

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।

**IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT  
[Conducted through "E" Court at Ahmedabad]**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER  
AND**

**SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**आयकर अपील सं./ ITA No. 744, 745, 746 and 747/RJT/2014**

**निर्धारण वर्ष/Assessment Years: 2007-08, 2008-09, 2009-10 and 2010-11**

Shri Dineshbhai P. Sorathia OPm Kirti Construction P.Ltd. 501-506, Shilp Tower, Tagore Road Nr. Krishna Complex, Rajkot.	Vs	ACIT, Cent.Cir.1 Rajkot.
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<b>अपीलार्थी/ (Appellant)</b>	<b>प्रत्यर्थी/ (Respondent)</b>
Assessee by :	Shri P.C. Yadav, AR
Revenue by :	Shri Jitender Kumar, CIT-DR

सुनवाई की तारीख/Date of Hearing : 02/08/2018

घोषणा की तारीख /Date of Pronouncement : 18 /09/2018

### **ORDER**

**PER RAJPAL YADAV, JUDICIAL MEMBER :** These four appeals are directed at the instance of the assessee against separate orders of the Id.CIT(A)-IV, Ahmedabad dated 30.10.2014, 17.10.2014, 30.10.2014 and 30.10.2014 respectively for the above assessment years. Since assessee is the same and issues are identical except in the assessment year 2008-09 for the sake of convenience, we proceed to dispose of all these appeals by this common order.

2. The assessee has filed applications for permission to raise additional grounds of appeal in all these years. The additional ground sought to be pleaded by the assessee is common in these years, which reads as under:

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*“On the facts and circumstances of the case, the order of assessment for the impugned year, for which proceedings were pending on the date of search, is void-ab-initio as the same has been passed without referring to any incriminating material found as a result of search.”*

3. On the strength of Hon'ble Supreme Court decision in the case of CIT Vs. Varas International, 284 ITR 80(SC) and National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC), it was contended by the ld.counsel for the assessee that if a legal issue going to effect the taxability of an assessee, then the assessee can be permitted to raise such issue at any stage. He further contended that law with regard to jurisdiction of AO for passing assessment orders in search case under section 153A has been developed subsequent to the passing such orders. He made reference to the following decisions:

- i) CIT Vs. Kabul Charwala, 380 ITR 0183 (Del)
- ii) CIT Vs. Kurele Papers, 380 ITR 571 (Del)
- iii) CIT Vs. Lata Jain, 384 ITR 543 (Del)
- iv) CIT Vs. Somaya Construction Ltd. 387 ITR 529 (Guj)

4. According to the ld.counsel for the assessee, all these decisions have come after adjudication of appeal by the ld.CIT(A). On the other hand, the ld.DR opposed prayer of the assessee and contended that entertaining such ground of appeal would take discovery of new facts and fresh inquiry requires to be made.

5. We have duly considered rival contentions and gone through the record carefully. Assessments in all these years have been made under section 143(3) r.w.s. 153A. Jurisdiction of the AO for framing assessment order under section 153A has been infused by virtue of search carried

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out at the premises of the assessee on 25.2.2011. Thus, the issue whether the AO could take cognizance of section 153A in these years or not, is a legal issue which on the basis of interpretation given by subsequent decisions of various High Courts including decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Somaya Construction Ltd., 387 ITR 529 (Guj) requires to be taken into consideration. It is pertinent to observe that the well settled proposition of law in such a situation would be that courts used to decide a dispute between the parties, because it involves decisions on facts. It can also involve decision on point of law. Both may have bearing on the ultimate result of decision. When a court interprets a provision, it decides as to what is the meaning of provision and effect of the words used by the legislature. It is a declaration regarding the statute. In other words, judgment declares as to what is the legislative intent at the time of proclamation of law. The declaration is .... "This was the law, this is the law and this is how provision shall construe." Four decisions referred by the ld.counsel for the assessee (supra) are subsequent to the orders of the ld.CIT(A) in all these years. Scope of section 153A has been explained in these four decisions therefore, it is incumbent upon us to take cognizance all these decisions and take note of additional grounds of appeal. Therefore, we admit additional grounds raised by the assessee and proceed to decide the ground on merit.

6. The ld.counsel for the assessee submitted details of filing of returns in these assessment years and also submitted time limit for issuance of notice under section 143(2) of the Act. Such details are as under:

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A.Y	Date of filing original return	Page No of PB	Time limit for issuance of notice u/s143(2)
2007-08	31.08.2007		31.08.2008
2008-09	23.12.2008		30.09.2009
2009-10	25.09.2009		30.09.2010
2010-11	30.08.2010		30.09.2011

7. The ld.counsel for the assessee contended that in the Asstt.Years 2007-08, 2008-09 and 2009-10 no assessment was pending on the date of search i.e. 25.2.2011. The time limit to issue notice under section 143(2) was also expired, therefore, according to the decision of Hon'ble Delhi High Court in the case of CIT s. Kabul Chawala, the AO can only scrutinize the return of non-abated years when some material has been found in search retable to that year, and if there is no material found, then the AO could not have reopened the issue for these years. In other words, Asstt.Years 2007-08 , 2008-09 and 2009-10, if no materials have been found, then he cannot take cognizance under section 153A of the Act.

8. The ld.DR on the other hand, contended that this issue was raised for the first time before the Tribunal, which requires examination of facts.

9. We have directed the ld.DR to submit the details of any incriminating material found during the course of search. In response to our query after conclusion of hearing, the ld.CIT-DR got information from the AO and placed on record the details. The letters written by the ld.AO as well as ld.CIT(A) to the Tribunal read as under:

*"No.CIT/DR/ITAT/e-Bench/DAS/Seized Material/18-10 Dt-01/09/2019  
The Hon'ble Members,  
ITAT E-Bench,  
Rajkot.*

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Respected Hon'ble Members,

Sub: Appeals in the case of Shri Dineshbhai P, Sorathia for ITA/744/14 for A. Y, 2007-08, ITA/745/14 for A. Y. 2008-09, ITA/746/14 for A.Y. 2009-10 PAN- AIOPS1567J and ITA/96/15 in the case of M/s, Om Kirti Construction Pvt, Ltd. A. Y. 2011-12, PAN- AAACO2484K-reg.

Kindly refer to the above.

2. At the time of hearing in the above referred appeals on 02-08-2018, the Hon'ble Bench has directed the department to submit the photocopies of the seized material relevant to the above referred appeals and as referred to in the assessment orders in these cases by the assessing officer.

3. In this regard 3 report received front the ITO Wd, 1(2)(5), Rajkot alongwith photocopies of the relevant seized material is enclosed herewith for kind consideration please. This is in continuation of arguments and submissions made by the department with regard to the above referred appeals.

Thanking You,

Yours faithfully,  
Sd/-  
(Jitender kumar)  
Commissioner of Income tax (D.R.)  
TAT, Rajkot.

End.: As Above

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No.ITO/Wd.1(2)(5)/DPS/Seized.Docu/2018-19

Date:09.08.2018

To,  
The Commissioner of Income-tax (D.R.),  
Income Tax Appellate Tribunal,  
Rajkot.

Sub : Appeals in the case of Shri Dinesh P. Sorathia for FIA/744/14 for A.Y.2007-08, ITA/745/14 for A.Y.2008-09 ITA/746/14 for A.Y.2009-10 PAN:AIOPS1567J-Reg.

