

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

**Before Shri Shailendra Kumar Yadav, Judicial Member
and Shri R.K. Panda, Accountant Member**

**ITA No. 1256/PN/2010 and 1257/PN/2010
(Assessment Years 2006-07 and 2007-08)**

Asst. Commissioner of Income Tax,
Central Circle 1(2), P.M.T. Building,
4th Floor, 'C, Wing, Pune.

.. Appellant

Vs.

Ali Akbar Jafari,
Akbar Radiant Plaza, 2nd Floor,
Above ABN Amro Bank,
M.G. Road, Pune.
PAN No. AASPJ 7119F

.. Respondent

Assessee by	:	Sri Nikhil Pathak
Department by	:	Sri S.K. Singh
Date of Hearing	:	26-02-2013
Date of Pronouncement	:	19-04-2013

ORDER

PER R.K. PANDA, AM :

The above 2 appeals filed by the revenue are directed against the separate orders dated 30-06-2010 of the CIT(A)-IV, Pune relating to Assessment Years 2006-07 and 2007-08 respectively. For the sake of convenience these were heard together and are being disposed of by this common order.

ITA No.1256/PN/2010 (A.Y.2006-07) :

2. Facts of the case, in brief, are that the assessee is an individual and is engaged in the business of builders and promoters, manufacturing and trading of bakery and confectionery products and running franchise. Apart from these, the assessee is also a partner in different firms. The proprietary business of the assessee are running in the name and style of Radiant

Builders-II, Naaz bakery and M/s. Icon Tower. A search u/s.132 of the Income Tax Act was carried out at the residential premises as well as the business premises of the assessee on 21-09-2006. In response to notice us/.153A the assessee filed the return of income. During the course of assessment proceedings the Assessing Officer noted that in the scrutiny assessment for A.Y. 2006-07 in the case of M/s. Nancy Icon Builders and Developers situated at Bharati Vidyapeeth, Pune-Satara Road, Katraj, the following points have been observed :

- i. *The above person is a joint venture commenced into existence on 03-02-2006. It is a joint venture between Mr. Ali Akbar Jafari, residing at Bungalow No. 8, Napier Road, Pune -411001 i.e. the assessee, and M/s. Nikita Builders and Developers having its office at Kale Palace, Ground Floor, Block No. A-25, Room No. 145/146, Madhuban Hotel Road, Ulhasnagar-421 001.*
- ii. *The copy of the joint venture shows that Mr. Ali Akbar Jafari was having development rights of the land bearing S. No. 8, Hissa No. 1+2/1 to 65 totally admeasuring 6 Hectares, 15 R i.e. 60630.59 sq. mtrs. At Village Katraj within the limits of the PMC. Mr. Ali Akbar Jafari has agreed to bring in the rights in the land as its capital in the joint venture. The book value of the said property is agreed at Rs. 25,00,000/-.*
- iii. *The document for transferring the rights and the commencement of the joint venture has been registered with the Registrar at Pune on 03-02-2006. From the copy of the Index II for such registration, it is seen that the value of the plot for registration by the parties is considered at Rs.25,00,000/-. However, the market value of the property for the purpose of stamp duty is at Rs. 56,67,000/-.*
- iv. *Now, as per the provisions of Section 45(3) of the IT Act, 1961, the profits and gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals in which he is or becomes a partner or member by way of capital contribution or otherwise shall be chargeable to tax as his income of the previous year in which such transfer takes place. This Section further provides that in such case, for the purpose of Section 48, the value of the capital asset recorded in the books of the partnership firm or the association of persons or the body of individuals shall be deemed to be the full value of consideration received or accruing as a result of such transfer.*

However, it is worthwhile to mention that Section 50C provides for the special provision for full value of consideration in certain cases. It provides that where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

3. The Assessing Officer therefore asked the assessee to explain as to why the provisions of section 50C should not be applicable to the assessee. In response to the same it was submitted that section 45(3) is already a deeming section and section 50C is also a deeming section and hence section 50C cannot override the provisions of section 45(3). It was further submitted that the asset which he introduced in the joint venture was not at all a capital asset.

4. However, the Assessing Officer was not convinced with the explanation given by the assessee. He noted that section 50C being specific provision overrides the provisions of section 45(3) and section 48 with regard to the definition of full value of consideration. He referred to the sequence of provisions of section 45, 48 and 50 and observed that a plain interpretation of the above provisions show that when a person transfers a capital asset to a firm/AOP/BOI, then capital gain will arise and the full value of consideration received or accrued shall be the value recorded in the books of a firm or that adopted by stamp valuation authorities whichever is higher. He therefore was of the opinion that the value adopted or assessed by the authority of State Government for the purpose of payment of stamp duty has to be taken for computation of capital gain arising to the assessee. He observed that the full value of the consideration in this case comes at ₹56,67,000. He further observed that there is no clear cut bifurcation in the balance sheet of the assessee as to which are the capital assets and which are the stock in trade. Further, according to the AO even if there was any such bifurcation it cannot be sacrosanct and every transfer has to be seen individually. The fact that the assessee has introduced his rights in the said land as capital asset itself exposes the hallowness of the assessee's claim

that it was stock in trade and not the capital asset. He therefore rejected the contention of the assessee that the asset which he introduced in the joint venture was not at all a capital asset. After deducting the cost of acquisition from the full value of consideration received the Assessing Officer determined the net taxable long term capital gain for A.Y. 2006-07 at `8,19,377 which was subsequently rectified to `5,12,19,377.

5. It was submitted before the CIT(A) that the assessee is engaged in the business of real estate, promoters, builders and developers and therefore purchases land, rights in land viz. development rights and when an opportunity for development arises he develops the plots into housing project and commercial project. Till such time the plots and developments rights in the plots are reflected, under the head 'current assets' in his balance sheet. It was submitted that the assessee is in this line of business since 1994 and has executed various projects. It was submitted that the assessee acquired the development rights in property at Survey No.8, Hissa No. 1+2/1 to 65, excluding S.No.62 total admeasuring 6 hectares & 15R at Village Katraj within the limits of P.M.C. vide four development rights agreements dated 8/3/1992. The said property was in agriculture zone and it came in residential zone on 27/6/2000. Thereafter, he obtained ULC order in 2001. Survey No. 8, Hissa No. 1+2/62 was inherited from his father who passed away in 1977. Due to lack of manpower & financial resources, it was not possible for him to develop this huge property on his own and therefore the assessee entered into a joint venture by the name Nancy Icon Builders & Developers and accordingly introduced his development rights in the property as his capital in the said joint venture (AOP Nancy Icon Builders & Developers) at an agreed value of

Rs.25 Lacs & computed his profit on introduction of his stock in trade as his capital in the said AOP as under:

Credit to capital account	Rs.25,00,000
Less : Cost of acquisition of land/Development rights	Rs.19,41,000

Profit transferred to Profit and Loss A/c.	Rs.5,59,000

6. It was submitted that the Assessing Officer at Page 14 of the order has mentioned that the assessee was having development rights in the said land. However, while finalising the assessment he substituted the market value of the property for the purpose of stamp duty at Rs.56,67,000/- by invoking the provisions of section 50C which was subsequently rectified to Rs.5,66,70,000/-. It was submitted that provisions of section 45(3) can be invoked only if a capital asset is transferred by the assessee to the firm in which he has become a partner by way of capital contribution. However, the assessee in the instant case has held the development rights and had shown the same as stock in trade and had reflected the same under the head "current assets. Therefore, the development right in the property in the instant case cannot be a capital asset so as to attract the provisions of section 45(5).

7. Referring to provisions of section 2(14) it was submitted that capital asset means property of any kind held by an assessee whether or not connected with his business/profession but does not include any stock in trade, consumable stores or raw materials held for the purpose of his business or profession.

8. It was submitted that since the assessee has introduced his stock in trade as his capital in the AOP, therefore, the profit on introduction of

development rights should be treated as business income. For this purpose the assessee relied on the following decisions :

- 1) Alpha Associates Vs. JC1T, 52 ITD, 640 (Bom)
- 2) Hathising H. Shah Vs. ITO, 25 777, 137 (A hd)
- 3) ACIT Vs. Ashok Motilal Kataria 308 ITR(AT) 298 Pune.

9. The assessee also relied on the decision of Hon'ble Madras High Court in the case of CIT Vs. Thiruvengadam Investments Pvt. Ltd. reported in 320 ITR 345 and submitted that provisions of section 50C cannot be applied where the assessee has treated the property as business asset and not capital asset. It was accordingly submitted that the computation done by the Assessing Officer being erroneous and not in accordance with law should be revised.

10. Based on the arguments advanced by the assessee the Ld. CIT(A) deleted the addition made by the Assessing Officer holding that the provisions of section 45(3) and section 50C would not arise in the case of the assessee. The relevant observations of the order of the CIT(A) read as under :

“5.4 I have carefully considered the facts of the case and law applied by the AO along with the grounds of appeal raised and submissions made in support of the same. This issue was discussed in detail with the AR during the course of the hearing. The primary issue which has been raised by the appellant relates to the nature of the asset itself. According to them, the development rights and the property transferred to the JV was not a capital asset as per the definition of s.2(14) of the Income-tax Act. Section 2(14) defines capital assets as property of any kind held by an assessee whether or not connected with the business or profession unless such a property is of the nature described in clause (i) to (vi). Therefore, while applying the above definition for determining a property as capital or otherwise, it is important to first hold whether the subject matter is a property or not and if yes, then whether they fall in any of the categories specified in clause (i) to (vi) or not. In the present case, the appellant has tried to argue that the property being the development rights was held by them as stock-in-trade shown in the balance sheet under the head 'Current Assets' which has been specifically excluded from the definition of 'Capital Asset' given u/s.2(14) and therefore, according to the appellant, the sale transaction cannot be charged to tax u/s.45 r.w.s. 48. The AO on the other hand has discussed the above argument of the appellant in the assessment order and has stated "there is no clear-cut bifurcation in the balance sheet of the assessee as to which are capital assets and which are the stock-in-trade. Even if there was any bifurcation, it cannot be sacrosanct and every transaction has to be seen individually. The fact that the assessee has introduced his rights in the said land as capital asset itself exposes the hollowness of assessee's

claim that it was stock-in-trade and not the capital asset. Therefore, assessee's contention in this regard is not acceptable." The appellant in this regard has submitted the copy of the audited balance sheet during appeal to show that the investment in development rights in land was shown as stock-in-trade under the heading 'Current Assets'. On examination of the same, it is noted that the above land is appearing in the balance-sheet under the broad head 'Current Assets' and under the sub-head 'Plot & Land Account'. Therefore, contention of the appellant looks correct. Now coming back to the other argument of the AO advanced in the assessment order on the above issue that such a classification cannot be sacrosanct, it is noted that the appellant is an established builder and developer who is engaged in this activity in individual capacity as well as through partnership firm, since 1994 and therefore the above classification appearing in the balance-sheet is also in agreement to his actual activity. In addition to the above, the argument of the appellant that the asset which has been transferred to the JV as capital is development rights, which by its nature is also supporting the fact that the asset is of the nature of stock-in-trade or raw-material and therefore the same appears convincing. The argument on the other hand of the AO that the introduction of right of development (asset) as capital in the JV shows the hollowness of the argument of the appellant, appears to be lacking the force of reasonableness and acceptability. Considering all these facts, I am of the opinion that the rights to development transferred to the JV as capital in the said firm (JV), is not the transfer of the capital asset as defined in s.2(14) and therefore, the said transaction cannot be put to charge for taxation u/s.45 of the I.T. Act. In view of the above, the applicability of s.45(3) and 50C would not/arise. Such a view has also been upheld recently by the Hon'ble High Court of Madras in the case of CIT Vs. Thiruvengadam Investments (P) Ltd. (2010) 229 CTR 284, 320 ITR 345. Considering the above, the appeal is allowed."

11. Aggrieved with such order of the CIT(A) the revenue is in appeal before us with the following grounds :

"1. In facts and circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs.8,19,377/- which was later on rectified to Rs.5,12,19,377/-.

2. In facts and circumstances of the case and in law, the learned CIT(A) has erred in considering the copy of the balance-sheet filed before him in respect of property under question showing as stock-in-trades under the head 'Current Asset' whereas the balance-sheet filed with the return of income does reflect the same.

3. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that in the balance sheet annexed to the return of income, there is no clear cut bifurcation as to which are capital assets and which are the stock-in-trades.

4. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that Even if, there was any such bifurcation, it cannot be sacrosanct and every transfer has to be seen individually.

5. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the assessee has introduced his rights in the said land as capital asset itself exposes the hollowness of assessee's claim that it was stock-in-trade and not the capital asset.

6. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the Section 50C being specific provision overrides the provisions of Section 45(3) and Section 48 with regard to the definition of full value of consideration.

7. *The appellant craves its right to add or alter the ground of appeal at any time before or during the course of hearing of the case.”*

12. The Ld. DR heavily relied on the order of the Assessing Officer. He submitted that the assessee has not shown the asset as stock in trade. Referring to the balance sheet as on 31-03-2005 (a copy of which is placed at PB 102) he submitted that the balance sheet does not specifically show the stock in trade under the head “current assets”. Therefore, the asset has to be treated as an investment. Referring to the decision of the Pune Bench of the Tribunal in the case of Purushottam Mukunddas Lohia Vs. DCIT vide ITA No.944/PN/2010 he submitted that provisions of section 50C are applicable to stock in trade also. He accordingly submitted that the order of the Ld. CIT(A) being not in accordance with law should be reversed and that of the Assessing Officer be restored.

13. The Ld. Counsel for the assessee on the other hand heavily relied on the order of CIT(A). Referring to page 22 to 77 of the Paper Book he drew the attention of the Bench to the development agreements between Mr. Mohd Saleh Jaffari, Smt. Khadija Yaveri, Mr. Ali Raza Jaffari, Mr. Javed Yaveri of the one part and Ali Jafari of the other part. Referring to Page 3 of the said agreement (Page 24 of the PB) he submitted that the owners of the plot have agreed to grant the development rights to the assessee. Referring to Page 7 of the said agreement (page 28 of the PB) he drew the attention of the Bench to pare 9 (b) of the agreement according to which the owners have agreed and affirm to give all necessary assistance/cooperation to the developer for the building project as per the approved plan and the sanctioned scheme. Referring to Page 1 of the said agreement he submitted that the assessee has paid stamp duty @ 1%. He submitted that if the

assessee had purchased the land then the stamp duty would have been 5%. Referring to various other pages he drew the attention of the Bench to similar joint venture agreements for the other properties. Referring to Page 79 to 100 of the Paper Book he drew the attention of the Bench to the joint venture agreement dated 03-02-2006 between the assessee and Nikita Developers and Builders, a partnership firm for developing the property.

13.1 Referring to page 24, 38, 53, and 67 of the Paper Book he submitted that the assessee has paid the consideration of Rs. 1,00,000/-, 4,50,000/-, 3,25,000/-, 7,50,000/- respectively towards the consideration for the development rights of the properties through 4 different agreements. Thus, the total consideration so paid is Rs. 16,25,000/-. Referring to the balance sheet as on 31-03-2005 (a copy of which is placed at PB 102) he submitted that the assessee under the head "current assets" had shown the amount of Rs.16,25,000/-. Referring to provisions of section 50C he submitted that it comes to picture only when an assessee transfers a capital asset. However, in the instant case, the assessee has transferred the current assets/stock in trade. Since the assessee is engaged in real estate business, therefore, the land so purchased cannot be a capital asset and it has to be held as "current asset". Referring to Page 102 of the Paper Book he drew the attention of the Bench to the balance sheet as on 31-03-2005 and submitted that there is clear bifurcation of fixed assets & current assets and the amount so paid has been shown under the head "current assets". He submitted that if the land so held by the assessee is treated as capital asset the assessee would have paid wealth tax. Referring to the Pages 111 to 114 of the Paper Book the Ld. Counsel for the assessee drew the attention of the Bench to the Wealth Tax return filed by the assessee and submitted that he has not paid any wealth tax

on this development right of the land although he has paid the wealth tax on various other assets which are declared in the wealth tax return. Referring to the copy of the wealth tax assessment order (a copy of which is placed at Page 115 of the PB) he submitted that the Assessing Officer in the order passed u/s.16(3) r.w.s.17 of the Wealth Tax Act, 1957 has passed the order on 31-12-2008 and has not made any addition on account of the land. Referring to the balance sheet as on 31-03-2001 the Ld. Counsel for the assessee drew the attention of the Bench to the “current assets, loans and advances” and submitted that the plot at Katraj at Rs. 1,46,000/- has been shown by the assessee in his balance sheet and the Assessing Officer has not disturbed the same and accepted the Wealth Tax return furnished by the assessee without making any addition on account of the said plot.

13.2 Referring to the decision of the Hon’ble Allahabad High Court in the case of CIT Vs. Kan Construction colonizers Pvt. Ltd. he submitted that if an asset is held as stock in trade the profit and gains from this sales is liable to be taxed as profit and gains from business and not as capital gains. Section 50C has no application where transfer of immovable property is on account of sale of stock. He also relied on the decision of Hon’ble Supreme court in the case of Jankiram Bahadurram Vs. CIT reported in 57 ITR 21, the decision of the Hon’ble Bombay High Court in the case of CIT Vs. Asian Dry Dock Co. reported in 108 ITR 822, the decision of Hon’ble Gujarat High Court in the case of CIT Vs. Smt. Minal Rameshchandra reported in 167 ITR 507 and the decision of Hon’ble Karnataka High Court in the case of CIT Vs. B. Narasimha Reddy reported in 150 ITR 347 and submitted that such income has to be considered as business income & not on account of capital gain. He accordingly submitted that the order of the CIT(A) being in

accordance with law has to be upheld and the grounds raised by the revenue should be dismissed. So far as the decision relied on by Ld. Departmental Representative he submitted that the same is under different issues and therefore decision relied on by Ld. DR is misplaced.

14. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee is engaged in the business of builders and promoters and manufacturing, trading of bakery and confectionary products and running franchise. There is also no dispute to the fact that the assessee has entered into 4 development agreements for development of the property at Katraj and for that purpose has paid an amount of Rs.16,25,000/- which was shown in the balance sheet under the head "current assets". There is also no dispute to the fact that the assessee has entered into a joint venture agreement with Nikita Builders and Developers, a partnership firm and has transferred the development rights to the said joint venture as his capital contribution and valued the same at Rs.25 lakhs. After deducting the cost of acquisition of land and development rights the assessee has declared profit of Rs.5,59,000/- as his business income. It the case of the revenue that since there is no clear cut bifurcation in the balance sheet as to which are capital assets and which are stock in trade, therefore, the claim of the assessee that it was stock in trade and not capital asset is not acceptable. Further, the market value of the property for the purpose of stamp duty is Rs. 5,66,70,000/-. Since the asset is a capital asset the Assessing Officer applied the provisions of section 50C and

determined the capital gain at Rs.8,19,377/- which was subsequently rectified to Rs.5,12,19,377/-.

14.1 It is the case of the assessee that since the value of development rights was shown in the balance sheet under the head “current assets” and since Assessing Officer in the wealth tax assessment order has excluded the land at Katraj from the purview of wealth tax, therefore, the development right shown in the balance sheet is in the nature of stock in trade and provisions of section 50C are not applicable.

15. We find merit in the above arguments of the Ld. Counsel for the assessee. We find from the balance sheet of the assessee as on 31-03-2001 (Paper Book Page No.109) that the assessee under the head “current assets, loans and advances” has shown the plots at Rs.2,02,93,041.97. In the schedule of plots, the plot at Katraj has been declared at Rs.1,46,000/- (Paper Book Page No.110). We find the Assessing Officer in the wealth tax assessment order for the A.Y. 2001-02 (Paper Book Page Nos. 115 & 116) has not made any addition on account of the land at Katraj and the order was passed u/s.16(3) r.w.s. 17 of the Wealth Tax Act. Similarly, we find from the balance sheet for the year ending 31-03-2005 (Paper Book Page Nos. 105 & 106) and for the year ending 31-03-2004v (Paper Book Page Nos. 107 & 108) that the plot of land at Katraj has been declared at Rs.1,46,000/- under the head “current heads”. Similarly in the personal balance sheet of the assessee the amount of Rs.16,25,000/- has been shown under plots or land account under current assets.

16. It has been held by the Hon’ble Allahabad High Court in the case of CIT Vs. Kan Construction colonizers Pvt. Ltd. (Supra) that if an asset is held as stock in trade, the profit and gains from the sales is liable to be taxed as profit and gains from business and not as capital asset and section 50C has

no application where transfer of immovable property is on account of sale of stock. The relevant observation of the Hon'ble High Court reads as under :

"12. Section 50C also uses the: word "capital asset." For applicability of section 50C one of the essential requirements is that an asset should be capital asset.

13. From the ratio of the various judicial pronouncements referred to above, it can be culled out that whether sale of land is sale of capital asset or stock in trade is essentially a question of fact. There is no rule of thumb to address the said issue. Several principles have been evolved in the judicial decisions, but although are more in the nature of guidelines. The question has to be answered in each case having regard to the circumstances of that case. There may be factors both for and against a particular point of view. The Court has to answer the question on a consideration of all of them in a process of evolution. The inference has to be drawn on a cumulative consideration.

14. Coming to the facts of the present case, the assessee is a builder. Construction of buildings is its business. The assessee has sold number of buildings referred to above, with regard to which there is no dispute. The dispute is with regard to the sale of plots. Investment in purchase and sale of plots by a builder who is indulged in selling buildings is ancillary and incidental to his business activity. It is a matter of record that the assessee has treated the land as stock in trade which finds corroboration from its balance sheet. Stock in trade has been excluded from the definition of capital asset. According to the Webster's New International Dictionary, the 'stock-in-trade' is "a. The goods kept for sale by a shopkeeper. b. The fittings and appliances of a workman." In other words, the stock-in-trade includes all such chattels as are required for the purposes of being sold or let to hire on a person's trade. According to Stroud's judicial dictionary, 4th Edition, Volume 5 page 2623 "stock-in-trade comprises all such chattels as are required for the purposes of being sold, or let to hire on a person's trade. In Additional Commissioner of Income-tax Vs. Puttu Coal Pvt. Ltd., (1983) 140 ITR 740 (Bombay), the assessee was money lender, who purchased a ship in satisfaction of his major portion of outstanding loan. The ship was considered as stock in trade of the assessee's money lending business.

15. It is apt to consider the decisions relied by the learned counsel for the department. Reliance was placed on Himatlal Govindji Vs. Commissioner of Wealth tax, (1977), 106 ITR 658, a case under the Wealth Tax Act decided by Gujarat High Court. Issue therein was whether the land in question was agricultural land within the meaning of section 2(e)(i) of Wealth Tax Act on the valuation date. The second case relied upon is Commissioner of Income-tax Vs. Gemini Pictures Circuit Private Ltd. 220 ITR 43, wherein the: Apex Court considered the question as to whether the land is agricultural or not and the criteria to determine the land as agricultural land with reference to section 45 of the Income-tax Act. The last case is Mahaveer Enterprises Vs. Union of India and others, (2000) 244 ITR 789 wherein the Rajasthan High Court considered the: question of capital gains with reference to sale of land. The issue was whether the land was agricultural land or not. None of the relied upon decisions have any application to the facts of the present case as they were rendered in a different factual matrix and the legal issues involved therein were altogether different than the one engaged in the present case:. The issue addressed in these cases relates to when the income from sale of land will be treated as agricultural income, exempt under the Act, not involved in the case in hands. In this appeal the Court is required to address the: issue as to whether the sale transaction of land on the facts of the present case is capital receipt or revenue receipt. Therefore, the relied upon cases by the learned counsel for the department are

distinguishable on facts and law as well. These decisions do not help the department any further.

16. The Commissioner of Income tax (Appeals) and the Tribunal on analysis of the facts of the case have reached to the conclusion that section 50C has no application as it was a case of transfer of plots which was stock in trade. An income earned from such Transaction is liable to be taxed as income from business activity. Alternatively, the finding recorded by the Tribunal which is last fact finding court, in this regard is essentially a finding of fact or at the most is a mixed question of fact, but if is not a substantial question of law to warrant the interference under section 260A of the Income Tax Act.

17. The view taken by the Tribunal is on terra-firma. The inference drawn by the Tribunal is based on relevant consideration.

18. At the end, the learned counsel for the appellant had prayed time to file a copy of balance sheet and sought adjournment. The said request was made at the fag-end of the argument. The memo of the appeal does not contain any ground. It contains statements of facts', 'substantial question of law' and 'prayer'. No grievance appears to have been raised therein with regard to misreading of balance sheet either by the Tribunal or by the Commissioner of Income-tax (Appeals). There being no grievance to the observations of the Tribunal that in the balance sheet also the land has been disclosed as stock in trade, the prayer for time to file copy of the balance sheet was declined.

19. There is no merit in the appeal. The appeal is dismissed by holding that on the facts of the present case, the Tribunal has rightly held that the provisions of section 50C are not applicable with respect of sale of land as sale of land was not capital asset.”

17. So far as the decision of the Tribunal in the case of Purushottam Mukuddas Lohia is concerned we find the same is rendered in the context of determination of fair market value by adopting the value determined by Stamp duty authorities in absence of any other basis. The Tribunal has nowhere stated that provisions of section 50C are applicable to stock in trade. In this view of the matter and in view of the detailed discussion by the Ld. CIT(A) we find no infirmity in his order and accordingly uphold the same. The grounds raised by the revenue are accordingly dismissed.

ITA No.1257/PN/2010 (A.Y. 2007-08) :

18. Facts of the case, in brief, are that during the course of search an amount of `1,20,14,501 was found in the bed room of the assessee out of which cash amounting to `1,20,00,000 was seized. Similarly, cash of

₹2,36,500 was found at the business premises of the assessee at the ABN Amro Building, 327, M.G. Road, Pune, out of which an amount of ₹ 2 lakhs was seized. During the course of search action the statement of the assessee was recorded u/s.132(4) in which he had offered the unexplained cash of ₹1.20 Crores as additional income for A.Y. 2007-08 over and above the regular business income. During the course of assessment proceedings the Assessing Officer noted that the assessee has added the additional income of ₹1,71,50,000 in the profit and loss account of Icon Towers which is the proprietary project of the assessee. The amount of ₹1,71,50,000 includes ₹1.20 Crores of voluntary declaration on account of unexplained cash, ₹2 lakhs seized from the office premises of the assessee and voluntary disclosure of ₹49,50,000 as unaccounted investment in Icon Towers. The assessee arrived at the net profit of ₹1,40,20,504 in Icon Towers. The assessee has set off carry forward losses of earlier years against the net profit shown in Icon Towers. Since the carried forward business losses were more than the net profit, the assessee computed his tax liability at NIL. The Assessing Officer, therefore, asked the assessee to explain as to why the amount of ₹1,22,36,500 should not be treated as “income from other sources”. The assessee in his submissions reproduced the statement recorded on 22-09-2006 and stated that on the basis of the said statement he had declared the additional income as “business income” for the A.Y. 2007-08. It was contended that the assessee by saying in his statement recorded on 22-09-06 that “This is not my business cash” he meant that it was not cash as per his business books of accounts. It was further submitted that out

of `1.20 crores the assessee had explained the source of `40 lakhs out of specific land dealings and only in respect of `80 lakhs he could not recollect the source. It was submitted that the assessee in his statement has stated that the main source of income was business income only.

19. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He reproduced the answers given by the assessee in Question No.15 to 36 recorded u/s.132(4) on 21-09-2006. He observed that the assessee while answering to Question No.36 had clearly mentioned that the cash found was not his business cash which clearly meant that the cash was not generated from the regular business of the assessee. Now the assessee is explaining that what he meant was that it was not cash as per his business books of accounts. He referred to the trial balance drawn by the accountant of the assessee Mr. Raghu as on 14-07-2006 according to which the cash balance was `4,01,500. Therefore, the cash found at the residence was not as per books of accounts of the assessee. The Assessing Officer further came to the conclusion that the assessee could recollect that he had received ` 20 lakhs from Sujay Builders, Pune in cash which is not reflected in the books of accounts. Similarly, he had stated that he had received `20 lakhs in cash from Mahanagar Housing which is also not accounted in the books of account. However, for the remaining `80 lakhs the assessee could not recollect as to exactly from whom he had received `80 lakhs. According to the Assessing Officer the onus is on the assessee to prove the source from which he had received the cash. Facts are within the special knowledge of the assessee. Therefore, if the assessee does not identify the source clearly

the burden cannot be placed on the Assessing Officer nor can it be presumed that the income was generated from the regular business of the assessee. Distinguishing the various decisions relied on by the assessee the Assessing Officer came to the conclusion that the unexplained cash found at the residential as well as business premises amounting to `1,22,36,500 has to be treated as “income from other sources”. He accordingly denied the benefit of set off of carry forward business losses against such income from other sources for A.Y.2007-08.

20. Before CIT(A) the assessee reiterated the same arguments as made before the Assessing Officer. Relying on the statement recorded from the assessee during the course of search u/s.132(4) and during the course of assessment proceedings u/s.131 and relying on various decisions it was submitted that the additional income declared by the assessee should be treated as “business income” and not “income from other sources”.

21. Based on the arguments advanced by the assessee and relying on the decision of the Hon’ble Supreme Court in the case of Nalinikant Ambalal Mody Vs. Narayan Row reported in 61 ITR 428 the learned CIT(A) held that the money found during the course of search and declared by the assessee for the impugned year has to be assessed under the head “business and profession” and not under the head “Other sources”. While doing so, he further noted that the Assessing Officer in the assessment order has analysed the cash found and seized on the basis of declaration made by the assessee to say that out of the total of approximately `1.2 crores, `40 lakhs admittedly has come for organising a land deal belonging to a firm in which the assessee is a partner with third party and therefore according to the AO the

receipt of ` 40 lakhs is a premium which is required to be assessed under the head “other sources”. According to the learned CIT(A) the word “premium” has been inappropriately used for this transaction as the land was not belonging to the assessee but was that of the partnership firm in which the assessee was a partner and therefore, money received for organising this deal can most appropriately be described as brokerage or commission or service charges. But the money definitely has been received due to land deal. According to the learned CIT(A) the Assessing Officer has not analysed this issue in the assessment order as to why for the above reason such receipt would fall under the head “income from other sources”.

22. So far as the remaining amount of ` 80 lakhs or so is concerned he observed that the assessee during the course of search as well as during the assessment proceedings in his statement had stated all through that the money represented income earned from business activities and the exact transactions which has resulted in accumulation of the unaccounted money was claimed to be not possible to be remembered. He opined that the Assessing Officer has not acted correctly as per law. Referring to the various replies given by the assessee he noted that the assessee was all through claiming the amount to be received from business activities. He also analysed the provisions of section 56 and sub section (2) of section 56 and noted that unaccounted cash found is definitely not falling under any of the provisions of section 56. Referring to the decision of the Hon’ble Supreme Court in the case of Nalinikant Ambalal Mody Vs. Narayan Row reported in 61 ITR 428 he held that the cash so found cannot be treated as “income under other sources”. Since the assessee undisputedly is engaged in the business of real estate, land dealings, running hotels and bakery etc. under

individual capacity as well as through partnership firm, therefore, he was of the opinion that the cash so found normally and naturally would belong to such activities. He accordingly held that the money so found during the search and declared by the assessee for assessment has to be assessed under the head “business and profession” and not under the head “other sources”.

23. Aggrieved with such order of the CIT(A) the revenue is in appeal before us with the following grounds :

“1. In facts and circumstances of the case and in law, the learned CIT(A) has erred in treating the income of Rs.1,22,36,500- as income from 'Business and Professions' as against the 'Income from other Sources' held by the A.O.

2. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that while answering to Question No. 36, the assessee has clearly mentioned that the cash found was not his business cash.

3. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the assessee received cash of Rs.20 Lakh each from Sujay Builders, Pune and Mahanagar Housing which is in the nature of a sort of premium.

4. In facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the assessee has not discharged his liability in proving the source of remaining cash of Rs. 80 Lakhs.

5. The appellant craves its right to add or alter the ground of appeal at any time before or during the course of hearing of the case.”

24. The learned Departmental Representative heavily relied on the order of the Assessing Officer. He submitted that the income declared during the course of search cannot be treated as “business income” and has to be treated as “income from other sources”. In his alternate contention he submitted that out of the cash of Rs. 1.20 Crores plus the assessee was able to explain only to the tune of Rs.40 lakhs. Therefore, atleast the balance Rs.80 lakhs for which the assessee could not explain the source should be treated as income from other sources.

25. The Ld. Counsel for the assessee on the other hand heavily relied on the order of the CIT(A). He submitted that the AO simply relied on the reply to the answer of the assessee to Question No.36 but ignored the reply to all other questions. Referring to question No.36 he drew the attention of the Bench to the mental condition of the assessee in which he had submitted that he was unable to explain the source of the said cash of Rs. 1.20 Crores and therefore offered the same for taxation as additional income for the A.Y. 2007-08. He has simply stated that “this is not my business cash”. He drew the attention of the Bench to Question No.15 and submitted that in reply the assessee has categorically stated that the cash of Rs. 1.20 Crores belongs to him and this is his business income. Referring to Question No.21 he submitted that the assessee in his reply to the source of Rs. 1.20 Crores had stated that he had withdrawn the money from the banks and from different business income which he could not recollect right now. Referring to Question No.25 he submitted that he had sold out land at Sachapeer Street, Pune and received Rs. 20 lakhs from Sujay Builders, Pune in cash which is not reflected in books of accounts. Similarly he had sold land at Kondva Khurd to Mahanagar Housing and had received Rs.20 lakhs in cash which is unaccounted. Referring to Question No.29 he submitted that the assessee in his reply to explain the source of Rs. 1.20 Crores had admitted that all transactions are not shown by him. He accordingly submitted that when the assessee was repeatedly stating that the source of Rs. 1.20 Crores is from business activity the Assessing Officer, simply relying on a reply given by the assessee in Question No.36, cannot reject the contention of the assessee that the amount of Rs.1.20 Crores is out of business income. He submitted that as regards unaccounted construction the Assessing Officer accepts Rs.49 lakhs as business income without any corroborative evidence. However, for

the amount of Rs. 1.20 Crores the Assessing Officer is of the opinion that the same is not business income which is not correct. Referring to the decision of the Pune Bench of the Tribunal in the case of Chander Mohan Mehta Vs. ACIT reported in 71 ITD 254 he submitted that statement recorded during the course of search has to be considered as a whole and revenue could not be permitted to use that part of the statement which was beneficial to it and reject other part of statement which was detrimental to the assessee.

26. Referring to various decisions he submitted that admission to be binding must be taken as a whole. The admissions must be clear if they are to be used against a person making them. There should be no doubt or ambiguity about the alleged admission. He accordingly submitted that the order of the CIT(A) be upheld.

27. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute that during the course of search an amount of Rs.1,20,14,501/- was found in the bed room of the assessee, out of which an amount of Rs. 1,20,00,000/- was seized by the department. Similarly, cash of Rs. 2,36,500/- was found at the business premises of the assessee out of which an amount of Rs. 2 lakhs was seized. There is also no dispute to the fact that the assessee in his statement recorded u/s.132(4) on 21-09-2006 had offered the unexplained cash of Rs.1.20 crores as additional income for A.Y. 2007-08 over and above the regular business income of the assessee.

28. We find the Assessing Officer in the assessment treated the cash found amounting to Rs. 1,22,36,500/- as “income from other sources” and did not allow the set off of carry forward losses from the business income of the assessee. We find the Ld. CIT(A) considered the income of Rs.1,22,36,500/- as “income from business and profession” as against “income from other sources” treated by the Assessing Officer. It is the submission of the Ld. Departmental Representative that since the assessee in his reply to Question No.36 had clearly mentioned that the cash found was not his business cash, therefore, the Ld. CIT(A) was not justified in treating Rs.1,22,36,500/- as “income from business and profession”. It is the alternate contention of the Ld. Departmental Representative that since the assessee was not able to explain the source of Rs.80 lakhs out of Rs.1.20 crores, therefore, atleast an amount of Rs.80 lakhs should be treated as income from other sources.

29. It is the submission of the Ld. Counsel for the assessee that the assessee in his statement recorded u/s.132(4) in more than one answer had stated that the cash found was his business income. Merely because at one place he had stated that the cash found was not his business cash cannot be held against the assessee.

30. We find the assessee in reply to Question No.36 being unable to explain the source of the cash of Rs.1.20 crores stated that this is not his business cash which is as under :

Q.No.36. I have repeatedly asking you since yesterday, i.e. 21-09-2006 regarding cash of Rs. 1.20 crores found at your residence. Pl explain the source of the same?

Ans. I am unable to explain the sources of said cash of Rs.1.20 crore and hereby offer the same for taxation as additional income in my hands for A.Y. 2007-08. This is not my business cash.

31. We find the taxability of Rs.1,22,36,500/- is not in dispute. The dispute is only regarding to the head under which it has to be taxed. It is the case of the revenue that the same should be taxed as “income from other sources” since the assessee in Question No.36 has stated that the cash of Rs.1.20 crores is not his business cash. It is the case of the assessee that he had categorically stated in his reply to various other questions that an amount of Rs. 1.20 crores which has been offered as additional income is his business income.

32. We find the assessee in his reply to Question Nos.15, 16, 21, 25, 27, 28, 30, 31, 32 has replied as under :

“Q.No.15 During the search action u/s.132 of the I.T. Act at your residence, cash of Rs.1.20 crore was found in the cupboard of the room, which is adjacent to the hall. Please explain the source of it and the cash belongs to whom?”

Ans. This cash of Rs.1.20 crore belongs to me. This is my income from business.

Q.No.16 Please state whether this cash of Rs.1.20 crore has entered in your books of accounts of any business concern”. Also this cash is in the denomination of Rs.1,000/- and currency is new. From which business did you get such huge amount of cash and that to all currencies are in the denomination of thousand? Pl. Explain this ?

Ans. It was collected in due course of time and denomination was changed after that as and when required to be changed.

Q.No.21 From where you have accumulated this currency of Rs.1.20 Crores?

Ans. I withdrawn the money from the banks and from different business income which I could not recollect right now.

Q.No.25 From which business income did you get cash and whether it is reflected in books of accounts ?

Ans. I have sold land at Sachapeer Street, Pune and received Rs.20 lac from Sujay Builder, Pune in cash which is reflected in books of accounts. I sold this land in Jan/Feb 2006. Total sale consideration of this land I couldn't recollect now. I have sold land at Kondva Khurd in March 2006. The land was sold to Mahanagar Housing. I received Rs. 20 lacs in cash which is unaccounted. Total amount of sale deed I couldn't recollect now.

Q.No.27 Pl. State from which business project or land transaction did you received the amount of Rs.1.20 crores? And have shown the receipts/income of Rs.1.20 crore in your I.T. return and entered the same in your regular books of accounts maintained by you ?

Ans. Not all transactions have shown by me.

Q.No.28 In the answer to Q.No.25, you have stated that Rs. 40 lacs has been received by you in cash which is unaccounted after the sale of land to two parties. Tell the source of remaining amount of RS. 80 lacs out of Rs.1.20 Crore?

Ans. I could not recollect now. Villagers from which land come for cheap rate, then I keep it ready in hand.

Q.No.30 Please explain the different business transaction through which you received Rs.1.20 crores?

Ans. I have already told you that Rs.40 lac I got through land dealing which is unaccounted for the remaining 80 lacs I do not remember from which business sources I have got.

Q.No.31 Whether this Rs. 80 lacs has shown in your books of accounts.

Ans. Partly might be reflecting in my books of accounts.

Q.No.32 What is this partial reflection of income in your books of accounts?

Ans. I have to see my books of accounts I do not remember right now."

33. From the above, we find that out of the amount of Rs.1.20 crores the assessee has already explained an amount of Rs.40 lakhs being the amount through land dealings which is unaccounted for. Therefore, the dispute is for the remaining Rs.80 lakhs. We find the assessee in his reply to Question No.15,16,21,27,28,30,31 and 32 had categorically stated that the additional income is from his business in land dealings etc. We, therefore, find merit in the finding given by the Ld. CIT(A) that the Assessing Officer has not acted correctly as per law. The assessee in his statement during the search as well as assessment proceedings has categorically stated all through that the money found related to his unaccounted business income. Out of the above, he could explain the exact transaction which resulted into collection of Rs.40 lakhs as brokerage for the land deals organised by him and for the remaining amount he stated that the money has been collected over a period of time and the exact transactions cannot be identified. However, he has accepted the cash found as his additional unaccounted income and the above fact has also been noted by the Assessing Officer in Para 3 of the assessment order.

34. So far as determining the additional income as income from other sources we find as per the provisions of section 56(1) income of every kind,

which is not to be excluded from the total income under this act, shall be chargeable to Income tax under the head “income from other sources” if it is not chargeable to Income tax under any of the heads specified in section 14 item No. A to E. Further, provisions of section 56(2) gives the nature of income which shall be chargeable to tax under the head income from other sources.

35. In this case, the cash was found from the residential and business premises of the assessee. The assessee in his statement recorded u/s.132(4) has accepted the same as unaccounted business income and offered the same for taxation along with unexplained investment in Icon Tower. The declaration made u/s.132(4) for investment in Icon Tower was accepted without assigning any specific reason but the same was not accepted selectively for the cash found. Further, the declaration for taxability was accepted but the source of the cash found was not accepted. It has been held in a number of judicial decisions that statement recorded during the course of search u/s.132(4) has to be considered and accepted as a whole if the Assessing Officer wants to use it as an evidence. The Assessing Officer cannot be allowed to blow hot and cold simultaneously. The revenue could not be permitted to use that part of the statement which was beneficial to it and reject the other part of the statement which was detrimental to it. We, therefore, are of the considered opinion that the entire statement of the assessee has to be considered as a whole and the additional income so declared to be treated as business income as claimed by the assessee and held by Ld. CIT(A). We further find merit in the submission of the Ld. Counsel for the assessee that when the assessee is undisputedly engaged in the business of real estate, land dealings, running of restaurants and bakeries

etc. in individual capacity as well as through partnership firm for the last so many years, therefore, the cash found from residence as well as business premises would belong to such activities. Considering the totality of the facts of the case and in view of the detailed reasoning given by the Ld. CIT(A) while allowing the claim of the assessee that the money found during the search and declared by the assessee as additional income has to be assessed under the head “business and profession” and not under the head “income from other sources”, we find no infirmity in his order. Accordingly, the same is upheld. Grounds raised by the revenue are accordingly dismissed.

36. In the result, both the appeals filed by the revenue are dismissed.

Pronounced in the Open court on this, the 19th day of April 2013.

Sd/-

Sd/-

(SHAILENDRA KUMAR YADAV)
JUDICIAL MEMBER

Pune, dated the 19th April 2013
satish

(R.K. PANDA)
ACCOUNTANT MEMBER

Copy of the order is forwarded to :

1. The assessee
2. The Department
3. The CIT(A)-IV, Pune
4. DGIT (Inv), Pune
5. CIT Central, Pune
6. D.R. “B” Bench, Pune
7. Guard File

By order

// True Copy //

Private Secretary,
Income Tax Appellate Tribunal, Pune

