

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 112 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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L.M. PATEL & B.M. PATEL (H.U.F.) - Appellant(s)
Versus

COMMISSIONER OF INCOME TAX - Opponent(s)

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Appearance :

MR RK PATEL for Appellant(s) : 1,
MR KM PARIKH for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 28/08/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1) The assessee has filed this appeal challenging the legality of the judgment of Income-tax Appellate Tribunal (hereinafter to be referred to as "the Tribunal") dated 18.2.2000. At the time of admission of the appeal, the Court had formulated following questions for consideration:

"1) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that payment of Rs.15,00,000/- made to Amora Chemicals Pvt. Ltd. Is not covered under the provisions of Section 48(1) and does not represent a deductible expenditure for computation of capital gains, and whether the interpretation of said section is correct in law and on facts?

2) Whether, on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in holding that the interest of Rs.1,66,014/- credited in the Savings Bank Account on the advance amount given by the purchaser, i.e. Bank of Baroda, against purchase consideration, is not income from house property but the same is income from other sources?"

2) The counsel for the appellant-assessee stated that looking to the smallness of the amount, he does not press question No.2. We have, accordingly, focused our attention only on the sole surviving question No.1. Such question arises in following background:

2.1) The appellant-assessee was owner of rented

property situated in Sayaji Ganj area of Baroda, on which the assessee had already constructed a building of seven floors with a provision for further construction of three more floors. Such construction was still going on. The assessee entered into lease rent agreement with one Amora Chemicals Pvt. Ltd. (hereinafter to be referred to "the Company") on 1.7.1978. The Company enjoyed the possession of 2nd and 4th to 7th floor of the building as a tenant. Upon completion of remaining three floors also, the Company was put in possession thereof as a tenant. The Company in turn sublet the property to the Bank of Baroda. About seven years after this arrangement, the assessee sold the property in question to the same Bank for a sum of Rs.1,03,22,325/-. The assessee also paid a sum of Rs.15,00,000/- to the Company for relinquishment of the tenancy rights. In computing the capital gain, the assessee contended that such sum of Rs.15,00,000/- should be deducted from the sale consideration in terms of section 48 of the Act. The Assessing Officer as well as the Commissioner both did not accept the assessee's contention primarily on the ground that the assessee HUF and the Company were closely linked. The assessee went further in appeal before the Tribunal.

The Tribunal dismissed the assessee's appeal, upon which the present appeal has been filed.

3) Mr. R.K. Patel, learned counsel for the appellant vehemently contended that the factum of payment of Rs.15,00,000/- to the Company is not disputed. In fact the Revenue desired to tax the Company's capital gain on such receipt of Rs.15,00,000/-. Since neither the transaction nor the payment was in doubt, in terms of section 48 of the Act, amount of Rs.15,00,000/- should be deducted for the purpose of computing capital gain on sale of the property. Counsel submitted that the Revenue Authorities as well as the Tribunal gravely erred in ignoring such admitted facts and proceeding merely on the basis of some interconnection between the assessee HUF and the Company.

4) Mr. K.M. Parikh, learned counsel, on the other hand opposed the appeal contending that the ingredients of section 48(1) of the Act were not satisfied. The Revenue Authorities and the Tribunal have held that the expenditure was not incurred wholly and exclusively in connection with the transfer of the capital assets. He pointed out that the sale deed was

not a tripartite agreement and the amount expended by the assessee separately would not fall within the expression wholly and exclusively incurred in connection with the transfer.

5) Having thus heard learned counsel for the parties, from the impugned decision of the Tribunal, we may notice that the Karta of the assessee HUF and his brother were the directors of the said Company. The said Company was shown to be the tenant of substantial portion of the building. The Company, however, created a sub-tenancy on the same property in favour of the Bank of Baroda. It was further noticed that:

"before the proceed further a few facts regarding the tenancy of the premises with the tenant M/s. Amora Chemicals and further sub-tenancy with the Bank of Baroda may be briefly noticed. Since these would be relevant for the purpose of adjudicating the issue regarding payments of Rs.15 lakhs made by the assessee to Amora Chemicals allegedly for termination of tenancy rights. Suraj Plaza building situated at Mangalwadi, Sayaji Gunj, Baroda has been constructed by the assessee HUF in 1978. The assessee HUF comprises inter alia Shri Lalit M. Patel, Karta and his brother Bhupendra M. Patel and their families. M/s. Amora Chemicals is a Private Limited company with fully paid up share capital of Rs.81,400 comprising 814 equity share of 100 each. Out of 814 shares 805 shares are

held by members of the assessee HUF. The company is thus controlled and managed by the assessee HUF and both the brothers viz. S/Shri L.M. Patel and B.M. Patel are directors of the company. As per the rent agreement place at page 13 of the paper book the assessee HUF entered into the agreement on 1.7.1978 whereby partly constructed building was agreed to be rented to the company whereby half portion of the second floor, and 4th, 5th, 6th and 7th floor were given on monthly rent of Rs.9,970/-. The agreement further provided that the assessee HUF shall give on rent to the company the the 8th, 9th and 10th floor of the said building as and when they are constructed and ready. It appears that even before the company had entered into the aforesaid agreement, it has been going about looking for the tenants in the market and carrying on negotiations with the prospective parties. On 24.1.1978 the company issued an advertisement in the Lok Satta seeking offers from the prospective tenants on the terms and conditions contained in the said advertisement. The advertisement has been issued in the name of Shri B.M. Patel director of the Amora Chemicals. Subsequently protractive negotiations have been made with the Bank of Baroda, by the said Shri B.M. Patel in his capacity as director of the assessee company. The Bank of Baroda suggested certain modifications and alterations including provision of cross ventilation on the second floor, parking space as well as arrangement for the staff canteen. After the negotiations were finalised sometime in June 1978, the rent agreement has been made by the assessee HUF with the Amora Chemicals on 1.7.1978. This agreement is signed by Shri Lalit M. Patel as karta of the HUF and Shri Bhupendra M. Patel as director of the HUF. It was on 20.7.1978 that the Bank of Baroda occupied the premises apparently as a subtenant of the company."

- 6) In addition to such striking facts, the Tribunal also noted that even before the Company was rented out the property, negotiations of the Bank of Baroda were

initiated. Only after such negotiations, rent note was entered into on 1.7.1978 between the assessee and the Company. It has also come on record that the assessee had entered into negotiations with the Bank even before terminating tenancy.

7) The Tribunal recorded that amount of Rs.15,00,000/- paid by the assessee to the Bank cannot be stated to be incurred wholly and exclusively for the purpose of the sale. The Tribunal further recorded that the amount shown as compensation for termination of tenancy rights is in fact not related to the transaction of sale made by the assessee HUF. The entire amount of Rs.1,03,22,325/- was made by the Bank of Baroda to the assessee on 9.6.1984 itself. It was noted that the Bank of Baroda was already in possession of the property. The Company passed resolution only on 10.6.1984 to relinquish the rights of tenancy by which time the assessee HUF had already received the entire sale consideration from the Bank. Payment of Rs.15,00,000/- was made much later after full consideration was received by the HUF. It was noted that in the rent note dated 1.7.1978, there was no provision for subletting the property, despite

which, the Company had created sublease in favour of the Bank. It was, therefore, concluded that payment of Rs.15,00,000/- made to the Company by the assessee was only for reducing its tax liability and not for the purpose of executing the transaction of sale.

8) Section 48(1) of the Act provides for mode of computation and deduction while charging capital gain. Clause-I thereof in particular provides for a payment from the value of consideration received or accrued as a result of transfer of capital asset, expenditure incurred wholly and exclusively in connection with such transfer. The Tribunal found that looking to the peculiar facts of the case noted above, such expenditure cannot be stated to be incurred wholly and exclusively in connection with such transfer. We do not find that Tribunal committed any legal error.

9) In the result, the question is answered in the negative, that is, against the assessee and in favour of the department. The appeal is dismissed.

(AKIL KURESHI, J.)

(HARSHA DEVANI, J.)

Vahid

