IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 157/2002

% Date of Decision : July 10, 2002

COMMISSIONER OF INCOME TAX ..... Appellant
Through
Mr.J.R.Goel.

versus

DR. INDU BALA CHHABRA ..... Respondent
Through
None.

CORAM :

HON'BLE MR.JUSTICE D.K.JAIN
HON'BLE MS.JUSTICE SHARDA AGGARWAL

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporters or not?

D.K.JAIN, J. (Oral).

This is an appeal under Section 260 A of the Income Tax Act, 1961 (in short the Act) from the order passed by the Income Tax Appellate Tribunal, Delhi Bench 'B' New Delhi (in short the Tribunal) on 31.1.2002 in ITA No.91/Del/95, pertaining to the assessment year of 1991-92.

The background facts, in brief, are:-

The respondent, hereinafter referred to as the assessee, derives income from medical profession. In her return for the relevant assessment year she declared an income of Rs.1,14,330/- as income from profession. During the course of assessment proceedings, the

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Assessing Officer noticed that during the previous year the assessee had received a sum of Rs.26,32,000/- on sale of some shops and flats but had not declared any capital gains on the plea that the sale consideration had been deposited in the specified capital gains bank account in terms of Section 54(2) of the Act. Rejecting the stand of the assessee that the property was residential and the entire sale proceeds having been deposited in the specified account, no capital gain was exigible to tax, the Assessing Officer held that the amount received by the assessee on the sale of the shops was to be charged to tax under Section 45 (2) of the Act, as the assessee had converted its capital assets (the shops and flats) into stock-in-trade and the same were sold in the relevant previous year. Estimating the market value of the shops, converted into stock-in-trade, at Rs.32 lacs, the Assessing Officer computed income on this account at Rs.32,00,000/-.

Aggrieved, the assessee preferred appeal to the Commissioner of Income Tax (Appeals), who held that neither the Assessing Officer was justified in invoking Section 45 (2) of the Act nor the claim of the assessee under Section 54F of the Act was tenable. The Commissioner, however, held that the construction of shops and the flats by the assessee was an adventure in

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the nature of trade and thus income from the sale of the shops was to be taxed as profits and gains of business, which was computed at Rs.22,85,820/-.

Not being satisfied with the relief granted by the first Appellate Authority, the assessee preferred further appeal to the Tribunal. The Tribunal accepted the stand of the assessee by observing as follows:

> "On the facts of the case, we have to categorically hold that the initial intention of the assessee was to hold the property as an asset for constructing a nursing home but subsequently after waiting for a period of three years and carrying out the construction for a period of three to four years, the assessee proceeded to dispose of major part of the property in assessment year 1991-92 and as stated before us the remaining shops were sold in 1999-2000. In other words, there is a substantial gap between the date of purchase, commencement of construction, sale of part of the property as also the sale of the remaining part thereof. In other words, after making the purchase in June, 1980 it took the assessee a good period of 19-20 years to dispose of the property and in case it was to be a business proposition then no prudent person would have waited for such a long period to dispose of a property and we, therefore, come to the conclusion that the surplus resulting form the sale has to be treated as capital gains and not arising form an "adventure in the nature of trade" as held by the CIT(A)".

Hence the present appeal by the Revenue.

We have heard Mr.J.R.Goel, learned senior standing counsel for Revenue. It is vehemently submitted by the learned counsel that the conduct of the assessee shows that right from the stage when the

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assessee had acquired the property, her intention was to exploit the same as a commercial venture, otherwise there was no point in constructing a number of shops and flats thereon. It is asserted that the varying stand of the assessee in first declaring it to be residential and then as a commercial property clearly indicates that the property was not acquired for self use as residence or nursing home but to re-sell it for profit. It is urged that Tribunal's conclusion that the transaction in question is to be treated as capital gains is vitiated as it ignores vital circumstances brought on record by the revenue, thus, giving rise to a substantial question of law.

We are unable to persuade ourselves to agree with learned counsel for the Revenue.

The question of distinction between a capital sale and an adventure in the nature of trade came up for consideration before the Supreme Court in G.Venkataswami Naidu & Co. Vs.Commissioner of Income Tax, (1959) 35 ITR 594, wherein it was observed that the character of a transaction cannot be determined solely on the application of an abstract rule, principle or test but must depend upon all the facts and circumstances of the case. Ultimately, it is a matter of first impression with the Court whether a

particular transaction is in the nature of trade or not. It was said that a single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of the trade, but mere purchase/sale of shares - if that is all that is involved in the plunge - may fall short of anything in the nature of trade. Whether it is in the nature of trade will depend on the facts and circumstances.

Dealing with the expression "adventure in the nature of trade" in Raja Bahadur Kamakhya Narain Singh Vs. CIT, (1970) 77 ITR 253, the Apex Court said that if the transaction is in the ordinary line of assessee's business, there would hardly be any difficulty in concluding that it was a trading transaction. But where it is not, the facts must be properly assessed to discover whether it was in the nature of trade. Similar views have been expressed by the Supreme Court in CIT Vs.Sutlej Cotton Mills Supply Agency Ltd. (1975) 100 ITR 706.

It is clear from the aforenoted pronouncements that there cannot be an abstract rule or principle which could be applied to determine the character of the transaction. It would depend upon all the facts and circumstances of each case.

From the afore-extracted portion of the order of

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the Tribunal it is evident that while coming to the aforenoted conclusion, the Tribunal has approached the question in the right perspective and has taken into consideration all relevant circumstances. Having applied correct principles, the finding that the transaction in question was not an adventure in the nature of trade is purely one of fact. We do not find any perversity in the order warranting interference by this Court. No question of law, much less a substantial question of law, arises from the order of the Tribunal.

The appeal is, accordingly, dismissed.

D.K. JAIN, J

SHARDA AGGARWAL, J

JULY 10, 2002
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