INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No.:- 1823/Del/2015
Assessment Year: 2011-12

Onkareshwar Properties (P) Ltd. Flat No. B-14C, First Floor, Freedom Fighters Enclave, Neb Sarai, New Delhi – 110 068 PAN AAACO7076M	Vs.	ACIT Range 13, New Delhi.
(Appellant)		**(Respondent)**

Assessee by:	Shri Rajesh Jain, CA
Department by :	Shri Shailesh Kumar, Sr.DR
Date of Hearing	26/11/2018
Date of pronouncement	21/01/2019

O R D E R

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the assessee against impugned order dated 22.1.2015, passed by CIT(Appeals)-7 Delhi for the quantum of assessment passed u/s 143(3) for the assessment year 2011-12. In the grounds of appeal the assessee has challenged following three additions:-

i) Treating the long term capital gain shown from sale of land as business income.

ii) Addition of Rs. 4,05,970/- u/s 40(a)(ia) on account of non deduction of TDS on guarantee commission paid to Bank.

iii) Disallowance of expenses u/s 14A of Rs. 40,55,600/-.

2. The facts in brief qua the first issue are that, the assessee is a private limited company which has shown long term capital gain of Rs. 117,67,97,883/- in its return of income. During the year under consideration assessee had sold a land measuring 133 Kanal, 14 Maria which is about 17 acres to Mapsko Builders(P) Ltd., New Delhi for Rs. 128 crores. The said land was purchased in the year April, 2005.

3. The Ld. AO required the assessee as to why the income shown under the long term capital gain should not be treated as business income as done by the AO in the assessment year 2009-10, as assessee company is in the business of real estate. In response, the assessee submitted that it had acquired certain lands in different batches in Gurgaon, which were held as fixed assets and these lands was not acquired as stock in trade. This fact was duly disclosed in its balance sheet as fixed assets. Further, the land was held by the assessee for a considerable period of time. Assessee also relied upon various judgments wherein it was held that if assessee has maintained two portfolios, viz., investment portfolio, then it has to be treated as capital asset; and second as a trading portfolio, comprising of stock-in-trade then same has to be treated as trading asset. The Ld. AO rejected the assessee's contention and observed that Assessee Company had deposited the fee for grant of licence for development of group housing on land measuring 17.168 acres at village Sihi Dostt. Gurgaon and has also incorporated in the letter written by the assessee to the Director, Town & Country Planning, Haryana. From the said letter he inferred that assessee has no intention to develop

the said land for its own house, but the reason for development sought by the assessee was purely for business activity. The assessee used to provide land to the developer who in turn used to develop the said land. He has referred the judgment including of Supreme Court in the case of G. Venkataswami Naidu and Company vs. CIT 35 ITR 594 and held that assessee has purchased and sold the land which was clearly an adventure in the nature of trade and therefore, sale proceed has to be treated as business income of the assessee and accordingly he taxed sum of Rs. 119,86,86,889/- as business income.

4. Ld. CIT (A) has decided the appeal ex parte after noting that various notices sent to the assessee remained uncomplied with. She also referred to Memorandum of Association and the main objects of the assessee company which was to carry on the business of construction of residential houses, etc.; and to act as builder/colonizers; to purchase, take on lease, sell and mortgage any estate, to buy any immovable property etc. She has also referred the income tax return for the assessment year 2006-07 to 2011-12 from where she gathered that there was no other activity of the assessee company except for purchase and sale of land and in all the years profit / loss/ sale of land has been shown under the head capital gain instead of business income. She has also noted the past history of the assessee company in the following manner:-

> *"5.2 From the IT Returns filed for AY 2006-07 to AY 2011-12, it is observed from the income and expenditure account and balance sheet of the appellant that there is no other activity of the appellant company except purchase and sale of land. 'However in all the years the profit /loss on sale of land has been shown under the head capital gain instead of income 'from business. In the AY 2006-07 the appellant company had acquired land in different villages of Dist, Gurgaon for Rs.1,62,75,000/- for the first*

time. More land of Rs.19,29,02,787/- was purchased in the AY 2007-08. There was no sale of land in these two years, In the AO 2008-09 there was more purchase of land and part of the land purchased was sold. There was loss on sale of land of Rs.23,33,205/- in the, AY 2008-09. In the AY 2009-10 there was further purchase and sale of land. Profit on sale of land of Rs.55,91,82,736/- was shown in the AY 2009-10. The appellant company has also entered into the sale agreement for land with developer in the year under consideration and has received advance against this. The appellant has entered into a development agreement with M/s. Vatika for the development of its land where M/s. Vatika Ltd. is the developer and the appellant company's only benefit is, "That upon 'the approval of lay-out plant of the colony, only the owner will be free to sell any developed area falling under Owner's allocation without any interference on the part of the developer." The role of the appellant company is to provide land and all other work related to project is to be done by the Developer only.

