

## **Sale of land to be taxed as capital gain when it was held as investment which subjected to wealth tax**

**Summary – The Ahmedabad ITAT in a recent case of Hiteshkumar, (the Assessee) held that where assessee purchased plots and declared its acquisition in its books as investment over a period of time and subjected same to wealth tax, since properties were held by assessee as capital assets before its sale, consequential gains arising on sale thereto was chargeable under head capital gains**

### **Facts**

- The assessee filed return of income and applied concessional rate on long term capital gains arising on sale of Santaj land and Rakanpur land.
- In the course of assessment proceedings, the Assessing Officer denied the application of concessional rate and treated it as adventure in the nature of trade under the head business income.
- The Commissioner (Appeals) upheld the order of the Assessing Officer.
- On appeal to the Tribunal:

### **Held**

- The substantive issue in the present appeal is whether gains arising on sale of plot/land by the assessee in the relevant assessment year is required to be taxed under the head 'capital gains' as offered by the assessee or is to be treated as 'business income' of the assessee. The issue is essentially factual in nature and depends on the facts and circumstances prevalent in a given case. It is the case of the assessee that plot/land was acquired/purchased over several years and held as capital asset in the nature of investment. From the written submissions of the assessee extracted by the Commissioner (Appeals), it is noted that the assessee has sold only few plots during the year as against the large land portfolio and there is considerable time lag between the purchase and sale of land. Simultaneously, it is noticed that land/properties have been declared as capital investment by the assessee all along. It is also noted that some agricultural produce were recorded in 7/12 extract and therefore, the assessee earned some money by way of yield on such investments. The land so held prior to dell were shown as investment and subjected to wealth-tax which further underscores the intention of the assessee to hold the properties as capital asset. The usage of borrowed funds no doubt gives some impression on the intention to acquire the land for trading purposes. However, in the same vain, such act of usage of borrowed funds by itself is not sufficient to substitute the declared intention of the assessee and alter the character of the asset substantially. The assessee has declared the acquisition of land in its books as investment over a period of time. Nothing turns on the allegation of the revenue that land has been converted into non-agricultural land prior to its sale. On the contrary, it is found that such act can only be with a view to maximize the gain on sale

of property by a prudent investor for which he cannot be faulted. After conversion of such land, the sale took place to a buyer who happens to be a developer. Thus, no adverse inference is permissible on this score also.

- Notably, what is relevant to determine the issue is to enquire into the intention at the time of acquisition of asset and not when the asset is proposed to be sold. The revenue has not alleged any real substantive and systematic course of activity or conduct with set purpose in the instant case. While description of a particular portfolio in the balance-sheet may not be conclusive in determining the nature of transactions *per se*, it is certainly an important factor to ascertain the intention of acquisition of assets. It is found that the action of the Assessing Officer was simply guided by the considerations of the revenue alone to collect more taxes without bringing any concrete material on record to justify that the acquisition of land under sale was induced by commercial spirit. At this juncture, it is found that section 2(14) stipulates that property can be 'capital asset' even if connected with business of the assessee. Therefore, the assessee is entitled in law to hold certain class of assets as capital asset even while he is dealing with the asset of similar nature in business with commercial objectives. Thus, in the totality of circumstances existing in the present case, it is found that plea of the assessee has merits and deserves acceptance. Accordingly, it is held that land/properties were held by the assessee as 'capital assets' before its sale and consequential gains arising on sale thereto is chargeable under the head 'capital gains'. Thus, the Assessing Officer is directed to consider the capital gains arising on sale of land/properties as chargeable under the head 'capital gains' as claimed by the assessee.