

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JANUARY 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE RAVI V. HOSMANI

ITA NO. 326 OF 2010

C/w

ITA No. 327 OF 2010

IN ITA No.326 OF 2010

BETWEEN:

1. COMMISSIONER OF INCOME TAX (CENTRAL)
CENTRAL REVENUE BUILDINGS
QUEENS ROAD
BANGALORE-560 001
2. THE DY. COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE(1)
BANGALORE

...APPELLANTS

(BY SRI.E I SANMATHI, ADVOCATE)

AND:

M/S KISHAN HOUSE
BUILDERS ASSOCIATION
NO.221, NAGARATHPET
BANGALORE-560052

...RESPONDENT

(BY SRI.A.SHANKAR, SR.COUNSEL FOR
SRI.M LAVA, ADVOCATE)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED HEREIN AND ALLOW THE APPEAL AND SET ASIDE THE COMMON ORDER PASSED BY THE ITAT, 'B' BENCH, BANGALORE IN ITA NO.809/BANG/2009 DATED 31/03/2010, IN THE INTEREST OF JUSTICE.

IN ITA NO. 327 OF 2010

BETWEEN:

1. COMMISSIONER OF INCOME TAX (CENTRAL)
CENTRAL REVENUE BUILDINGS
QUEENS ROAD
BANGALORE-560 001
2. THE DY. COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE(1)
BANGALORE

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AND:

M/S ASHA HOUSING ENTERPRISES
NO.221, NAGARATHPET,
BANGALORE - 560052

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BANGALORE IN ITA NO.810/BANG/2009 DATED 31/03/2010, IN THE INTEREST OF JUSTICE.

THESE APPEALS COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

These appeals under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'Act' for short) have been filed by the Revenue which were admitted by the Bench of this Court by an order dated 18.01.2011 on the following substantial questions of law.

“Whether the assessing officer was justified in treating the income as business income for the assessment year 2003-04 when the assessee offered it as capital gains for the assessment year 2005-06?”

2. Since, substantial questions of law in ITA No.326/2010 and in ITA No.327/2010 are same, these appeals were heard analogously and are being decided by this common judgment.

3. Facts giving rise to filing of these appeals briefly stated are that the assessee in I.T.A.No.376/2010 purchased a land situated at Kaienahalli Agrahara village, Begur Hobli, Bengaluru in 1992, whereas the assessee in I.T.A. No.327/2010 purchased a land situated at Shinivagilu in Bengaluru in the year 1992 itself. The assessee in I.T.A No. 326/2010 entered into an agreement of lease on 13.05.2002 with M/s. Abhishek Developers for a sale consideration of Rs.16.25 Crores and on the date of agreement received a sum of Rs.3.00 Crores as part of sale consideration. The balance sum of Rs.3.25 crores was received in part in the years FY 2002-03, 2003-04 and 2004-05. The assessee in I.T.A. No.327/2010 entered into an agreement for sale on 22.06.2002 for Rs.12.25 crores and received a sum of Rs.5.52 crores as part of sale consideration and the balance amount was received in instalment in subsequent assessment years.

4. The assessee filed his returns of income under Section 139 of the Act on 31.03.2006 for the

Assessment Year 2005-06 admitting the transactions over the income arising out of the aforesaid transactions as long term capital gains. Assessing Officer by an order dated 30.06.2008, treated the income as business income and not a capital gain. Being aggrieved the assessing authority filed an appeal before the Commissioner of Income Tax (Appeals). The aforesaid appeals were dismissed by the order dated 17.07.2009.

5. Thereafter, assessee filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'Tribunal' for short). The Tribunal by its order dated 31.03.2000, *inter-alia*, held that the properties in question were never transferred to M/s. Abhishek Developers during the Financial Year 2002-03. It was further held that the assessee had entered into an agreement with M/s. Abhishek Developers for the sale of lease and had retained the physical possession of the property in question. It was further held that the Revenue did not come out with any documentary evidence to suggest that the assessee has incurred the

income from the transactions of land during the Assessment Year 2003-04.

6. The Tribunal further held that in the balance sheet the assessee had disclosed the land under the head 'property' as an asset from the year 1995 till 2005. Accordingly, the Tribunal while placing reliance on the decision of the Rajasthan High Court in '**COMMISSIONER OF INCOME TAX VS. SOHAN KHAN**', '**(2008) 304 ITR 194**' held that the transaction was a capital transaction and has to be treated as long term capital gain and not as business income. Accordingly, the appeals filed by assessee were allowed. Being aggrieved the Revenue has filed these appeals.

7. Learned counsel for the revenue submitted that the Tribunal ought to have considered intention of the assessee to do business with the properties in question and to have appreciated that it was in the nature of business. It is further submitted that one Susheel Mantri and Snehal Mantri are partners in M/s. Abhishek Developers and after the search was

conducted in the premises of the assessee, only thereafter the return of income was filed by showing the income from the properties in question as long term capital gain. It is further submitted that the entire rights in the properties were transferred on the date of execution of the agreement i.e., 13.05.2002. In support of aforesaid submissions learned counsel for the Revenue has placed reliance on the decisions in '**COMMISSIONER OF INCOME TAX VS. SHAMBU INVESTMENTS PVT., LTD.,**', '(2001) 249 ITR 47'. It is further submitted that the aforesaid decision has been upheld by the Supreme Court in **203 ITR 143**.

8. On the other hand, the learned Senior Counsel for the assessee submitted that the question, 'whether the income from the property is a business income or a long term capital gain' is a question of fact. The ITAT on the basis of the meticulous appreciation of the evidence on record has recorded the findings in this regard. It is also pointed out that in the Assessment Year 2005-06 the revenue has accepted the income from the

aforesaid properties as long term capital gain. In support of his submission learned Senior Counsel for the assessee has placed reliance on the decision of Division Bench of this Court in '**COMMISSIONER OF INCOME TAX AND ANOTHER VS. BAGMANE DEVELOPMENT PVT., LTD.,**',, '(2017) 392 ITR 379'.

9. We have considered the submissions made by the learned counsel for the parties and have perused the records. It is trite law that the scope of judicial scrutiny against an order of the Tribunal is limited to the substantial question of law and this Court in exercise of powers under Section 260A of the Act can neither appreciate the evidence nor can oppose the findings of the fact. The Division Bench of this Court in the case of Commissioner of Income Tax and another *supra* has laid down criteria for determining whether or not an income from the property is a business income or is a long term capital gain, which is reproduced below for the facility of reference:

- (1) *“There was a large time-gap between the dates of acquisition of the shares and the sale thereof.*
- (2) *Thus, the intention to sell cannot be inferred at the point of time of the purchase.*
- (3) *That merely because the sale had resulted in a profit did not mean that when the assessee purchased the shares, it was with an intention to sell them at a profit.*
- (4) *That an investor may sell the shares when he gets a good price for the shares.*
- (5) *That the assessee had shares in 25 to 30 companies and the value of the total holding was between Rs.57,000 and Rs.63,000, which was a very small amount considering the number of companies in which the shares were held, thus, denoting that the assessee was a small investor.*
- (6) *That the number of transactions are not many every year and the assessee could not be said to indulge in several transactions of purchase and sale every year.”*

10. It has further been held that total fact of relevant factors and circumstances determining the character of the transaction and the volume, frequency continued and regularity of transactions of parties and

sale on goods has also be taken into account. It has been held that the aforesaid question is a question of fact it has to be determined in the fact situation of the case.

11. In the light of aforesaid settled legal principles, the facts of the case may be examined. Admittedly, the properties were acquired by the assessee in the year 1992 and assessee had entered into an agreement for sale on 13.05.2002. Thereafter in the accounts up to the year 2004, the property was mentioned as an asset. The details of which read as under:

<u>Year ended</u>	<u>Amount</u>
31.03.1993	9,85,621
31.03.1994	20,03,964
31.03.1995	20,03,978
31.03.1996	20,04,079
31.03.1997	20,04,129
31.03.1998	20,04,299
31.03.1999	20,04,339
31.03.2000	20,04,379
31.03.2001	20,04,379
31.03.2002	20,04,389
31.03.2003	22,11,578
31.03.2004	64,21,678
During the period 01.04.2004 to 31.03.2005	Property was sold for Rs.16.65 crores.

12. Thus, from perusal of the aforesaid entries it is evident that the assessee has not conducted any other activity other than holding the land as investment. It is also pertinent to mention here that the revenue has not come up with any documentary evidence to suggest that assessee had earned income from the transaction to the land in question during the year 2003-04. The Tribunal thereafter on the basis of meticulous appreciation of evidence on record has recorded a finding that assessee has rightly disclosed the income from the property as long term capital gains instead of business income. The aforesaid finding by no stretch of imagination can be believed to either perverse and arbitrary.

13. In view of the preceding analysis, the substantial question of law framed by this Court are answered against the revenue and in favour of the assessee.

14. In the result, we do not find any merits in these appeals. The same fail and are hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

BVK