5.3. From the above, it is evident that there were continuous transactions of purchase and sales of land. The purchase and sale of land in the case of appellant is not an isolated transaction and the manner of dealing with the land purchased stamp the transaction as a trading venture. The appellant also has entered into development agreement with developer with the intention to sell it after development. The Issue whether the transactions are adventure of the nature of trade is determined on the basis of nature of activity, intention and conduct. The appellant company is purchasing and selling land on regular basis. These do not appear to be any compulsion for the appellant to sell land which it had purchased. No steps were taken by the appellant to utilize the

land purchased either by way of cultivation or farming or to build on it. It could not be assumed that the purchase of open plots land could involve any pride of possession to the appellant. The appellant has purchased land, with the sole intention to sell them consolidate its holding and sell them in series of transactions at a convenient time. The appellant's main objects of business, the intention of the appellant company in purchasing the property, the length of its ownership and holding the conduct and subsequent dealings of the appellant in respect of the properties, the manner of its disposal and frequency and multiplicity of transaction proves that the appellant was carrying on trading activity and the transactions are adventure in the nature of trade. Therefore, the income from sale of land is to be assessed as business income."

5. Thereafter, she has also referred to various judgments to hold that the transaction of purchase and sale of land in the case of the assessee is in the nature of trade and therefore AO was rightly treated the income as income from sale of land as income from business.

6. Before us, Ld. Counsel for the assessee submitted that in the earlier assessment year this issue has reached up to the stage of the Tribunal, wherein the Tribunal after detailed discussion has held that gain on sale of land was taxable under the head long term capital gain in the case of assessee and not as business income. The decision of the Tribunal has now also been upheld by the Hon'ble Delhi High Court vide judgment and order dated 3.4.2016 in ITA No. 287/2016 Thus, this issue now stands squarely covered by the judgment of Tribunal and Hon'ble Jurisdictional High Court.

7. On the other hand, Ld. DR strongly relied upon the order of the AO and Ld. CIT(A).

8. We have heard the rival submissions and also perused the relevant finding given in the impugned orders. It is an undisputed fact that assessee all throughout has been showing land as an investment right from the assessment year 2006-07 till this year. The land in question was purchased in assessment year 2006-07 and was shown as fixed assets. In that year assessment was made u/s 143(3), wherein such treatment of the land in question was accepted as business assets. Thereafter, part of this land was sold in assessment year 2008-09 wherein the assessee has declared long term capital gain and in which has not been disturbed by the department. Here in this case both AO and Ld. CIT (A) have referred to the similar treatment done by the AO in the assessment year 2009-10. However, in the that year the Tribunal had dealt and discussed this issue in detail and took note of judgments relied upon the AO and Ld. CIT (A). The relevant observation and the finding of the Tribunal in this regard reads as under:-

> *"18. The main issue which arises for consideration is as to whether the land held by the assessee was being held as a capital asset or not. There is no dispute to the fact that this land was purchased in the year 2005-06. There also does not appear to be any dispute that no activity has been carried on, on this land or in relation to this land. The assessee has classified this land as a capital asset in its books of account and has also disclosed the same as capital asset in the annual accounts for the financial year 2005-06 i.e. A.Y. 2006-07. This classification as capital asset has continued in the subsequent years as well. There is no adverse material or finding in relation to this land being held as capital asset. The assessee has also not claimed any expenditure in relation to this land. On going through the profit and loss account for each year it is also evident that the assessee had a column of*

purchase land whereby it has shown 'nil' figure every year. Thus the assessee in the accounts for each of the year has not been holding any land as stock-in-trade. In the preceding assessment year 2008-09 when a small portion of the land was sold, the assessee incurred a loss of Rs.23,33,205/-. This loss was also declared as capital loss and was not set of against any other income. From these facts it is quite clear that the intention as well as declaration both confirms the assessee's stand that the land was being held as a capital asset. There, is no change of position in the year under consideration also.

19. The Assessing Officer as well as learned CIT(A) are silent on above aspects and in fact have not brought any material or evidence relating to the preceding three years whereby the intention and declaration of the assessee company is so categorical to demonstrate that what was declared and intended was not true. Thus the finding of the Assessing Officer and learned CIT(A) both are without any supporting material to hold that income arising from sale of land is not from the sale of a capital asset but business income.

20. The Assessing Officer and learned CIT(A) both have referred to another agreement entered into during the year by the assessee company with a developer. Firstly this agreement will not change the nature and character of the land held as capital asset on which income has arisen during the year. All that the assessee company has done is that in respect of the other land it has entered into an agreement. Entering into such agreement will not change the nature and character of the land held as capital asset and sold by the assessee during the year. Assessee is permitted to have two portfolios, one as investment and another as stock-in trade. Even for the sake of an argument it is assumed that by

entering into an agreement in respect of another land with a developer, that land has become a part of the business, and then this will not change the nature and character of this land held as capital asset which has been sold and on which capital gain has been earned. In fact as rightly contended by the Learned AR that section 45(2) of the Income Tax Act do permit an assessee to convert an asset held as stock in trade of a business carried on by him. It may be relevant to refer to the provisions of Section 45(2) which reads as under.-

> *"45(2) Notwithstanding anything contained in sub-section (I), 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. "*

21. As per the above provision of section 45(2) in the case of such conversion also the income till the date of conversion is computed on -the basis of fair market value as on the date of the transfer is to be assessed as capital gain and income arising over and above fair market value after such conversion is to be assessed as business income and that too in the year in which the ultimate sale takes place. Thus the agreement entered into with M/s Vatika about the other land will not change the transaction under consideration keeping in view the fact that the land from the date of its purchase is being continuously held as a capital asset and

there is no material or evidence whatsoever to allege that the land so held was not a capital asset. Considering these facts we do not consider it relevant to go into further arguments advanced by the learned AR that the gain arising by entering into an agreement with M/s Vatika will also not be chargeable as business income as the holder of a capital asset is entitled to maximize its gain if it can be so achieved by entering into such arrangement.

22. As regards the contention of the learned DR that the assessee has shown this gain as part of the profit and loss account and hence it is to be considered as business income. This contention of the learned DR is not sustainable. Income whether it is from rent, business or income from other sources such as interest, etc. including capital gain is to be shown in the profit and loss accounts of the company. As per the Companies Act every company is required to prepare its profit and loss account and in such profit and loss account it is supposed to include every type of income not only the business income. 'On the contrary, as rightly argued by the learned AR, the profit and loss account supports the contention of the assessee that it has not classified the land as purchase and sale as is done while doing trading. It is only the gain on sale of land, held as capital asset has been declared in the profit and loss account.

23. As regards the other contention of the Assessing Officer and learned CIT(A) that as per the Memorandum and Articles of Association the main object of the company is to carry on the business of construction or residential house, hotels, vendors, etc. We are of the view that this will not mean that the income arising on sale of capital assets will become business income. The main object may be to carry on the business of real estate business but that will not debar such a company from holding an asset as

capital asset. If the company holds the land as, a capital income arising on sale of such capital asset will be chargeable to tax under the head capital gain and not as business income in view of the specific mandate of section 45(1) of the Income Tax Act. In this regard it may be relevant to refer to section 45(1) which reads as under:-

> *"45.(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under 'the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. "*

24. As per the above provision, gain arising from transfet of a capital asset is to be taxed under the head capital gain. Further section 2(14) defines 'capital asset' as under:-

> *“2(14) "capital asset” means-*
>
> *(a) property of any kind held by an assessee, whether or not connected with his business or profession,' but does not include*
>
> *(i) any stock in trade, consumables, stores or raw materials held for the purposes of the business or profession. " .*

25. On going through the above definition it is quite clear that capital asset does not include any stock-in-trade, consumable stock or raw material held for the purpose of business or profession, In the present case, as is evident from the facts on record, this land was not held as stock-in-trade. Thus the reliance by the Assessing Officer as well as learned CIT(A) on the objects clause of the Memorandum and Articles of Association is not

