by the assessee from the sale of these two lands is in the nature of Long Term Capital Gain (LTCG) and not the business income. He pointed out that these properties were shown in the balance sheet as fixed assets instead of 'stock in trade' in the return of income filed for previous years. He further pointed out that assessee had deliberately not disclosed the sale of the two lands in the original return of income when the sale was effected before the filing of the return and reflected the same as business profit in the revised return after receiving notice u/s 143(2) to avoid capital gain tax and continuously changed his stand with regard to

incidence of tax without providing supporting documentary evidences. Therefore, ld DR prays the Bench that order passed by the assessing officer may be upheld.

6. On the other hand, Ld. Counsel for the assessee defended the order passed by the Ld. CIT(A).

7. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. Though facts have been discussed in detail in the foregoing paragraphs, however in the succinct manner, the relevant facts and background are reiterated in order to appreciate the controversy and the issue for adjudication. During the year, the assessee had entered into transactions, with regard to two immovable properties (lands) appearing in Survey No 547, and survey no 550 at Vesu, Surat. The assessee filed his return of income on 22.11.2011 declaring total income at Rs. 62.61 lakhs. In this return of income, the assessee failed to disclose the income earned from the above two transactions. Subsequently, on 22,10.2012, the assessee filed revised return of income. In the revised return, the assessee offered the income of Rs.3,78,533/- earned out of above two transactions as “Business Income" thereby taking total income to Rs.65.95 lakhs. The assessing officer has not recognized the revised return of income, as the original return itself was belated return filed after due date given u/s 139(1) of the Act. Therefore, assessing officer made addition in respect of two properties at Rs. 14,78,58,450/- (Rs.39,60,335 + Rs.14,38,98,115).

8. During the appellate proceedings, ld CIT(A) observed that main dispute in assessee`s case, is regarding the nature of transactions of these two properties. That is, whether income from sale of these two properties should be taxable under the head “Capital Gain” or under the head “Business Income”. During the appellate proceedings, the assessee contended that income should be assessed under the head “Business Income”. Therefore, ld CIT(A), during the appellate

proceedings, after going through the submission of the assessee, summarized the claim of assessee as follows:

(i) Though the transactions were done by the assessee, the real investment in the transaction was carried out by Shri. Dharmeshbhai Patel (in short SDP). The assessee and SDP entered into an arrangement wherein, SDP provided the money required to buy such property, physical possession of which, is not possible in the name of assessee. These properties would be later sold for profit and the profit is shared at ratio of 10:90 after recovering the investment made by SDP.

(ii) The terms and conditions of this arrangement is laid down in the Memorandum of Understanding (in short 'MOU'). The MOU is printed on 100 rupees stamp paper purchased on 13.10.2016 and has the name, stamp and signature of the stamp paper vendor along with date. It also contains rubber stamp and signature of advocate namely Shri Bhupatsinh B Baria who apparently drafted the MOU. The MOU contains signature of two witnesses along with signatures of the assessee and SDP. This MOU is not registered and not notarized.

(iii) The assessee explained the entire sequence of transactions, evidenced in the bank accounts, sale agreement and the Memorandum of Undertaking. It can be seen that, the transactions have been carried out as laid down in the said MOU.

9. The ld CIT(A) has gone through the sequence of transactions, as evidenced by the bank accounts, sale deed, and sale agreement, etc, and noted that the transactions are being conducted in the manner as laid out in the MOU. The ld CIT(A) after reading of assessment order, observed that assessing officer was lead to believe that the assessee is claiming that transaction is made through AOP. The MOU, however, does not suggest creation of any AOP. The assessee argued before ld CIT(A) that said Memorandum of Undertaking is on stamp paper purchased on a particular date and contains the signature of the Stamp Vendor, advocate, parties to MOU and two witness. Hence, it should be presumed to be executed on that particular date. The assessee also relied on the Judgment of

Hon'ble Supreme Court in case of **Sreelekha Bannerjee** (491 ITR 122), wherein it was held that " ..... *before the department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence, which it has in possession ...*"

10. Then after, ld CIT(A) summarized the sequence of events as follows:

> *"Two lands were purchased on 28.11.2006 and amount paid is reflected in books of accounts of SDP. The payments have been made by Demand Drafts purchased in ABN AMRO Bank through account no. 1191714, even though the sale deed / sale agreement show only one buyer i.e the assessee. Subsequently, on 11.05. 2010, a joint account of assessee and SDP was opened in Rajkot Nagari Bank, Surat branch a/c no. 38/2463. The sale proceeds of the two lands are deposited in this account and then distributed to the assessee and SDP in same manner given in the MOU as under :-*

