

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
RANCHI 'SMC' BENCH, RANCHI**

**BEFORE S/SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER**

**ITA No.14/Ran/2018**  
Assessment Year: 2013-14

Rajesh Kumar Adukia, Vyapar Bhawan, Lalji Hirji Road, S.N.G. Road, Ranchi	Vs.	DCIT, Circle-2, Ranchi
PAN/GIR No.AAWPA 4845 R		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**ITA No.15/Ran/2018**  
Assessment Year: 2013-14

Sunita Adukia, Vyapar Bhawan, Lalji Hirji Road, S.N.G. Road, Ranchi	Vs.	DCIT, Circle-2, Ranchi
PAN/GIR No.AAWPA 4846 R		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri Rajiv Ranjan Mittal, CA  
Revenue by : Shri P.K.Mondal, Addl. CIT(DR)

**Date of Hearing : 29/08/2019**  
**Date of Pronouncement : 30/10/2019**

**ORDER**

The above captioned appeals have been filed by two assessees against the separate orders of the Commissioner of Income Tax(Appeals)-Ranchi both dated 16.10.2017 for the assessment year 2013-14.

2. In the beginning of the hearing, Id representative of parties agreed that the facts and circumstances of both the appeals are identical and



similar as the land on which construction of flat was done was purchased by Smt. Asha Devi Adukia on 10.11.1981 jointly with Rajesh Adukia, who gifted her part of the land with building to her son Prakash Kumar Adukia on 20.11.2006. For the sake of convenience of adjudication, we are taking up the appeal in ITA No.14/Ran/2018 in the case of Rajesh Kumar Adukia as a lead case to decide the controversy.

3. Identical grounds have been raised in both the appeals, which read as under:

"i) For that search and seizure operation was initiated against the assessee u/s 132 of IT Act on 19.01.2017. as per second proviso to section 153 A(l) of income tax act. The assessment order passed by Assessing Officer for A/Y 2013-14 and for which appeal was pending has abated on the date search is initiated i.e 19.01.2017. Order passed by Honourable CIT (appeal) dated 16.10.2017 is a void order. The order is passed on assessment which has abated. Assessee brought this fact in the notice of learned CIT (appeal). Assessee request Honourable ITAT to treat the order of CIT (appeal) as well as assessment order as cancelled since, Assessee's income for A/Y-2013-14 is being reassessed u/s 153A of income tax act.

(ii) For that the Ld. CIT (A), Ranchi erred in treating the activity of self construction of building on owned land and selling subsequently as adventure in the nature of trade and ignored our ground of appeal. The Ld. CIT (A) erred in treating income as business income instead of long term capital gain. It is the capital assets of the assessee and should be treated as capital gain.

(iii) For that the Ld. CIT (A), Ranchi erred in calculating profit earned from sale of flats by arbitrary enhancing the value of unsold flats at market rate instead of cost price. (iv) For that the order passed u/s 143(3) of the Income Tax Act, 1961, treating the Long Term Capital Gains as Short Term Capital Gain is bad in law as well as in facts and against the Principles of natural justice and therefore liable to be set aside.



(iv) For that the order passed u/s 143(3) of the Income Tax Act, 1961, treating the Long Term Capital Gains as Short Term Capital Gain is bad in law as well as in facts and against the Principles of natural justice and therefore liable to be set aside..

(v) For that the learned Assessing Officer erred in law as well as in facts of the case, while treating the Long Term Capital Gain as Short Terms Capital Gain and failed to appreciate the fact the assessee had sold one composite unit of flat and not land and flat separately. For all practical purposes, flat and land cannot be separated.

(vi) For that the learned Assessing Officer erred in treating the flats as Short Term Capital Asset. The learned Assessing Officer had done a self contradictory addition. The learned Assessing Officer in Principle had accepted the flats was constructed in Financial Year 2009-10. Also the learned Assessing Officer had accepted that flat was sold in Financial Year 2012-13 (A.Y. 2013-14). The period between Financial Year 2009-10 to Financial Year 2012-13 is 48 months. Thus flats had to be treated as Long Term Capital Asset.

(vii) The learned Assessing Officer erred in law in applying stamp duty value to calculate the capital gain without referring the case to **DVO**. Even the assessee had objected that the stamp duty value was higher than the market value.

(viii) For that the learned Assessing Officer also failed to consider the submission of the assessee and intention of the assessee in respect of long term capital asset.

