

ORDER SHEET

ITA NO.383 OF 2008
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME-TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-X
Versus
SURJEET KAUR, WIFE AND LEGAL HEIR OF LATE MANJIT SINGH

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE

The Hon'ble JUSTICE AMITABHA CHATTERJEE

Date : 5th January, 2018.

Appearance:

Mr. D. Chowdhury, Adv.
..for Appellant.

Mr. Ashok Gupta, Adv.
Mr. Bidyut Dutt, Adv.
Mr. Bijan Datta, Adv.
..for Respondent.

The Court : The original assessee in this appeal was an officer of the Indian Revenue Service, attached to the Income Tax department itself. He had acquired a piece of land covering an area of 800 square yards by perpetual sub-lease from a Government Servants Cooperative Society. The superior landlord thereof was the Delhi Administration. The land was acquired through an instrument of perpetual sub-lease in the year 1971. He

had entered into an agreement on 9th January, 2001 for developing the land with one Indra Mohan Thapar. The broad arrangement between the original assessee and the developer appears from the order of the Tribunal and this arrangement has been specified as:-

“Builder’s share –

- (a) Entire second floor.
- (b) 50% of the entire driveway adjacent to Plot No.39, Vasant Vihar, New Delhi and proportionate rear courtyard to provide spiral staircase for the servants to go up and for installation of a generator set for the use of servants to go up and for installation of a generator set for the use of 2nd and 3rd floor only.

Owner’s Share -

- (a) Entire basement;
- (b) Entire ground floor with front lawn and proportionate courtyard.
- (c) Entire first floor.
- (d) Entire third floor with terrace.
- (e) Independent driveway adjacent to plot No.41 Poorvi Marg.

- (f) 50% of entire driveway adjacent to Plot No.39
Poorvi Marg for use of the third floor with
terrace.”

During the assessment proceeding for the assessment year 2003-04, the original assessee passed away. His widow, who is the respondent before us as legal representative of his estate continued to conduct the assessment proceeding on behalf of estate of the deceased. The dispute in this appeal is primarily concerned with the sale proceeds of Rs.80 lakh in respect of the third floor of the building along with roof rights developed on the aforesaid land. This transaction was undertaken by the respondent in this appeal. The aforesaid sale was executed on 29th May, 2002. Prior to that date, an agreement for sale was entered into by the original assessee on 11th June, 2001 and advance thereof was received, which constituted a sum of Rs.45 lakh. One Jaspreet Thapar was the other party to that prior agreement. The aforesaid agreement for sale as well as subsequent receipt of consideration thereof were both undertaken prior to handing over possession of the third floor of the building.

The Assessing Officer treated the said sum of Rs.80 lakh as business income. In the opinion of the Assessing Officer, this transaction constituted adventure in the nature of trade. The

respondent, however, wants the said sum to be taxed as long term capital gains after the indexing exercise. She failed in her appeal before the Commissioner of Income Tax, who agreed with the view of the Assessing Officer as regards treatment of the said sum. She appealed against the Commissioner's order before the Income Tax Appellate Tribunal. The Tribunal invalidated the order of the Assessing Officer as well as the First Appellate forum and sustained the assessee's stand that the consideration money of Rs.80 lakh ought to be treated as long term capital gain. The decision of the Tribunal was delivered on 18th January, 2008.

The Revenue's appeal was admitted by a Coordinate Bench of this Court on 7th August, 2008 on the following substantial question of law:-

“On the facts and in the circumstances of the case and having regard to the ration of Apex Court decisions reported in 68 ITR 573, 199 ITR 173, 200 ITR 584 and 42 ITR 179, the Learned Tribunal committed a manifest error of law in not treating the sale of flat at Rs.80 lakhs after consideration of sale agreement with the builder's wife at Rs.45 lakhs as ‘adventure in the nature of trade’ within the meaning of Section 2(13) of the Income Tax Act and hence business income and not long term capital gain

and thus the Learned Tribunal overlooked and reversed the concurrent findings of Assessing Officer and Commissioner of Income Tax (Appeals) without pinpointing the infirmities of such concurrent findings.”

Mr. Chowdhury, learned counsel for the Revenue has urged us to set aside the decision of the Tribunal and restore the order of the Assessing Officer. He has stressed on the fact that there was intention on the part of the assessee to enter into the transaction and this arrangement was in the nature of trade. He sought to sustain his argument by referring to the intervening agreement for sale and its subsequent cancellation. According to him, this factor established that the assessee was undertaking business venture in selling of a part of the building. He has referred to a decision of the Hon'ble Supreme Court in the case of **Raja J. Rameshwar Rao Vs. Commissioner of Income Tax, Hyderabad** (XLII ITR 179) in support of his submission that even a single transaction can qualify for being described as a business venture.

The other authority he relied upon is also a decision of the Supreme Court in the case of **Khan Bahadur Ahmed Alladin Vs. Commissioner of Income Tax** in 68 ITR 573. This was a case arising out of Hyderabad Income Tax Act, parts of which corresponded to the Indian Income Tax Act, 1922. The assessee in that case, being a firm, had purchased a factory with buildings, residential quarters and certain other ancillary items from the Government of India. Some of these assets

which were resold. Question arose as to whether surplus realized from the resold part would constitute capital accretion or not. The Appellant Tribunal in that case, on facts took the view that that Assessee's firm had planned a well calculated scheme of profit making and that it had the intention of the exploiting the properties. This view was sustained by the High Court and a detailed analysis of the nature of transaction entered into by the Assessee was made. In that case, the Supreme Court of India confirmed the view of the High Court that such transaction was an adventure in the nature of trade and the same was in the course of a profit making scheme. As regards the other two authorities referred to in the question formulated admitting the appeal, **Commissioner of Income Tax Vs. Ganga Prasad Birla(HUF)** 199 ITR 173(Cal.) and **J.K. Synthetics Ltd. Vs. Assistant Commissioner of Income Tax.** [200 ITR 584 (Delhi)], Mr. Chowdhury has not placed them before us as according to him, they do not apply in the facts of this case. In the case of **Ganga Prasad Birla** (supra) the question was as to whether a solitary speculative transaction could adventure in the nature of trade and in **J. K. Synthetics Ltd.** (supra), the propositions of law laid down do not apply in the facts of this case.

Appearing on behalf of the estate of the Assessee, Mr.Gupta primarily relied on a decision of this Court delivered by a Coordinate Bench, to which one of us (Aniruddha Bose, J.) was a party. In that decision, ***Principal Commissioner of Income Tax-3 Vs. Rungta Properties Pvt. Ltd.*** [2017 (249) TAXMAN Page 18] one of the factors considered by this Court was sale of a part of a building constructed through a developer. In the facts of that case, it was held:-

“We have considered the ratios of these authorities and in our opinion, the transactions which the assessee had entered into could not come within the ambit of adventure in the nature of trade. We accept the submission of Mr. Khaitan that determination of that question involves enquiry into facts and requires analysis of the agreement or arrangement between the assessee and the developing company. Other factors which Mr. Khaitan wants us to consider are that the assessee caused improvement upon the property and retained substantial portion of it for self-use. The assessee’s arrangement with the developer was not a joint venture agreement and

there was no profit or loss sharing arrangement. The ratio of the decision in the case of **P.M. Mohammed Meerakhan** [MANU/SC/0227/1969 : (1969) 73 ITR 375 (SC)] cited by the Revenue does not apply on facts to the case of the assessee. There was clear intention of the assessee in that case to undertake business venture and on that basis the immovable property was treated to be stock-in-trade. In the cases of **R.V. Gupta** (supra), **Mohakampur Ice and Cold Storage** (supra), intention to resell the immovable assets was considered to be a major factor to determine a question of this nature, and the length of time the property was held by the assessee was also considered by the Court in each case to deal with the questions raised in those cases. On that yardstick, the Commissioner and the Tribunal rightly decided the issue in favour of the assessee in this appeal. In **Razia Sulaiman** (supra), the fact that the assessee was not in the business of selling of sites or flats weighed in favour of the assessee. In the cases **Sohan Khan** (supra) and **Shanti**

Banerjee (supra) the same factors were applied to reject Revenue's contention that development of immovable properties with aid of a builder and income generated from sale of flats of the developed property per se would not render such income to be taxable as business income. So far as assessee in this appeal is concerned, no material has been brought to our notice that it had carried on the business of property development. In the absence of any evidence that the assessee undertook the business of property development, the object clause in the memorandum cannot be treated to be determining factor to conclude that this was part of the assessee's regular business. On the same reasoning, reference to property in corporate name of the assessee cannot make the assessee a property development company. The Tribunal as well as the Commissioner of Income Tax have concurrently found that gain of the assessee from the transactions of sale of flats did not constitute adventure in the nature of trade. The orders of the

assessing officer on the same point for the two other assessment years were also dismissed by the Commissioner and the Tribunal. We do not find any perversity in such finding and hence confirm such finding.”

Mr. Gupta’s submission is that the ratio of that decision squarely applies to the facts of this case. Mr. Chowdhury on the other hand, has referred to the intervening arrangement in the form of agreement for sale and from that factor, he wants us to conclude that the intention of the Assessee was to undertake business venture.

The test for deciding the question as to whether a particular transaction would constitute adventure in the nature of trade or would be the normal sale of assets attracting long term capital gain has been laid down by the Supreme Court of India in the case of **G. Venkataswami Naidu & Co. vs. CIT** [(1959) 35 ITR 594 (SC)]. The parameters for testing the character of such transaction would appear from the following passage of that judgement :-

“As we have already observed it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the courts in tax proceedings. It

would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the border line that cause difficulty. (i) If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion of realisation of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the character of such transactions several factors are treated as relevant. (ii) Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Affirmative answers to these questions may furnish relevant data for determining the character of the transaction. (iii) What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold? If the commodity purchased

is generally the subject matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment. (iv) Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily resalable? What were the incidents associated with the purchase and resale? Were they similar to the operations usually associated with trade or business? Are the transactions of purchase and sale repeated? (v) In regard to the purchase of the commodity and its subsequent possession by the purchaser, does the element of pride of possession come into the picture? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of

trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of transactions alleged to be in the nature of trade. In considering these decisions it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction; and so, though we may attempt to derive some assistance from decisions bearing on this point, we cannot seek to deduce any rule from them and mechanically apply it to the facts before us.

In this connection it would be relevant to refer to another test which is sometimes applied in

determining the character of the transaction. Was the purchase made with the intention to resell it at a profit? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no half-way house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test distinction will have to be made between initial intention to resell at a profit which is present but not dominant or sole; in other words, cases do often arise where the purchaser may be willing and may intend to sell the property purchased at profit, but he would also intend and be willing to hold and enjoy it if a really high price is not offered. The intention to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise where the purchase has been made solely and exclusively

with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention I no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade.”

Mr. Chowdhury has drawn our attention to fourth and fifth factors formulated in that decision and submitted that the transaction out of which this appeal arises ought to result in answer to the question on which the appeal was admitted in favour of the Revenue. According to him, the intention of higher profit clothed the transaction with the character of adventure in the nature of trade and no element of pride of possession came into the picture.

Whether a particular transaction fits the character of normal capital accretion or quasi business venture would have to be largely inferred from materials available and involves determination of mixed questions of fact and law. The Tribunal ought to be the ultimate fact finding body in a similar context and unless perversity is shown in finding by the Tribunal, this Court in exercise of its appellate power under Section 260A of the Income Tax Act, 1961 would be reluctant to enter into such domain of facts. The question as formulated does not indicate any perversity was hinted by the Revenue in the decision of the Tribunal. At the time of admission, this Court had formulated the question so as to test as to whether the Tribunal's decision was contrary to the ratio of the decisions of the Supreme Court of India but even if we indulge into brief fact finding exercise, we do not find any material from records to suggest that at the time of acquisition of the properties such acquisition was for the purpose of undertaking a business venture. What we are to look at now is as to whether there was a business venture simultaneously with the development agreement. Major portion of the developed building was to remain with the assessee after

construction. Sale of one unit therefrom *per se* would not have constituted an adventure in the nature of trade. Materials available on record do not show that building construction formed part of normal activity of the Assessee. The determining factor in this appeal, as urged by Revenue, becomes the intervening arrangement of agreement for sale and its subsequent cancellation when the property fetched better price. Revenue's stand is that pursuit of higher profit by itself would confer on the transaction the character of business venture.

We are, however, unable to agree with this submission. It might be natural for a person, who is not undertaking any business venture, to seek higher return from sale of his assets. That would be a rational pursuit and in our view reflects normal human behaviour and not a special attribute for a trader or a businessman. Just because for a particular unit, an intervening transaction is aborted for the reason that the property would fetch a better price, if sold to another person, grievance may be caused to the person with whom the earlier arrangement was entered into. But such an exercise would not transform the nature of activity from normal sale of

capital asset to a business venture. There is substantial gap in time between the day of acquisition of the asset and its development and part-sale. The original assessee was not a property dealer but a member of the Indian Revenue Service, working with the Income Tax department itself. Only a portion of the property was sold. In these circumstances, the test laid down in the case of **G.Venkataswami Naidu & Co.** (supra) has to be decided in favour of the assessee. We, accordingly, dismiss the appeal answering the question formulated for admission in favour of the assessee.

No order as to costs.

(ANIRUDDHA BOSE, J.)

(AMITABHA CHATTERJEE, J.)

nm/sb