Sale consideration of R S No. 547	*21.05.2010*	*Rs.24,01,000*
Transferred to SDP	*08.07.2010*	*Rs 22,40,460*
Transferred to assessee	*23.07.2010*	*Rs.1,60,540*
Sale consideration of R S No. 550	*01.01.2011*	*Rs 33,00,000*
Transferred to SDP	*10.03.2011*	*Rs 30,82,063*
Transferred to assessee	*11 .03.20 11*	*Rs 2,17,993*

11. From the above sequence of events, the ld CIT(A) observed that there is no hint of making of an AOP appears in MOU and also it does not appear to be intention of the assessee and SDP. Hence, the existence of AOP or filing of return of AOP is irrelevant here. The assessee submitted that unless some overriding and irrefutable evidence is found, things need to be presumed to exist as they appear. The Assessing Officer ought of have given evidence and cogent reasoning to say that MOU is not a genuine document or that it is an afterthought. No such claim is made in the assessment order. However, this argument is redundant as the Assessing Officer has not given any Adverse finding or contrary inference on the said MOU. On careful consideration of the facts in this case, the ld CIT(A) observed that even if the Memorandum of Undertaking is rejected, the entire sequence of transaction shows that there was an arrangement and meeting of

minds between the assessee and SDP to acquire such litigated lands and dispose of at a profit. This shows that assessee and SDP collaborated to sense an opportunity, take risk, plan their moves to reach their objective of earning profit. Both the lands were bought in the name of the assessee, but the money is invested by SDP being fully aware of litigation involved and that the money may be lost. By these facts, the transactions clearly appear to be business transactions or an adventure in nature of trade. Purchase of property with an intention to sell, it is Key ingredient of an adventure in nature of Trade, as held by the Hon'ble Supreme Court in case of Indramanibai 70 Taxmann. Com 67. The ld CIT(A) noted that assessing officer has not really examined this issue and given a reasoned fluid based on cogent analysis.

12. The ld CIT(A) observed that no investment is made by the assessee; the assessee has not incurred any 'cost of acquisition'. Hence, the lands cannot be called as his Capital Assets. The assessee has only allowed his name to be used in the transactions and has personally involved in the making of these deals. The income earned by the assessee is not an appreciation of his investment, but it is consideration for being part of the arrangement to earn profit from transactions involving lands. The income earned is towards his personal involvement and for time contributed. There is no transfer of Capital Asset by the assessee. For this reason too the income earned by the assessee cannot be said to be Capital Gains. In the absence of 'cost of acquisition' the computation of Capital Gains as per section 48 cannot be made in a strict sense. It is seen that the Assessing Officer has computed LTCG by deducting indexed '**cost of acquisition**' which is actually incurred by SDP and not by the assessee. It can be seen that SDP has claimed the same in his return of income.

13. The ld CIT(A) noted that it is evident from the bank account, the amounts invested by SDP and 90% the profit made on two transactions is remitted to his account. SDP has disclosed the profit made from these two transactions in his return of income under the head "**Business Income'** which is accepted u/s 143(3) vide order dated 26.03.2013. The 90% of the profit arising from these transactions

has already been taxed as "**Business Income**" by the department. Principles of uniformity demands that the balance 10% also to be taxed as '**Business Income'.** During the appellate proceedings, the assessee submitted that when the immovable property is bought and sold with an intention to earning profit, then the transaction takes the nature of adventure in nature of trade. Therefore, ld CIT(A) noted that there is a clear element of business planning, risk taking and intention to re-sell for profit. The profit earned from the above two transactions hence, has to be taxed under the head '**Business income'** and not as LTCG. Therefore, ld CIT(A) considering the facts of the assessee and legal position applicable to the facts, held as follows:

"9. As already stated above, it is clear that the lands located at Survey Nos 547 and 550, at Vesu, Surat are disputed lands and physical possession was not possible. The two lands were agricultural lands and original owners had sold them to Private Limited Companies with whom assessee entered into sale agreement / sale deed as the case may be. Both lands being agricultural lands, could not be sold to the Private Limited Companies as per State Law. Hence, the sellers had faulty title and could not pass on good title to the assessee. It can be seen that the transactions with assessee have been made at a very low price. This explains the situation. The sellers did not have title so, they had to dispose of lands for whatever amount they would get to minimize losses.

