

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No: 1965/Ahd/2017
Assessment Year 2013-14**

The DCIT, Circle-4(2), Ahmedabad (Appellant)	Vs	Shri Bharatkumar Babubhai Patel B-27, Shyam Satadhar Society, Sola Road, Ghatlodiya, Ahmedabad-380061 PAN: AJRPS7815B (Respondent)
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**ITA No: 1963/Ahd/2017
Assessment Year 2013-14**

The DCIT, Circle-4(2), Ahmedabad (Appellant)	Vs	Shri Lalitbhai Jayantibhai Patel 9-Chanchal Baug Society, Ranna Park, Ghatlodiya, Ahmedabad-380061 PAN: ABCPP1881B (Respondent)
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**Revenue Represented: Dr. Vipul Chavda, Sr.D.R.
Assessee Represented: Shri S.N. Divetia, &
Shri Samir Vora, A.Rs.**

Date of hearing : 29-11-2023
Date of pronouncement : 31-01-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These two appeals are filed by the Revenue as against separate appellate orders dated 29.06.2017 & 30.06.2017 passed by the Commissioner of Income Tax (Appeals)-4, Ahmedabad, arising out of the assessments passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2013-14 of the respective assessee mentioned hereinabove.

2. Since common issue of sale of agricultural land is involved in both the appeals and both the assessee herein are the Confirming Party in the sale transaction, the same are disposed of by this common order.

3. ITA No. 1965/Ahd/2017 is taken as the lead case and the brief facts is that the assessee is an individual and Proprietor of Shailja Buildcon engaged in the business of construction. Assessee filed his Return of Income for the Assessment Year 2013-14 on 27.03.2014 declaring total income of Rs.80,50,300/- which is inclusive of Long Term Capital Gain on sale of immovable property through Banakhat rights as a Confirming Party of Rs.69,37,813 and also claimed exemption u/s. 54B of Rs.1,79,59,304/-. The Ld. Assessing Officer held that the Banakhat (Agreement of Sale) was entered by the assessee on 29.04.2005 for a consideration of Rs.15.50 lakhs and an advance of Rs. 2 lakhs only paid, balance was not by the assessee and the Banakhat was also unregistered,

but only a notarized agreement. As per the section 17 of the Registration Act, the assessee does not get right over the property by merely entering into an agreement (Banakhat). Therefore the sale consideration received by the assessee in 2011 through registered Sale Deed as Confirming Party cannot be treated as a transfer and not a capital asset in the hands of the assessee. Therefore the entire transaction “income from other sources” and taxed accordingly and also denied deduction u/s. 54B.

4. Aggrieved against the same, the assessee filed an appeal before Commissioner of Income Tax (Appeals). The Ld. CIT(A) dealt the issue in detail and held that the Ld. A.O. failed to consider Para 4 of the Banakhat which clearly stated “the balance amount of Rs.13.50 lakhs will be paid by the assessee only an absolute clear Title Clearance Certificate is provided by the vendor, till that date the period of this Banakhat will be extended automatically”. Further it is a fact that no buyer will pay crores of rupees to any third person through amount payee cheques, if someone has no right in the property. As per clause 4 of the Banakhat, the assessee herein has the right over the property, the title dispute were cleared with the previous vendor in Spl. Civil Suit No. 95/2006 wherein the assessee is also a party in the suit. Thus Ld. CIT(A) confirmed that the transfer of the property is a capital asset within the meaning of section 2(14) of the Act and thereby allowed the assessee to compute capital gain and also claim deduction under section 54B of the Act by observing as follows:

“.....5.3 The facts of the case, submissions of the appellant and findings of the AO have been considered thoroughly. The appellant with other partner, Shri Bharatbhai Patel entered into Banakhat with Vendor, Shri

Kiran V. Patel for the land under consideration on 29.04.2005 for a consideration of Rs.15.50 lakh, out of which Rs 2 lakh were paid Remaining Rs. 13.50 was to be paid within one year of the "Banakhar The A.O's first reason for making additions is that the Banakhat' dated 29.04.2005 is not registered one and it's notarized only, therefore, it is not a valid Banakhat". This reason of the A.O is not legally sustainable for the reason that as per amended section 17 of the Registration Act, 1871, 'Banakhat' comes under the exception category from mandatory registration.

