आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,

'' A''BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT And

SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No. 377/AHD/2011**

निर्धारणवर्ष/Asstt. Year: 2006-2007

M/s Anil Dye Chem Industries Pvt. Ltd., 508, Ship Building, CG Road, Navrangpura, Ahmedabad-380009. **PAN: AABCA7881K**	Vs.	A.C.I.T.(OSD) Range-1, Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by :	Shri M. K. Patel, A.R
Revenueby:	Shri Vidhuyt Trivedi, Sr. D.R

सुनवाई की तारीख/Date of Hearing : 13.02.2020
घोषणा की तारीख **/Date of Pronouncement: 08.06.2020**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The appeal has been filed by the assessee for A.Y. 2006-07 which is arising from the order of the CIT(A)-VI, Ahmedabad dated 24.11.2010, in the proceedings under section 143(3) of the Income Tax Act, 1961 (in short "the Act").

2. The assessee has raised the following concise/revised grounds of appeal:-

"Your appellant being dissatisfied with the order passed by the Commissioner of Income tax (Appeals) presents this appeal against the same on the following amongst other grounds.

1.0 The order passed by the Commissioner of Income tax (Appeals) is bad in law. The order is contrary to the provisions of law and the facts of your appellant's case. It is submitted that it be so held now.

1.1 The appellant submits that order was framed by the assessing officer without affording reasonable opportunity of being heard and in violation of principle of natural justice. The order be therefore quashed and variations to the returned income be deleted.

1.2 The assessing officer had made erroneous observations in body of the assessment order. The observations and conclusion on part of the assessing officer are unilateral and completely ignoring the facts. The observations and conclusion be quashed and each and every variation in consequence thereof be quashed.

2.0 The CIT(A) erred in upholding that the transaction in respect of purchase and sale of Metro House was an adventure in nature of trade. The Commissioner of Income tax (Appeals) further erred in upholding that Rs. 2783879/- was profit chargeable to tax u/s 28. The Commissioner of Income tax (Appeals) further erred in upholding that the appellant was not entitled to capital loss of Rs. 2591351/-computed by the appellant.

2.1 The appellant submits that there was no adventure in the nature of trade and the building known as Metro House was a capital asset. The appellant submits that it be so held now. The appellant submits that Metro House was held as a capital asset and gain derived on its transfer is on capital account and chargeable to tax u/s 45. The appellant submits that it be so held now.

2.2 The assessing officer erred in holding that cost of construction incurred after 21st March, 2000 were not entitled to indexation. The appellant submits that in view of provisions of section 48 each and every capital expenditure of Rs. 8317516/- was entitled to indexation. The appellant submits that the conclusion in para 12 of the assessment order is unilateral in nature, and not in consonance with the provisions of law. The said conclusion be quashed and the assessing officer be directed to allow indexation.

3.0 The appellant without prejudice to above further submits that the Commissioner of Income tax (Appeals) erred in concluding that the gain was taxable as short term capital gain. The appellant submits that the capital asset was a long term capital asset and therefore gain was long term capital gain. The appellant submits that it be so held now.

3.1 The appellant submits that conclusion has been arrived at by the CIT(A)

without affording any opportunity of being heard. The appellant submits that conclusion being unilateral and in violation of principles of natural justice be quashed.

4.0 The CIT(A) erred in upholding erroneous demand in the case of the appellant. It is submitted that the assessing officer be directed to make correct computation of the demand. It is further submitted by the appellant that the assessing officer be directed to delete interest charged by the assessing officer by invoking provisions of sections 234B and 234C. It is submitted that appropriate relief be allowed as per the provisions of law."

3. The interconnected issue raised by the assessee is that the Ld. CIT-A erred in upholding that the profit of Rs. 27,83,879/- arising on sale of land is business income rather than capital gain income.

4. Brief facts of the case are that the assessee is Private Limited Company. The assessee engaged in the business of trading of Dyes and Dye Intermediates and Financing Activities.

5. The assessee in the year under consideration has sold its 1/4th share in a property namely "Metro House" situated at Plot No. 424, Paiki Hissa No.2 of TP SchemeNo.3 at Mouje Changispur, Ahmedabad for a consideration of Rs. 1,11,01,395/- to Rational Handloom Co Pvt. Ltd. on which the assessee had claim capital loss amounting to Rs. 25,91,351/- .

6. The assessee claims that it had purchased the above said premises along with other three companies in an auction on 24-07-1991 in equal share. The three companies had amalgamated into M/s Metrochem Industries Limited. Later on the said premises had been demolished and the construction of a four storied building started. The assessee to use the building for commercial purpose obtained a permission from the Ahmedabad Municipal Corporation on dated 21-03-2000. The amount of expenditure incurred in construction of building had been shared with M/s Metrochem Industries Limited in the ration of 1:3.The assessee further claims that it had continuously incurred the expenditure in the

construction of such building from 1994-95 to 2004-05. The details of the expenditure incurred by the assessee are available on page no 3 of AO order.

7. The assessee also claims that the intention behind the construction of building was to start corporate office in the said building but eventually the said building was not economically viable to run as corporate house. Therefore, it was decided to sell such building.

8. As such the building was held as capital assets viz a viz the Income Tax Department also recognizes the transaction from sale of building or land under the head capital gain. Accordingly the income from sale of such building had been computed under section 45 of the Income Tax Act.

9. As per the assessee there was the isolated transaction for the sale of the building which was held for more than 10 years. Thus in this way the resultant loss had been arisen after providing indexed cost of acquisition and indexed cost of improvement.

10. However, the AO observed that the assessee had been incurring the expenditure continuously, knowing fully well that such building was not economically viable to run the corporate house. Thus the intention of the assessee was very clear to sell the property ultimately at a good point of time after development. Thus the AO was of the view that the activities carried out by a developers/builders to run his business are similar to the activities carried out by the assessee. The AO therefore considered the transaction as adventure in the nature of the trade and accordingly the transaction would be covered under the head business and profession. The AO accordingly denied the indexation on cost and improvement incurred by the assessee.

11. The AO further while computing the business income, improvement cost incurred by the assessee before 21-03-2000, did not allow for the reason that

the permission was granted by Ahmedabad Municipal Corporation to use as commercial building on 21-03-2000. As such the expenditure incurred on the building prior to such permission does not exist.

12. The AO thus in view of the computed the business profit after deducting the cost of acquisition and improvement expenditure incurred after 21-3-2000 amounting to Rs. 27,83,879/-. The details of the computation of business income on such sale of building stand as under:

"Purchase consideration for the premises	*Rs. 15,00,025*
Total expenditure incurred on the premises	
Till the date of sale	*Rs.68,17,491*
Total expenditure incurred	*Rs. 83,17,516*
Total sale consideration	*Rs. 1,11,01,395*
Profit on the transaction	*Rs. 27,83,879"*

13. Aggrieved assessee preferred an appeal before the Ld. CIT-A. The assessee before the Ld. CIT-A reiterated the submission as made before the AO.

14. However, the Ld. CIT-A disregarded the contention of the assessee and upheld the order of the AO by observing as under:

"3.3 I have considered the facts of the case, assessment order and appellant's submission. Appellant along with its associate concerned purchased a residential bungalow in auction to construct the same in a commercial premise. The old residential bungalow was demolished and new construction was carried out. As mentioned by the assessing officer in para-12 that permission of the demolition of residential bungalow and the construction of the commercial building was granted by Ahmadabad municipal Corporation on 21st of March 2000. All these activities and the spending of money on construction activities right up to financial year 2004-05 show that appellant has not sold any capital asset but created another asset which were sold after completion at profit. Purchasing old bungalow, demolishing the same and constructing commercial building having basement, ground and two floors are not simply transfer of capital asset but an organized activity to construct a commercial complex to be sold for profit. Assessing officer discussed all the arguments of the appellant and rebutted a!! of them. In view of this the same are not repeated here. However in brief following facts go against the appellant's claim as to how the transaction cannot fit in the category of adventure in the nature of trade.-

1- Appellant demolished the old bungalow purchased in auction and then commercial construction was carried on the plot of land after demolition. The construction continued till the year of sale which shows that appellant constructed the same for commercial benefit. The whole thing cannot be treated as improvement of capital asset.

