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THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.08.2015

+ ITA 489/2014

COMMISSIONER OF INCOME TAX-IV ... Appellant

versus

EDWARD KEVENTER (SUCCESSORS) PRIVATE LIMITED ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Kamal Sawhney and Mr Raghaven Singh
For the Respondent : Ms Kavita Jha and Ms Mehak Gupta

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the Revenue under Section 260A of the Income-tax Act, 1961 is directed against the order of the Income-tax Appellate Tribunal dated 18.11.2013 in ITA No.1242/Del/2011 pertaining to the assessment year 2006-2007.

2. The only point urged by the learned counsel for the Revenue before us was with regard to the decision of the Tribunal that the transfer of the two properties to Mr Niranjan Koirala and Ms Sheila Aggarwal was wrongly concluded by the Tribunal to result in capital gains and not income from business.

3. The facts of the case are that the assessee had purchased leasehold rights in a large parcel of land in 1952 with the object of dairy farming and for production of milk. That venture never took off because the requisite permission for the same was not given by the New Delhi Municipal Council. On 02.03.1989, the assessee entered into an MOU (Memorandum of Understanding) with Balarpur Industries Limited and Dalmia Promoters for developing a portion of the said land. According to the learned counsel for the Revenue, the two properties which are sold to Mr Niranjan Koirala and Ms Sheila Aggarwal, respectively, were also part of the Memorandum of Understanding. However, according to the learned counsel for the assessee, both these properties, which are the subject matter of the present appeal, were excluded from the Memorandum of Understanding for development of the properties. Anyhow, the said Memorandum of Understanding was cancelled on

08.06.2005 and the development of land, as proposed under the Memorandum of Understanding, did not take place. Prior to the cancellation of the Memorandum of Understanding, on 27.05.2005, two Agreements to Sell were entered into between the assessee and Mr Niranjan Koirala on the one hand and the assessee and Ms Sheila Aggarwal on the other in respect of the said two properties. Mr Koirala and Ms Aggarwal were both occupying those properties. The property agreed to be sold to Mr Koirala comprised of land of 2715 sq. yds. upon which a residential bungalow and an outhouse were constructed. The property, which was transferred to Ms Aggarwal, comprised of 9090 sq. yds upon which a residential bungalow and an outhouse were constructed. The property transferred to Mr Niranjan Koirala carried a sale consideration of Rs.10.51 crores and the sale consideration in respect of the transfer to Ms Sheila Aggarwal was Rs 35.1 crores.

4. The only issue, that is raised before us, is whether the said transactions of transfer of properties to Mr Koirala and Ms Aggarwal, has resulted in capital gains or business income in the hands of the assessee. The Assessing Officer, by virtue of the assessment order dated 31.12.2008, held that the transaction resulted in business income and not

in capital gains. The assessee preferred an appeal before the Commissioner of Income-tax (Appeals). By an order dated 22.12.2010, the CIT (A) reversed the findings of the Assessing Officer. The CIT(A), after examining the case law, which was presented before him, and also facts of the case, came to the conclusion that the intention of the assessee, at the time of purchase of the property in 1952 was to establish a dairy farm in which it would produce milk. The said property was held as an asset and shown as a fixed asset in the books of the assessee from 1952 onwards. The CIT (A) also observed that no contrary fact had been brought on record by the Assessing Officer and that successive assessments from the date of purchase of the land accepted the treatment of the asset as a fixed asset in the books of the assessee. The CIT (A) also observed that there had been no sale or purchase of land by the assessee throughout all these years from 1952 except for the two transactions, which are subject matter of the present appeal. The CIT (A) held that the original intention of the assessee in purchasing the property was clear which was to hold it as a fixed asset. Finally, the CIT (A) concluded that he had no hesitation in holding that the two residential bungalows sold on 27.05.2005 to the existing occupiers of the same by

the assessee, would result only in long term capital gain and not in any income under the head of business.

5. The Revenue, being aggrieved by these findings of the Commissioner of Income-tax (Appeals), preferred an appeal before the Income-tax Appellate Tribunal, which confirmed the findings of the CIT (A), by virtue of the impugned order dated 18.11.2013.

6. We have heard the learned counsel for the parties and have examined the records of the case. The decision of the Bombay High Court in the case of ***CIT v. V.A.Trivedi*** : **172 ITR 95 (Bom.)** was placed before us. In that decision, it has been observed that it is not possible to evolve a single test or formula which can be applied in determining whether the transaction was an adventure in the nature of trade. It was also noted that in the case of purchase and sale of land, generally speaking, the original intention of the party in purchasing the property, the magnitude of the transaction of purchase, the nature of the property, the length of its ownership and holding, the conduct and subsequent dealing of the assessee in respect of the property, the manner of its disposal and the frequency and multiplicity of transactions, afford valuable guides in determining whether the assessee is carrying on a

trading activity and whether a particular transaction should be stamped with the character of a trading adventure.

7. We are in agreement with these observations of the Bombay High Court. We may also point out that in a Division Bench decision of this Court in the case of ***CIT v. Dr Indu Bala Chhabra*** : **(2003) 132 Taxman (Delhi),** this Court observed that the question of distinction between a capital sale and an adventure in the nature of trade can be drawn out in respect of a particular transaction but it cannot be so determined solely on the application of an abstract rule, principle or test, and would depend on all the facts and circumstances of the case. Importantly, the Division Bench held that the finding as to whether the transaction in question was or was not an adventure in the nature of trade was purely one of fact. The Division Bench held that unless and until there was any perversity in the order warranting interference by this court, the findings of fact returned by the Tribunal would have to be accepted and no question of law, much less a substantial question of law would arise for consideration of this Court.

8. Having gone through the facts of the present case, we are of the view that the Tribunal, as a final fact finding authority has confirmed the

findings of fact returned by the CIT (A). While doing so, it did not look at any solitary fact to determine as to whether the transactions in question resulted in capital gains or in business income. Several factors were considered, which included the intention of the assessee in purchasing the property, the length of time the property was kept by the assessee (which in this case is more than fifty years), the lack of any transactions of sale or purchase of property throughout this period of time etc. The CIT (A) as also the Tribunal have examined the case in the correct perspective and after examining all the factors, which would go into determining the question as to whether the transactions resulted in capital gains or income from business, have arrived at concurrent findings of fact. No perversity in the findings has been pointed out. Therefore, no question of law arises for our consideration much less a substantial question of law.

The appeal is dismissed.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

AUGUST 20, 2015
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