
(2008) 04 RAJ CK 0127
In the Rajasthan High Court

Commissioner of Income Tax

APPELLANT

Vs

Sohan Khan and Mohan Khan

RESPONDENT

Date of Decision : 24-04-2008

Acts Referred:

Citation : (2008) 304 ITR 194

Hon'ble Judges : N.P. Gupta, J;Kishan Swaroop Chaudhari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.P. Gupta, J.—These two appeals arise in identical circumstances, and have been admitted vide different orders dated April 21, 2006 and May 10, 2006, by framing the same substantial question of law, and are being closely interconnected, consequently, they are being decided by this common order.

2. The substantial question of law, as framed reads as under:

Whether taking into consideration the various factors discussed by the learned Assessing Officer and other appellate authorities, the true nature of Nagnechi Scheme and Vallabhgarden land is an adventure in the nature of trade or it is merely a transaction of transfer of capital asset?

3. The facts of the case, as appear from the Assessing Officer's order are, that the assessee submitted returns declaring particular income as capital gain. The cases were taken up for scrutiny, and ultimately, it was found that certain number of plots were sold, and the assessee had shown the income therefrom, as long-term capital gain. It is found that the assessees purchased the big chunk of land measuring few lakhs square feets, somewhere in 1970, under a valid document, and the land was lying fallow, during all this time. It also appears that the land was under the cloud of ceiling laws, and after it got cleared therefrom, the assessees picked up the idea of disposing it of by making the best profit, i.e., by ensuring that it fetches the best price, and accordingly, the site plan was prepared, showing the land to be divided into different plots, and the plots were

accordingly sold. The different assessees sold different plots during different period of time, inasmuch as, Sohan Khan had sold certain plots during the relevant year for the assessment years 1993-94, 1994-95 and 1995-96 and some plots still continued to remain, while the assessee Mohan Khan had also sold certain plots during the relevant year for the assessment year 1994-95. These appeals relate to the assessment year 1994-95.

4. The Assessing Officer found the sale to be not taxable as capital gain, but it was found to be a business income, and for that, the Assessing Officer found, that the original land is surrounded by many lands of his near relatives and family members, and if the plots would have been carved out from his land alone, they could not have been sold for want of network of roads being available up to the adjoining lands only, and that, at some distance there is government road measuring 200 ft. Then the other circumstance is, that all the land owners had planned the sale of plots, in Nagnechi Scheme, and Vallabh Garden, together, and no land could be sold for residential purposes. Then the next ground considered is, that the purchasers were impressed by the fact that all the land belong to the same family, and is being planned, and sold together, at no stage the huge property of the assessee or his family members was used for personal purposes, and the intention was to gain profit only. Inter alia with this, it was concluded, that the transaction was in the nature of trade.

5. In appeals, the learned Commissioner found, that the learned Assessing Officer was not justified in taxing the profit earned by sale of the plots under the head "Profits and gains by business", and they were liable to be taxed only under the head "Capital gains", as the appellants were not found to be regular dealers, in purchase and sale of land. It was also found that nothing contrary has been brought on record to establish that the appellant had any intention to deal in the property, and with that intention, any development or improvement had been made before effecting the sale. In case of Sohan Khan various judgments of different High Courts were also relied upon.

6. It may also be observed that the question about the amount of profit, i.e., depending on the price of the land, was also gone into, which aspect is not a subject-matter of appeal before us, therefore, we need not go into that.

7. Aggrieved of the order of the learned Commissioner, the Revenue also filed an appeal before the learned Tribunal, and the learned Tribunal found, that the sale proceeds is to be considered as "capital gain" only. In this regard, in case of Sohan Khan, the Tribunal relied upon the fact, that in the earlier assessment year 1993-94 of this assessee himself, it had been taxed as "capital gain" only, and we are informed, that no appeal had been filed against that order. However, in case of Mohan Khan, it has been found, that the Commissioner of Income Tax had rightly come to the conclusion, that the sale consideration is to be taxed under the head of "capital gain" instead of "business income". For arriving at this conclusion, it was also found, in case of Mohan Khan, that the assessee had purchased the land in 1970, and thereafter no land is purchased, and no land

was sold. It was found, that it seems, that assessee never had any intention to carry on any business in purchase and sale of land, but he invested the money in the land, with a motive of investment in capital asset, as there was no proof of development on this piece of land, coupled with the fact, that the assessee is not a dealer in purchase and sale of land, thus the conclusions inferred by the Assessing Officer are not valid.

8. Arguing the appeal, learned Counsel for the Revenue placed strong reliance on the judgment of the hon'ble Supreme Court, in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, , and submitted, that in that case also the isolated transaction of purchase and sale of land, was held to be taxable as profit of business, inasmuch as, in that case one chunk of land was purchased in piecemeal, and thereafter sold to the adjoining mill, and that was found to be taxable as profit of business, and therefore, the findings recorded by the learned Tribunal, as well as the learned Commissioner, are required to be set aside, and it is required to be treated, that the true nature of transaction was of "adventure in the nature of trade" and was not merely a transaction of transfer of capital asset, so as to be taxable as capital gain.

9. Learned Counsel for the assessee on the other hand, supported the impugned orders, by also inviting our attention to the fact, that the big chunk of land belonged to some 15 persons, and in case of other persons, being co-owners also, the income derived by sale has been taxed as capital gain. Likewise, in the case of Sohan Khan himself also, for earlier year, it has been taxed as capital gain, as such, it cannot be said, that for the assessment year 1994-95, it is required to be, or permissible to be, taxed as profit from business, with respect to two assessees.

10. We have considered the submissions, and have gone through the judgment in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, , in detail.

11. Coming to the *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, , the facts of that case were telling, inasmuch as, the assessee was the managing agent of the company, the mill, to whom the land was sold, and the land was situated adjoining the mill, a total land measured 5 acres 26 cents, and was purchased by four sale deeds dated October 25, 1941, November 15, 1941, June 29, 1942 and November 19, 1942, and after about 5 years it was sold in two lots to the mill, on September 1, 1947 and November 10, 1947. By this transaction, the assessee earned the profit of Rs. 43,887 and odd. On these facts the Tribunal and High Court had found the transaction in question being an "adventure in the nature of trade", correctness of which view was challenged before the hon'ble Supreme Court. The expression "adventure in the nature of trade" is defined in Section 2(4) of the Act, and the hon'ble Supreme Court considered various judgments of House of Lords and other decisions of the Court of Appeal etc., and then, at page 609 of 35 ITR it was held as under:

...it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the courts in tax proceedings. It would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the border line that cause difficulty. If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realisation of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the character of such transactions several factors are treated as relevant. Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Affirmative answers to these questions may furnish relevant data for determining the character of the transaction. What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold? If the commodity purchased is generally the subject-matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment. Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? Were they similar to the operations usually associated with trade or business? Are the transactions of purchase and sale repeated? In regard to the purchase of the commodity and its subsequent possession by the purchaser, does the element of pride of possession come into the picture? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of transactions alleged to be in the nature of trade. In considering these decisions it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction; and so, though we may attempt to derive some assistance from decisions bearing on this point, we cannot seek to deduce any rule from them and mechanically apply it to the facts before us.

In this connection it would be relevant to refer to another test which is some times applied in determining the character of the transaction. Was the purchaser

made with the intention to resell it at a profit? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no halfway house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test distinction will have to be made between initial intention to resell at a profit which is present but not dominant or sole; in other words cases do often arise where the purchaser may be willing and may intend to sell the property purchased at profit, but he would also intend and be willing to hold and enjoy it if a really high price is not offered. The intention to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention is no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. We thus come back to the same position and that is that the decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule, principle or test and must in every case depend upon all the relevant facts and circumstances.

12. Then in final concluding para, after recapitulating the relevant facts of the case, it was found, that the purchase was the first step taken by the appellant therein in execution of the well considered plan, to acquire open plots near the mills, and the whole basis for the plan was to sell the said lands to the mills, at a profit, and then the subsequent conduct of the purchaser was considered, and after appreciating the totality of attending circumstances, it was found to be a series of transactions, undertaken by the appellant therein, in pursuance of the scheme, and it was after the appellant had consolidated its holding, that at a convenient time the land was sold. The appellant was found to be managing agent of the mill, who was in a position to influence the mill to purchase its properties, which cannot be said to be unreasonable. Thus, in our view, in view of the principle propounded therein, and on the facts of that case as considered, it is clear, that in order to arrive at a conclusion, as to whether it is to be taxed as capital gain or the transaction is to be treated to be an "adventure in the nature of trade", things cannot be put in any strait jacket formula, and it was dependent upon the facts and circumstances of each case, to be decided on the basis of relevant considerations.

13. In our view, one of the most significant considerations would be, the regularity of transaction of purchase and sale. Mere fact that there was a series of transactions of sale only, by selling the part of the whole land, purchased in

one go, or purchased once upon a time, in piecemeal, would not render the activity of sale to be an "adventure in the nature of trade". In the present case, there is nothing to show that the land was purchased with the intention to sell at a profit, or with requisite intention, to bring it within the parameters of "stock-in-trade". It is not shown that the assessee is a regular dealer in real estate. It appears, that the land was purchased in 1970, which was under cloud of land ceiling laws, and after that cloud was cleared, and other adjoining lands had been developed, and since the land was not yielding any return, it was decided to be sold in piecemeal, by earmarking plots, but then nonetheless it would remain a disposal of the capital asset only, and not a "transaction of any "stock-in-trade" so as to be described as "adventure in the nature of trade". Obviously therefore, it is liable to be taxed only, as the capital gain.

14. It is the different story, that the question, as to whether a particular transaction falls within the category of "adventure in the nature of trade", or is merely a transaction of transfer of capital asset, since depends on appreciation of facts, cannot be said to be giving any rise to the substantial question of law, as such, however, since the submissions have been addressed, we have gone through these aspects also.

15. However, we are at one with the findings arrived at by the learned Commissioner, so also the learned Tribunal. The question, as framed, is accordingly answered against the Revenue, and in favour of the assessee.

The appeals are, therefore, dismissed.