*9.1 In the case of survey no. 547 at Vesu, the original owner of land (Patel family) sued the 15 companies to whom it had allegedly sold the land saying that the sale made to them was bogus. The assessee has purchased the land from these 15 companies, so title is faulty. However, all the 3 parties involved appeared to have reached a compromise and the original owners (Patel Family) and the 15 companies and the assessee together sold the said property to one Jasmathbhai N Vidiya. The final sale deed of the property executed on 31.06.2010 at the Sub Registrar Office, Surat, mentions the names of all the original owners i.e. Members of the Patel family and the assessee appearing as '**sellers**' and also give details of payments received by each of them. (page no. 4 of sale deed.). As evident therein, the assessee got a sum of rupees 24,01,000/-. Out of this, the assessee gave a sum of Rs.22,40,460/- to SDP as evidenced by the bank account. The balance amount of Rs.1,60,540/-only was retained by the assessee. Such being the complicated situation, understandably the sellers i.e. the Member of Patel family, the 15 companies from whom assessee purchased land as well as the assessee were in a hurry to dispose off the said land. Understandably they would not, wait for the market rates for the land.*

9.2 In the case of land bearing Survey No 550 at Vesu Surat.

'The facts in this case are also same as survey no. 547. However, in this case, the litigation took a different turn wherein, the State Government acting through the State Revenue authorities cancelled the sale by issue of circular dated 23.11.1998. By virtue of this circular, the said 15 companies could not acquire a "title' in the said land. In response, the 15 companies moved single member bench of the Hon'ble High Court of Gujarat and got a favorable order dated 14.03.2000. The State Government filed an appeal before the Division Bench in the same year. Meanwhile, during the year 2006, apparently with full knowledge in the face of risk of adverse order in appeal, the assessee entered into Satakhat (sale agreement) to buy the land at the cost of Rs.10.35 lakhs. Subsequently, the Division Bench of the Hon'ble Gujarat High Court pronounced

an order on 31.08.2010 quashing the said purchase of land by the 15 companies. Subsequently, the Mamlatdhai issued an order dated 28.06.2013 vesting the ownership of the said lands, in the Government of Gujarat. This made the Satakhat as ***null and void*** *and non - executable.*

9.3 In the circumstances, the assessee on 29.12.2010 entered into an agreement with Shri Arvindbhai Tejani, wherein he has transferred all his right in the said land to him, for Rs.33,00,000/- This sale agreement is not registered with the Sub Registrar of Surar, as the assessee does not have any title in the land as the ownership of land vests with State Government.

9.4 The case laws cited / argued by the AR are considered .and the legal position w.r.t transfer in case of immovable property is discussed by the Hon'ble Courts as under:-

Pendente lite

Section 52 of Transfer of Property Act, 1882 provides that a property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of other party to the suit. Hence, where the assessee purchased from the owner a property during pendency of an appeal filed after dismissal of suit of specific performance filed by a purchaser to whom the owner had earlier agreed to sell and the appellate Court decreed the suit of specific performance in favour of prior purchaser and directed that the owner shall execute sale deed in favour of said prior purchaser and assessee as subsequent purchaser would join in the execution of said sale-deed, it was held that since the assessee did not get any title to the property, he was not liable for any tax on any supposed capital gain even though the assessee had shown in his accounts certain capital gain to have resulted to him [CIT vs. Provincial Farmer P. Ltd. (1977) 108 ITR 219 (Cal) : TC20R.946].

Effective conveyance— Mere delivery of possession not sufficient

In Alapati Venkatramaiah vs. CIT (1965) 57 ITR 185 (SC) : TC20R.154 reversing CIT vs Alapati Venkataramiah (1962) 46 ITR 623 (AP) : TC20R.161, it has been observed that though the word "transfer" in section 12B is used in addition to "sale" yet, in the context, transfer must mean effective conveyance of the capital asset to the transferee and delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of immovable property. See also Meccane Industries Ltd. vs. CIT 174 CTR (Mad) 70 : (2002) 254 ITR 175 (Mad)

Sale of immovable property— Registered deed necessary

In Addl, CIT vs. Mercury General Corpn, (P) Ltd. (1982) 26 CTR (Del) 171 : (1982) 133 ITR 525 (Del) : TC20R.987 the building owned by the assessee which was in the occupation of tenants was agreed to be sold under an agreement in which it was mentioned that intending purchasers were entitled to receive rent from the tenants. Since there was no conveyance by a registered deed, the finding of the Tribunal that there was no transfer within the meaning of section 2(47)' was upheld.

