

(2002) 07 DEL CK 0104

In the Delhi High Court

Case No : IT Appeal No. 175 of 2002 22 July 2002

Commissioner of Income Tax

APPELLANT

Vs

R.V. Gupta

RESPONDENT

Date of Decision : 22-07-2002

Acts Referred:

Citation : (2002) 124 TAXMAN 191 : (2002) 123 TAXMAN 191

Hon'ble Judges : Sharda Aggarwal, J;D.K. Jain, J

Bench : Full Bench

Advocate : Prem Lata Bansal, for the Revenue, for the Appellant;

Final Decision : Dismissed

Judgement

D.K. Jain, J.

This is an appeal by the revenue u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the order of the Tribunal, Delhi Bench-A, dated 21-11-2001, passed in IT Appeal No. 7077 (Delhi) of 1994, pertaining to the assessment year 1991-92, for determination of the following questions of law :

"1. Whether the Income Tax Appellate Tribunal was correct in law in treating the amount of Rs. 7,58,250.00, being the profit made by assessed on sale of apartments, as long-term capital gain ?

2. Whether the Income Tax Appellate Tribunal was justified in confirming the order of the Commissioner (Appeals) and thereby holding that the profit was accrued to the assessed on sale of portion of land on which the flats are constructed and not on account of cost of construction, where there was a single agreement for sale of flats ?

3. Whether the Income Tax Appellate Tribunal was correct in law in upholding the observation made by the Commissioner (Appeals) that the transaction of sale of flats was not in the nature of any business transaction ?

4. Whether the Income Tax Appellate Tribunal was correct in bifurcating the sale agreement into two parts, i.e., sale of superstructure and sale of land whereas the assessed has entered into a single agreement for sale of apartment for a consideration of Rs. 26.05 lakhs which included the sale of superstructure, land beneath and right to use the common facilities ?

5. Whether the Income Tax Appellate Tribunal was correct in applying the ratio of judgment of the Supreme Court in G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, when the facts of the present case are similar to the case reported in Raja J. Rameshwar Rao Vs. Commissioner of Income Tax, Hyderabad, in which the Supreme Court has held the similar transaction as adventure in the nature of trade ?

6. Whether the order of the Income Tax Appellate Tribunal is perverse in law and on facts when it has not considered the facts pointed out by the department ?"

2. Briefly stated, the material facts giving rise to the present appeal are :

The respondent (hereinafter referred to as the assessed) is a senior IAS Officer. In the year 1971, he was allotted a plot of land admeasuring 664 sq. mtrs. by the Delhi Development Authority (DDA), in a group housing society at Anand Lok, New Delhi. The plot was acquired by the assessed jointly with his brother for a total consideration of Rs. 31,000. A perpetual sub-lease was executed by the DDA in favor of both of them on 11-5-1971. The lease contained a clause that the allottees shall construct residential house on the said plot within two years of the allotment. However, they could apply for extension of time for completing the construction. From time to time the assessed applied for extension of time for completing the construction and, ultimately, in the year 1989 decided to construct six flats on the said plot. To meet the cost of construction, the assessed and his brother entered into agreement to sell in respect of four flats and retain the remaining two for their own use. Permission to sell these flats was obtained from the DDA.

3. In his return for the assessment year 1991-92, the assessed declared capital gains on account of sale of his 50 per cent share in the said four flats. However, while completing the assessment for the relevant assessment year, the assessing officer took the view that the transaction in question was an adventure in the nature of trade and, Therefore, the profits accruing there from were to be taxed under the head "Income from business or profession" and not as capital gains as declared. Income under the said head was determined at Rs. 7,58,250.

4. Aggrieved, the assessed preferred an appeal before the Commissioner (Appeals), who came to the conclusion that it was not a case of adventure in the nature of trade. While holding so, the Commissioner (Appeals), inter alia, noticed that the plot of land was retained by the assessed for 18 years and investment therein was shown in his wealth-tax returns as investment in plot; there was no change in the said plot from 1971 to 1989; he was not permitted by the DDA to sell a portion of land and to meet the cost of construction, it became necessary

for the assessed to construct the flats. The Commissioner (Appeals), accordingly, directed the assessing officer to compute the income from sale of the flats as long-term capital gains.

5. The revenue took the matter in further appeal to the Tribunal. By the impugned order, the Tribunal has affirmed the view taken by the Commissioner (Appeals). Hence, the present appeal.

6. We have heard Ms. Prem Lata Bansal, the learned senior standing counsel for the revenue. Ms. Bansal would submit that the intention of the assessed right from the day he had purchased the plot was to exploit it as a commercial venture and that is why instead of constructing a house for their self use, six flats were constructed and the same were sold at a premium. It is urged that the Tribunal having failed to apply the correct principles to determine the nature of the transaction, substantial questions of law arise for determination by this court.

7. We do not agree. It is well-settled that there cannot be an abstract rule or principle which could be applied to determine the character of the transaction. It would depend on the facts and circumstances of each case. The question of distinction between a capital sale and an adventure in the nature of trade was considered by the Supreme Court in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, wherein it was said that the character of transaction cannot be determined solely on the application of an abstract rule, principle or test, but it must depend upon all the facts and circumstances of the case. It was observed that ultimately it is a matter of first impression with the court whether a particular transaction is in the nature of trade or not. A single plunge may be enough provided it is shown to the satisfaction of the court that the plunge was in the waters of the trade, but a mere purchase and sale of property - if that is all that is involved in the plunge - it may fall short of anything in the nature of trade. Whether it is in the nature of trade or not will depend on the facts and circumstances of a particular case.

8. Dealing with the expression "adventure in the nature of trade" in *Raja Bahdur Kamakhya Narain Singh Vs. The Commissioner of Income Tax, Bihar and Orissa*, , the Apex Court observed that if the transaction is in the ordinary line of the assessed's business, there would hardly be any difficulty in concluding that it was a trading transaction. But where it is not, the facts must be properly assessed to discover whether it was in the nature of trade. Similar views were expressed by the Supreme Court in *Commissioner of Income Tax, Nagpur Vs. Sutej Cotton Mills Supply Agency Ltd.*, .

9. Having perused the orders of the Commissioner (Appeals) and the Tribunal, in the light of the aforementioned broad principles, we are of the view that both the authorities below have approached the issue in the correct perspective, taking into consideration the relevant circumstances. Both the authorities have found that the assessed was in service; no change in the character of the said plot had been effected from the year 1971 to 1989 and there was no material on record

from where it could be said that the assessed ever had the intention to exploit the plot as a commercial venture. We are in complete agreement with the Tribunal that merely because six flats had been constructed, out of which four were sold to friends, it would not show that it was an adventure in the nature of trade, as is sought to be pleaded by the learned counsel for the revenue. We do not find any ground to interfere with the concurrent findings recorded by the Commissioner (Appeals) and the Tribunal. The questions proposed deal with conclusions on facts, giving rise to no question of law, much less a substantial question of law.

10. The appeal being misconceived is dismissed accordingly.