Ref: No.CIT/DR/ITAT/ITO-2(l)(3)/DPS/Seized docu/18-19 dated  
02.08.2018  
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Kindly refer to the above.

2. In this connection, it is submitted that the above referred letter dated 02.08.2018 has been received in this office on 09.08.2018 from ITO Wd-2(l)(3) Rajkot. In this regard, I am enclosing herewith Xerox copy of seized material as per Annexure-A1 (Dairy, Page No.1 to 8) and AnnexureA-2 (Losse Papers File, Page No.1 to 8), which was seized during the search at the premise of M/s Om Kirti Construction Pvt. Ltd at "501-506 Shilp Tower Tagore Road Rajkot" vide Annexure A(l) dated 25.02.2011.

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Yours faithfully,  
Sd/-  
(Bablu Meena)  
Income-tax Officer  
Wd-1(2)(5), Rajkot

Encl: As above

*Income-tax Officer Wd-1(2)(5), Rajkot Copy for kind information please:*

1. *The Pr. Commissioner of Income-tax-1, Rajkot.*
2. *The Addl.CIT Range-1 (2) Rajkot."*

10. We have duly considered rival contentions and gone through the record. Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra) has examined scope of section 153A. After a detailed analysis Hon'ble Court has summarized legal proposition emerging out for application of section 153A. Such proposition reads as under:

*"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*

- i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
- ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
- iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed*

*income would be brought to tax".*

- iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
- v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*
- vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
- vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."*

It is also pertinent to note that in the case of CIT Vs. Kabul Chawla (supra) Hon'ble Court has observed that return for Asstt.Years 2002-03, 2005-06 and 2006-07 were accepted under section 143(1) of the Act. Thus, Hon'ble Court has considered this acceptance of return as an assessment made under section 143(1). In concluding paragraph, the Hon'ble Court has held that on the date of search, assessments for A.Ys.

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2002-03, 2005-06 and 2006-07 already stood completed and no incriminating material was unearthed during the search, therefore, no addition should have been made to the income of the assessee.

11. In the light of the above, let us examine facts of the present case. There is no dispute that in the Asstt.Years 2007-08 to 2009-10 time limit to issue notice under section 143(2) was expired. The returns of the assessee were accepted under section 143(1) of the Act. Thus, it is to be construed that these assessments were completed and not pending on the date of search. In view of the Hon'ble Delhi High Court decision, the additions in these years can only be made if during the course of search some incriminating materials were found.

12. The Id.DR has placed on record seized material contained in Annexure A/1 and Annexure A/2. A perusal of annexure A/1 would indicate that it contained certain details regarding steel scrap on page no.4 of the A/1, details of certain rentals. Similarly annexure A/2 contained balance sheet of Om Kirti Construction Pvt.Ltd. and certain other financial statements. But all these details are pertained to financial year 2010-11 or relates to Om Kirti Construction. None of the documents is related to assessment years 2007-08, 2008-09 and 2009-10. Therefore, decision of Hon'ble Gujarat High Court in the case of CIT Vs. Somaya Construction Ltd., (supra) is fully applicable in these three assessment years. Assessment orders in these assessment years are not sustainable. We quash them.



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13. Though we have quashed the assessment orders in these three years on the additional ground of appeal, still we would like to adjudicate the issue on merit also.

14. In the assessment years 2007-08, 2009-10 and 2010-11 common issue raised relates to treatment of profit earned by the assessee from sale of land as business income by the AO and confirmed by the ld.CIT(A) instead of capital gain as claimed by the assessee. As observed earlier, since the issue involved is identical in all these three years, to adjudicate this issue, we take facts from the assessment year 2007-08.

15. Brief facts leading to the present case, as merges out from the orders of the Revenue authorities are that, assessee is a partner in various firms and also director in M/s.Om Kirit Construction P.Ltd. Assessee was having income from remuneration from firm and also income from sale of land and shares. A search under section 132 of the Income Tax Act was carried out at the premises of the assessee on 25.2.2011. Pursuant to that, notice under section 153A of the Act was also issued on 18.7.2011 requiring the assessee to file return of income within the stipulated time. Assessee filed returns of income on 7.9.2011 declaring total income at Rs.5,83,410/-, Rs.18,09,680/- and Rs.2,79,52,400/- for the assessment years 2007-08, 2009-10 and 2010-11 on 7.9.2011 respectively. During the assessment proceedings, the AO noticed that the assessee was engaged in the land trading activities, but no separate accounts were maintained for 'stock in trade' and 'investments'. The assessee has also debited expenses like stamp duty charges, labour expenses, ground filling expenses to the profit & loss

account. On the basis of incriminating materials found during the course of search, the assessee had admitted unaccounted income of Rs.1.62 crores, which comprised of debtors for different lands. This, according to the AO, was receivable from the debtors related to sale of land, and therefore, the AO assumed that assessee was indulging in land trading activities on regular basis, which was adventure in the nature of trade. Thus, the ld.AO made additions of Rs.1,12,005/-, Rs.28,92,848/- and Rs.2,75,73,406/- for the assessment years 2007-08, 2009-10 and 2010-11 respectively.

16. In the assessment year 2007-08, the ld.AO further noticed that the assessee has shown exempt long term capital gain of Rs.2,02,479/- on sale of shares without any supporting evidence. On being show caused by the AO, the assessee filed copies of invoices for purchase and sales of shares. The AO construed that assessee has engaged in the business of trading in shares by looking into the size of transaction and treated profit on share trading activities to the extent of Rs.2,02,479/- as business income and added to the total income.

17. Aggrieved by action of the ld.AO in treating both income from sale of land and sale of shares as business income, the assessee carried the matter in appeal before the ld.First Appellate Authority. So far as first issue, i.e. income from sale of land is concerned, the assessee *interalia* pleaded before the ld.first appellate authority that the ldAO was erred in presuming that entire land transactions was the main business activities of the assessee, and therefore, the income earned should be treated as business income. However, fact was that the ld.AO failed to

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consider books of accounts of the assessee which would reveal that the assessee has maintained two separate portfolio viz. 'investment'; and 'stock-in-trade'. In the balance sheet for A.Y.2007-08 these lands were shown as investment, and the land held as stock-in-trade was shown separately in the trading account, which clearly demonstrated the intention of the assessee. Whatever gain directly credited to the capital account of the assessee. It was further submitted that the declaration made during the search was in respect of transaction *qua* real estimate, which could not be presumed that all land dealings were on business account. The holding period of the land was not too low. Particularly, in the Asstt.Year 2009-10 and 2010-11 the holding period was more than three years. Therefore, overall picture demonstrated that the intention of the assessee for holding the land was not of business but for investment purpose. Contentions of the assessee could not find favour with the Id.CIT(A). The Id.CIT(A) was of the view that the purchase and sale of land was regular and year to year basis; plots were sub-divided so as to indulge in commercial activities and earn profit. Accordingly, the Id.CIT(A) confirmed the action of the AO and sustained the addition.

18. So far as profit from sale of shares is concerned, the assessee submitted before the Id.First Appellate Authority that shares held by the assessee were in the nature of investment and the profit earned from such sales was directly shown the capital account of the assessee. The AO has mixed both the share transactions of business and investment and has treated both as held for trading purposes. However, the Id.CIT(A) did not accept this submissions of the assessee and observed that in the absence of evidence to prove that purchases were made for

the investment purpose and not business purpose, the AO was justified in holding that activities of sale and purchase of share were in the nature of regular trading activities. He confirmed the order of the AO.

