



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

RESERVED ON: 06.11.2012
PRONOUNCED ON: 17.01.2013

+ **W.P.(C) 4350/2012, C.M. APPL. 9016/2012**

M/S.SIMKA HOTELS AND RESORTS Petitioner
Through: Sh. Rajat Navet, Advocate.

Versus

DEPUTY COMMISSIONER OF INCOME TAX AND ANR.

..... Respondents
Through: Sh. Amol Sinha, Sr. Standing Counsel
with Sh. Deepak Anand, Jr. Standing Counsel, Sh.
Anshum Jain and Sh. Rahul Kochar, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. In this writ petition, the petitioner seeks setting aside of the order dated 29.3.2012 passed by Respondent no. 2, i.e. Commissioner of Income Tax (“Commissioner”, for short).

2. The brief facts of the case are that on 03.02.1997 the petitioner entered into a Memorandum of Understanding (MoU) with M/s. Dalmia Promoters and Developers Pvt. Ltd. and Edward Keventer (Successor) Pvt. Ltd for the purchase of 500 sq mtrs. of land or a residential flat not exceeding 300 sq mtrs, in Block No. 48, Keventer Lane, Sardar Patel Marg, Chanakaya Puri, New Delhi for a sale consideration of Rs. 4,28,00,000/-. At the time of



entering into the MoU a sum of Rs. 68,00,000 was paid by the petitioner and the balance amount was to be paid in two installments; the first installment when the layout plan was sanctioned by the competent authority and the second installment at the time of possession of the plot. On 22.05.1998 the petitioner entered into a supplementary MoU by which plot no. A-1 measuring 500 sq mtrs was allotted to the Petitioner. On 27.08.1998 Appropriate Authority, Income Tax Department issued a “No Objection Certificate: in respect of Plot No. A-1, i.e. the said Plot, for an apparent consideration of Rs. 4,28,00,000/-.

3. On 28.12.2005 the petitioner relinquished its ownership rights in the said Plot for a total sale consideration of Rs. 5,05,00,000/- (including the Rs. 68,00,000/- paid at the time of entering into the MOU). In terms of the relinquishment agreement the petitioner released and discharged the vendors from all obligations and also relinquished and released all its claims, ownership, right, title and interest in the said plot. On 28.03.2007 it filed its income tax return for the assessment year 2006-2007 and declared capital gain of Rs. 3,94,19,345/- on account of receipt of Rs. 5,05,00,000 for sale of its rights/title in the said Plot.

4. On 11.09.2009, Respondent No.1 issued a notice u/s 148 of the Income Tax Act, 1961 (“Act”, for short) asking the petitioner to furnish its return for the assessment year 2006-2007; the said notice was received by the petitioner after almost a year i.e. on 02.09.2010. The petitioner wrote a letter to Respondent No.1 on 21.09.2010 bringing to its notice that it had received the notice u/s 148 only on 02.09.2010 and sought reasons for the delay in sending notice and reasons for reopening the case. In its letter dated



08.10.2010, the first respondent did not furnish any reasons for the delay in serving of notice and reopening of the case but merely stated that the petitioner should comply with its notice and file its return for the assessment year 2006-2007. The petitioner, therefore, furnished the return filed for the assessment year 2006-07 and also asked for the reasons for re-opening assessment. The first respondent reproduced some clauses of the MoU as reasons for reopening the case. On 02.12.2010 the petitioner, on receipt of the reasons for re-opening, filed its objection and stated that the proceedings under section 148 were initiated merely on a change of opinion and were, therefore, bad in law.

5. On 14.12.2010 the first respondent passed an order stating that the income of Rs.5,05,00,000/- earned by the petitioner on account of transfer of capital asset was “ income from other sources” and not “capital gains”. The petitioner preferred an application under section 264 of the Act, seeking revision of the said order but on 29.03.2012, the Commissioner, i.e the second respondent rejected its application and refused to interfere with the Assessing Officer’s order dated 14.12.2010. The petitioner aggrieved by order dated 14.12.2010 and 29.03.2012 has preferred the present proceeding under Article 226 for quashing of the reassessment proceedings.

6. The petitioner argues that the proceedings initiated under Section 148 of the Act are illegal and void. It is contended that the petitioner had fully disclosed all material facts in the original assessment; it had duly declared the long term capital gain of Rs. 3,94,19,345/- on account of receipt of Rs. 5,05,00,000/-. It further submitted that the Assessing Officer had no reason to believe that any income of the petitioner escaped assessment.