The title to immovable property of the value of rupees one hundred and upwards passes on the date of execution of registered sale-deed and not on the date of execution of agreement [Hail & Andersen Pvt, Ltd. vs. CH (1963) 47 ITR 790 (Cal): TC20R, 990A, K.C. Pal Chowdhury vs. CIT (1962) 46 ITR 1 (Cal) : TC20R.991, CIT vs. Meetles Ltd. (1972) 84 ITR 37 (Del)].

Mere agreement of sale is not a transfer [CIT vs. jayaiakshmi Rajendran (1985) 152 ITR 744 (Mad); M.D. Joseph vs, CIT (1990) 90 CTR (Ker) 6 : (1990) 187 ITR 112 (Ker) : TC20R.996] [See also Alapati Venkatararnaiah vs, CIT (1965) 57 ITR 185 (SC) : TC20R.154].

In CIT vs. Minerva Talkies (1996) 133 CTR (AP) 10 : (1996) 217 ITR 591 (AP) it was held that things permanently attached to that which is embedded in the earth is immovable property and

such things (cinema hall in the instance case) not having been conveyed by way of registered document, no transfer took to give rise to capital gains.

Sale transaction of land being declared null and void by the Collector, no capital gains accrued to assessee on null and void transfer of such land, [CIT vs. Vithaibhai P Patel) (1998) 148 CTR (Guj) 601]

9.5 In case of land at survey no. 550, there is no sale or transfer of land from the 15 companies to the assessee and further from Assessee to Shri Arvindbhai Tejani, hence there is no Capital Gain. The AR relied upon the decision of the Hon'ble Gujarat High Court in the case of Vittalbhai P Patel v/s CIT (102 Taxmann. 36 (Guj), where it is held that as there was no sale transaction in the eye of law, there would be no Capital Gain arising out of a Null and Void transfer of such land and hence, the Tribunal held correctly that no Capital Gain had accrued to the assessee. This decision is binding on the appellate authorities in Gujarat and hence, respectfully followed.

9.6 In view of the facts discussed and the binding decision of the jurisdictional Hon'ble High Court of Gujarat (supra), I am in agreement with the AR that there is no valid sale of land and hence the income is not a "Capital Gain". However, this discussion is of only academic value as I have already held that the transactions fall within the meaning of ***adventure in the nature of trade'*** *and hence, Profit arising therefrom are taxable as '**Business Income**" (as declared by the assessee in return of income). It is also important to note here that; 90% of profit arising from above two transactions are already taxed in hands of SDP as '**business Income u/s** 143 (3) of the Act.*

10. In view of above discussion, the taxable income of assessee is computed as under:

1. Income declared original return dated 22.11.2011	*Rs.62,16,890*
2. Profit and gainis from business (sale of lands)	*Rs. 3,78,533*
Total income	*Rs.65,95,420/-"*

14. We have gone through the above findings of ld CIT(A) and observed that the transactions were done by the assessee and the real investment in the transaction was carried out by Shri. Dharmeshbhai Patel (in short SDP). The assessee and Shri. Dharmeshbhai Patel (SDP) entered into an arrangement wherein, Shri. Dharmeshbhai Patel (SDP) provided the money required to buy such property, physical possession of which, is not possible in the name of assessee. Therefore these properties would be later sold for profit and the profit is shared at ratio of 10:90 after recovering the investment made by Shri. Dharmeshbhai Patel (SDP). We note that no investment is made by the assessee. The assessee has not incurred any '**cost of acquisition**'. Hence, the lands cannot be called as his capital assets. The assessee has only allowed his name to be used in the transactions and has personally involved in the making of these deals. The income earned by the assessee is not an appreciation of his investment, but it is consideration for being

part of the arrangement to earn profit from transactions involving lands. The income earned is towards his personal involvement and for time contributed. There is no transfer of capital asset by the assessee. For this reason too the income earned by the assessee cannot be said to be capital gains. It is evident from the bank account, the amounts invested by Shri. Dharmeshbhai Patel (SDP) and 90% the profit made on two transactions is remitted to his account. Shri. Dharmeshbhai Patel (SDP) has disclosed the profit made from these two transactions in his return of income under the head "**Business Income**" which is accepted u/s 143(3) vide order dated 26.03.2013. Since the 90% of the profit arising from these transactions has already been taxed as "**Business Income**" by the Department. Principles of uniformity demands that the balance 10% also to be taxed as "**Business Income"** in the hands of the assessee. Considering these facts, we do not find any infirmity in the order of ld CIT(A). That being so, we decline to interfere with the order of Ld. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

15.In the result, the appeal of the Revenue is dismissed.

Order is pronounced on 16/09/2022 by placing the result on the Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat/िदनांक/ Date:
16/09/2022Dkp Outsourcing
Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat