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IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD "C" BENCH

(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER  
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)

ITA. No: 3682/AHD/2015  
(Assessment Years: 2011-12s)

Deputy Commissioner of Income Tax, Circle-3(3), Ahmedabad (Appellant)	V/S	Shri Niketan Krishorchandra Patel, 200, Nehru Park, Vastrapur, Ahmedabad-380015 (Respondent)
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PAN: AAWPP5134G

Appellant by : Shri L. P. Jain, Sr. D.R.  
Respondent by : Shri B.R. Popat, A.R.

(आदेश)/ORDER

Date of hearing : 11-06-2019  
Date of Pronouncement : 25 -07-2019

**PER MAHAVIR PRASAD, JUDICIAL MEMBER**

1. This appeal filed by the Revenue is directed against the order of the Ld. CIT(A)-3, Ahmedabad dated 27.10.2015 pertaining to A.Y. 2011-12 and following grounds have been taken:

1. *The Ld. CIT(A) has erred in law and on facts in treating the income of Rs.1,68,85,349/- in respect of sale of land at survey No. 461/2, Village Nikol as long term capital gain instead of income from business & profession as held by the AO.*
2. *The Ld. CIT(A) has erred in law and on facts by allowing deduction U/S.54F of the Act of Rs.45,51,847/-.*
3. *The Ld. CIT(A) has erred in law and on facts by not appreciating that the assessee was regularly engaged in the business of sale and purchase of plots of land and offered the profit from sale of land (except the land at Nikol) under the head income from business & profession.*
4. *The Ld. CIT(A) has erred in law and on facts by not appreciating that the transactions with respect to the aforesaid land was a trading activity/an adventure in nature of trade as per section 2(13) of the Act and therefore liable to be assessed under the head "Income from Business & Profession".*
5. *The Ld. CIT(A) has erred in law and on facts by not appreciating that the land in question was held by the assessee as current assets in A Ys 2009-10 and 2010-11.*
6. *Cn the facts and circumstances of the case, the Ld. Commissioner of Income tax (A) ought to have upheld the order of the Assessing Officer.*
7. *It is, therefore, prayed that the order of the Ld. Commissioner of Income tax (A) may be set-aside and that of the Assessing Officer be restored.*

2. The facts of the case are as emanates from the ld. CIT(A) order. The assessee is in the business of share of profit, interest & remuneration from partnership firms and trading in land.

*5. On perusal of computation of income alongwith its annexure, it was observed that during the year under consideration, the assessee has sold the land at Mouje Village Nikol (Survey No.461/2) for a sale consideration of Rs.1,90,68,400/-. The assessee has shown purchase cost for the said land at Rs.2,25,000/- and Development & N.A. Cost at Rs.15,83,015/-, resulting into total acquisition cost at Rs.18,08,051/-. The assessee further claimed transfer cost of Rs.3,75,000/- on the said land. Long term capital gain from the sale of land has been shown at Rs.1,63,60,235/-. Further after adjusting the claim of Rs 45,51,847/- u/s. 54F of the I.T. Act, taxable capital gain has been shown at Rs.1,18,08,478/- from sale of land at Mouje Village Nikol (Survey No.461/2) under the head long term capital gain.*

*5.1 On verification of further details submitted during the course of assessment proceedings, it was noticed that during the year the assessee has sold three*

*properties(i.e land). It was further observed that out of these three properties, profit from sale of two properties (i.e. Land at Lilapur Sr. No.2 & Land at Lilapur Sr. No.29) have been credited to Profit & loss account i.e. under the head business & profession and profit from the sale of third property (i.e. Land at survey no.461/2, Mouje Village Nikol) has been shown under the head long term capital gain.*

*During the course of assessment proceedings, the assessee was asked vide this office order sheet noting dated 19.08.2013 to furnish details of development and N.A. cost (Rs.15,83,015/-) claimed while calculating capital gain related to land at Nikol (survey no.461/2).*

*In response to which the assessee filed reply vide his letter dated 12.09.2013 giving details and year wise break up of such expenses. On perusal of the same, it is noticed that out of Rs. 15,83,015, an amount of Rs.78,250/- incurred in F.Y. 2007-08 for stamp, registration, vakil fees, NA Charges etc. and amount of Rs. 15,83,051/-incurred in F.Y. 2008-09 for betterment charges & Misc. AMC charges etc.*

*5.2 On above observation, the assessee was asked vide this office letter dated 18.09.2013 to explain following points:-*

*(i) As to why profit from sale of above mentioned three properties (land) have been taken in two different heads?*

*(ii) As to why 'indexed cost of improvement' should not be recalculated as per sec. 48 of the I.T. Act.?*

*The relevant part of the letter is reproduced hereunder for the sake of reference:-*  
*"2. On verification of details furnished by you, it is noticed that during the year, you have sold three properties. It is further observed that out of these three properties, profit from sale of two properties (i.e. Land at Lilapur Sr. No.2 & Land at Lilapur Sr. No.2) have been credited to Profit & loss account i.e. under the head business & profession. On the other hand, one property i.e.survey no.461/2, Mouje Village Nikol has been shown under the head long term capital gain. Please explain the reason for allocation of sale proceeds (or profit from sale of land) under the different heads in respect of respective properties sold during the year.*

3. On verification of details furnished by you, it is noticed that as regards property sold at survey no.461/2, Mouje Village Nikol, while calculating capital gain, you have shown total acquisition cost at Rs. 18,08,051/- (including development & N.A. cost of Rs.15,83,01s/-) and further index cost of land has been calculated at Rs. 23,33,075/-(taking base year for indexation as F.Y.2007-08). However, on going through the detailed bifurcation of development & N.A. cost of Rs.15,83,01s/-, as submitted vide your letter dated 12.09.2013, it is noticed that expenses of Rs.78,250 (13500+64750) only had been incurred in the F.Y.2007-08, whereas remaining expenses had been incurred in the separate base year i.e. F.Y.2008-09.

Explanation (iv) given below the section 48 clearly states that "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as cost Inflation Index for the year in which the asset is transferred bears to the cost of Inflation Index for the year in which the improvement to the asset took place..

In view of above observation, please furnish your reply as regards why not "indexed cost of improvement" in respect of property mentioned above should be recalculated as per Explanation (iv) given below the section 48 of the I.T.Act."

In response to which the assessee filed his reply vide letter dated 27/09/2013.

Relevant part of assessee's reply are being reproduced as under:-

" 2. / have treated and reflected in books of account and income Tax return as a profit on sale of land at Lilapur Survey No. 2 of Rs. 127901/- and land at Lilapur Survey No. 29 of Rs. 218836/-. This land is purchased only for trade purpose and not for the investment in fixed assets. The period of land purchased and sale of land transaction are very short. It is necessary to compliances of transfer of property act for documentations and registration of the said land purchases and sale. I have right to claim expenses against the said land profits and not to avoid or evasion of income tax.

That is why I have shown said allocation sale proceed of land as a sale of land of profit"

5.3 On perusal of above, it is observed that the reply of assessee revolves around the treatment given to sale proceeds of two lands (i.e Lands situated at Lilapur Survey. No.2 & 29). Assessee replied that both the land had been purchased for trading purpose. However, assessee remained silent and not

*offered any comments on treatment given to sale proceeds received from the third land (i.e land at survey no.461/2, Mouje Village Nikol) and not explained why sale proceeds of this was taken under and head capital gain instead of business & profession. And finally disallowed the claim of the assessee of long term capital gain and held whatever profit was earned from the sale of the land was treating by the A.O. as business income and made addition of Rs. 16885349/- and also disallowed interest expenses.*

**Disallowance of Interest Expenses**

*On perusal of profit & loss account for the year under consideration, it was noticed that the assessee has claimed & debited Interest expenses of Rs. 6,31,459/-. Hence, vide this office letter dated 18.09.2013 Assessee was asked to furnisih details of interest expenses claimed in P&L A/c along with its justification. Relevent para of the letter is reproduced as under:-*

*"On perusal of Profit & loss Account for the year ending on 31/03/2011, it is noticed that out of total receipts of Rs.8,61,876/- credited to P & L account, significant receipts (Rs.4,40,139/-) related to other income/remuneration/interest income/dividend) and resulting into balance receipts credited to P & L account are related to consulting fees/profit from sale of land at Rs.4,21,737/- only. Against these receipts of Rs. Rs.4,21,737/-, you have claimed and debited substantial interest expenses of Rs.6,31,459/- in the Profit & loss account. In view of the same, please furnish your reply with justification and supporting evidences as regards allowability of your claim of interest expenses."*

*In response to which vide letter dated 27.09.2013 assessee replied that amount of Rs. 199566/- has been shown as income from other sources and no interest was claimed against this income.*

*From the assessee's reply it appears that probably assessee misunderstood the query raised by this office. Therefore vide letter dated 01.10.2013 assessee was asked to furnish ledger a/c of the person to whom interest was paid during the year. Assessee was also asked to furnish fund utilization chart and to prove that borrowed fund were utilized for business purpose only.*

*In response to which , assessee submitted its reply vide letter dated 21.10.2013. The relevant part of assessee's reply is reproduced here as under :-*

*" Vide Para-2 of the communication, your Honor has called for the party-wise details of various unsecured loans availed with utilization chart thereof and of the corresponding interest aggregating to Rs.6,31,459/- paid there against which has been claimed as deduction while computing the income falling under the head "Income from business or profession". It will be appreciated by your Honor that since the aggregate interest paid and claimed as deduction to the extent of Rs.6,31,459/- is in respect of the on going transactions of acceptance of various loans from different parties and repayment thereof in due course of time and since the entire process has started much prior to the beginning of the financial year relevant to A.Y. 2011-12, linking or correlating such transactions with their precise utilization may not always be possible. This may not also be of any practical use either. It may however be appreciated that the undersigned has an aggregate capital base of Rs.2,27,11,617/-apart from also having certain other non-interest bearing funds available. All these facts are very much available in the Balance Sheet as at 31st March 2011. Since the corresponding non-business assets are less than this aggregate availability of interest free amount, no adverse inference is required to be drawn by presuming that the interest bearing fund may have been utilized for non-business purposes. It may also be appreciated by your Honor that as against the total interest expenditure of Rs.7,37,734/- incurred and debited in the books of account, the undersigned has claimed only Rs.6,31,459/- as deduction while voluntarily treating the balance interest of Rs.1,06,275/- as personal in nature, thus not eligible for claim of any deduction. This has accordingly been debited to the capital account, which may please be noted.*

*Without prejudice to what has been mentioned above, we are filing herewith copy of the relevant party accounts who have been subjected to payment of interest during the course of the year. Corresponding copy of the interest expense account is also enclosed herewith in this regard.*

*On legal side, specific attention of your Honor is also drawn to the fact that in order to claim deduction under section 36(l)(iii), no such direct nexus is required to be established and the person is only required to prove that the conditions specified in the section have been duly complied with. For the purpose of convenience, the relevant portion of the section is reproduced here in below:*

*"36(1) the deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section*

*28.....*

*(iii) the amount of the interlaced paid in respect of capital borrowed for the purposes of the business or profession:*

*Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books of account or not): for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.*

*Explanation. - Recurring subscriptions paid periodically by shareholders, or subscribers in mutual benefit societies which fulfill such conditions as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause;...."*

*In view of what has been mentioned above, we request your Honor not to draw any adverse inference with regard to the bona fide and genuine claim of deduction in respect of interest expenditure of Rs.6,31,459/- and oblige."*

*The reply submitted by the assessee has been considered carefully but could not found satisfactory. In his reply assessee admitted that linking or correlating the transaction with their precise utilization may not be possible.*

*Therefore, assessee was again show caused vide this office letter dated 12/11/2013, the relevant part of which is reproduced as under:-*

*Please refer to para-1 of annexure attached with this office letter dated 18.09.2013 and subsequently further details asked vide this office letter dated 01/10/2013 on the issue of allowability of claim of Interest expenses of Rs.6,31,459/-for the year under consideration. In response of these letters, the reply/details filed vide your submission dated 21.10.2013 has been perused. The arguments put forth by you on the issue of allowability of claim of Interest expenses of Rs.6,31,459/- have been considered but could not found satisfactory. You have failed to furnish details of utilization of the funds as well as fail to establish nexus or utilization of fund for business purpose only. In view of such observation, you are hereby show-cause why the interest expenses of Rs.6,31,459/- claimed by you, should not be disallowed and added to your total income for the year under consideration.”*

*As the assessee had not filed ledger accounts of some of the parties, the assessee was given another opportunity and asked vide above mentioned show cause letter to furnish the ledger accounts as well as bank statement of eight parties (from whom funds have been borrowed) from starting indicating where the borrowed funds have actually been utilized.*

*In response to show-cause letter, the assessee replied vide his letter dated 02.12.2013, the relevant part of which is reproduced as under:-*

*"Your honour has proposed to disallow the claim of deduction in respect of the interest expenditure to the extent ofRs. 6,31,459/- by treating the same as not having been incurred for business purpose. We have to state the following in this regard.*

*At the outset, it will be appreciated by your Honour that out of the investment in immovable properties held by the undersigned and as reflected in the balance sheet, certain properties have been held for the purpose of business. Similarly, major portion of other assets is also held for business purposes and since substantial portion of interest is attributable to such applications, the interest to the extent of Rs. 6,31,459/- has rightly been claimed as deduction. It may be appreciated by your Honour that the interest, to the extent not attributable to business, has not been claimed as deduction and the same has either been*



*charged to capital account or to the respective asset account, as per the copies of the relevant accounts and other details very much furnished in the earlier hearings.*

*To be specific, attention of your honour is drawn to the fact that the land at Godhavi (Rs. 17,11,18s/-) and land at Nikol 42(2) (Rs. 8,00,000) as appearing in the balance sheet as at 31st March 2011 were held as part of stock-in-trade and the same can be evidenced from the fact that when these properties were transferred in the financial year relevant to A. Y. 2012-13, the resultant profit was offered for taxation under the head " Income from Business or Profession" as per copy of the relevant documents attached. It will also be appreciated from the balance sheet that practically the entire amount of Rs. 2,19,21,997.70 under the head "Current Assets" is predominantly for the purpose of business and any interest expenditure incurred in this connection has to be thus allowed as deduction while computing the income from business or profession.*

*Without prejudice to what has been mentioned above and assuming though not admitting about there being no direct nexus between the interest bearing fund and application of the same, specific attention is drawn to the fact that section 36(l)(iii) does not require any such direct nexus to be proved or established, as discussed in detail in written submission dated 21st Oct.2013.*

*In view of what has been mentioned above, we request your honour not to draw any adverse inference in this regard while framing the assessment order and oblige."*

*The reply of the assessee has been perused and considered but could not found satisfactory. From close scrutiny of balance sheet for both the year (i.e 2009-10 & 2010-11) it is noticed that interest bearing fund have been utilized in giving interest free loan/advances and to purchase the land/ properties.*

*It is noteworthy that substantial increase (Rs.182.27 lacs(207.07-24.8)) in compare to last year has been noticed in the value of land/property shown in balance sheet. Apart from that, it is observed that interest free loan were also*

*advanced to M/s Rajhans Developers, M/s Sahajanand Developers & Kanchanben G Patel etc. with whom assessee was not having any business transaction. Some of the illustrations are as under:-*

- (i) Vide its reply dated 27.09.2013 assessee himself stated that fund borrowed from Pragjibhai patel HUF and Mahavir Rolling Mill have been utilized in purchasing the land.*
- (ii) Similarly fund borrowed from Lalbhai G Patel and Rupa R Patel have been utilized in giving interest free loan/advance to M/s Rajhans Developers.*
- (iii) Fund borrowed from Manas Corporation and Kishorechandra N Patel have been utilized in purchasing the land at Telav, paying brokerage on land deal etc.*
- (iv) On being asked at para 7 reply dt. 12.09.2013 assessee stated that interest has not been charged on 19.5 lacs advanced to 7 parties as per term & condition of banakhat*

*The assessee in concluding para of his reply stated that section 36(l)(iii) does not require any such direct nexus to be proved or established. To analyze the issue in true perspective the relevant part of Section 36(l)(iii) of the I.T. Act is reproduced as under:-*

*"The amount of the interest paid in respect of capital borrowed for the purposes of the business or profession"*

*Thus, provisions of Section 36(l)(iii) is very clear in its wording that deduction for interest expenses will be allowed only if the capital borrowed is utilized for the purpose of business or profession of the assessee. However, the assessee, despite provided with sufficient opportunities, failed to establish the utilization of funds for business purpose substantiated with convincing supporting evidences.*

*In view of above discussions, the claim of the assessee of interest expenses of Rs. 6,31,459/- is disallowed and added back to total income for the year under consideration. Penalty proceedings u/s. 271(l)(c) r.w.s. 274 of the Income Tax Act are initiated for furnishing inaccurate particulars of income thereby concealment of income. And finally made addition in the hands of the assessee.*

3. Thereafter assessee preferred first statutory appeal before the Id. CIT(A) who partly allowed the appeal of the assessee.
4. Now Revenue has come before us by way of second appeal.
5. We have gone through the relevant record and impugned order and also gone through the detailed paper book filed on behalf of the assessee.
6. In this case, assessee has purchased a land situated at village Nikol (Survey No. 461/2) and in the balance sheet, assessee shown that land as a fixed asset since 2007. Thereafter same was transferred during the course of hearing was acquired, developed and held exclusively by him as capital asset. Since this was a capital asset for more than 3 years. The resultant gain was offered for taxation under the head capital gain after claiming exemption u/s. 54F of the Act. But Id. A.O. is of the opinion that since assessee was doing business of land trading as well. Therefore, this land amounted to an adventure in nature of trade.
7. We have seen the CBDT Circular No. 4 of 2007 dated 15<sup>th</sup> June, 2007. Though this circular is in the context of holding of shares and securities as investment vis-à-vis stock in trade. The crux of what has been mentioned therein is applicable even in relation to holding of immovable properties. The CBDT emphasized that it is possible for a tax payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads i.e., capital gains as well as business

income. Since assessee was showing land in question as a fixed asset in his return of income.

8. In our considered opinion, same was a capital asset and ld. CIT(A) has rightly granted relief to the assessee by holding that assessee was eligible for long term capital gain. Therefore, in our considered opinion, ld. CIT(A) has passed reasoned order.
9. So far ground relating to ld. CIT(A) has erred in law and on facts by allowing deduction u/s. 54F of the Act is concerned, since in ground no. 1, we have already hold that assessee is entitled for long term capital gain and held that land in question was capital asset . Therefore, benefit of section 54F to be given.
10. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in Open Court on 25 - 07- 2019

Sd/-

Sd/-

**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER True Copy**  
Ahmedabad: Dated 25 /07/2019

**(MAHAVIR PRASAD)**  
**JUDICIAL MEMBER**

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar  
ITAT,Ahmedabad