19. Aggrieved assessee is in further appeal before Tribunal.

20. Before us, the ld.counsel for the assessee while reiterating submissions made before the Revenue authorities further submitted that the assessee has shown the land in question as investment since long. The ld.AO construed that the assessee was doing activities of trading in land and did not maintain separate accounts. Most of the land holding by the assessee was for more than three years, and therefore, there is no question of denying long term capital gain from the sale of the land. Purchase of land was shown in the balance sheet as investment and not as stock-in-trade. Whatever the loss or profit accrued, as also expenditure have been debited and capitalised in the account of the assessee, and therefore, there is no question of denying claim of the assessee. Assumption drawn by the Revenue authorities is not based on evidence, rather a non-appreciation of facts on record.

21. So far as profit on sale of share is concerned, the ld.counsel for the assessee reiterated the submissions that purchase of shares were for the purposes of investment and profit, if any, was directly credited to the capital account of the assessee and not accounted in trading account of the assessee. The ld.AO was not right in mixing both transactions and treating them as for trading purpose. On the other hand, the ld.DR supported the orders of Revenue authorities.

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22. We have considered rival submissions and gone through the record carefully. The dispute before us relates to, whether the assessee was 'investor' or 'trader' in land. Whether an assessee is an 'investor' or 'trader' is an objective consideration taking into account various aspects. According to the assessee, he was maintaining two portfolios i.e. trading in land as well as making investment both. Both are identifiable in accounts. Expenditure incurred thereof has been debited separately and whatever profit earned or loss suffered has been given effect in the capital account of the assessee. Meaning thereby, whatever income earned and expenditure incurred has been capitalized in personal accounts of the assessee, which establish the investment attitude of the assessee. The disclosure made by the assessee at the time of search was with regard to business activities of the assessee, but the ld.AO mixed up both transactions and treated them as business activities.

23. It is pertinent to observe that ITAT Lucknow Bench in the case of Sarnath Infrastructure (P) Ltd. v. ACIT (2009) 120 TTJ 216 has also considered issue whether an assessee deserves to be treated as a "trader" or "investor". Though the issue involved in that case relates to investment/trading in shares, but broad principle carved out by the ITAT is applicable on all sorts of transactions, where adjudicator is required to find out whether transaction was entered into by the assessee with a pre-dominant intention of trading or investment. The following tests are worth to note:

*"13. After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:*

(1) *What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.*

(2) *Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.*

(3) *What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).*

(4) *Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.*

(5) *How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.*

(6) *How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice verse.*

7. *It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.*

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8. *The mere fact of credit of sale proceeds of shares ( or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.*

9. *One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?*

10. *It is permissible as per CBDT's Circular No. 4 of 2007 of 15<sup>th</sup> June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.*

11. *Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen.”*

24. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

“After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

(a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

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- (b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.
- (c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.
- (d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.
- (e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.
- (f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding then an inference can readily be drawn that the activity is in the nature of business.”

25. In the light of the above, let us examine order of the Id.CIT(A). A perusal of the impugned order would indicate that the Id.CIT(A) has observed on a similar line as that of the Id.AO and relied upon the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Rewashanker A. Kothari, 283 ITR 338 (Guj) where guidelines have been drawn to determine whether profit arising on sale is business income or not. Conclusions briefly drawn by the CIT(A) are on page no.35 of the impugned order. It reads as under:



**“6. Profit from share trading activities :(AY 2007-08)**

Ground number 3 of A.Y.2007-08 is against the action of the AO of considering the proceeds from sale of shares amounting to Rs. 2,02,479/- as business income and not long-term capital gain. Appellant has claimed exempt long-term capital gain on sale of shares. The AO noted that appellant, during the year, has purchased shares worth Rs. 31,62,927/- and sold shares worth Rs.15,78,706/-. Since the appellant was into share trading activity, the profit earned on sale of shares was held as business income of the appellant.

6.1 The relevant portion of the submissions furnished by the appellant is reproduced as under:

*"The appellant had sold some shares during the year under consideration purchased by it in the year 2006 and had shown long term capital gain of Rs. 2,02,479/- as exempt u/s 10(38) in its return of income. The A.O. has treated the same as business income mainly on the ground that the assessee is a trader in shares. However, it is submitted that the figures shown by the A.O. in its assessment order of purchase and sale of shares are different from the one which has been claimed as long term capital gain. Those which were in the nature of trade have been directly shown in profit and loss account and treated separately as business income*

*The shares which were in the nature of investment and not in the nature of trade, profit of which have been directly shown in the capital account of the appellant. The A.O. has mixed both the share transactions of business and investment and has treated both as held for trading purposes. Hence, as these shares were held for the purpose of investment, it was claimed as long term capital gain. Hence, the sale of said shares is in the nature of investment and not trade."*

6.2 I have carefully considered the submissions made by the appellant and have gone through the assessment order as well.

6.2.1 Admittedly, the appellant is in the business of share trading. No details have been furnished to show that relevant purchases in shares were shown in the balance sheet of earlier year as 'investment' and not stock. There are frequent purchase and sale transactions of shares carried out by the appellant. Appellant has not given any reason or evidence, either during assessment proceedings during appeal proceedings, to show that relevant purchases were made for the investment purpose and not business purpose. In the circumstances, the AO was justified in holding that sale and purchase transactions of shares carried out by the appellant were in the nature of business activity. Thus, the profits earned there from have to be treated as business income of the appellant. This ground is accordingly dismissed

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8. Addition on account of profit from land trading activities :  
(AYs 2007-08, 2009-10 & 2010-11).

Ground no. 2 of A.Y. 2007-08, Ground no. 2 of 2009-10 and Ground no. 1 of 2010-11 relate to one common issue of treating the profit from sale of plots of land as business income and not capital gain. The AO noted that appellant was engaged in land trading activities year by year. Appellant was having land at various locations and no land was shown as 'stock in trade' in the balance sheet for the years under consideration. The expenses related to land like stamp duty charges, labour expenses, ground filling expenses, ground levelling expenses, site salary etc were debited in the profit and loss account. The appellant was not maintaining separate accounts for lands kept as 'stock in trade' and lands purchased for 'investment'. The AO relied on CBDT Instruction number 1827 dated 31.8.89 which has laid down certain criteria to distinguish between shares held as a 'stock in trade' and shares held as 'investment'. AO has also observed that a search took place at the premises of the appellant and during search, on the basis of incriminating material, appellant had admitted unaccounted income of Rs. 1.62 crores comprising of debtors for different lands. Thus the unaccounted income disclosed by the appellant was comprising receivables for sale of land which proved that appellant was engaged in land trading activities and this activity was in the nature of business. In view of above facts, the AO treated the profit earned by the appellant from land trading activities as business income instead of capital gains as claimed by the appellant.

8.1 The relevant portion of the submissions furnished by the appellant is reproduced as under:

"The assessee sold during the year agricultural land styled as 292/5, 292/2 for Rs.2,25,000/-. It was purchased in F.Y. 2003-04 for Rs. 1,12,885/- (indexed cost 1,26,853/-). The assessee claimed profit on sale of land of Rs. 1,12,005/- as long term capital gain. The A.O. has treated the same as business income mainly on the ground that the assessee is a dealer in real estate. The appellant submits that it has even in A.Y. 2005-06, shown income as capital gain on sale of real estate separately and in other years also, income from land held as business asset is shown as business profits. The declaration during survey was in respect of business income from real estate and it cannot be presumed that all land dealings are on business account.

From the balance sheet of preceding year (31-03-2006) (PB Page No. 26 - 28), it will be seen that all lands are shown as investments and there was no dealing in land and it was not treated as business income. Thus, the holding period is more than three years. The assessee has not dealt with, any land as a trader. The

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incomes are by way of mainly share from firms (not being real estate firms), interest/remuneration as partner, agriculture etc. Even in accounts the profit was credited to capital account directly. Hence, the character is that of investment in agricultural land and not that of a business asset. In any case, one is not ordinarily supposed to deal in agricultural lands,"

8.1.1 Further submissions were filed by the appellant. The relevant part of the same is as below :

"With regard to the dispute whether income from sale of lands-for all years in appeal is to be -charged as capital gains or income from business, the facts in nutshell are presented by way of a chart annexed. Submissions in this regard are as under:

A.Y. 2007-08:

1. Plot no. 292/5 and 292/2 were sold for Rs. 2,25,000/-. The holding is above 3 years. There is no conversion of the land for non-agricultural use and the hence, the statement given by the A.O. that it was purchased as agricultural land, then got converted into non-agricultural one is incorrect,
2. In the balance sheet (PB -1, Page 28), it was treated and disclosed as investment.
3. In the trading account, lands held as stock have been shown and treated separately (PB - I, Page 29) which clearly establishes the intent of the assessee.
4. Holding period is not too short. -
5. Gain on sale is directly credited to capital account of assessee -individual and disclosed separately (PB -1, Page 31)

A.Y. 2009 - 10:

1. Plots of land situated at Mavdi - 177 were sold for Rs. 33,92,2007/-. The holding is above 3 years. It was a non-agricultural land at the time of purchase of the property by the assessee and it was not converted by assessee after its purchase. Hence, statement given by the A.O. that it was first purchased as agricultural land and then got converted into non-agricultural one is incorrect.
2. In the balance sheet (PB -1, Page 35), it was treated and disclosed as investment.
3. In the trading account, lands held as stock have been shown and treated **separately (PB - II, Page 28)** which clearly establishes the intent of the assessee.
4. Holding period is not too short.

5. Gain on sale is directly credited to capital account of assessee - individual and disclosed separately (PB - II, Page 31).

A.Y. 2010-11:

1. Plots of land situated at Mavdi - 177 were sold for Rs. 21,90,5007- and plot of land at Raiya Survey no. 157/1 was sold for Rs. 2,67,01,6507-. The holding is above 3 years. In respect of plot at Mavdi - 177, it was a non-agricultural land at the time of purchase of the property by the assessee and it was not converted by assessee after its purchase and in respect of plot at Raiya no 157/1, it was converted into non-agricultural in the year 2008-09, hence it can be seen that the intention of the assessee was to keep the Raiya plot as investment only as the assessee had keep the said land as agricultural for three years and more and then got converted into non-agricultural one.

2. In the balance sheet (PB - II, Page 32), both were treated and disclosed as investment.

3. In the trading account, lands held as stock have been shown and treated separately (PB - II, Page 28) which clearly establishes the intent of the assessee.

4. Holding period is not too short.

5. Gain on sale is directly credited to capital account of assessee - individual and disclosed separately (PB - II, Page 36).

From the above factual analysis which is on record, it may kindly be appreciated that (i) large pan of activities of assessee is by way of partner of firms carrying on steel business, (ii) There is nothing on record brought out by the A.O. to show that the intention was to deal in lands at the time of purchase thereof. The Supreme Court in case of **H. Holck Larsen** in (1986) 160 ITR 67 has propounded that intention of the assessee is relevant at the time of purchase of an asset and not at the time of sale thereof. (Hi) The assessee has accorded separate and respective treatment in books to land acquired for investment and acquired for trading. The Board Circular in respect of share dealing also recognizes and accepts that both investment and trading asset can co-exist.

8.2 I have carefully considered the submissions made by the appellant and have gone through the assessment orders as well.

8.2.1 First coming to the facts of the case, during appeal proceedings, appellant was directed to submit details of land dealings carried out in different years. The relevant details are as below:

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Sr. No	Property	Year of Purchase (F.Y.)	Nature of Asset	Whether converted into N/A	Year of Sale	Remarks
1	Vavdi Plot	1998-99	Non-Agri	-	-	Holding Continues
2	Plot No. 292/5					
	292/2	2003-04	Agri land	No	2006-07	Holding Sold
3	Premises	12005-06	(Non-Agri	-		(Holding Continues
4	Bapunagar Dela	Before 1993-94	Non-Agri	-	-	Holding Continues
5	Thorala Wadi	(2004-05	Agri	-	-	Holding Continues
6	- Lodhika	(1996-97	(Non-Agri	-	2004-05	(Holding Sold
7	Raiya Plot - 1 57/1 J	2003-04	Agri land	Yes	2009-10	
					2010-11	Holding Continues
8	Nana Mava/ Mavdi-43	2001-02	Agri land	Yes	2003-04	
					2005-06	
					2006-07	
					2008-09	
					2009-30	Stock sold
9	Mavdi - 1 77	2005-06	Non-Agri land		2008-09	
					2009-10	
					2010-11	Holding Sold

From the above details it is clear that appellant has been purchasing pieces of land almost every year. Similarly, in almost all the years, right from the year 2003-04 appellant has been selling pieces of land. The appellant has purchased mostly non-agricultural lands. Only three pieces of lands at serial number 5, 7 and 8 were (purchased as agricultural land out of which, in two cases the land has been converted into nonagricultural land. As noted by the AO, the land was divided into various plots and these plots were sold to the buyers. The land at Nana Mava 43 was purchased by the appellant in the year 2001-02 and it was sold in pieces in the years between 2003-04 and 2009-10. Similarly, the land at Mavdi 177 was purchased by the appellant in the year 2005-06 and was sold in the years 2008-09, 2009-10 and 2010-11.

8.2.2 As noted by the AO, in order to decide whether the transaction is in the nature of business activity or sale of assets, some of the criteria required to be examined are as under:

1. whether the purchase and sale was allied to usual trade or business/was incidental to it or was an occasional independent activity
2. whether the purchase was made solely with the intention of resale at a profit or for long-term appreciation
3. whether scale of activity is substantial
4. whether transactions were entered into continuously and regularly during the year
5. whether the purchases are made out of own funds or borrowings
6. ratio of sales to purchase
7. time devoted to the activity and the extent to which it is the means of livelihood.

8.2.3 As clear from the facts of this case, the transactions of purchase and sale of land have been continuously carried out by the appellant, year by year. These are not occasional independent activities. The pieces of land are not sold as such but are subdivided into plots and then sold to the buyers reflecting a pure commercial activity. This shows that the intention for purchasing the land was always to earn maximum profit by selling parts of land in subsequent years otherwise the land would have been sold at one go in one year. The scale of activity is also substantial. Appellant has been earning regular profits from land selling activity and these profits as means of livelihood. Regarding sources of funds used for purchase of land, it is seen that appellant has been

regularly borrowing funds from ate parties. This is evident from the details furnished by the appellant related to around of disallowance of interest. Therefore the purchases were made by using re borrowed funds and were not out of own funds of the appellant.

8.2.4 As stated above, the appellant has debited various expenses related to land like stamp duty charges, labour expenses, ground filling expenses, ground levelling expenses, site salary. These type of expenses are usually incurred for making the land commercially saleable. Most importantly, during search, appellant has made disclosure of unaccounted income of Rs. 1.62 crores comprising of debtors for various pieces of land. This proves that appellant was engaged in the commercial activity of purchase and sale of land and the profits earned there from were not fully disclosed in the regular books of accounts. Only a part of such sale considerations were reflected in the regular books and the balance consideration was received as unaccounted income.

8.2.5 There are several judicial pronouncements as per which above type of transactions are required to be treated as business transactions and resultant profits as business income. As per CBDT's recent Circular No.4 of June, 2007, an assesses can have both portfolios, one for trading and other for investment provided it maintains separate account for each type, there are distinctive features for both and there is no intermingling of holdings in two portfolios. In case of appellant, above conditions are not satisfied. No separate accounts are maintained for two types of land. If there were distinct portfolios, the appellant may have income under both heads. The Hon'ble jurisdictional High Court in CIT v. Rewashanker A. Kothari [2006] 283 ITR 338 (Guj) laid down the following guidelines in order to determine whether profits arising on sale is business income (page 343):

\*\*\*\*    \*\*\*\*    \*\*\*\*\*

8.2.6 In view of above factual and judicial matrix, it is held that AO was justified in treating the profit from land trading activity as business income of the appellant. Accordingly, the related grounds are dismissed for all the relevant assessment years."

26. Though, the Id.CIT(A) has taken cognizance of land holding in para 8.2.1, but at the cost of repetition, we would like to mention that during the course of hearing, the Id.counsel for the assessee placed on record complete details of land owned by the assessee and treatment given to this land i.e. whether in the 'investment' portfolio or 'trade' portfolio. The Id.CIT(A) has already taken note of nine pieces of land

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which we have reproduced while taking cognizance of CIT(A)'s finding contained in para 8.2.1. The remaining land whose details have been submitted by the ld.counsel for the assessee reads as under:

“A.Y. 2005-06 GIDC plot at Lodhika

Cost Of Purchase	Date/Year of Purchase	Sales Consideration	Place at where it shown
317463.00	2003-04	2124360.00	This plot shown as fixed assets in the B/S. this plot sold during A.Y. 2005-.06 and index cost of this plot is Rs. 3220588.00
178878.00	2002-03		
179589.00	2001-02		
196503.00	2000-01		
266349.00	1999-00		
241194.00	1998-99		
93090.00	1997-98		
934768.00	1996-97		

**A.Y.2006-07**

Cost Of Purchase	Date/Year of Purchase	Sales Consideration	Place at where it shown
	11.09.2001 11.09.2001	85518.00 83419.00	This plot shown as stock in the B/S. Further this plot is situated at Nana mava Sr No.43/4

**A.Y. 2007-08**

Cost Of Purchase	Date/Year of Purchase	Sales Consideration	Place at where it shown
	11.09.2001 11.09.2001 11.09.2001 11.09.2001	71265.00 71502.00 270900.00 286000.00	This plot shown as stock in the B/S. Further this plot is situated at Nana mava Sr No.43/4
112885.00	14.08.2003	225000.00	This plot shown as Assets in the B/S and sold during the A.Y 2007-08. Sr No.292/2



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A. Y. 2009-10

Cost Of Purchase	Date/Year of Purchase	Sales Consideration	Place at where it shown
	19.09.2001	951000.00	This plot shown as stock and it is situated at nana mava Sr. No. 43/4
499352.00	06.10.2005	224400.00	This plot shown as assets and it is situated at Mavdi Sr. No. 1 77
	06.10.2005	224400.00	
	06.10.2005	390200.00	
	06.10.2005	673200.00	
	06.10.2005	30000.00	
	06.10.2005	468000.00	
	28.10.2005	561000.00	
	06.10.2005	234000.00	
	06.10.2005	125200.00	
	06.10.2005	125200.00	
	06.10.2005	112200.00	
	06.10.2005	112200.00	
06.10.2005	112200.00		

A. Y. 2010-11

Cost Of Purchase	Date/Year of Purchase	Sales Consideration	Place at where it shown
2919917	06.10.2005	2190500.00	This plot shown as assets and it is situated at mavdi Sr. No. 177
1026827.00	2003-04	26701650.00	This plot shown as assets and it is situated at Raiya 157/1
		1748640.00	Sold from stock situated at Nana mava 43/4

A.Y. 2011-12			
Cost Of Purchase	Date/Year of Purchase	Sales Consideration	Place at where it shown
	2005-06	220000.00	This plot shown as assets and it is situated at mavdi Sr. No. 177
128530.00	2003-04	3410000.00	This plot shown as assets and it is situated at Raiya 157/1
76691.00	2003-04	2035000.00	
123839.00	2003-04	2900000.00	
17577.00	2003-04	467000.00	

27. Thus, a perusal of order of Revenue authority would indicate that the main force which weighed in the mind of Revenue authorities to treat the income of the assessee as business income and not capital gain are that (i) transactions of purchase and sale were continuous and substantial, (ii) plots of land sub-dividend with intent to make trading activities and earn profit, and (iii) the assessee has borrowed funds for purchases. In other words, these three factors persuaded the Id.CIT(A) to harbour a belief that the land purchased in the year of 2004 and held for more than three years is to be treated as a trade asset. Accounts furnished before us show that the assessee was dealing in lands both as a trader as well as investor. He had kept separate accounts for both types of dealings. Income earned and expenditure incurred has been accounted in the capital account of the assessee. Period of land holding is more than three years. They were reflected in the balance sheet as investment. We find that the frequency of such purchase or sale in said portfolio was not large enough to doubt that this portfolio was only as

colourable device to pay lesser taxes. Basis for treating the transactions of the assessee as business activities by the Revenue authorities are not based on some cogent evidence rather based on some presumption. We are not convinced with the reasoning given by the Revenue authorities for treating the income of the assessee as business income, and therefore, we direct the AO to treat the income earned by the assessee from sale of land as capital gain and not business income. This ground of appeal is allowed.

28. So far as income earned from the sale of shares is concerned, we have gone through the orders of the Revenue authorities, and find that both the authorities below in similar manner observed that income from sale of shares was to be treated as business income, since the assessee trading in shares. Though the assessee has submitted that he was maintaining separate portfolio for investment and trade, the Revenue authorities have clubbed both the accounts into one and treated all the sales as regular trading activities and accordingly treated as business income. It was also submitted by the assessee all the transactions were reflected in the capital account of the assessee, and therefore, it could not be treated as business income, which was not appreciated by the Revenue authorities. In our view, the ld.Revenue authorities, in a sweeping manner, treated the entire transactions of sale of shares as regular business without any basis and justification. There is no specific finding to the effect that the entire sale of shares is part of business activities of the assessee and is to be treated as business income of the assessee. There is no discussion as to the period of holding, and whether the transactions are intra-day or delivery based and/or size of

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the transaction, so as to determine whether income earned from the investment or through regular course of trading. In the absence of the same, we are not convinced with observation of the Revenue authorities on this issue, which we reverse and direct the AO to treat the gain from sale of shares as long term capital gain. This ground of appeal is allowed. Consequently, ground no.1, 2 of the Asstt.Year 2007-08, ground no.1 of the Asstt.Year 2009-10 and ground no.1 of the Asstt.Year 2010-11 are allowed.

29. One more ground left in Asstt.Year 2007-08 is ground no.3. In this ground, assessee is aggrieved by the action of Id.CIT(A) in upholding addition of Rs.1,29,949/- made by the AO.

