

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HON'BLE THE CHIEF JUSTICE DR. MANJULA CHELLUR
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

FRIDAY, THE 3RD DAY OF JANUARY 2014/13TH POUSHA, 1935

ITA.No. 344 of 2010 ()

**AGAINST THE ORDER IN ITA 953/COCH/2008
OF INCOME TAX APPELLATE TRIBUNAL,COCHIN BENCH, COCHIN
(ASSESSMENT YEAR 2005-2006)**

APPELLANT/APPELLANT IN ITA :

**LACHMANDAS & SONS,
COCHIN-35.**

BY ADV. SRI.K.SRIKUMAR

RESPONDENT/RESPONDENT IN ITA :

**THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-2 (2) ERNAKULAM.**

**BY SENIOR STANDING COUNSEL SRI. P.K.R. MENON
BY ADV. SRI.JOSE JOSEPH, SC, INCOME TAX**

**THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 03-01-2014,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Mn

...2/-

APPENDIX

PETITIONERS' ANNEXURES :

- ANNEXURE 1 : COPY OF ASSESSMENT ORDER DATED 27-12-2007.
- ANNEXURE 2 COPY OF THE APPELLATE ORDER DATED 15-10-2008.
- ANNEXURE 3 COPY OF ORDER OF THE INCOME TAX APPELLATE TRIBUNAL,
COCHIN BENCH DATED 12-5-2010.
- ANNEXURE 4 COPY OF THE MEMORANDUM OF UNDERSTANDING DATED
22-6-2001.
- ANNEXURE 5 COPY OF THE SALE DEED DATED 25-2-2005.
- ANNEXURE 6 COPY OF THE BANKER'S CHEQUE DATED 22-6-2001.
- ANNEXURE 7 COPY OF THE LETTER DATED 29-3-2001.

RESPONDENT'S ANNEXURES : NIL

//TRUE COPY//

P.S. TO JUDGE

Mn

**MANJULA CHELLUR, CJ
& A.M.SHAFFIQUE, J.**

*** * * * ***

I.T.A.No.344 of 2010

Dated this the 3rd day of January 2014

J U D G M E N T

MANJULA CHELLUR,CJ

The following substantial questions of law arises for consideration:

“(i) In the facts and circumstances of the case whether the definition of capital assets as indicated in Section 2(14) can be given a restrictive meaning to the extent of that property owned by the assessee himself in view of the judgment reported in [(1990) 186 ITR 693]?”

“(ii) In the facts and circumstances of the case, whether the tribunal was right in holding that the date of transfer of funds i.e. February 2004 is the date of acquisition as against the fact that the right to obtain the conveyance of immovable property was

acquired in 2001 by virtue of a MOU executed on 22/06/2001?

(iii) In the facts and circumstances of the case whether the Tribunal was right in holding that the transaction is only a short term capital gain rather than a long term capital gain as claimed by the assessee?"

2. This appeal is directed against the orders of the Appellate Tribunal. The relevant year of consideration is assessment year 2005-2006. The appellant/assessee admittedly is a partnership firm. While filing the return of income for the above assessment year, he declared his income as ₹ 36,75,130/-. When return came up for scrutiny, assessment was proceeded under Section 143(3) of the Income Tax Act. It is also not in dispute that the return of the assessee indicated claim of long term capital loss of ₹ 45,51,944/-. The material placed before the Assessing Officer was that the assessee entered into a memorandum of understanding (for short 'MOU') with M/s.Damodar Sons

& Co and also their partners for acquisition of property on 22/06/2001. It is also not in dispute certain amounts were due to Central Bank of India which had obtained recovery certificate issued by Debt Recovery Tribunal. The property in question was attached by an order of attachment duly registered with the Sub Registrar, Ernakulam.

3. M/s.Damodar Sons & Co approached the present appellant/assessee to sell the property after clearing off the debt to the bank. As per the terms and conditions of the MOU, ₹ 3 crores was the sale consideration and however the sale deed which came to be executed on 25/02/2005 to which the appellant/assessee was also a consenting party, the sale consideration was shown as ₹ 4,25,00,000/-.

4. The claim of the assessee was that he acquired a right when he entered into agreement of sale in 2001 (MOU) and irrespective of payment of ₹ 3 crores on 11/02/2004, looking at the date of sale deed 25/02/2005 it amounts to long term capital gain. Therefore, after computing the cost

of acquisition of right to purchase the property at ₹ 4,17,58,600/- on the date of MOU long term capital loss of ₹ 45,51,944/- has to be taken into consideration. However, rejecting the contention of the assessee, the Assessing Officer held that there was no right to purchase acquired by virtue of MOU on 22/06/2001 unless and until the terms and conditions of MOU were completely fulfilled. Treating the gain on transfer of whatever right acquired by the assessee by virtue of MOU opined that such right is a limited one and computed short term capital gain at ₹ 7,41,400/-. Aggrieved by the same, the assessee went in appeal before CIT (Appeals). However, CIT (Appeals) confirmed the findings of the Assessing Officer.

5. Thereafter, the appellant/assessee approached the Appellate Tribunal. The Appellate Tribunal also treated the amount as short term capital gain from the transfer of property in question and came to the conclusion that it does not amount to long term capital gain. In other words, the

Tribunal proceeded on the presumption that there is no dispute from either side so far as treating the transfer in question within the meaning of Section 2(47) of the Act. The Tribunal, further opined that as there was no dispute with regard to the occurrence of transfer within the meaning of Section 2(47) of the Act proceeded to consider whether it is a short term capital gain or a long term capital gain. According to the Tribunal, after referring to the definition of long term capital gain and short term capital gain, as there is no scope for treating the same as long term capital gain entirely agreed with the view expressed by the Assessing Officer which was confirmed by the CIT(Appeals). They also referred to appreciation of materials by the assessing authority for the assessment year. Accordingly the appeal came to be dismissed. Aggrieved by the same, the present appeal is filed.

6. Learned counsel for the appellant/assessee placing reliance on **J.K.Kashyap v. Assistant**

Commissioner of Income Tax [(2008) 302 ITR (Delhi)]

contends that by virtue of MOU in 2001, the appellant/assessee acquired right which has to be treated as an asset. Therefore, as he was a party to the document of sale in 2005, it has to necessarily be considered as a long term capital gain. He also places reliance on

Commissioner of Income Tax v. Vijay Flexible Containers [(1990) 186 ITR 693].

7. We have gone through the relevant facts and also the opinion of the High Court of Delhi and High Court of Bombay in the above two decisions. On a perusal of MOU, it is very clear that possession of the property was not handed over to the assessee as on the date of MOU in 2001. As on the date of MOU ₹ 62,50,000/- came to be paid to the Central Bank of India and so far as ₹ 3 crores to be paid to the owner of the property, no amount as such came to be paid. The said amount came to be paid only in the month of February 2004. It is not in dispute that in the month of

February 2004, the funds that ought to be paid under MOU came to be transferred to the bank and obtained no dues certificate from the Central Bank of India. It is also not in dispute that on 25/02/2005 regular sale deed came to be executed by M/s.Damodar Sons & Co along with the assessee in favour of third parties for a sum of Rs.4,25,00,000/-. The cost of acquisition of right acquired by the appellant/assessee that is right to get conveyance of property was computed at Rs.4,17,58,600/- as on 22/06/2001 which is also not disputed by the department.

8. The only question is whether the date of MOU i.e 22/06/2001 or 11/02/2004 i.e. the date of payment of entire amount of Rs.3 crores as per MOU is to be considered as date of transfer as defined under Section 2(47) of the Income Tax Act. The terms and conditions of MOU clearly indicates that property will not be transferred either in the name of appellant/assessee or his nominee till entire amount agreed upon as per the terms of MOU is paid. Mere

MOU would not confer any right to appellant/assessee to transfer the property in favour of third parties. The right is acquired only after payment of entire amounts as per MOU. It would happen only with the fulfilment of terms and conditions under MOU which apparently occurred in 2004. Therefore, whatever right accrued to appellant/assessee under MOU accrued only with the complete payment of amounts as per the terms and conditions of MOU on 11/02/2004. Till this right accrued to the appellant/assessee, he could not have ventured to transfer any limited right accrued to him under MOU, to third parties. In the absence of any regular document of conveyance in his favour or unless M/s.Damodar Sons & Co joined him in signing the documents of sale deed, he could not have transferred any right even if it was limited right. The said execution of sale deed occurred in 2005. Therefore, the right accrued to appellant/assessee in 2004 came to be transferred along with M/s.Damodar Sons & Co only in 2005. Hence the

Assessing Officer was justified in saying it is a short term capital gain and not long term capital gain.

Accordingly, the appeal is dismissed answering substantial questions of law against appellant/assessee.

(sd/-)

**(MANJULA CHELLUR,
CHIEF JUSTICE)**

(sd/-)

(A.M.SHAFIQUE, JUDGE)

jsr
04/01/2014