2- Appellant has not disclosed the construction of commercial building as capital work in progress to indicate that it wasconstructing its own office building. If it would have been the case, appellant would have transferred the same to office building account and the same would have been business asset. The sale of depreciable business asset would have resulted in short term capital gain in section 50 of IT act. Even as per this also appellant would have paid taxes at the same rate as business head. Therefore even if appellant would have treated this as its own office building construction, the tax effect would be the same as done by the AO.

3- Appellant's claim that single venture cannot be treated as adventure in the nature of trade is not correct since various courts have held that even single venture can be adventure in the nature of trade if the same is done by way of organised activity. Appellant has done construction on plot of land after demolishing old bungalow. Construction resulted in commercial complex which was sold at profit after completing the construction. All these activities clearly show that it is a profitable venture involving set of activities and therefore not a simple transfer of capital asset to be covered under section 45.

4- Appellant's argument that it was constructing its own office building but sold it since company's activities got reduced and profitability also suffered. If it was constructed for its own office then during the process the same would have been shown as capital W IP and on completion would have been office building in fixed asset which is eligible for depreciation. By not doing any of these things, appellant kept this project outside its normal business activities and this building was not constructed as its office. As discussed earlier, if it would have been business asset, the profit on sale would have been taxable as short term capital gain. Since the claim of the appellant is not borne out of its own records, the same cannot be accepted.

5- Intention has to reflect in balance sheet or financial statements but the same has not been reflected as construction of own office building therefore appellant's argument in this regard cannot be accepted.

6- Assessing officer discharged the onus that appellant was carrying on organised activity of construction resulting in a commercial complex with basement, ground and two floors. These cannot be treated as improvement of capital asset which itself was demolished for the commercial construction carried on by the appellant.

7- The appellant's argument that the property was held for more than 10 years and therefore it cannot be adventure in the nature of trade is not justified. Many real

estate projects take years before they are complete therefore it cannot be said that more number of years will take out the transaction out of business head.

8- The assessing officer provided several opportunities to the appellant as mentioned in the assessment order however appellant chose not to comply. Even during appeal hearings several opportunities were given right from August 2009 but no compliance was made till 18th November 2010 when written submission were submitted. Therefore appellant can't claim that the reasonable opportunities were not provided.

9- Appellant's claim that it made investment is not correct since the purchase of bungalow was not the mere investment. Subsequentactivities including demolition of the same and construction thereon show that it was not simply an investment but adventure in the nature of trade for the purpose of earning profit.

In view of the above and judicial decisions relied upon by the assessing officer, I am of the clear view that appellant carried out regular organized activity in constructing a commercial premise which was later on sold to outside parties and this constituted adventure in the nature of the trade. Result of this activity is definitely business profit taxable in business head and not capital gain. The addition made by the assessing officer is therefore confirmed. Even otherwise, as mentioned earlier, the appellant is liable to short term capital gain under section 50 if this premise would have been taken as its own office building. In either case the addition made by the AO is justified."

15. Being aggrieved by the order of the ld. CIT-A, the assessee is in appeal before us.

16. The ld. AR before us reiterated the submission as made before the authorities below.

17. On the other hand the ld. DR vehemently placed his reliance on the finding contained in the orders of the respective authorities.

18. We have heard the rival contentions of both the parties and perused the materials available on record before us. From the preceding discussion the issue arises whether the income generated by the assessee from the sale of the immovable property amounts to business income or the income under the head

capital gain in the given facts and circumstances. We note certain undisputed facts from the order of the authorities below which are detailed as under:

i. The primary activity of the assessee was in the nature of trading of dyes as submitted by the assessee before the authorities below.
ii. There was only one isolated transaction for sale of the property by the assessee in the year under consideration.
iii. The assessee in its books of accounts has shown such property as fixed assets which was not disputed.
iv. The assessee has never claimed depreciation on such property shown as fixed assets.
v. The assessee held such property for very long period/time.

19. On perusal of the order of the authorities below, we note that the entire thrust of the Revenue for holding the transaction for the sale of the property as in the nature of trade was based on the fact that the assessee has been incurring expenses on continuous basis for the development of the land purchased in the auction over certain period of time which is akin to the activity of the builders of the property. Accordingly, the Revenue concluded that the assessee was engaged in the activity of the business and accordingly such income was to be taxed under the head of business and profession. Admittedly, the assessee had been incurring expenses on the development of the land purchased by it in the auction but that does not establish the fact that the assessee was carrying out any activity in the nature of trade.

20. There are certain aspects requiring the consideration before arriving at the conclusion whether the assessee is carrying out any activity in the nature of trade. Such aspects can be enumerated as under:

i. The intention of the assessee at the time of acquisition of the land.

ii. The period of holding of such land by the assessee.

iii. The treatment made by the assessee in the books of accounts with respect to such land.

21. However, none of the authority below has brought out anything on record on the aspects as discussed above but arrived at the conclusion that the assessee has been carrying on business of property development on the basis that the assessee has been incurring the expenditure on continuous basis for the development of the land. The contention as raised by the assessee before the authorities below that it wanted to development the impugned land for its business activities has not been challenged.

22. We also find that in the similar facts and circumstances the Hon'ble Tribunal Jodhpur has decided the issue in favour of the assessee in the case of Marudhar Hotels Pvt. Ltd v/s ACIT reported in 40 taxmann.com 161 wherein it was held as under:

> *"Thus, in the given facts and the circumstances of the case, and in view of the above stated legal (position) inescapable conclusion that follows is that the share of sale consideration received by the appellant from developer on sale of plots under the development agreement was in the course of realization of a capital asset held by the appellant for over 30 long years, giving rise to income taxable under the head 'Capital gains'. Such an activity could not, on the undisputed facts of the case, be regarded as carrying on an adventure in the nature of trade. Consequently, the orders of the authorities below need to be reversed"*

23. In view of the above, we hold that the income generated by the assessee from the sale of the property in dispute is taxable under the head capital gain. Accordingly we set aside the finding of the learned CIT (A) and direct the AO to treat the transaction for the transaction of sale of land under the head capital gain. Hence the ground of appeal of the assessee is allowed.

24. The learned AR at the time of hearing submitted that if the contention of the assessee is accepted as income on the sale of such land under the head

capital gain, the other grounds raised by it become consequential. As such no further separate adjudication is required. Accordingly we dismiss the same.

25. Before we part with the issue/appeal as discussed above, it is pertinent to note that the clause © of rule 34 of the Appellate Tribunal Rules 1963 requires the bench to make endeavour to pronounce the order within 60 days from the conclusion of the hearing. However the period of 60 days can be extended under exceptional circumstances but the same should not ordinarily be further extended beyond another 30 days. In simple words the total time available to the Bench is of 90 days upon the conclusion of the hearing.

26. However, during the prevailing circumstances where the entire world is facing the unprecedented challenge of Covid 2019 outbreak, resulting the lockdown in the country, the orders though substantially prepared but could not be pronounced for the unavoidable reasons within the maximum period of 90 days. In such circumstances we find that the Hon'ble Mumbai Tribunal in the case of **JSW Limited *Vs* Deputy Commissioner of Income Tax in ITA No. 6103/MUM/2018 vide order dated 14-5-2020** extended the time for pronouncing the order within 90 days of time by observing as under:

> *9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "**In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown**". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim*

*orders, has also observed that, "**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020**". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term '**force majeure'** has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.*

*10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "**while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.*

11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Considering the above, we express to pronounce the order beyond the period of 90 days. Accordingly, we proceed to pronounce the order as on date.

27. In the result the appeal of the assessee is partly allowed.

Order pronounced in the Court on 08th June, 2020 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 08/06/2020

Tanmay, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad