



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

% Judgment delivered on: 26.11.2008

+ **ITA 585/2008**

COMMISSIONER OF INCOME TAX**APPELLANT**
CENTRAL-III, NEW DELHI

-versus-

HITASHI ESTATES LIMITED**RESPONDENT**

Advocates who appeared in this case:

For the Appellant : Ms Prem Lata Bansal with Mr Sanjeev Rajpal
For the Respondent : Mr Sriram Krishna

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

BADAR DURREZ AHMED, J (ORAL)

1. The Revenue is aggrieved by the order dated 25.5.2007 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA No. 1359/Del/2006 pertaining to the assessment



year 2002-03 in as much as the Tribunal has directed the Assessing Officer to assess the profit/loss arising from the surrender of tenancy rights under the head “capital gains” as claimed by the assessee.

2. Property No 7, KG Marg, New Delhi was taken on rent by the assessee. Thereafter, the assessee made improvements in the said rented premises and retained the same for more than five years. The assessee had shown the said property as inventory in its balance-sheets for several years. On 4.4.2001 the assessee surrendered the tenancy right in the said property to the owner for a consideration. In the year in question, the assessee showed the said property as a capital asset and the loss incurred on surrender of the tenancy right in the said property was claimed at Rs 14,10,737/- after claiming the benefit of indexation. The Assessing Officer did not allow this claim. The Commissioner of Income Tax (Appeals) [hereinafter referred to as ‘CIT(A)’] also confirmed the stand taken by the Assessing Officer.

3. Before the Tribunal, the assessee contended that the tenancy right was a capital asset, particularly, in view of the Supreme Court decision in the case of *CIT vs D P Sandhu Brothers Pvt Ltd*: (2005)



273 ITR 1 and that the profit on transfer of the said asset would be chargeable to tax under the head “capital gains”. It was contended that the cost of acquisition of the said capital asset (the tenancy right) in the hands of the assessee was nil. However, substantial improvements to the extent of Rs 33,37,847/- were made in respect of the said capital asset in different years. Upon indexation, the same came to Rs 56,10,337/-. On behalf of the assessee it was contended that the cost of improvement incurred by the assessee had been wrongly shown as stock-in-trade in its books of accounts and it is on the basis of such wrong treatment that the tenancy right was held to be stock-in-trade by the Assessing Officer. It was contended that since the accounting treatment given by the assessee was patently wrong, Assessing Officer as well as the CIT(A) were not justified in deciding the nature of the tenancy right as being stock-in-trade of the assessee’s business relying on such wrong treatment. The assessee contended that its business was purchase and sale of properties and not to acquire tenancy rights and sell the same so as to construe tenancy rights as its stock-in-trade.



4. On behalf of the Revenue it was contended that the assessee itself had shown the said property in all its earlier years as stock-in-trade and it is only in the year in question that it has been shown as a capital asset. It was contended that this cannot be permitted and, therefore, the capital loss claimed by the assessee could not be allowed.

5. The Tribunal noted that the tenancy right surrendered by the assessee during the year in question was held to be its stock-in-trade by the Assessing Officer as well as the CIT(A) mainly on the basis of the treatment given by the assessee itself to the said tenancy rights as stock-in-trade in the books of accounts for the earlier years. The Tribunal noted that apart from this, there was no finding given by the authority below to the effect that the purchase and sale of tenancy rights was the business of the assessee company. The Tribunal observed that on examination of the copies of the balance-sheets and profit and loss account filed by the assessee for the year under consideration as well as for the earlier years showed that the assessee was engaged in the business of purchase and sale of property on ownership basis and that there was no transaction involving the



purchase or sale of tenancy rights except the one in question. The Tribunal also observed that the present case was one where property was taken by the assessee on rent and after making substantial improvement therein, the same was occupied by it for a considerable length of time before finally surrendering the tenancy right in the said property to the owners thereof for consideration. According to the Tribunal, this was not a part of the business of the assessee. The Tribunal held that it was a solitary transaction of surrender of the tenancy right by the assessee in respect of the premises occupied by it and that too in favour of the owner. Consequently, the Tribunal returned the finding that the tenancy rights were not acquired by the assessee for the purposes of sale in the normal course of business. The Tribunal also returned a finding that the tenancy right did not represent the assessee's stock-in-trade as alleged by the Revenue. The Tribunal observed that the treatment given by the assessee in its books of accounts for the earlier years was patently wrong. Consequently, such wrong treatment could not be held against the assessee when the clear finding was that the said tenancy right was a capital asset in the hands of the assessee. It is in these



circumstances, that the Tribunal set aside the order passed by the CIT(A) on this issue and directed the Assessing Officer to assess the profit/loss arising from the surrender of tenancy rights under the head “capital gains” as claimed by the assessee.

6. The Supreme Court, in the case of *D.P. Sandhu Brothers Pvt. Ltd* (*supra*) clearly held that a ‘tenancy right’ is a capital asset. The only issue raised by the Revenue is that, given the fact, that the assessee treated the ‘tenancy right’ as stock-in-trade, even though erroneously, the assessee ought not to be allowed to treat the same as a capital asset. We think such a submission is completely untenable. A transaction of the kind we are considering, that is, acquisition/surrender of a tenancy right, cannot in law acquire a different character because of the treatment accorded to it in the books of accounts of the assessee. This is trite law [see: *The Kedarnath Jute Mfg. Co. Ltd vs CIT: (1971) 82 ITR 363 (SC)*]. There may be transactions, in respect of which, while determining their true nature, the treatment accorded to them by the assessee in the books of accounts may be one of the factors relevant in coming to a conclusion one way or the other. This is not such a transaction.



7. No fault can be found with reasoning of the Tribunal. No perversity in its findings has been pointed out. Consequently, the appeal is dismissed as no substantial question of law arises for our consideration. It is made clear that in case the cost of improvement has been treated as business expenditure in the earlier years then the Assessing Officer would be within his rights to withdraw the same. The learned counsel for the respondent does not have any objection to this direction.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

November 26, 2008
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