.....
5.4 As clearly provided in the Registration Act, 1871 itself that registration of agreement to sale is not mandatory, the A.Os. findings in this regard is not as per the law in force. These provisions of the Registration Act, 1871 have been upheld by the Hon'ble jurisdictional High Court of Gujarat, Ahmedabad in the case of Kaushik Rajendra Thakore Vs. Allied Land Corporation 1) LGH22(Gujarat) & followed in the case of Nitin Kumar Laxmidas Vis. Savitaben 351 GLR 560. In these cases, it has been held that registration of agreement to sale is not required as per the Registration Act, 1871, Looking to provisions of the Registration Act, 1871 and the judgments of Hon'ble High Court of Gujarat, Ahmedabad in above cases, the reason given by the A.O. that the 'Banakhat' was not registered, hence it was not enforceable, is found unjustified, hence this argument of the A.O. is not found acceptable. Moreover, the A.O. considered the 'Banakaht dated 29.04.2005 as null & void stating that the consideration of Rs. 15,50 lakh was fixed in the 'Banakhat', out of which Rs.2 lakh were paid by the appellant & partner. Remaining Rs.13.50 lakh were to be paid within one year from the date of 'Banakhat' but this condition of the Banakhat was not complied with. Further payment of Rs. 13:50 lakh was made on 20.12.2011 for which no Banakhat was made The AO held that as the conditions of Banakhat for making remaining payment of Rs. 13.50 lakh was not compiled with, therefore, this Banakhat dated 29.04.2005 has become null & void. But while holding the same, the A.O. did not consider para 4 of the "Banakhat in which it is agreed upon that the vendor of the property will provide title clearance certificate and till that date, the period of this Banakhat will be extended automatically. The A. O has considered one condition of the Banakhat but it seems that the condition mentioned in para 11 that till the title clearance certificate is provided, time of this Banakhat will be extended automatically, could not be noticed by the A.O. The appellant's contention that the A.Os finding considering the Banakhat as null & void for this reason is not justified, is found acceptable, hence it in accepted.

5.5 Another reason for making additions by the AO is that Banakhal dated 29.04.2005 is an afterthought to avoid/lower tax liability but did not give any reason for this finding. The appellant & his partner, Shri Kiran V. Patel, vendor and Prasthan Infrastructure Pvt. Ltd. ie buyer are not related parties in any manner directly or indirectly Generally, the A.Os, have apprehension about the genuineness of the confirming parties and some time it is found correct by making further enquiries. Bogus confirming

parties are created by the vendor/buyer of the property to avoid/reduce tax liability in some cases To find out genuineness of the confirming party, one parameter is that weather the confirming parties are related directly or indirectly to the vendor or vendee Because bogus confirming parties are created by paying small commission and if parties are not related, the confirming party may not return the amount paid. Such risk will not be taken by the person, who create the confirming party in the appellant's case, as the parties to the transaction are not related in any manner, thus, first test of genuineness of the appellant as confirming party is passed. Another important test to find out the genuineness of the confirming party is to see how the amount received by the confirming party has been utilized. If the confirming party is created one and not genuine, the amount paid to the confirming party will be diverted to the vendor/vendee by way of loan or by some other way. Only small portion as commission will be kept by the created confirming party. In the appellant's case, the amount received as confirming party has been fully remained with the appellant or invested in the property/Bonds in his own name, for which exemption us 54EC/F have been claimed. The detail of investment made in the house and bonds are mentioned in the return of income itself. These facts also prove that the appellant and his partner are genuine confirming party

5.6 One more reason for making additions by the A.O. is that as the Banakhat dated 29.04.2005 has been held as null & void. Therefore, the appellant was neither the owner of the capital asset nor had any interest in capital asset as defined u/s 2(14) of the Act. From the discussion in para above, it has been established beyond doubt that the appellant is a genuine confirming party to the transaction under consideration. Therefore the appellant had right in the said property. It is a fact that no buyer will pay crores of rupees to any one through amount payee cheques, if someone has no right in the property. The name of confirming parties are mentioned in the sale deed to make title absolute clear, so confirming party should not raise any claim over the property in future. It a person has no right in the property, the buyer will not agree to include his/her name in the sale deed. Therefore, making of payment of huge amount by account payee cheque and mentioning name of confirming parties in the Sale Deed also prove that the appellant had right in the property. It has been held in the following cases that the right in property is a capital asset as per section 2(14) of the Act.

a) Hon'ble SC in the case of Ahmed G.H. Ariff & Others Vis. CWT (1970) 76 ITR 471 (SC).

b) Hon'ble Bombay High Court in the case of CIT Vis. Vijay Flexible Containers (185 ITR 693 (Bombay)).

The above palgments have been re affirmed by the following judgments of the Hon'ble High Courts:-

i) CIT Vis Tate Services Lid (122 ITR 594. Bombay)

- ii) CIT Vis. Surat Laxmi Devi Ratnani 296 ITR (393 MP)
- iii) J.K. Kashyap VN. ACIT (302 ITR 255 Delhi)

As mentioned above, in all these cases, it has been held that a right created by agreement to sale is an enforceable right, therefore, it is capital asset u/s 2(14) of the I.T. Act. Therefore, the findings of the A.O. that the appellant did not have any right in property as per section 2(14) of the Act is not found legally sustainable, hence rejected

5.7 The A.O cited case law of Suraj Lamp & Industries Pvt. Ltd. Vis. State of Haryana decided by the Hon'ble Supreme Court to strengthen his arguments to make additions But the same is not found applicable in view of extended meaning given to the term transfer u/s 2(47) of the Income Tax Act. The said decision rendered prior to the amendment in the definition of transfer u/s 2(47) of the Act and the aforesaid judgment is not related to special provisions of Income Tax Act. Therefore, with due respect, this came law is not found applicable to this case.

5.8 On the basis of discussion above, it is held that the appellant had right in property under consideration by virtue of "Banakhar dated 29.04.2005, therefore, the amounts received as confirming party on sale of the said right is considered as receipt on sale of capital asset and income is held as income from long term capital gain. The additions made by the A. O. on this ground are deleted. This ground of appeal is allowed.

5.9 As the income of the appellant has been held as income as Long Term capital gain the appellant is entitled for deduction u/s 54B/D/G etc. of the Act. The AO is directed to allow the deduction claimed u/s 54B/D/G etc. of the Act, if these are found otherwise allowable as per the provisions of the Act. This ground of appeal is allowed with the direction."

5. Aggrieved against the same, the Revenue is in appeal before us raising the following Grounds of Appeal:

1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 2,67,25,000/- made by the AO by considering the income of the assessee under the head of "Long Term Capital Gain" in place of "Income from other sources" and in allowing deduction under sections 54B/54D/54G" (actually 54EC and 54F).

2. The Ld. CIT (A) has erred in holding that registration of the Bunakhat was not necessary even though as per clause (aa) inserted in sub-section (1) of the section 17 of the Registration Act, 1908 by the Registration (Gujarat Amendment) Act, 1982, instruments which purport or operate to affect any contracts for transfer of any immovable property are required to be registered. (Refer Gohil Amarsing Govindbhai... Vs. Shah Mansukhlal Chhaganlal AIR 2003 Guj 78).

3. The Ld CIT(A) has erred in law and on facts in holding that a right had been created in favour of the assessee by virtue of the Banakhat even though it was held by the Hon'ble Supreme Court in the case of Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and another in SLP(C) No.13917 of 2009 that an unregistered agreement of sale does not create any charge on its subject matter and the Banakhat in the present case was not registered.

4. The Ld.CIT(A) has erred in law and on facts in not appreciating that the original seller Shri Kiranbhai Vitthalbhai Patel had executed an agreement with M/s. Pratham Infrastructure Pvt. Ltd for one of the properties and construction had commenced, which showed that the assessee had no rights over the lands by virtue of the Banakhat.

5. The Ld.CIT(A) has erred in not appreciating that the Banakhat was a scheme, as an agriculturist vendor could not be expected to obtain the certificate of conversion of land from Agricultural Land to Non Agricultural Land and the automatic extension of time for payment by vendor on non-completion of formalities within 12 months from the date of Banakhat without any penalty or consideration was unusual.

6. The Ld CIT(A) erred in placing reliance upon the decision of the Hon'ble Supreme Court in the case of Sanjeev Lal Vs. CIT even though the said case was decided on the peculiar facts of the case and related to the issue of relief w/s.54 of the Act within the factual matrix of the said case, which are quite different from the present case.

6. We have heard rival submissions extensively and also gone through the Paper Book and Case laws filed by both the parties. The primary contention of the Revenue is that the Banakhat (Agreement of Sale) dated 29.04.2005 was unregistered and the Banakhat was meant only for 12 months period, therefore the assessee does not get right over the property. The Ld. Counsel filed before us a copy of the Banakhat which was later registered as a document vide serial no. 174 on the 1st day of June, 2013 as "Agreement of Sale" by paying Registration Fees of Rs. 2,68,250/- with the Sub Registrar, Ahmedabad-2, Wadaj. Thus the question of non-registration does not arise and the Assessing Officer and the

Lower Authorities failed to note this crucial document. Further clause 4 of the Banakhat reads as follows:

“4. There is no encumbrance over the said land of any kind of loan. If the executee finds that he wants to avail a loan over the said property then, the executor herein shall have to execute the necessary papers for the same. The executor herein is bound to get all kinds of documents such as writings, documents, affidavits, acceptance, assurances, indemnity bonds, etc. from all the concerned persons at his own cost and risk. The executor herein shall also be bound to obtain the title clear certificate and the N.A. permission in respect of the said land and provide it to the executee. If the first party fails to obtain the non-agricultural permission and title clearance certificate as mentioned herein above, then, the tenure of this agreement to sale shall be deemed to have automatically extended.”

6.1. From reading of clause 4 of the Banakhat makes it clear that the seller is to obtain title clearance certificate and non-agricultural permission in respect of the land to the seller namely the assessee herein, failure of the same, the tenure of the Banakhat shall deem to have extended automatically. Thus it is clear that the Civil disputes over the land was cleared between the parties in Civil Suit No. 95/2006 vide Decree dated 11.03.2010 by Principal Sr. Civil Judge withdrawing the suit unconditionally and N.A. permission in respect of the land was obtained from the Collector, Ahmedabad District vide order No.CB/Land-1/N.A./S.R.714/2011 on 08.09.2011. The above details are very much reflecting in the registered Sale Deed executed on 05.01.2013 registered as Document No. 174 of 2013 with the Office of the Sub Registrar, Ahmedabad-2, Wadaj. It is in the above registered Sale Deed, the respondents/assesseees herein are shown as the Confirming Parties and received the consideration through various payment from the buyer/developer. Thus the allegations and averments made by the

Assessing Officer does not stand good in the eye of law namely Banakhat is unregistered and the Banakhat after 12 months period is invalid in law are not properly understood by the Ld. A.O. in legal prospective. Thus the Grounds of Appeal (namely violation of section 17(1)(aa) of Registration Act) and Case law Suraj Lamp and Industries Pvt. Ltd. relied upon there are clearly distinguishable to the facts of the present case. Therefore the grounds are liable to be dismissed. Thus we do not find any infirmity in the order passed by the Ld. CIT(A) who held that rights held by the assessee as a Confirming Party in the Sale Deed as a capital asset within the meaning of Section 2(14) of the Act and liable for LTCG and the assessee is also eligible to claim deduction u/s. 54B of the Act.

7. Therefore the appeal filed by the Revenue is hereby dismissed.

8. **ITA No. 1963/Ahd/2017** is the other Confirming Party in the very same Sale Deed and the facts herein is also identical.

9. The Grounds of Appeal raised by the Revenue in this appeal reads as follows:

1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 2,67,25,000/- made by the AO by considering the income of the assessee under the head of "Long Term Capital Gain" in place of "Income from other sources" and in allowing claim of exemption u/s.54.

2. The Ld. CIT (A) has erred in holding that registration of the Banakhat was not necessary even though as per clause (aa) inserted in sub-section (1) of the section 17 of the Registration Act, 1908 by the Registration (Gujarat Amendment) Act, 1982, instruments which purport or operate to affect any contracts for transfer of any immovable property are required to be registered (Refer Gohil Amarsing Govindbhai... Vs. Shah Mansukhlal Chhaganlal AIR 2003 Guj 78).

3. The Ld. CIT(A) has erred in law and on facts in holding that a right had been created in favour of the assessee by virtue of the Banakhat even

though it was held by the Supreme Court in the case of Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and another in SLP(C) No.13917 of 2009 it has been held that an unregistered agreement of sale does not create any charge on its subject matter and the Banakhat in the present case was not registered.

4. The Ld.CIT(A) has erred in not appreciating that the Banakhat was a scheme, as an agriculturist vendor could not be expected to obtain the certificate of conversion of land from Agricultural Land to Non Agricultural Land and the automatic extension of time for payment by vendor on non completion of formalities within 12 months from the date of Banukhat, without any penalty or consideration was unusual.

5 The Ld. CIT(A) erred in placing reliance upon the decision of the Hon'ble Supreme Court in the case of Sanjeev Lal Vs. CIT even though the said case was decided on the peculiar facts of the case and related to the issue of relief w/s. 54 of the Act within the factual matrix of the said case, which are quite different from the present case.

10. The assessee herein is the another confirming party in the above sale transactions. Since the issue involved are identical, the decision that we arrived in ITA No. 1965/Ahd/2017 will be applicable in the facts of the present assessee's case also. Following the same, the appeal filed by the Revenue is liable to be dismissed.

11. In the result, the appeal filed by the Revenue is dismissed.

12. In the combined result, the appeals filed by the Revenue are hereby dismissed.

Order pronounced in the open court on 31-01-2024

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 31/01/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT

4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद