



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Orders reserved: 31st August, 2007.
Date of decision: 24th September, 2007.

+ **ITR No. 395 of 1985**

COMMISSIONER OF INCOME TAX Petitioner
Through Ms. P.L.Bansal with Mr.Vishnu Sharma,
Advocates.

versus

ASHOK KAPUR(HUF) Respondent
Through None.

CORAM:

HON'BLE MR. JUSTICE MADAN B. LOKUR

HON'BLE DR. JUSTICE S.MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the order? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the order should be reported in the Digest? | YES |

DR. S.MURALIDHAR,J.

1. Relevant for the assessment year 1980-81 the following questions have been referred to us by the Income Tax Appellate Tribunal ('Tribunal)under Section 256(1) of the Income Tax Act, 1961 ('Act'):

“1.Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that there was no 'transfer' of the asset?

2.Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that no capital gains was assessable in the hands of the assessee?”

2. Despite service none appears for the Respondent.



property belonged to a larger HUF and after partition took place among the family members, the Assessee HUF acquired one-fifth share in a five-eighth part of the property in terms of a decree dated 27.3.1968 passed by this Court. According to the Assessee, the Karta of the Assessee HUF, Mr. Ashok Kapur, wanted to start a business of real estate in the name of another entity named Ashok Kapur & Co. HUF. Therefore, on 6.11.1979 Mr. Ashok Kapur made a declaration that he as Karta of Ashok Kapur HUF (the Assessee) was converting the Assessee's share in the property as stock-in-trade of the new venture to be started in the name of Ashok Kapur & Co. (HUF). Based on the rates fixed by the Land & Development Office ('L&DO'), the Assessee's share in the property was valued at Rs. 5,58,000. This was taken to be the market value of the Assessee's share of the property on the date of conversion and the same amount was credited to the capital account of Ashok Kapur & Co. (HUF).

4. Mr. Ashok Kapur, describing himself as Karta of Ashok Kapur & Co. (HUF) entered into an agreement with M/s. Ansal Properties & Industries (Ansal Properties') on 19.11.1979 for construction of a multi-storeyed building at Barakhamba Road. In this agreement Ashok Kapur is described as Owner Dealer and Ansal Properties, as Builders. The Builders were to demolish all the structures at 21 Barakhamba Road for constructing the multi-storeyed building. It was agreed that after construction 50% of the building would be handed over to the Builders and the remaining 50% would be retained by the Ashok Kapur & Co. (HUF). It is not disputed that the Assessee was, in terms of the agreement, paid Rs 10 lakhs by the



5. A question arose before the Income Tax Officer ('ITO') whether in the previous year 1979-80 (relevant to the assessment year 1980-81) there had been a transfer of the Assessee's share in the property as the stock-in-trade of Ashok Kapur & Co.(HUF) which had resulted in capital gains in the hands of the Assessee.

6. Initially the ITO held that the transfer had occurred at two stages: first when the Assessee's share was brought into the stock-in-trade of the proprietorship of Ashok Kapur & Co.(HUF) and at second stage when there was a transfer of the property from the said proprietorship concern to M/s. Ansal Properties on 19.11.1979. The ITO proposed to charge capital gains on both transfers and referred the draft assessment order for instructions to the Inspecting Assistant Commissioner ('IAC').

7. The IAC disagreed with the ITO that there had been conversion of the Assessee's share in the property into the stock-in-trade of the proprietary concern Ashok Kapur & Co. (HUF). The IAC held the conversion had taken place only at the stage of the agreement dated 7.11.1979 with the Builders. Consequently, the ITO acted on the opinion of IAC and held that the joint venture with Ansal Properties was in the nature of a partnership and that by transferring its share of the property to the partnership, at the cost indicated in its books i.e. Rs. 5,58,000 capital gains had accrued in the hands of the Assessee. A demand was accordingly raised.



(Appeals) ['CIT(A)'], by an order dated 9.9.1983 did not accept the contention of the Assessee that it had transferred the share in the property as stock-in-trade of the proprietorship concern Ashok Kapur & Co.(HUF). As regards the other issue concerning transfer of the share in the property to the joint venture, the CIT(A) agreed with the ITO that a partnership between the Assessee and the Builders had indeed come into existence in the previous year 1979-80 and that the Assessee had transferred its one-eighth share in the property to the joint venture. Consequently the CIT (A) held that such transfer was assessable to capital gains tax in the hands of the Assessee. The ITO was directed to recompute the Assessee's total income even while the computation of capital gains at Rs. 3,77,250 was affirmed.

9. The Assessee's appeal ITA No. 5098(DEL)/1983 was allowed by the Tribunal by an order dated 31.12.1984. The conclusions of the Tribunal as set out in para 24 of its order read thus:

“1.The assessee's admitted conversion of his immovable property into stock-in-trade on 6.11.1979 has not resulted in any transfer within the meaning of Income Tax Act for the purpose of charging of capital gains. Firstly we have not accepted the bonafides of such conversion and secondly we have hold that the legal effect of such conversion, even if, it had taken place, could not be a transfer for the purpose of charging capital gains.

2. By entering into an agreement with the Builders M/s. Ansal Properties and Industries Pvt. Ltd. The assessee did not enter into a partnership agreement and the two parties were to deal with each other on principal to principal basis. The important elements of partnership were absent in this activity.

3. The assessee did not bring in his immovable property as a contribution towards his joint venture with the Builder and the agreement contemplates the continued ownership of the assessee in respect of the immovable property



not concerned with the notional valuation of the property as if as the venture's accounts were concerned. The addition in respect of the capital gains has, therefore, to be deleted.”

10. Arising from the above impugned order, the two substantial questions of law set out in para 1 of this order have been referred to us for our opinion.

11. As regards the first question, it is necessary to recall the issue concerning the two stages of transfer was examined by the ITO to begin with. As regards the question whether there was a conversion of the Assessee's share in the property into the stock-in-trade of the proprietorship concern of Ashok Kapur & Co.(HUF), the ITO, the CIT(A) and the ITAT have concurrently held that no such transfer took place. In view of the concurrent findings by the three authorities, we are not persuaded to take a different view. Having again examined the orders of these authorities and the relevant documents, we find nothing erroneous in the conclusion reached by the authorities on this aspect.

12. As regards the second stage of the transfer namely the transfer by the Assessee of the share in the property to the joint venture with the Builders, the agreement dated 6.11.1979 is required to be examined. A copy of the said agreement, which is included in the paper book, reveals that it has been entered into between the Ashok Kapur as Karta of Ashok Kapur & Co.(HUF), described as “Owner Dealer” and M/s. Ansal Properties as “Builders”. The following preamble clauses of the agreement are indicative of the status of the parties at the time the agreement was entered into:



AND WHEREAS on 6th November, 1979, Shri Ashok Kapur declared that he has converted his undivided one fifth share of the said property, into the stock in trade of M/s. Ashok Kapur & Co. (HUF) and contributed the same as proprietor's capital for the purpose of carrying on the business.

AND WHEREAS M/s. Ashok Kapur & Co. (HUF) is carrying on the business of dealing in real estates, sale and purchase of immovable properties and property agents; builders, contractors and financiers.

WHEREAS the Builder is proposing to build a composite multistoreyed commercial building on the entire premises No. 22, Barakhamba Road, New Delhi, and has offered in connection therewith to the OWNER DEALER to erect a part of the said proposed multistoreyed commercial building on the one fifth share of the Owner Dealer in the said property (which amounts to One Eighth share in the said premises No. 21, Barakhamba Road, New Delhi, after demolition of existing structures, at Builder's own cost and expenses and with Builder's Own resources and to pay in respect thereof or therefor all incidental and other charges including but not limited to commercialisation charges in consideration of the Owner Dealer allocating to the Builder 50% of the Owner Dealer's share, as herein after defined, in the said multi-storeyed commercial building, in the manner and subject to and on the terms and conditions hereinafter contained.”

13. The clauses in the agreement dated 6.11.1979 regarding the conversion of the share of Shri Ashok Kapur in the property into the stock-in-trade of the Ashok Kapur & Co. (HUF) have not been believed by any of the authorities and we too have concurred with that finding. Therefore, the logical corollary is that it is the Assessee i.e. Ashok Kapur (HUF) which is for all practical purposes the Owner Dealer as regards the agreement dated 6.11.1979. In terms of the said agreement in consideration of the Owner Dealer “allocating to the Builder 50% of the Owner Dealer's share”, the Builder was to erect a part of the multi storeyed building on the one-fifth share of the Owner Dealer in the property. This clause itself indicates that



the property to the Builder.

14. The terms “saleable space”, “owners”, “allocation”, and “builders allocation” have been separately defined in the agreement dated 16.11.1979 and they read as under:

'Saleable Space' shall mean the space in the project building available for independent use and occupation and shall include additional space available after payment of penalties to statutory and local authorities for use and occupation, parking space and lofts, after making the provision for common facilities.

'Owners allocation' shall mean 50% of the saleable space comprised in owner's share and proportionately spread and shall include basements, parking spaces and lofts, proportionately spread in the project building belonging to the owner dealer according to the portion to be agreed upon mutually between the owner Dealer and Builders.

'Builder's allocation' shall mean 50% of the saleable space comprised in Owner Dealer share and proportionately spread and shall include basement parking space and lefts in the project building allocation to be mutually decided between the Builder and the Owner Dealer, subject to and on the terms and conditions hereinafter contained, in consideration of Builder, developing, obtaining necessary permissions and approvals including those in regard to user of the plot and of the plans for the project building, constructing and completing in all respect the project building for occupation and use and for doing all other acts, deeds and things and assuming all obligations and liabilities as contained hereinafter.”

15. Again, the aforementioned definitions reveal the intention of the parties that the Builder's allocation was an identified portion of the property in question and that such allocation was to take place in terms of agreement itself. The expression “transfer of space” was defined to “include transfer by delivery of possession” which also indicates that this was not an



16. Clause 6 of the agreement talks of the restrictions on Build occupying and using any part of the “existing construction and structures” unless certain approval has been obtained from the authorities. Clauses 22 & 23 of the agreement is significant and reads as under:

22. The Builder is allowed to agree to sell the area comprised in Builder's allocation his portion of 50% area to prospecting Flat Buyers at Builder's own risk and responsibility even prior to the sanctioning of the Building plans and the approval of the Project Building by the concerned authorities or commencement of construction. The BUILDER shall be entitled to sell to any third person whole or part of the saleable floor space, basement space, and parking space forming part of BUILDER'S allocation provided that such a transfer shall be registered only after the BUILDER has completed the project building in all respects and has obtained occupation certificates, and the OWNER DEALER has allocated 50% interest in his one eighth share in the plot to the BUILDER or his nominees at BUILDER'S cost i.e. BUILDER or his nominees paying the stamp duty and registration charges in respect thereof, such transfer being part of the consideration pursuant to and in accordance with this agreement.

23. The BUILDER agrees and undertakes to indemnify and keep indemnified the OWNER DEALER against all or any claims and which may be made by any persons against the OWNER DEALER in respect of the sale or dealings by the BUILDER with third persons in respect of the BUILDERS allocation in the Project Building.”

17. In our view, the above clauses 22 and 23 clinch the issue concerning transfer of the Assessee's share in the property to the Builder in terms of the aforementioned agreement. The Tribunal was persuaded by Clause 43 of the agreement to hold that there was no partnership between the Assessee and the Builder. Clause 43 reads as under:

“43. MISCELLANEOUS:

(i) The Owner Dealer and the Builder have entered this agreement on a principal to principal basis only and nothing



Builder, nor shall the Builder and Owner Dealer in any mann constitute an association of persons. Each shall be strictly responsible for his/her its own tax liability, and shall keep the other party hereto indemnified from and against the same.”

18. We find that the above clause by itself cannot be determinative of whether there was a transfer from the Assessee to the joint venture or if there was a partnership between the Builder and the Owner Dealer. The other clauses, namely the preamble clauses, as well as Clauses 22 and 23 are unequivocal that the Assessee has allocated to the Builder 50% of the building to be constructed and has also given the Builder the right to sell the Builder's allocation to third parties. These clauses have all the elements of transfer. For the purposes of capital gains what was critical to be examined was whether pursuant to the agreement there was a transfer of an asset from one party to the other. Even if one were to accept the argument that there was no joint venture between the Assessee and M/s. Ansal Properties, still the inescapable conclusion is that there was a transfer of property from one entity to the other. In that view of the matter, this Court is unable to agree with the Tribunal that there has been no transfer by the Assessee of its right in the property in question.

19. We are also not persuaded by the reasoning of the Tribunal that there is no capital gains arising from such a transaction since the value of the property in the hands of the Assessee was not indicated anywhere in the agreement. We are of the view that even if the agreement did not spell out the value of the property in the hands of the Assessee, the valuation of the property in question indicated by the Assessee itself in its accounts should



20. In that view of the matter, the impugned order of the Tribunal to the extent it holds that there was no transfer of the Assessee's share in the property in question from the Assessee to the Builders pursuant to the agreement dated 6.11.1979 is erroneous. Consequently, both questions referred to us are answered in the negative, that is, in favour of the Revenue and against the Assessee. The computation by the ITO of the capital gains tax, concurred with by the CIT(A) is affirmed.

21. The reference is disposed of.

S. MURALIDHAR, J

MADAN B. LOKUR, J

SEPTEMBER 24, 2007

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