7. Counsel for the petitioner also urges that, the order of the Assessing Officer dated 14.12.2010 whereby he held that the income earned by the petitioner fell under the head “income from other sources” instead of “long term capital gains” is absolutely contrary to the well settled principles of law. The term “Capital Asset” and “Transfer” is defined in the Act as follows:

“Section 2 – Definitions

In this Act, unless the context otherwise requires, –

(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include –

(i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession ;

[(ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes -

(a) jewellery;

(b) archaeological collections;

(c) drawings;

(d) paintings;

(e) sculptures; or

(f) any work of art.

Explanation : For the purposes of this sub-clause, “jewellery” includes –



(a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semiprecious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;]

(iii) agricultural land in India, not being land situate -

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year ; or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette ;

(iv) 6½ per cent Gold Bonds, 1977, or 7 per cent Gold Bonds, 1980 or National Defence Gold Bonds, 1980, issued by the Central Government ;

(v) Special Bearer Bonds, 1991, issued by the Central Government;

[(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 notified by the Central Government ;]



[Explanation.--For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever;]

- (47) "**transfer**", in relation to a capital asset, includes, -
- (i) the sale, exchange or relinquishment of the asset ; or
 - (ii) the extinguishment of any rights therein ; or
 - (iii) the compulsory acquisition thereof under any law ; or
 - (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
 - [(iva) the maturity or redemption of a zero coupon bond ; or]
 - (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
 - (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.



[Explanation 1].-- For the purposes of sub-clauses (v) and (vi) "immovable property" shall have the same meaning as in clause (d) of section 269UA;

[Explanation 2.--For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;”

8. It was argued by the respondent, and through its counsel that the disclosure made by the petitioner in its return was not a full and true disclosure, because there was in reality no transfer of any capital asset qualifying for treatment of the amount received as capital gain. In the absence of any definite right to own property, the petitioner could not claim ownership of any immovable property, or for that matter, any property. Counsel relied on the terms of the MoU, to say that the vendor had never promised to part nor indeed parted with the title to any particular property. The amount which passed hands was only towards property that was to be conveyed in the future. That surely could not be treated as ownership of property. In these circumstances, it was necessary for the petitioner to properly disclose the total amount received, and report it as income from other sources, where it was properly assessable. The respondents contended that the amount was invested for the purpose of earning interest. The



omission to so show it in the returns, entitled the Assessing Officer to treat the disclosure as wrongly made, and issue notice under Section 148 of the Act.

9. The Assessing Officer in this case held that the sum of Rs. 5,05,00,000/- reported by the petitioner was “income from other sources” and not “long term capital gains”. The AO proceeded on the premise that since there was no sale deed the petitioner never owned the property and, therefore, the question of capital gains arising from the said property does not arise. The Assessing Officer/authorities failed to appreciate that the petitioner had relinquished all its rights in the immovable property which it had acquired by way of the MoU and the same amounted to transfer of the capital assets making it “long term capital gain”. The question which has to be addressed in this case therefore, is whether the amount received and declared by the assessee/petitioner was a capital gain or income from other sources, which it wrongly reported, as to warrant re-assessment proceedings under Section 148.

10. In *J.K. Kashyap vs. Asst. CIT* (2008) 302 ITR 255 (Delhi) a Bench of this Court held that if the assessee relinquishes his rights in the property for a consideration it amounts to transfer under Section 2(47) of the Act and he is liable to capital gain tax under Section 45 of the Act. The petitioner urged that the Assessing Officer erred in considering that the agreement dated 03.02.1997 and the two supplementary agreements dated 22.05.1998 and 27.01.2005 entered into did not confer any ownership rights in its favour. The view taken by the Authorities that the right was not capable of being transferred is flawed. The petitioner’s argument that had it in fact invested



the sum for the purpose of earning interest then it would have had earned 71% interest each year on Rs. 68 lacs to be entitled to the sum of Rs. 5,05,00,000/-; which shows that the inference is baseless. Therefore it was submitted that the amount invested was paid as a part of the consideration for the valuable rights in an immovable property and there is no relationship between the amount of Rs. 68 lacs and interest on it. It was also argued that there had been actual allotment of a property, i.e plot no. A-1, which was allotted to it. The no objection certificate was issued by the authority only after physical inspection for a consideration of Rs. 4.28 Crores.

11. The revenue contended that there was no sale deed and therefore the petitioners could not have relinquished any rights; there was no ownership right to begin with and, therefore, they could not have transferred any right. It had also been argued that no rights in the land were created in its favour and therefore the income arising out of the cancellation of the MoU dated 03.02.1997 was rightly assessed under “Income from other Sources” and not “Capital Gains”. To support its argument that no ownership right was vested with the petitioner, the Revenue Department relied on some of the clauses in the MoU.

12. In the present case, the undeniable facts are that the petitioner paid Rs. 68 lakhs, at the time of entering into the MoU, i.e the Agreement for Sale. That transaction was reported to the revenue; a no objection certificate was issued. No doubt, the MOU did not assign a particular defined plot of land. A supplementary deed was later entered into, and the petitioner was consequently allotted plot no. A-1. The revenue relies on the following clauses:



“2. The allotment shall be done by Keventers/DPD and allotment letter issued only if the Intending Allottee has already paid a sum of Rs. 1.80 crores to Keventers/DPD in terms of Clause 4(1)(a) below.”

3. Para 3 “It is clarified that this MOU shall not be, or deemed to be, an allotment, sale or transfer (including under the Transfer of Property Act or any of the Acts in force) and the eventual allotment/sale shall be subject to, inter alia, receipt by Keventers/DPD of full payments.

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The allotment of the plot shall be made after sanction of Lay-out plan, as stated herein and the transfer or sale would be after handing over of possession of the plot of land.... Until such allotment of a plot or a flat, as the case may be, at the mentioned price, this MOU shall remain non-est, inoperative and of no effect, save and except the Intending Allottee’s right to refund of the amount deposited with Keventers/DPD as hereinafter detailed.”

13. The decision in *J.K. Kashyap (supra)* is an authority for the proposition that even when an assessee becomes entitled to an undefined and undivided share in a property, through an agreement, which he later relinquishes, the gain has to be assessed as income from capital gain, and not as income from other sources. This much is clear from the following observations of the court:

“....in the agreement to sell dt. 26th Sept., 1995 in which the assessee is the fourth party and he along with fifth party, has entered into an agreement to purchase the undivided 2/3rd rights and undivided shares of first and second parties for a total consideration of Rs. 2 crores.

17. The assessee has also placed on record copy of his statement recorded in suit No. 2312/90 filed in this Court, which reads as under :



"Statement of Mr. J.K. Kashyap, plaintiff on S.A. and of counsel for the parties. The parties have arrived at a settlement and agreement of sale has been entered into M/s FMI Investment (P) Ltd. has today handed over a bankers cheque No. 217252, dt. 22nd Sept., 1995 for a sum of rupees two crores twenty four lakhs to the plaintiff Mr. J.K. Kashyap drawn on 'Banque Nationale Paris'. All the original documents relating to the suit property and in possession of the plaintiff have been handed over to the intending purchaser. The plaintiff has no other document left with him. The claim of the plaintiff stands satisfied. The suit be dismissed as withdrawn leaving the parties to bear their own costs."

18. So, it is clear from the record that by way of first agreement which was entered in the year 1990, the assessee had acquired right in the property and this right he has relinquished in favour of new vendee in 1995. Thus, we are of the considered opinion that the assessee is liable to long-term capital gain and not to short term capital gain.

19. Under the circumstances, we do not find any infirmity in the impugned order passed by the Tribunal and since it is a finding of fact given by the Tribunal that the assessee acquired right in the property at the time of execution of first agreement in the year 1990 and had relinquished his rights in favour of new vendee in 1995, no substantial question of law arises for our consideration."

14. This Court is in agreement with the above reasoning. That apart, in the present case, the Petitioner had acquired right to a specific plot; furthermore, the interest was in the nature of an actionable claim, which could be asserted in a legal proceeding. The tax authorities had issued a no objection certificate in respect of the transaction. In these circumstances, the reporting of the amount received as capital gains was correct. Moreover, *Calcutta Discount Ltd. vs. ITO*, 1961 (41) ITR 191 (SC) is an authority for the proposition that



as long as the assessee makes a full and true disclosure of the income, the fact that it might claim that as falling under one head which is ultimately not accepted, would not make it a wrong disclosure, or suppression. The question as to the proper assessability of any amount, to income tax falls within the domain of the tax adjudicator.

15. In view of the above discussion, the writ petition is entitled to succeed; the reassessment proceedings are hereby quashed. The petition and accompanying application consequently are allowed, without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JANUARY 17, 2013