

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**

**श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष**  
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.713/Ahd/2016/SRT	निर्धारण वर्ष/A.Y.:2011-12
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Shri Rameshchandra Chhabildas Tamakuwala, 1/208, Khardo Sheri, Nanpura, Surat 395 001  [PAN: AAFPT 4356 F]	Vs.	The JCIT, Range-5, Surat.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Hiren M. Diwan, CA
राजस्व की ओर से /Revenue by	Shri R. P. Rastogi, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	03.08.2018
उद्घोषणा की तारीख/Pronouncement on	31.08.2018

**आदेश /O R D E R**

**PER O. P. MEENA, ACCOUTANT MEMBER:**

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-4, Surat (in short “the CIT (A)”) dated 21.01.2016 pertaining to Assessment Year 2011-12, which in turn has arisen from the order passed by the Joint Commissioner of Income-tax, Range-5, Surat (in short “the

AO”) dated 28.02.2014 under section 143 (3) of Income Tax Act, 1961 (in short ‘the Act’).

**2.** The grounds of the appeal raised by the assessee are as under:

*“1. The Id. CIT (A) has erred in law and on facts in confirming the action of the Ld.AO of treating the impugned land transferred during the year as business asset instead of capital asset.*

*2. The Id. CIT (A) has erred in law and on facts in confirming the action of the learned AO of treating the surplus arising on sale of impugned land of Rs. 1, 62, 67, 160 as business income instead of long-term capital gain.*

*3.The Id. CIT (A) has erred in law and on facts in confirming the action of the learned AO of treating the asset transferred during the year by the appellant being land to be the short-term asset, though held for more than a period of 36 months by the appellant.*

*4. The Id. CIT (A) has erred in law and on facts in confirming the action of the learned AO of not granting the indexation of the cost of capital asset being land transferred by the appellant during the year.*

*5.The Id. CIT (A) has erred in law and on facts in confirming the action of the learned AO of rejecting the claim of set off of the appellant of brought forward long-term capital loss of Rs.16, 40, 564 against the long-term capital gain earned by the appellant on transfer of capital asset being land.”*

**3.** Since the above ground Nos.1 to 6 of appeal are interconnected and the key issue is involved is treating the long-term capital assets as business asset and long-term capital gain as business income and thereby not allowing of indexation cost and set off of brought forward long-term capital loss. Therefore, these being considered together in consolidated manner.

4. Succinctly, facts as culled out from the orders of lower authorities are that the assessee has sold a piece of land on 16.09.2010 for Rs.1,66,82,160/- which was purchased on 03.12.2005 for total consideration of Rs.4,57,875/- and the said land was shown as investment in the balance sheet as on 31.03.2006 (paper book-16) as fixed asset. This has been reflected as capital assets, as per copy of accounts and audit report filed for the assessment year 2006-07 and assessment year 2007-08 appearing at paper book page number 16 to 21. The learned A.R. took us through the return of wealth tax filed for assessment year 2006-07 and 2007-08 (Paper Book-22-31) in which the impugned plot of land was treated as capital asset by the assessee. It was submitted that this plot of land was converted into a stock-in-trade on 01.04.2008 and passed necessary entries in the books of accounts for the financial year 2008-09. Copy of Ledger account is appearing at page number 33 and 34 of the paper book. The learned A.R. submitted that when the assessee has not implemented any project in 2 years period, this plot of land was

reconverted into capital assets as on 01.04. 2010 and accordingly made necessary entries in the books of accounts as appearing at paper book page number 35-36. It was contended that as per Evidence Act 1872, the entry in books of accounts of the assessee which are regularly maintained in the case of assessee by him be treated as evidence to substantiate the transaction shown in respect of the concerned entry. The learned A.R. submitted that after around 5 and half months of conversion of stock-in trade into capital asset, the assessee has found a suitable buyer and therefore sold this plot of land on 16.09.2010 for a consideration of Rs.1,66,82,160/-and surplus yield of Rs.1,62,24,285/- was shown as long-term capital gain. However, the AO treated this as business income instead of long-term capital gain. The CIT (A) placing reliance on the decision in the case of Indo Stone Pvt. Ltd. v. ITO [2014] 34 ITR 534 (Mum) upheld the action of the AO. However, the facts of that case are totally different, as in that case, the shares were held as capital assets as on 01.04.2005 and these were sold on 05.04.2005, 19.04.2005, 20.04.2005 and 26.04.2005 i.e. within period of 26 days after classifying the said

assets as capital asset, whereas in the case of assessee, he has sold capital asset after 5/12 months after classifying the capital asset. In lucid contrast, the assessee immediately after purchase of plot of land in financial year 2005-06 and accounted for the said capital asset in the books of accounts as on 31.03.2006, 31.03.2007 and 31.03.2008 as capital asset and not as a stock-in-trade. The learned A. R has also submitted that the AO has denied the benefit of indexation, whereas there is no provision in the Act, even if the asset is held as business asset or capital asset to deny the indexation. The ld. A.R. further submitted that the AO has also denied benefit of set-off of long-term capital loss of Rs.16,40,564/-. The learned A.R. relying on the decision in the case of CIT v. Rama Rani Kalia (2013) 358 ITR 499 (All) and A. Suresh Rao v. ITO [2013] 157 TTJ 753 (Bang) submitted that while classifying an asset as capital asset, the total period of holding of the concerned asset by the assessee should be taken into consideration and nature of title of the concerned asset is immaterial. The learned A. R. further relied in the case of CIT v. V.S. Dempo Co. Ltd. [2016] 74 taxmann.com 15 (SC) to contend

that section 50 creates a deeming fiction only for mode of computation of capital gains under section 48 and 49 and not for other provisions, hence, the assessee is entitled to exemption under section 54E of the Act in respect of capital asset on which depreciation has been allowed. Therefore, in the light of ratio to above decision, it was contended that even after allowing depreciation on business asset, these assets were considered as long-term asset and not as short-term capital asset.

**5.** *Per contra*, the learned departmental representative supported the order of the authorities below. It was contended that the assessee has shown the said asset as a stock in trade as on 31.03.2010 in the balance sheet, hence, its reconversion into capital asset on 01.04.2010 i.e. before the sale of asset on 16.09.2010 is not a genuine act and a make-believe attempt to claim set off- of long -term capital loss of Rs.16,40,564/- as by showing the business income earned during year as the long-term capital gains for the year under consideration. Since the assessee has himself shown the assets as stock-in trade in last two years,

therefore, the AO was justified in treating the sale of plot of land as business income.

**6.** We have heard the rival submissions and perused the relevant material on record. We find that the impugned land was purchased on 03. 12. 2005 and was held as capital asset during the financial year 2005-06, 2006-07 and 2007-08 i.e. from the period 03.12.2005 to 31.03.2008. This land was converted into a stock.in trade on 01.04.2008 and has remained as stock in trade up to 31.03.2010. The assessee has shown this land as capital assets during the assessment year 2006-07 and assessment year 2007-08 and 2008-09 in the wealth tax return as investment. The land was ultimately sold on 16. 09. 2010. It has been claimed that the land was re-converted into capital asset as 01.04. 2010 and thereafter, it was sold as capital asset and not as business assets. The learned A.R. has filed copy of accounts as appearing at page number 36 paper book showing the entry of capital asset as investment. Thus, as per the claim of the assessee, this land was remained as capital assets from the year 03.12.2005 to 01.04.2008 and 01.04.2010 to 16.09.2010. However, the assessee has held this as capital assets from 03.12.2005 to 16.09.2010. Therefore, the holding period of

this asset by the assessee is more than 36 months, even though the nomenclature or title given by the assessee may be capital asset or a stock in trade. As per the definition given in section 2 (42A) of the Act. The short-term capital assets is to mean a capital asset held by an assessee for not more than 36 months. This section does not recognize the nature of asset, whether it is capital or is as a depreciable asset as that expression used in this section is “held by the assessee” and does not say whether it is an investment or as stock in trade. Reverting to the facts of the present case, we find that the land in question was held for the period from 03. 12. 2005 to 16. 09. 2010 by the assessee, being legal owner of the asset under consideration. Therefore, as per the definition of section 2 (42A) of the Act, the underlying asset held by the assessee was land which was held for more than 36 months and the title or treatment given by the assessee in books of accounts is immaterial so far the holding period of this asset is concerned. This view is further supported by the decision of Honourable Allahabad High Court in the case of CIT v. Rama Rani Kalia [2013] 358 ITR 499 (All) /221 Taxman 72 (All) and was held as under:

*“11. The difference between the 'short-term capital' asset and 'long-term capital asset' is the period over which the property has been held by the assessee and not the nature of title over the property. The lessee*



*of the property has rights as owner of the property subject to covenants of the lease, for all purposes. He may, subject to covenants of the lease deed, transfer the leasehold rights of the property with the consent of the lessor. The conversion of the rights of the lessee in the property from having lease hold right into free hold is only by way of improvement of her rights over the property, which she enjoyed. It would not have any effect on the taxability of gain from such property, which is related to the period over which the property is held. If the period is less than 36 months, the gain arising from such transfer would be of short-term capital gain."*

7. The ld. A.R. has relied in the case of A Suresh Rao v. ITO [2013] 157 TTJ 753 (Bang) wherein the head note reads that : ***since it is doubtful that legislature intended to give meaning to expression "held by the assessee "used in section 2(42A) as referring to only vesting of legal title - It is unlikely that legislature would wish to deny exemption from levy of tax on capital gains in case where , otherwise assessee satisfies all parameters for grant of exemption- capital gain has to be treated as long-term capital gain as claimed by assessee- Assessee also entitled to consequential benefit of exemption from levy of capital gains - Assessee `s appeal allowed ."*** Thus, this decision supports the view of the ld. A.R. that the asset in question is long-term capital asset.

**8.** The Id. A.R. further relied in the case of ACIT v. Bright Star Investment (P) Ltd. [2008] 24 SOT 288 (Mumbai) wherein it was observed as under:

*“While incorporating sub-section (2) to section 45, the Legislature has not visualized the situation in other way round, where the stock-in-trade is to be converted into the investment and later on the investment is sold on profit. In the absence of a specific provision to deal with this type of situation, a rational formula should be worked out to determine the profits and gains on transfer of the asset. The Supreme Court in the case of Sir Kikabhai Premchand v. CIT [1953] 240 ITR 506 and further the Calcutta High Court in the case of CIT v. Dhanuka & Sons [1980] 124 ITR 24 [1979] 1 Taxman 417 had taken the view that there cannot be an actual profit or loss of such transfer when no third party is involved and the items are kept in a different account of the assessee himself. The question of gain or loss would arise only in future when the stock transferred to the investment account might be dealt with by the assessee. If such shares be disposed of at a value other than the value at which it was transferred from the business stock, the question of capital loss or capital gain would arise. In the absence of a specific provision to deal with the present situation, two formulas can be evolved to work out the profits and gains on transfer of the assets. One formula which had been adopted by the Assessing Officer, i.e., difference between the book value of the shares and the market value of the shares on the date of conversion should be taken as a business income and the difference between the sale price of the shares and the market value of the shares on the date of conversion, be taken as a capital gain. The other formula which was adopted by the assessee, i.e., the difference between the sale price of the shares and the cost of acquisition of share, which was the book value on the date of conversion with indexation from the date of conversion, should be computed as a capital gain. In the absence of a specific provision, out of these two formulas, the formula which was favourable to the assessee, should be accepted. Therefore, the Commissioner (Appeals) had properly examined this issue in the present situation and directed the Assessing Officer to accept the capital gain offered by the assessee. Hence, the order passed by the Commissioner (Appeals) deserved to be upheld. [Para 6].”*

**9.** The facts of the above decision are squarely applicable to present case. As in the present case, the assessee has converted his stock-in trade in to capital asset and sold out the said asset

after its conversion, the gains arising therefrom is therefore, required to be taxed as long-term capital gain and not as business income as held by the AO. Since the assessee has re-converted the stock-in trade in to capital asset as on 01.04.2010, we find that there is no bar in law for re-conversion of business assets into capital asset and vice versa. No judicial pronouncement has been cited before us to controvert this view. Since the asset in question sold has been considered as capital asset in the books of accounts, which are the evidence on record in form of book entries to substantiate the facts unless proved otherwise. Therefore, we are of the considered view that when the capital asset is sold, the gains from which will be assessable as long-term capital gain. We do not find any merit in the view of CIT (A) that holding period for capital asset should be counted during the duration when it was held as capital asset. In our considered view, it is the period for which the assets is held by the assessee and its title is not relevant to determine the period of holding. As we have already discussed above that as per definition as given in section 2 (42A) of the Act, according to which, the holding period as owner of asset is to be considered for computation of period for the purpose of capital gains u/s. 45 of the Act. In view of these facts and circumstances,

we are of the considered opinion that the land in question is to be treated as long term capital asset for the purpose of computation of long-term capital gain and is required to be taxed and assessed as long-term capital gain. We, therefore, modify the order of lower authorities and hold that surplus arising of Rs.1,62,67,160/- is as long-term capital gain and be assessed accordingly. Consequently, the assessee will be entitled to set-off of brought forward long-term capital loss of Rs.16,40,564/-. Accordingly, we direct the AO to allow deduction on account of indexation after verification of records. In view of these facts and circumstances, all the grounds of appeal raised by the assessee are allowed.

**10.** In the result, the appeal of the assessee stands allowed.

**11.** Order pronounced in the open court on 31-08-2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

Sd/-

(ओ.पी.मीना/O.P.MEENA)

न्यायिकसदस्यतथा/JUDICIAL MEMBER लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

सुरत Dated: 31<sup>st</sup> August, 2018 /OPM

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1.अपीलार्थी/ The Appellant; 2. प्रत्यर्थी/ The Respondent; 3. आयकरआयुक्त (अपील) The CIT(A)4.आयकरआयुक्त / Pr. CIT 5.विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/D.R. (ITAT) 6. गार्डफाईल / Guard file ITAT.

By order

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Assistant Registrar, Surat