30. After hearing both the sides, we have gone through the record carefully. We find that an amount of Rs.1,29,949/- was found credited to the capital accounts of the assessee. No explanation or details were furnished at the time of assessment by the assessee, therefore, the same was treated as unexplained credit and added to the income of the assessee. Though the assessee has not furnished before us any details thereof, however, submitted that since the assessee has disclosed an amount of Rs.1.62 crores during the search, addition may be deleted by giving telescoping effect. In order to ensure that the assessee is not taxed twice for the same source of income, the AO is directed to give benefit of telescoping against the addition made on account of disclosure of Rs.1.62 made during the course of search. Thus, this addition of Rs.1,29,949/- is deleted.

31. In the result, ITA No.744/RJT/2014 is allowed.

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32. Now we shall deal with other common issue regarding disallowance of interest on loan. This issue is raised in ground no.2 in the Asstt.Years 2009-10, 2010-11 and ground no.1 in the Asstt.Year 2008-09. The amounts involved are of Rs.15,10,642/- and Rs.15,85,240/- in Asstt.Years 2009-10, 2010-11 and Rs.37,143/- (interest expenses) and Rs.1,27,757/- (processing charges) in the Asstt.Year 2008-09.

33. Brief facts in this regard are the assessee has taken loan from ICICI bank. The assessee debited interest payment of the loan in the profit & loss account of the relevant years. The ld.AO observed that the loan was taken for personal user of the assessee, and therefore, the assessee is entitled to deduction of interest. The ld.CIT(A) confirmed the action of the AO on issue in all these years. The assessee submitted before the ld.CIT(A) that it has sufficient interest free funds to cover the advances made. It was submitted that no interest free funds are diverted for non-business purpose.

34. On due consideration of the above facts and circumstances, and a perusal of the balance sheet of the assessee for the year 2010-11, it reveals that the assessee has capital of more than Rs.4.82 crores which is sufficient to meet the interest free advances. There is nothing on record to suggest that the assessee has diverted its capital for non-business purpose and therefore following the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities and Powers Ltd., 313 ITR 340 no disallowance is warranted on this count. Accordingly all these grounds are allowed. Similarly, in Asstt.Year 2008-09, assessee has sufficient interest free funds therefore, no interest expenditure or

processing charges deserves to be disallowed on the ground that interest bearing funds was used for non-business purpose.

35. Now only ground left for adjudication is ground no.2 raised in the Asstt.Year 2008-09, whereby the assessee has agitated upholding the action of the he AO in construing jewellery of Rs.1,93,006/- belonging to Smt.Anjanaben Joshi, as belonged to the assessee.

36. Brief facts of the case are that during the course of search at the residence of the assessee a bill/ retail invoice no.1500 dated 21.11.007 of JP Jewellers for purchase of jewellery value at Rs.1,93,006/- was found and seized. This invoice was in the name of one Smt. Anjanaben Joshi. Since this bill was found in the premises of the assessee, the AO presumed that investment in jewellery was made by the assessee and onus to prove otherwise was on the assessee. The assessee explained that bill was in the name of Smt.Anjanaben Johshi and jewellery belonged to her. She left the bill at the premises of the assessee, and the assessee was nothing to do with the alleged investment. Since no further evidence was with the Revenue, addition if at all to be made, the same should be in the hands of the Smt.Anjanaben Joshi and not in the hands of the assessee. Both the Revenue authorities did not accept the explanation and made the addition.

37. After hearing both the sides and on perusal of the impugned orders, we find that the addition based on the alleged bill belonged to third party found at the premises of the assessee is not sustainable in the eyes of law, because the bill does not mention the name of the assessee nor bear signature of the assessee nor any jewellery was found and

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seized at the premises of the assessee. Simply because the alleged bill was found at the premises of the assessee it cannot be presumed, without any corroborative evidence that the same was belonged to the assessee and the addition should be made in the hands of the assessee. Therefore, we are not convinced with reasoning given by the Revenue authorities for making such addition in the hands of the assessee.

During the hearing before us, the ld.counsel for the assessee submitted that even if the addition is to be sustained, then disclosure of Rs.1.62 crores made by the assessee during the search would suffice to meet the alleged unexplained investment in jewellery. Therefore, it is submitted that by applying telescopic effect this addition may be deleted. Considering all these facts, since no corroborative material was available to prove the case of the Revenue, we delete the impugned addition on account of unexplained investment in jewellery and allow this ground.

38. In the result, all the appeals of the assessee are allowed.

**Pronounced in the Open Court on 18<sup>th</sup> September, 2018.**

**Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER**

**Sd/-  
(RAJPAL YADAV)  
JUDICIAL MEMBER**

Ahmedabad; Dated, 18/09/2018

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

**BEFORE SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

ITA No.721/Lkw/2016  
Assessment Year:2009-10

Shri Indra Pal Singh, 4/4, Vipul Khand, Gomti Nagar, Lucknow. PAN:ANXPS 0254 L (Appellant)	Vs.	Income Tax Officer-1(2), Lucknow.  (Respondent)
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Appellant by	Shri K. R. Rastogi, C. A.
Respondent by	Shri Nimish Mishra, D.R.
Date of hearing	14/09/2018
Date of pronouncement	18/09/2018

**ORDER**

This appeal has been filed by the assessee against the order of learned CIT(A)-I, Lucknow dated 19/08/2016.

2. At the outset, Learned A. R. invited my attention to the additional grounds of appeal which was filed on 25/04/2018 and submitted that these grounds are legal in nature and the issue raised in these grounds goes to the issue of jurisdiction and therefore, the Hon'ble Tribunal was empowered to admit the same. Reliance in this respect was placed on the order of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (SC) and it was submitted that Hon'ble Supreme Court in this case had held that Tribunal had jurisdiction to examine a question of law which arose from the fact and which had a bearing on the tax liability of the assessee. Learned A. R. submitted that through these additional grounds the assessee has challenged that reasons recorded were not valid



reasons recorded as the Assessing Officer did not apply his mind as to how the income had escaped assessment. Learned A. R. invited our attention to the copy of reasons recorded, placed at page 24 of the paper book, and it was submitted that the Assessing Officer has just recorded that assessee had made deposits in bank and nowhere in these reasons he has made any findings from the return of income as to how the income had escaped. It was further submitted that the Assessing Officer had required the assessee vide non statutory letter dated 14/11/2011 to explain the deposits and for which the assessee had replied and had submitted his PAN and information regarding filing of original return of income. It was submitted that the Assessing Officer without further verifying the contents of the information which was already on record in the form of return did not make any satisfaction regarding escapement of income. It was submitted that various Benches of Hon'ble Tribunal and various Hon'ble High Courts have held that in the reasons recorded, the Assessing Officer should record his satisfaction after examination from the return of income and from the information in hand that income had escaped assessment. It was submitted that mere cash deposits in the bank cannot be said to be income of the assessee as the cash deposits can be from various other sources which may not be income of the assessee. Reliance in this respect was placed on a number of case laws. Our specific attention was invited to an order of Hon'ble Delhi High Court in the case of Bir Bahadur Singh Sijwali vs. Income Tax Officer 53 Taxmann.com 366 and further our attention was invited to a case law of Amritsar Bench of the Tribunal in the case of Gurpal Singh vs. Income Tax Officer [2016] 71 Taxmann.com 1-8 (Amritsar –Trib). Our attention was also invited to an order of Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax vs. Meenakshi Overseas (P.) Ltd. where Hon'ble court had held that where no independent application of mind is made by the Assessing Officer, the notice issued u/s 148 was void ab initio.