(ix) For that the learned Assessing Officer was not justified in disallowing the deduction u/s 54 of the Income Tax Act, 1961 from the long term capital gain so determined in the assessment order and misinterpreted the provision of income tax act as stipulated in section 54.

(x) For that the learned Assessing Officer was not justified in charging interest u/s 234A, 234B and 234C of the Income Tax act, 1961, keeping in view of the order passed by the Hon'ble Jharkhand High Court in the case of Ajay Prakash Verma in T.A.No. 38 of 2010.

(xi) For that the appellant craves for leave to add, delete, amend or modify any ground before or at the time of appellate proceedings."



4. Facts in brief are that the assessee is an individual filed his return of income on 31.3.2014 declaring total income of Rs.17,12,450/-. The income of the assessee includes income from partnership firm, house property and other sources and long term capital gain from sale of flats. The assessee alongwith Smt Asha Devi Adukia purchased a land with building on 10.11.1981. Smt. Asha Devi Adukia gifted her part of the land with building to Prakash Kumar Adukia on 20.11.2006. Thereafter, the assessee alongwith Prakash Kumar Adukia decided to develop and construct flat after demolishing the old structure on the land and constructed 12 flats. For constructing the flat on total area of 44,298 sq. ft from the financial year 2009-2010 to 2013-14, an amount of Rs.5,92,54,714/- was incurred. Out of 12 flats, four flats were sold in the assessment year 2013-14 at the rate of Rs.66,00,000/- per flat and 2 flats were sold in assessment year 2014-15 at the rate of Rs.78,00,000/- per flat. The Assessing Officer calculated the long term capital at Rs.10,70,123/- and short term capital gain at Rs.25,34,024/- and assted the total income at Rs.53,16,597/-.

5. On appeal, the CIT(A) observed that the transaction in question is an adventure in nature of trade as defined under section 2(13) of the Act and that profits arising therefrom are chargeable to tax under the head "profits and gains of business or profession" under section 28 of the Act. The Id CIT(A) enhanced the income to Rs.1,63,60,920/- and took the closing cost of balance 8 flats at Rs.78,00,000/- per flat at which 2 flats have been sold



in the next financial year in place of cost incurred in the construction. Accordingly, the claim of deduction under section 54F was not allowed against the income from sale proceeds of the flat. Hence, the assessee is in appeal before the Tribunal.

6. Ld A.R. submitted that the CIT(A) has erred in treating the activity of self-constructed building on own land and selling the flats subsequently as adventure in nature of trade and ignoring the fact that it was one time venture. He submitted that neither before nor subsequently, the assessee had undertaken such kind of activity of construction of flats and selling the same. Placing the reliance on various decisions including the decisions of Hon'ble Supreme Court in the case of Saroj Kumar Mazumdar vs CITA, 37 ITR 242 (SC), in the case of Janaki Ram, Bahadur Ram vs CIT, 57 itr 21 (SC) and Hon'ble Bombay High Court in the case of CIT vs. Anandlal Becharlal & co. 107 ITR 677 (Bom), Ld A.R. submitted that the nature of transaction must be determined on consideration of all the facts and circumstances, which are brought on record of the authorities below. Ld A.R. submitted that Hon'ble Supreme Court in the case of Janaki Ram Bahadur Ram (supra) has held that the transaction of purchase of land cannot be assumed without more to be venture in the nature of trade. The mere fact that the owner of an immovable property takes steps to enhance its value before selling, it does not amount to an adventure in the nature of trade. Ld A.R. strenuously contended that there is no iota of evidence that



either pre-proceeding period or subsequent period, the assessee undertook any other project or business of construction of flats and selling the same as regular business. Therefore, the CIT(A) was not correct and justified in holding the activities of construction of flat and further selling part of the same as adventure in nature of trade.

7. Replying to above, Id D,.R. strongly supporting the order of the CIT(A) submitted that in the case of ITO v.s [vs. Ch. Atchaiah](#) (1966) **218 ITR 239** (SC), the Hon'ble apex **Court** held that the AO must tax the right person and the right person alone and 'right person' means the person who is liable to be taxed, according to law, with respect to a particular income. Ld D.R. submitted that the CIT(A) was right in taxing the income of the assessee from sale of flats as business income treating the activities of construction and selling the flat as adventure in nature of trade. Therefore, Id DR submitted that the CIT(A) was right in treating the sale as adventure in the nature of trade and taxing the income as business income of the assessee.

8. On careful consideration of the rival submissions, first of all, I respectfully observe that in the case of [vs. Ch. Atchaiah](#) (supra) in the relevant para as reproduced by the CIT(A) in para 5.22, Their Lordships speaking for the apex court held that the Assessing Officer can and he must tax the right person and the right person alone. Bu 'right person' is meant the person who is liable to be taxed according to law, with respect to a



particular income. For this proposition, Their Lordships categorically held that merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. In my humble understanding, this proposition rendered by Hon'ble Supreme Court enlightens tax authorities and the Tribunal rendering the proposition that the Assessing Officer is empowered to tax the right person and merely because a wrong person is taxed, the Assessing Officer is not debarred in taxing in the hands of right person. For this proposition, I am unable to see any observations of Hon'ble Supreme Court regarding taxing an income as business income as adventure in the nature of trade in a particular and peculiar facts and circumstances. Therefore, I take respectful cognizance of this proposition that the right person should be taxed and with respect to a particular income and the expression of wrong persons is obviously used as the opposite of the expression of 'right person'.

9. Now I proceed to decide the controversy placed before me for adjudication. First of all, I observe that Hon'ble Delhi High Court in the case of Shanti Banerjee vs DCIT in ITA No.299/2003 order dated 17.11.2015, as vehemently relied by Id A.R., held that where there was no material on record from which it could be said that the assessee ever had the intention to exploit the plot as a commercial venture. Merely because six flats had been constructed out of which four were sold to friends, it would not show



that it was ' an adventure in the nature of trade' . It was held by Hon'ble High Court that merely because the assessee sold two plots that fell to her share pursuant to collaboration agreement in respect of the property owned by her since 1956, it would not render the transaction as an 'adventure in the nature of trade' leading to the resultant receipt as business income in the hands of the assessee. Similar view has been expressed by Hon'ble Bombay High Court in the case of CIT vs. Anandlal Becharlal & Co. (supra), wherein, it was held that a solitary transaction of purchase of land by the assessee firm, doing business of jewellers, for purposes of building houses for partners and its sale six years later due to the unhealthy conditions of the locality, could not constitute an adventure in the nature of trade, especially when the land is not ordinarily a commercial commodity.

10                   At thus juncture, I also find it necessary to take cognizance of the decision of Hon'ble Supreme Court in the case of Saroj Kumar Mazumdar (supra), wherein, it was held that in a case where a transaction under examination is not in the line of the business of the assessee and is an isolated or a single instance of a transaction, the burden lies on the revenue to bring the case within the words of the statute, namely, that it was an adventure in the nature of trade. Similar view has been expressed by Hon'ble Supreme Court in another decision in the case of Janaki Ram Bahadur Ram (supra), wherein, Their Lordships observed that a transaction of purchase of land cannot be assumed without more to be venture in the





nature of trade. The mere fact that the owner of an immovable property takes steps to enhance its value before selling, it does not amount to an adventure in the nature of trade.

11. In the present case, undisputedly, the land was purchased on 10.11.1981 and after passage of 26 years, the owners of land applied for permission/sanction of constructing the building on 17.2.2007 and got sanction on 4.5.2007. Subsequently, the construction was started on 19.6.2009, which was partly completed during the financial year 2012-13 and fully completed during financial year 2013-14 pertaining to assessment year 2014-15. On careful reading of the assessment order and first appellate order, I am unable to see any evidence to show that either during the preceding financial year or during subsequent financial year, the assessee had ever under taken any activity of construction and selling of flats excepts activity of developing the land, constructing the building and selling the same, which is under assessment in assessment year 2013-14. In the totality of the facts and circumstances of the case, I have no hesitation to hold that the development and construction of flats on the land purchased before 26 years is only act of the assessee with an intention to enhance the value of capital asset before selling the same and same cannot be treated as adventure in the nature of trade and thus, the income deriving on selling of flats cannot be treated as business income from partnership firm. I am satisfied with the contention of the assessee that it



was only instance when the assessee applied for sanction of construction of flat for the last purchase of land and building on 10.11.1981 and no other instances have been brought on record showing that the assessee was in the regular business of construction and selling of flats. Therefore, the view and findings recorded by the CIT(A) in the first appellate order cannot be held as sustainable and thus, I dismiss the same. Accordingly, I direct the Assessing Officer to treat the income from selling of flats as capital gains.

12. The next point of dispute for my adjudication is that whether the income accrued to the assessee from selling of four flats in the present assessment year 2013-14 is long term capital gain or short term capital gain. On this issue, Id A.R. has contended that the Assessing Officer has bifurcated the receipts from selling of flats in long term capital gain as well as short term capital gains. Ld A.R. explained that the part of sale consideration out of total sale consideration on sale of flats has been treated as long term capital gain and construction receipts has been treated as short term capital gain in spite of the fact that the authorities below have accepted that the expenses on improvement and construction of the land and building has been started during financial year 2009-2010 and completed in 2013-14. Ld A.R. also contended that the land and building was capital assets and the entire amount of receipts should be treated as long term capital gain.



13. Replying to above, Id DR drew my attention towards written synopsis filed by the assessee and submitted that the assessee sold four flats during financial year 2012-13 relevant to assessment year 2013-14 and construction was started from financial year 2009-2010 but the substantial amount of construction has been invested during financial years 2010-2011, 2011-12, 2012-13 and 2013-14 and out of total cost of construction shown by the assessee of Rs.5,92,54,714/-, only a meagre amount of Rs.51,98,963/- have been expensed during financial year 2009-2010. Therefore, the entire income accrued to the assessee from the sale of flats cannot be treated as long term capital gain. Ld D.R. submitted that the AO was right in bifurcating the income in two parts i.e. income from sale of land and income from sale of flats as long term capital gain and short term capital gain, respectively. Therefore, the orders of lower authorities may kindly be upheld.

14. On careful consideration of rival submissions, I am of the considered view that so far as treating partial income on proportionate basis on sale of land attributable to each flat as long term capital is correct action of the Assessing Officer and I am unable to see any ambiguity, perversity and valid reason to interfere with the same.

15. So far as proportionate income accrued to the assessee from sale of flat is concerned for assessment year 2013-14 as per section 45 of the Act as applicable for financial year 2012-13 i.e. previous year under



consideration, for claiming capital gain, it was the onus of the assessee to show that after acquiring the property, he held the same for minimum period of three years and thereafter same was sold. In this situation, the capital gain earned therefrom should be treated as long term capital gain. Undisputedly, the construction map was approved on 4.5.2007 and the assessee started the construction on 19.6.2009, which was partly completed during financial year 2012-13 pertaining to assessment year 2013-14 and fully completed in the subsequent assessment year 2014-15. From the table submitted by the assessee in the written synopsis, it has not been disputed and controverted by Id D.R. that out of total construction cost of Rs. 5,92,54,714/-, only Rs.51,90,963/- has been expenses during financial year 2009-2010, which is less than 10% of total expenses of construction. In this situation, I am inclined to hold that maximum cost of expenditure was incurred during financial year 2012-13 and 2013-14 and four flats have been sold by the assessee during financial year 2012-13 pertaining to assessment year 2013-14. Therefore, I am of the opinion that when the construction of flats and sale of the same was completed during financial year 2012-13, then the holding period of such capital asset cannot be treated as more than three years on the date of sale. In this situation, the income accrued to the assessee from sale of flats cannot be treated as long term capital gain and the AO was right in treating the said income as short



term capital gain. Accordingly, this ground of the assessee being devoid of merits, is dismissed.

16. The last controversy for our adjudication is that as to whether the authorities below are right in dismissing the claim of the assessee u/s. 54F of the Act on the ground that residential flat was not constructed after the date of transfer and they were constructed alongwith saleable flats.

17. Ld A.R. submitted that the assessee is entitled for claim of exemption u/s.54F of the Act as the income earned or accrued to the assessee from sale of flats has been utilised for the purpose of construction of flats kept by the assessee for his residential purpose. Ld A.R. further drawn my attention towards judgment of Special Bench of ITAT Kolkata in the case of Octavius Steel & Co. Ltd vs ACIT, 83 ITD 087 (Kol) (SB) and CBDT circular No.791 dated 2.6.2000 and submitted that for the purpose of claiming deduction u/s. 54EA/54EB/54EC, the date of transfer shall be the date on which the stock-in-trade is sold or otherwise transferred by the assessee and not on the date of conversion of the capital asset into stock-in-trade. Ld A.R. submitted that on conversion of capital asset into stock-in-trade, there is no profit as no can make profit out of himself and this situation is now clarified by the legislature by introducing provisions of section 45(2) of the Act, which provides that for taxation where the converted stock-in-trade is sold and difference between the market value



on the date of conversion and actual cost is the capital gain, then the difference on transfer or sale of capital asset shall be the date of transfer of stock -in-trade and not the date on which capital asset was converted into stock-in-trade.