justified. An assessee carrying on the business and holding the asset as stock-in-trade, the income arising there from will definitely be business income. But if the assessee though having object clause of carrying on the business of real estate 'in the Memorandum and Articles of Association but holding land as capital asset, that land will not become stock-in trade because the Memorandum and Articles of Association has an object clause to carry on the business of the real estate. An income has to be assessed under the head as per the provisions of the Income Tax Act. " The judgment of the Honourable Supreme Court in the case of Sultan Bros (P) Ltd. vs. CIT 51 ITR 353 (SC) also supports the case of the assessee on this issue. As stated by us hereinabove, there is no material or evidence brought on record by the AO or referred to by the Ld. CIT'(A) that the land held by the assessee was not a capital asset particularly, keeping in view the fact that its statement in the books of account and the disclosure in the balance sheet is certified by the auditors and also filed with the Registrar of Companies. We have also perused the profit and loss account of the preceding years starting from F.Y. 2005-06. On going through the same it is apparent that assessee has not carried out any activity with reference to this land. In fact no expenditure has been claimed on account of any development. There is no administrative expenditure. Had the intention being to hold the land as stock in trade then the assessee would have declared the same as purchase of land and carried it over as closing stock. The fact that assessee did not carry on any activity on the land nor any development, division or sub-division and also did not incur any expenditure also supports the contention of the assessee. The fact that assessee has declared capital loss in the preceding year also cannot be ignored. No doubt principles of res

judicata are not applicable to income tax proceedings but the intent and nature of the asset held can be judged from these facts. The nature of asset held as capital asset in the preceding year and accepted as such will not change to stock in trade in the next year merely because the gain arising on sale of stock in trade will be chargeable at the rate of 30 per cent as against 20 per cent chargeable on capital gain. The learned DR could not controvert the fact that in the preceding year such loss has been assessed as capital loss.

26. The law even permits person carrying on the business in particular nature or trade such person to make investment and hold similar type of asset as capital asset. In the case of CIT vs. Gopal Purohit 336 ITR 287 (Born) an issue has arisen whereby the assessee was trading in shares and was holding certain shares as .investment. The Hon'ble Bombay Court has held-that - '

> *"The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business. The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received there from should be treated either as short-term or, as the case may be, long-term capital gain, depending upon the period of the holding. The Tribunal has observed in its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the*

presentation of shares as investment at the end of the year, in all the years. The Tribunal correctly accepted the position that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach a/the Tribunal cannot be faulted. "

27. The SLP filed against the above judgment stand dismissed by the Hon'ble Supreme Court vide order dated 15th November, 2010. The judgment of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu vs ClT 35 ITR 594(S.C) relied upon by the Assessing Officer as well as learned CIT(A) in fact supports the case of the assessee whereby the Honourable Supreme Court has held as under :-

"If a person invests money in land intending to hold it, enjoys its income for some time and then sells it at a profit, then it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade."

28. The Hon'ble Supreme Court in its judgment has clearly mentioned that if money was invested in Land with the intention of holding it, then. any profit derived from the sale of such land is to be treated as "Capital Gain" rather than as "Business Income"

29. Similarly the Honourable Delhi High Court in the case of CIT vs. PNB Finance and Industries Ltd. 46 DTR 345(Del) has held as under:-

"Assessee was not involved in the business of buying and selling of shares after 1st April 1997. It had purchased the shares in question on 27th Jan.'1996 and held the same for

seven years before selling them. Though the object incorporated in its memorandum of association states that the assessee can deal in shares, there was no such regular activity. A taxpayer can have two portfolios i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Shares in question were held by the assessee as investment. Therefore) sale thereof gave rise to capital gains and not business income"

30. In the present case the appellant company has acquired the land in the year 2005-06 as a capital asset. It has accounted for the same as capital asset. It has continued to hold the same as a capital asset. It has not converted that capital asset. It has not converted that capital asset to stock-in-trade. There are no multiple transactions.. It has declared the capital loss in the preceding year. Considering all these facts and taking into consideration all the above facts and circumstances we are of the view that the income arising from the sale of the land held as a capital asset is to be assessed as long term capital gain and the Assessing Officer and Learned CIT (Appeals) were not right in treating the income as business income. Accordingly the Assessing Officer is directed to assess the income as capital gain. Thus the appeal is allowed,

3l. In result, the appeal is allowed."

9. The judgment of the Tribunal was appealed by the revenue before the Hon'ble Delhi High Court, wherein the Hon'ble Court has confirmed the order of the Tribunal and dismissed the revenue's appeal in the following manner :-

1. *"This appeal by the Revenue is directed against the order dated 23rd October 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5754/Del/2013 for the Assessment Year ('AY') 2009-10.*

2. *The question sought to be urged by the Revenue is whether the ITAT was correct in holding that the Assessing Officer ('AO') and the Commissioner of Income Tax (Appeals) ['CIT (A)'] were not right in treating the income of the Assessee as business income and in accepting the plea of the Assessee that the income should be assessed as capital gain from the sale of land?*

3. *The Assessee was formed with the main object of dealing in The Assessee entered into an agreement with M/s Vatika Ltd. in respect of development of its land during the AY in question which it had acquired in the year 2005-06 and had shown as a capital asset. There was no conversion of capital asset into stock-in-trade. The ITAT found that there was no transaction for the AY in question in relation to said capital asset.*

4. *Significantly, the ITAT noticed that the Assessee had classified the land in question as capital asset from AY 2006-07 onwards. It had not claimed any expenditure in relation to such land. In the accounts for each of the year it had not shown any land being held as stock-in-trade. In the AY 2008-09, a small portion of the land was sold and the loss therefrom was declared as a capital loss and was not set off against any other income. The ITAT held that a mere fact that a development agreement was entered into by the Assessee with Vatika Ltd. would not change the nature and*

character of the land since in terms of the agreement it was the developer who would undertake the work of development upon being paid a fee by the Assessee. It was also observed that although the main object of the Assessee may be to carry on the business of real estate, that would not prevent the Assessee from holding the land in question as a capital asset. Therefore the income generated through the sale of land would be chargeable to tax under the head capital gains and not as business income.

5. *Having heard Mr. Dileep Shivpuri, learned Senior Standing Counsel for the Revenue and having examined the orders of the AO, CIT(A) and the impugned order of the ITAT, the Court is not persuaded to agree with the Revenue's submission that the impugned order of the ITAT is perverse.*

6. *In the facts and circumstances of the present case, no substantial question of law arises for consideration. The appeal is dismissed."*

10. Thus, when same issue on similar set of facts and reasoning has been decided in favour of the assessee by the Tribunal which has also been upheld by the Hon'ble Delhi High Court, then this issue becomes a binding judicial precedent and no contrary view can be taken in this year. Moreover when in all the years, the assessee has been showing the land which is in dispute as a part of fixed assets which stood accepted year after year as an investment / fixed assets, then sale of such land will only give rise to capital gain chargeable u/s 45(2). Thus, the order of the AO and Ld. CIT (A) in treating it as a business income is reversed and the assessee's claim for taxability of such gain on sale of land under the head capital gain is affirmed. In the result, ground raised by the assessee on this score is allowed.

11. In so far as disallowance u/s 40(a) (ia) is concerned, it is seen that AO has made disallowance on the ground that assessee should have deducted TDS and bank commission / guarantee fee. He has also took note on CBDT Circular No. 56/2012 and held that the said notification was only applicable from 1st January, 2013; and therefore, this notification will not apply upon the assessee. Ld. CIT (A) too has confirmed the said addition.

12. On perusal of the said CBDT circular, it is seen that CBDT has clarified that no TDS is required to be deducted on bank guarantee Commission, etc. Such a circular was brought to reduce the hardship and the compliance cost of the assessee. Once a benevolent circular has been issued to remove the hardship for the assessee then it cannot he held that any such payment made prior to the said circular which was causing hardship to the assessees should continue. It is a well settled proposition that CBDT Circular removing the hardship in favour of the assessee has to be treated as retrospective and accordingly, we hold that no disallowance u/s 40(a)(ia) can be made for non deduction of TDS. In the result this issue is decided in favour of the assessee.

13. Lastly, in so far as disallowance u/s 14A is concerned, Ld. Counsel has submitted that admittedly there is no dividend on exempt income earned by the assessee and accordingly no disallowance u/s 14A can be made in view of the issue of the Judgement of Hon'ble Jurisdictional High Court in the case of **Cheminvest vs. ITO. (2015) 378 ITR 33 (Delhi)** wherein Hon'ble Court has held that once there is no exempt income earned by the assessee, then no disallowance u/s 14A can be triggered. Accordingly, in view of the binding judicial precedent in the case of Cheminvest Ltd. (SUPRA), we hold that in absence of any exempt income earned by the assessee, no

disallowance can be made u/s 14A. Thus, this issue is allowed in favour of the assessee.

14. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 21st January, 2019.

sd/- **sd/-**

(L.P. SAHU) **(AMIT SHUKLA)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 21/01/2019

Veena

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR

ITAT, New Delhi