Without prejudice it was submitted that non statutory notice and notice u/s 133(6) dated 01/03/2012 for verification of cash deposits was not legal as no proceedings were pending at the time of issue of notice u/s 133(6) and Assessing Officer was not empowered to issue any notice without the prior approval of Principal Director or Principal Commissioner and in this respect our attention was invited to the proviso to section 133(6) of the Act. Learned A. R. submitted that Hon'ble Supreme Court in the case of Income Tax Officer, Ward-23(4), New Delhi vs. Sky View Consultants (P.) Ltd. [2018] 96 taxmann.com 424 (SC) vide order dated 17<sup>th</sup> August, 2018 has held that the notice issued u/s 131 without the authorization to exercise his power were invalid and therefore, has decided the issue in favour of the assessee. Learned A. R. submitted that the Assessing Officer did not take any approval as required by the Act and in this respect our attention was invited to copy of order sheet entries placed at pages 24 to 26 of the paper book. It was submitted that the proceedings started on 14/02/2014 whereby Assessing Officer recorded the reasons and nowhere in the order sheet the required permission has been taken. Learned A. R. therefore, argued that the reasons recorded by the Assessing Officer itself are not valid and therefore, the consequent assessment proceedings are illegal and void ab initio.

3. Without prejudice it was argued that Assessing Officer had not made any addition on account of cash deposits and had made addition on other grounds which were also not legal in view of the decision of Hon'ble Lucknow Bench of the Tribunal in the case of Anita Srivastava in I.T.A. No.98/Lkw/2017.

4. Learned D. R., on the other hand, submitted that the record of obtaining the permission from higher authority was not available with him and it was submitted that the Assessing Officer might have taken the

permission separately. As regards the other legal issue of notice u/s 148, Learned D. R. argued that sufficient reasons were recorded by the Assessing Officer.

5. I have heard the rival parties and have gone through the material placed on record. The assessee has taken the following additional grounds of appeal which have been accepted in view of the ratio of judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (SC):

*"1. That the notice u/s 148 of I.T. Act dated 14.02.2014 is an invalid notice as it does not specify the reassessment on the basis of concealed income as per satisfaction of the A.O., hence subsequent proceedings are also invalid.*

*2. That information itself could not be sufficient material for formation of belief. Further, there was no investigation or evidence collected by the A. O. having a nexus or live link or rational connection with the income escaping the assessment, hence the reopening of the assessment is void.*

*3. That there is no addition in the assessment on the reasons recorded, hence other additions made by Ld. A. D. are not valid and present assessment order is void ab initio."*

These grounds are legal in nature and therefore, these are being first disposed of as under. For disposal of these grounds it is important to first visit the reasons recorded which are reproduced below:

*"In this case as per information available with the department, the assessee has made transactions regarding cash deposits totaling to Rs.29,50,000/- in his bank account maintained with State Bank of India, Hazratganj, Lucknow during the financial year 2008-09 relevant assessment year 2009-10. In compliance of non statutory letter dated 14.11.2011 assessee has submitted his PAN and information regarding filing of return but has not furnished source of said cash deposits. Further a notice*

*u/s 133(6) dated 01.03.2012 and subsequent reminder letter dated 10.01.2014 were issued regarding verification of said cash deposits but no compliance has been made by the assessee in this regard till date. Thus it is clear that the assessee has no explanation to offer in this regard.*

*In view of the above facts, I have reason to believe that the income of the assessee to the tune of Rs.24,41,902/- (Rs.29,50,000/- -Rs.5,08,098/-) has escaped assessment for the Assessment Year 2009-10. Proceedings u/s 147 are being initiated and notice u/s 148 issued accordingly."*

5.1 From the above reasons recorded, it is apparent that the Assessing Officer had in his possession certain information regarding deposit of cash in bank account of the assessee. The Assessing Officer wanted assessee to furnish source of cash deposit to which the assessee furnished his PAN and had also furnished information regarding filing of his return. The Assessing Officer did not examine the original return of income to find out the source of cash deposits but he again required the assessee to explain source of cash deposits to which the assessee did not reply and therefore, he held that the income of assessee had escaped assessment and therefore, he issued notice u/s 148. I find that this legal issue argued by Learned A. R. regarding non approval of issue of notice u/s 131 of the Act do not find part of additional grounds of appeal therefore, this issue do not require any adjudication. However, on grounds No. 1 & 2, I find that the Assessing Officer himself has noted that assessee had furnished PAN and had also furnished information regarding filing of original return of income. The Assessing Officer wanted assessee to furnish source of cash deposits to which assessee did not reply. I find that Assessing Officer should have applied his mind from the documents already on record and should have compared the information which was in his possession and only after verifying such information should have arrived at the conclusion regarding escapement of income. The mere deposit of cash in the bank account

cannot give rise to a belief of Assessing Officer that income had escaped assessment as the cash deposit can be from any other source other than income. Such satisfaction was needed by the Assessing Officer which has not been made. Hon'ble Delhi Tribunal in the case of Bir Bahadur Singh Sijwalia vs. Income Tax Officer has decided the similar issue in favour of the assessee by holding as under:

*"8. Let us, in the light of this legal position, revert to the facts of the case before us. All that the reasons recorded for reopening indicate is that cash deposits aggregating to Rs 10,24,100 have been made in the bank account of the assessee, but the mere fact that these deposits have been made in a bank account does not indicate that these deposits constitute an income which has escaped assessment. The reasons recorded for reopening the assessment do not make out a case that the assessee was engaged in some business and the income from such a business has not been returned by the assessee. As we do not have the liberty to examine these reasons on the basis of any other material or fact, other than the facts set out in the reasons so recorded, it is not open to us to deal with the question as to whether the assessee could be said to be engaged in any business; all that is to be examined is whether the fact of the deposits, per se, in the bank account of the assessee could be basis of holding the view that the income has escaped assessment. The answer, in our humble understanding, is in negative. The Assessing Officer has opined that an income of Rs 10,24,100 has escaped assessment of income because the assessee has Rs 10,24,100 in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the assessee. Of course, it may be desirable, from the point of view of revenue authorities, to examine the matter in detail, but then reassessment proceedings cannot be resorted to only to examine the facts of a case, no matter how desirable that be, unless there is a reason to believe, rather than suspect, that an income has escaped assessment.*

9. *Learned Departmental Representative has referred to a number of judicial precedents in support of her stand that even deposits in the bank account, as having come to the notice of the Assessing Officer through AIR, can be reason enough for holding the belief that income has escaped assessment. She has relied upon the decisions in the cases of CIT Vs Nova Promoters & Finlease Pvt Ltd [(2012)342 ITR 169] but then none of the questions before I.T.A. No.: 3814/Del/11 Assessment year: 2008-09 Page 5 of 6 Hon'ble High Court had anything to do with reopening of assessment and this decision can not, therefore, be taken as an authority on the legal issue which did not even come up for specific adjudication before Their Lordships. As for her reliance on Hon'ble Supreme Court's judgment in the case of Phool Chand Bajrang Lal Vs ITO [(1993) 203 ITR 456], that was case in which Their Lordships concluded that the AO "rightly initiated the reassessment proceedings on the basis of subsequent information, which was specific relevant and reliable, and after recording the reasons for formation of his own belief that in the original assessment proceedings, the assessee had not disclosed the material facts truly and fully and, therefore, income chargeable to tax had escaped assessment" and we are unable to see anything on the facts of the present case which are materially similar to the facts of the said case. As regards her reliance on the decision of a coordinate bench in the case of Mithila Credit Services Limited Vs ITO (ITA No. 1078/Del/2013; order dated 23.5.2014), it is important to bear in mind the fact that it was a case in which the Assessing Officer had reopened the assessment on the basis of receipt of information from Directorate of Investigation, and, as noted by the Assessing Officer in the reasons recorded for reopening the assessment, "the name of the assessee figures as one of the beneficiaries of these alleged bogus transactions" in the information given by the directorate. If the assessee was a beneficiary of such a scam, the income was indeed to have been taxed in its hands but then in the case before us the only reason for reassessment proceedings was the fact of deposit of bank account which by itself does not lead to income being taxed in the hands of the assessee. Learned Departmental Representative has referred to several other judicial precedents in support of the proposition that at the stage of initiation of reassessment proceedings, all that is to be seen as existence, rather than adequacy, of the material to come to the conclusion that income has escaped assessment.*

*To us, there cannot be any, and there is no, doubt on the correctness of this proposition but then, as we have elaborately explained earlier in this order, the material must indicate income escaping assessment rather than desirability of further probe in the matter which may or may not lead to income escaping the assessment. On the basis of reasons as recorded in this case, such an inference about income escaping assessment, in our humble understanding, cannot be drawn.*

*10. In view of the reasons set out above, as also bearing in mind entirety of the case, we are of the considered view that the reasons recorded by the Assessing Officer, as set out earlier, were not sufficient reasons for reopening the assessment proceedings. We, therefore, quash the reassessment proceedings. As the reassessment itself is quashed, all other issues on merits of I.T.A. No.: 3814/Del/11 Assessment year: 2008-09 Page 6 of 6 the additions, in the impugned assessment proceedings, are rendered academic and infructuous."*

5.2 Similarly I find that Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax vs. Meenakshi Overseas (P.) Ltd. [2017] 82 Taxmann.com 300 (Delhi) has held as under:

*"Section 68, read with section 147 of the Income-tax Act, 1961 - Cash credit (Accommodation entries) - Assessment year 2004-05 - Information was received from Director (Investigation) that during year under consideration, assessee had received accommodation entries from a beneficiary - Notice under section 148 was issued and an assessment order was passed by Assessing Officer treating credit received as unexplained income under section 68 -Whether since there was no independent application of mind by Assessing Officer to tangible material and, conclusions of Assessing Officer were reproduction of conclusion in investigation report, reasons failed to demonstrate link between tangible material find formation of reason to believe that income had escaped assessment and, consequently, reassessment was unjustified - Held, yes [Paras 36 and 37] [In favour of assessee]."*



Further I find that Assessing Officer has not made any addition on account of cash deposits in the bank and has made addition on other grounds which fact is verifiable from assessment order. This grievance has been taken by assessee as ground No. 3 of his appeal.

6. I find that Lucknow Bench of the Tribunal in the case of Anita Srivastava vs ACIT in I.T.A. No.98/Lkw/2017 has held that where a case has been reopened u/s 148 on account of some information and if addition is not made on account of that information then no other addition can be made on any other ground. The findings of Hon'ble Tribunal are reproduced below:

*"7. We have perused the case records, heard the rival contentions and we find that the reasons recorded under section 148 of the Act, which prompted assessment to be framed under section 147/143(3) of the Act, is essentially in relation to the possession of information by the Department regarding purchase of immovable property valued at Rs.62,92,500/- and in respect of the same various details were asked for i.e. PAN, copy of ITR and bank account statements. We find that the reason, for which the Assessing Officer feels that income might have escaped assessment, is with regard to the purchase amount of Rs.62,92,500/- and on a perusal of the paper book, we find that all the relevant details in relation to the transaction as specified in the reasons recorded by the Assessing Officer were submitted by the assessee to the Department but while completing the assessment, no addition/disallowance under this head was made. Thereafter the Assessing Officer has proceeded to disallow the claim made under section 54F of the Act which does not form subject matter of the reasons recorded for initiation of proceedings under section 147/148 of the Act. What we are to examine is when on a particular ground or reasons recorded by the Assessing Officer, he reopens the assessment but makes no addition on those grounds and reasons, then whether the Assessing Officer can make addition in that assessment order for some other grounds or reason, which do not form part of the reasons for reopening at all. In our humble understanding, it is in the negative.*

*8. In the case of CIT vs. Mohmed Juned Dadani (supra), the Hon'ble Gujarat High Court opined that when on the ground on which*



*the reopening of assessment is based, no additions are made by the Assessing Officer in the order of assessment, he cannot make additions on some other grounds which did not form part of the reasons recorded by him. In this judgment, we also find reference made to the decision of the Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (supra) wherein it was held considering an identical situation interpreting the provisions contained in section 147 of the Act that even by virtue of introduction of Explanation (3) to the said section, the situation would not be different, which means that if upon issuance of a notice under section 148 of the Act, the Assessing Officer does not assess the income which he has reason to believe, had escaped assessment and which forms the basis of a notice under section 148 of the Act, it is not open to the Assessing Officer to assess independently any other income which does not form the subject matter of the notice. This reasoning given by the Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (supra) also found in agreement with the judgment of the Hon'ble Delhi High Court which has taken similar view in the case of Ranbaxy Laboratories Ltd. vs. CIT reported in 336 ITR 136 wherein the Hon'ble Delhi High Court has observed that the heading of section 147 is "**Income escaping assessment**" and that of section 148 is "**Issue of notice where income escaped assessment**". Section 148 is supplementary and complimentary to section 147. Section 147 mandates recording of reasons to believe by the Assessing Officer that income chargeable to tax has escaped assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. However, the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 of the Act regarding assessment or reassessment of the escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction.*

9. *We also find that in the case of CIT vs. Shri Ram Singh reported in 306 ITR 343, the Division Bench of the Hon'ble Rajasthan High Court has held that the Assessing Officer was justified in initiating proceedings under section 147/148 of the Act, but then, once he came to the conclusion that the income, with respect to which he had entertained "reason to believe" to have escaped assessment, was found to have been explained, his jurisdiction came to a stop at that, and he did not continue to possess jurisdiction, to put to tax, any other income, which subsequently came to his notice, in the course of*

*the proceedings, which were found by him, to have escaped assessment.*

*10. After taking guidance from the judicial principles laid down in the aforesaid cases and considering the facts and circumstances of the present case, we are of the considered opinion that the reasons recorded under section 148 of the Act does not pertain to the issue of claim under section 54F and, therefore, the disallowance made by the Assessing Officer is arbitrary, illegal and without jurisdiction. We accordingly set aside the order of the Id. CIT(A) and annul the assessment framed by the Assessing Officer under section 147/143(3) of the Act and delete the disallowance made under section 54F of the Act. We have allowed the legal ground in favour of the assessee, therefore, all other grounds on merits taken by the assessee become academic and infructuous."*

7. In view of the above facts and circumstances of the case and keeping in view the judicial precedents, I allow additional grounds taken by the assessee and therefore, I quash the assessment order as the notice issued u/s 148 is void ab initio and assessment is also void ab initio therefore, all the proceedings are illegal.

8. In the result, the appeal of the assessee stands allowed.

(Order pronounced in the open court on 18/09/2018)

**Sd/.**  
**( T. S. KAPOOR )**  
**Accountant Member**

Dated:18/09/2018

\*Singh

**Copy of the order forwarded to :**

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow