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

+ ITA 1258/2010

COMMISSIONER OF INCOME TAX Appellant
Through Mr. Sanjeev Sabharwal, Sr.
Standing Counsel.

versus

NEW DELHI HOTELS LTD Respondent
Through Mr. Manu K. Giri & Mr. Anoop
Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

% **ORDER**
22.03.2012

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) was admitted to hearing vide order dated 30th August, 2010 on the following substantial question of law:

“Whether in the facts and circumstances of the present case, the ITAT is justified to hold the assessee’s claim of deduction as bad debt of Rs.44,28,000/- being allowable as business loss instead of holding by Assessing Officer as capital loss?”

2. The respondent-assessee is a company and the



assessment year in question is 2004-05. In the said year, the assessee had declared income of Rs.2,62,34,270/- in the return filed on 12th September, 2004. In the assessment order dated 29th August, 2006, the Assessing Officer disallowed bad debt of Rs.44,28,000/- on the ground that provisions of Section 36(1)(vii) read with Section 36(2) of the Act were not satisfied as the amount had not been taken into account in computing income of the earlier years. It was noted that this amount was paid to M/s Gulmohar Estate Limited for purchase of property/plots at Gurgaon but this amount was neither refunded nor the property/plot was sold. The Assessing Officer held as under:

“From the facts of the case it is clear that the said written-off amount loss of capital in nature. The claimed advance was given to M/s Gulmohar Estate for the purchase of property in Gurgaon in July, 1990 and assessee could not provide an iota of evidence in spite of various opportunities given, that this amount was advanced for purchase of stock-in-trade or in ordinary course of business. In fact the assessee has investments in properties also which is evident from its balance sheet (Plot in Gurgaon). Even in the assessment year under consideration the assessee has shown Long Term Capital Gain on the sale of flat at HUDA. Therefore, it is allowable as business loss also. Though, assessee has not made any such class business loss



either in the return of income or during the course of assessee proceedings. It is established beyond doubt from the facts of the case that claimed bad debt written off is nothing but a loss of capital in nature.”

3. The CIT(Appeals) confirmed the said addition though he noticed the defence and the plea of the assessee that it was a construction and a real estate company; they were promoters and developers of New Delhi House and Mercantile House at New Delhi; the payments made to M/s Gulmohar Estate Limited in 1990-91 were for purchase of three properties and transaction was entered into during the course of business for the purpose of acquiring stock in trade; in spite of repeated reminders physical possession was not given by the vendor; and the vendor Gulmohar Estate Limited was absconding and its offices were locked. The claim was allowable under the law.
4. The tribunal has allowed the aforesaid loss under Section 37 of the Act, after recording the following findings:-

“15. We have carefully perused the papers placed in the paper book filed by the assessee. The agreement to purchase the property was made by the assessee with M/s. Gulmohar Estate Ltd., which was desirous of building a designer house complex having a number of dwelling units of various sizes and specifications, common facilities, provision of private electricity and water supplies, club, shopping centre etc.



and in pursuance thereto they were building dwelling units of different sizes and specifications. The assessee was desirous of purchasing the dwelling units being constructed by M/s. Gulmohar Estate Ltd. The assessee entered into similar type of three agreements to purchase of following properties:-

- (i) Property measuring 700 square feet for consideration of 11,47,500;
- (ii) Property measuring of 1960 square feet for consideration of Rs.13,23,000/-;
- (iii) Property measuring 2900 square feet for Rs.19,57,500/-.

16. The assessee, thus, agreed to purchase three number of dwelling units in designer housing complex being constructed by M/s. Gulmohar Estate Ltd. The assessee is not an individual so these flats could be considered with intent to use them for own residential purposes. It is not in dispute that the assessee is also in the business of constructing and developing buildings. In the balance sheet as on 31.03.1989, 31.03.1990 and thereafter, the assessee has been showing stock in trade in the form of land, agricultural land, flats and basement and building under construction. The assessee was, thus, in the business of purchasing and sale of real estate and in the construction and development of properties and flats. The assessee has also received advances from flat owners against the flats to be sold to them, which has been shown under the head "current liabilities and provisions". The amount of Rs.44,28,000/- receivable from M/s. Gulmohar Estate Ltd. paid towards purchase of flats were shown under the head "loans and advances" in the balance sheet as on 31.03.1991. The audited accounts for the year under



consideration have been carefully perused by us. The assessee has shown rent and other income at Rs.4,34,29,879.62, details of which are as under:-

SCHEDULE-7	As on 31.03.04	As on 31.03.03
RENT & OTHER INCOME		
Rent	9,660,581.00	14,195,194.00
Interest & Dividend Income	9,104,009.45	7,381,696.59
Car Parking and Other Income	1,883,354.95	1,664,238.00
Sale of Flats (Heritage City)	21,815,908.00	52,566,480.00
Profit on Sale of Plot (Huda)	<u>966,026.22</u>	--
	<u>43,429,879.62</u>	<u>75,807,608.59</u>

17. The rent and other income has been credited in the profit and loss account. The opening stock in trade has been shown at Rs.82,88,005/- and the closing stock as on 31.03.2004 has been shown at Rs.79,35,987/-. The profit from sale of flats (heritage city), has been shown under the head "profit and gains of business or profession". The object of the company as seen from the memorandum of association of the company is also to acquire by purchase, lease, exchange or otherwise, sale or otherwise and sell in and dispose of lands, building, hereditaments of any tenure or description etc. The clause (3) of the memorandum of association is relevant in this regard, which has been reproduced as under:-

"3(a) To acquire by purchase, lease, exchange or otherwise and sell or



otherwise deal in and dispose of lands, buildings and hereditaments of any tenure of description and any estate or interest therein or any part thereof or any tenements therein on ownership basis or otherwise and any rights over or connected with lands and in particular by laying out, developing, or assist in developing and preparing land for building purposes and preparing building sites by planting, paving, drawing and by constructing, reconstructing pulling down, altering, improving, decorating, furnishing and maintaining and dealing in offices, flats, service flats, houses, bungalows, factories, warehouses, shops, cinema houses, bungalows, works and conveniences of all kinds and by consolidating or connecting or sub-dividing properties and by leasing, letting or renting, selling and otherwise disposing of the same on such terms and conditions as may be thought fit.

3(b) To undertake building and structural construction works of all kinds and to work as builders, contractors, sub-contractors, and to sub-let all or any contracts from time to time and upon such terms and conditions as may be thought expedient.

3(c) To carry on the business as estate agents for buildings, land and other property and to arrange or undertake the sale and purchase of, assist in selling or purchasing lands, buildings, and other property



whether belonging to the Company or not and to let any portion of any premises for residential, trade or business purposes, and to collect rents, and incomes and to supply to tenants and occupiers all conveniences, amenities etc.”

18. The assessee company was the promoter and developer of New Delhi House and Mercantile House at New Delhi. The assessee is also the promoter and developer of Heritage City at Gurgaon, in respect of which the profit has been shown under the head “business or profession”. During the year 1990-91, the assessee company entered into an agreement with M/s. Gulmohar Estate Ltd for the purchase of three properties at Garden Estate, Gurgaon for the total consideration of Rs.44,28,000/- as per the agreement dated 27.07.1990. The assessee made the total payment to M/s Gulmohar Estate Ltd. in the year 1990-91. In spite of making full payment, no physical possession was handed over by the purchaser to the assessee. Since no physical possession was received by the assessee, the property proposed to be purchased by the assessee were not shown as stock in trade in the books of assessee as per the normal accounting practice. The assessee had debited the amount of Rs.44,28,000/- in the books of accounts and shown under the head “loans and advances”. Thereafter, in the year 2003-04, M/s. Gulmohar Estate Ltd. locked their offices and it was found that the property purchased by the assessee were fraudulently sold to some other people also. District town and Country Planner, Haryana gave a public notice canceling the licence of Garden Estate of M/s. Gulmohar Estate Ltd.



The assessee, therefore, taken a decision to write off the entire amount as business loss. It is also an admitted position that the possession of the flats agreed to be purchased by the assessee was not given to the assessee and, thus, the transfer of flats within the meaning of Income Tax Act was not completed. Therefore, it is a case where amount was paid in advance for purchase of property. The assessee is in the line of business or real estate as discussed above. It can, therefore, be reasonably be presumed or a reasonable inference can be drawn that the assessee intended to purchase the property in the course of original business carried on by it or at best it can be said that the assessee purchased the property for residences of its employees including directors. Even if it is presumed that the assessee intended to purchase the three flats of use of its employees and directors, the amount so advanced to M/s. Gulmohar Estate Pvt. Ltd would be considered to be made as incidental to the business carried on by the assessee.”

5. Learned counsel for the Revenue has submitted that in the end of paragraph 18 the tribunal has drawn an assumption without any basis that the intended purchase was in the course of business or at best the purchase was for a residence of its employees, including directors. We are not impressed by the aforesaid contention. The tribunal has referred to the nature of activities undertaken by the respondent-assessee, i.e., the assessee was a real estate company and was a contractor. The



tribunal referred to the Memorandum of Association at mentioned other transactions of sale/purchase in which the assessee had treated immovable properties as stock in trade. The history for the business transactions undertaken by the assessee have been kept in mind. No doubt, the assessee also had rental income but this factum alone does not show and establish that the properties, which were being purchased from M/s Gulmohar Estate Limited, were to be treated as investment and not for the purpose of stock in trade. The tribunal thereafter in paragraphs 19 and 20 has observed as under:-

“19. The Id. CIT(A) has rejected the assessee’s claim of business loss merely by observing as under:-

“6.3 It may also be mentioned here that the appellant has not claimed such written off as business loss either in the return of income filed or during the course of assessment proceedings or appellate proceedings before me that the advance was made for the purchase of stock in trade or the amount was advanced in the ordinary course of business. It is also observed from the Assessment Order that appellant has made investment in properties and has shown long term capital gain on sale of such property. In view of these facts, appellant’s claim that he amount written off may be treated as



business loss is also rejected.”

From the said observation of the Id. CIT(A), we find that the Id. CIT(A) was of the view the assessee failed to produce any evidence that the advance was made for the purpose of stock in trade or the amount was advanced in the ordinary course of business, which in our considered opinion, is not correct in the light of the submissions of the assessee made before the Id. CIT(A), which has been reproduced by the Id. CIT(A) in his order at para 5 of his order. In the aforesaid submission made before the Id. CIT(A), the assessee categorically stated that the assessee was a construction and real estate company promoted by Shri Ram Prasad Ji in 1968, and the assessee is promoter and developer of New Delhi House and Mercantile house at New Delhi and Heritage City at Gurgaon. The details about the agreement made during 1990-91 were also given to the Id. CIT(A). The Id. CIT(A) has not stated anything adverse to the assessee's contention to the fact that the assessee is promoter and developer of New Delhi House and Mercantile House of New Delhi and Heritage City at Gurgaon. The assessee also explained before the Id. CIT(A) that since the possession of the proposed property was not given to the assessee, the property could not be shown under the head “stock in trade” but the amount advanced had to be shown under the head “loans and advances”.

20. One more reason given by the A.O. as well as by the Id. CIT(A) to reject the assessee's claim that from the assessment order, it was observed that the assessee made investment in property and has shown long term capital gain on such property.



However, the answer to question whether any property purchased by the assessee, who is also in the business of construction and sale of flats/properties/housing complex, is on investment account or on trading account is to be determined in the light of the intention of the assessee to be decided upon on facts and surrounding circumstances relating to the given property in question. No uniform or abstract test can be applied to all the transactions carried on by any assessee. It depends on facts and circumstances of any given transaction. We, therefore, have to decide the controversy in the light of the facts relating to the property in question and the intention of the assessee with regard to that property. In the light of the facts relating to the transaction in question, we have already observed above that the transaction to purchase property from M/s. Gulmohar Estate Ltd. was related or incidental to the assessee's business. After taking into account the intention of the assessee, it is well settled that it is the intention of the assessee which would matter in deciding as to whether the property purchased were intended for carrying on business or to hold it as an investment coupled with the line of the business carried on by the assessee. In the present case, after considering the totality of the facts and circumstances of the case, we find that the assessee's intention to purchase three flats in housing complex by making total payment in advance was to do business of real estate or otherwise transaction was undertaken for the purpose of business ordinarily carried on by the assessee."

6. The aforesaid reasoning given by the tribunal is factual in nature. It cannot be said that the findings recorded by the



tribunal are unreasonable or perverse.

7. In view of the aforesaid factual findings recorded by the tribunal, the answer to the question has to be in affirmative, i.e. in favour of the assessee and against the Revenue.

The appeal is accordingly dismissed. No order as to costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

MARCH 22, 2012
VKR