



IN THE HIGH COURT OF DELHI

ITA No.175/02.

Date of Decision: 22 July 2002

Commissioner of Income-tax, Delhi-XVI.....Appellant

through: Ms. Perm Lata Bansal,  
Sr. Standing Counsel

Versus

Shri R.V. Gupta.....Respondent

through: Nemo

CORAM:

THE HON'BLE MR. JUSTICE D.K. JAIN  
THE 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 Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

D.K.JAIN, J. (Oral)

This is an appeal by the Revenue under Section 260A of the Income-tax Act, 1961 (for short 'the Act') against the order of the Income-tax Appellate Tribunal, Delhi Bench-A, Delhi, (for short 'the Tribunal') dated 21 November 2001, passed in ITA No.7077/Del/1994, pertaining to the assessment year 1991-92, for determination of the following questions of law:

.....contd/-



::2::

[ITA 175/02]

- A. "Whether ITAT was correct in law in treating the amount of Rs.7,58,250.00, being the profit made by assessee on sale of apartments, as long term capital gain?"
- B. "Whether ITAT was justified in confirming the order of CIT Appeals and thereby holding that the profit was accrued to the assessee on sale of portion of land on which the flats are constructed and not on account of cost of construction, where there was a single agreement for sale of flats?"
- C. "Whether ITAT was correct in law in upholding the observation made by CIT Appeals that the transaction of sale of flats was not in the nature of any business transaction?"
- D. "Whether ITAT was correct in bifurcating the sale agreement into two parts i.e. sale of superstructure and sale of land whereas the assessee has entered into a single agreement for sale of apartment for a consideration of Rs.26.05 lacs which included the sale of superstructure, land beneath and right to use the common facilities?"
- E. "Whether the ITAT was correct in applying the ratio of judgment of the Supreme Court in 35 ITR 594 when the facts of the present case are similar to the case reported in 42 ITR 179 in which the Supreme Court have held the similar transaction as adventure in the nature of trade?"
- F. "Whether the order of the ITAT is perverse in law and on facts when it has not considered the facts pointed out by the Department?"

....contd/-



::3::

[ITA 175/02]

2. Briefly stated, the material facts giving rise to the present appeal are:

The respondent, hereinafter referred to as the assessee, is a senior IAS officer. In the year 1971, he was allotted a plot of land admeasuring 664 Sq.Mtrs, by the Delhi Development Authority( DDA), in group housing society at Anand Lok, New Delhi. The plot was acquired by the assessee jointly with his brother for a total consideration of Rs.31,000/-. A perpetual sub-lease was executed by the DDA in favour of both of them on 11 May 1971. The lease contained a clause that the allottees shall construct residential house on the said plot within two years of the allotment. However they could apply for extension of time for completing the construction. From time to time the assessee applied for extension of time for completing the construction and, ultimately, in the year 1989 decided to construct six flats on the said plot. To meet the cost of construction the assessee and his brother entered into agreements to sell in respect of four flats and retained the remaining two for their own use. Permission to sell these flats was obtained from the DDA.

3. In his return for the assessment year 1991-92, the assessee declared capital gains on account of sale of his 50% share in the said four flats. However, while

....contd/-



::4::

[ITA 175/02]

completing assessment for the relevant assessment year, the Assessing Officer took the view that the transaction in question was an adventure in the nature of trade and, therefore the profits accruing therefrom were to be taxed under the head 'income from business or profession' and not as capital gains, as declared. Income under the said head was determined at Rs.7,58,250/-.

4. Aggrieved, the assessee preferred appeal before the Commissioner of Income-tax (Appeals) [for short the CIT(A)], who came to the conclusion that it was not a case of adventure in the nature of trade. While holding so the CIT(A), inter alia, noticed that the plot of land was retained by the assessee for 18 years and investment therein was shown in his wealth tax returns as investment in plot; there was no change in the said plot from 1971 to 1989; he was not permitted by the DDA to sell a portion of land and to meet the cost of construction it became necessary for the assessee to construct the flats. The CIT(A), accordingly directed the Assessing Officer to compute the income from sale of the flats as long term capital gains.

5. The Revenue took the matter in further appeal to the Tribunal. By the impugned order, the Tribunal has affirmed the view taken by the CIT(A). Hence the

....contd/-



::5::

[ITA 175/02]

present appeal.

6. We have heard Ms.Prem Lata Bansal, learned senior standing counsel for the Revenue. Ms.Bansal would submit that the intention of the assessee right from the day he had purchased the plot was to exploit it as a commercial venture and that is why instead of constructing a house for their self use, six flats were constructed and the same were sold at a premium. It is urged that the Tribunal having failed to apply the correct principles to determine the nature of the transaction, substantial questions of law arise for determination by this Court.

7. We do not agree. It is well settled that there cannot be an abstract rule or principle which could be applied to determine the character of the transaction. It would depend on the facts and circumstances of each case. The question of distinction between a capital sale and an adventure in the nature of trade was considered by the Supreme Court in G.Venkataswami Naidu & Co v. Commissioner of Income-tax (1959) 35 ITR 594, wherein it was said that the character of 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. It was observed that ultimately it is a matter of first

....contd/-



::6::

[ITA 175/02]

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

8. Dealing with the expression "adventure in the nature of trade" in Raja Bahadur Kamakhya Narain Singh v. Commissioner of Income Tax, Bihar & Orissa (1970) 77 ITR 253 the Apex Court observed 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 were expressed by the Supreme Court in Commissioner of Income-tax, Nagpur v. Sulej Cotton Mills Supply Agency Ltd. (1975) 100 ITR 706.

9. Having perused the orders of the CIT(A) and the Tribunal, in the light of the aforementioned broad principles, we are of the view that both the authorities

....contd/-



::7::

[ITA 175/02]

below have approached the issue in the correct perspective, taking into consideration the relevant circumstances. Both the authorities have found that the assessee was in service; no change in the character of the said plot had been effected from the year 1971 to 1989; there was no material on record from where it could be said that the assessee ever had the intention to exploit the plot as a commercial venture. We are in complete agreement with the Tribunal that merely because six flats had been constructed, out of which four were sold to friends, it would show that it was an adventure in the nature of trade, as is sought to be pleaded by learned counsel for the Revenue. We do not find any ground to interfere with the concurrent findings recorded by the CIT(A) and the Tribunal. The questions proposed deal with conclusions on facts, giving rise to no question of law, much less a substantial question of law.

11. The appeal, being misconceived, is dismissed accordingly.

  
D.K. JAIN, J.

  
SHARDA AGGARWAL, J.

22 July 2002

"v"