18. Replying to above, Id D.R. supported the assessment order and submitted that residential flat on which exemption u/s.54F has been claimed by the assessee was not constructed after the date of transfer but constructed alongwith saleable flats. Therefore, the exemption was rightly disallowed by the AO. Ld D.R. further contended that as the CIT(A) treated the income from sale of flats as income from business or profession, therefore, exemption u/s.54F of the Act cannot be allowed to the assessee out of business income.

19. On careful consideration of rival submissions, first of all, I may point out that since in earlier part of this order, I have held that the activity of construction and sale of flat was not in the adventure in nature of trade and income accrued to the assessee from sale of flats has to be treated as long term capital gain and thus, ground of disallowance of exemption u/s.54F of the Act by the Assessing Officer cannot be held as sustainable. Further, from the relevant part of the assessment order, I observe that the AO has denied exemption u/s.54F of the Act on the ground that residential flat was not constructed after the date of transfer of



saleable flats. Therefore, he held that the assessee is not entitled for exemption u/s. 54F of the Act.

20. At thus juncture, I take cognizance of CBDT Circular No.791 dated 2.6.2000 (supra), which clarified that for the purpose of claiming deduction u/s. 54EA/54EB/54EC, the date of transfer shall be the date on which the stock-in-trade is sold or otherwise transferred by the assessee and not on the date of conversion of the capital asset into stock-in-trade. Further, Special Bench of ITAT Kolkata in the case of Octavius Steel & Co. Ltd (supra) has held that on conversion of capital asset into stock-in-trade, there is no profit as no can make profit out of himself. Further, as per amended sub-section(2) of section 45 of the Act, which was inserted by the Taxation Legislation (Amendment Act), 1984 w.e.f. 1.4.1985, notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income tax as his income of the previous year in which such stock in trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset. Therefore, in view of above CBDT circular and order of Special Bench of Kolkata Bench of the Tribunal in the case of Octavius Steel & Co.



Ltd (supra), I have no hesitation to hold that the Assessing Officer was also not correct in denying benefit of section 54F of the Act to the assessee on the ground that residential flat was not constructed after the date of transfer but alongwith saleable flats.

21. In the present case, the assessee has constructed 12 flats out of which 4 flats were sold in the assessment year 2013-14 and partial capital gain was accrued to the assessee during this period. From the table submitted by the assessee and not disputed by the department, it is clearly discernible that the assessee has incurred huge expenditure of Rs.1,91,22,401/- and Rs.1,92,80,023/- during financial year 2012-13 relevant to assessment year 2013-14 and obviously, this cost has been incurred by the assessee towards construction of flats, which were kept by him for his residential purposes and for claiming exemption u/s.54F of the Act. Therefore, I have no hesitation that the assessee is very much entitled for claiming exemption u/s.54F of the Act out of income accrued to him on sale of flats during present assessment year 2012-13. Consequently, I direct the AO to allow exemption u/s.54F of the Act to the assessee and re-calculate the capital gain while giving appeal effect in pursuance to this order.

22. Apropos Ground taken regarding charging of interest u/s.234A & 234B, I find that Hon'ble Jharkhand High Court in the case of Ajay Prakash Verma Vs. ITO(2010) TA No 38 of 2010 reported in 2013(1) TMI 140, has





held that the revenue can levy the interest only on the total income declared in the return of income and not on the income. Therefore, the AO is directed to delete the interest levied u/s. 234A and 234B of the Act as the same has been charged on the assessed income.

23. In the result, appeal is partly allowed.

**ITA No.15/Ran/18-Sunita Adukia.**

24. Since I have noted that the facts and circumstances are identical to the case in ITA No.14/Ran/2018, the conclusions drawn in that case would apply mutatis-mutandis to this appeal also. Accordingly, this appeal is partly allowed.

25. In the result, both the appeals are partly allowed.

Order pronounced in the open court under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 on / 10/2019.

Sd/-

**(Chandra Mohan Garg)**  
**JUDICIALMEMBER**

Ranchi; Dated 30/10/2019  
B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The Appellants : Rajesh Kumar Adukia/Sunita Adukia,  
Vyapar Bhawan, Lalji Hirji Road, S.N.G. Road, Ranchi
2. The Respondent. DCIT, Circle-2, Ranchi
3. The CIT(A)-Ranchi
4. Pr.CIT- Ranchi
5. DR, ITAT, Ranchi
6. Guard file.  
//True Copy//

**By order**

Sr. Pvt. Secretary,  
ITAT, Cuttack