
(2007) 01 MP CK 0050
In the Madhya Pradesh High Court

Commissioner of Income Tax

APPELLANT

Vs

Suresh Chand Goyal

RESPONDENT

Date of Decision : 11-01-2007

Acts Referred:

Income Tax Act, 1961 — Section 2, 260A

Citation : (2007) 209 CTR 410 : (2008) 298 ITR 277 : (2007) 2 MPHT 296 :
(2007) 3 MPLJ 60 : (2007) 1 MPLJ 478 : (2007) 163 TAXMAN 54

Hon'ble Judges : P.K. Jaiswal, J;A.K. Gohil, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

This judgment shall govern the disposal of the aforesaid Misc. Appeals as the similar question is involved in all the aforesaid Misc. Appeals.

Revenue has filed these appeals u/s 260A of the Income Tax Act aggrieved by a common order passed by I.T.A. Nos. 1979, 1980 and 1981/Del/1995, on 11-9-2002.

Facts of the case are that the respondent has income from sale of property, agriculture income and income from sale of general goods in the name and style of M/s. Quality General Stores, Sadar Bazar, Guna. The respondent had been adopted by Smt. Mishri Bai and as the adoption matters were referred to the Court, she had decided to gift him some agricultural land vide gift deed dated 2-9-74. The dispute later on was cleared in favour of the respondent. The respondent thereafter took steps for getting this agricultural land received in gift to be diverted for non-agricultural purposes. This effort was started in 1982 and diversion order was received in 1986. Thereafter the land was converted into the plots. As many as 40 plots were carved out in the name of Goyal Colony. The Assessing Officer noted that apart from the approval of map, deposit of tax and other activities for developing them into the plots like making of roads etc. was also taken up and in two out of three assessment years, expenditure has been claimed for such developmental activity. It was also claimed before the AO that

in the same area the respondent had reserved part of land for his own use and it could be said that the activity of selling these plots in different numbers in the different assessment years were an activity which could be taken to the category of "adventure in the nature of trade" and A.O. concluded the matter against assessee. The CIT (A) considering the location of the land, its diversion from agricultural to non-agricultural use and the improvement of the whole town of Guna and the Industrial activities around Gwalior and Bhopal, found that the activity of the assessee in dividing the land into plots and not selling it as a single unit went to indicate that he was carrying on business in real property and it was a business venture. The intention of the assessing was also gathered from his various other activities like "leveling of the land, development of road and drainage" and considering all aspect of the matter, the CIT(A) upheld the order of the AO that the activity of the respondent was in the nature of adventure in trade and business.

In appeal before the ITAT after hearing the learned Counsel for the parties and considering the various decisions particularly in the case of CIT v. A. Mohd. Mohideen 74 CTR (Mad) 129 and also the decisions in the cases of CIT v. Shashi Kumar Agrawal 195 ITR 67 and Bhagirath Prasad v. CIT 139 ITR 918 the ITAT has held that the gain arising out of the sale was not business activity, therefore, the same is not assessable income from business. The learned ITAT has also considered the decision in the case of Smt. Mishri Devi (2007) 184 CTR (MP) 432. The amount of sale proceeds received out of the sale of the plots is the income in the form of "capital gain" and not from adventure in the nature of trade and allowed the appeal and set aside the judgment of AO as well as that of CIT (A), against which the Revenue has filed the aforesaid appeals.

It was submitted on behalf of the appellant/Revenue that the following common substantial question of is involved in all the three appeals:

Whether the Income Tax Appellate Tribunal erred in not affording the finding of the Assessing Officer since evidence showed that the exploitation of assets as carried out by the assessee amounted to an adventure in the nature of trade ?

We have heard the learned Counsel for the parties and perused the evidence and judgment on record. There is no dispute about the facts of the case that the respondent received the land by way of gift deed dated 2-9-1974. Originally, it was a non-agricultural land. When the gift deed was executed, it was an agricultural land and thereafter the respondent got it diverted from agricultural to non-agricultural land. He developed it in a colony in the name of Goyal Colony and in all 40 plots were carved out. The development work of the colony was also undertaken by him, such as, levelling of the land, construction of road and drainage system etc. etc.

Shri R.D. Jain, Senior Advocate, appearing for the Revenue in support of his contention placed reliance on decisions of the Patna High Court reported in 170 ITR 84 and of the Hon''ble Supreme Court reported in Senairam Doongarmall Vs.

Commissioner of Income Tax, Assam, in which Supreme Court held that purchase of land with a view to sell it after developing and dividing it into plots, it is a business adventure, even if it is a single etc.

In reply, the learned Counsel for the respondent placed reliance on a decision of the Delhi Bench, ITAT in the case of the brother of the appellant, Shri Ashok Kumar Kiledar in ITA No. 5452/Del/94. He also placed reliance on the decision of the Jabalpur Bench of ITAT in the case of ITO v. Saraswati Bai Jaiswal, in ITA No. 292/Jab/93 and also placed reliance on the following decisions:

- (1) CIT v. A. Mohd. Mohideen 74 CTR (Mad) 129;
- (2) Commissioner of Income Tax Vs. Shahsi Kumar Agrawal, ;
- (3) Bhagirath Prasad v. CIT 139 ITR 918.

He also placed reliance on the decision of Bombay High Court in the case of Indian Hume Pipe Co. v. CIT (1992) 107 CTR (Bom) 95 and on the decision of Hon"ble Supreme Court in the case of Commissioner of Income Tax, Madras Vs. M/s. Gemini Pictures Circuit Private Limited, and on other decisions. In addition to the aforesaid submissions, the learned Counsel for the respondent also raised an objection that the appeal filed u/s 260A of the Income Tax Act is not maintainable as per the Circular issued by CBDT, dated 27-3-2000, by which monetary limits of Rs. 2.00 lacs have been prescribed for filing the appeal and it has been directed that if the amount of the tax is below Rs. 2.00 lacs, no appeal should be filed by the Revenue and the same shall not be maintainable and placed reliance in support of this contention on the decision of the Bombay High Court in the case of CIT v. Cameo Colour Co. ITR Vol. 254 (2002) Page 565 and Anr. decision of the Bombay High Court in the case of CIT v. Pithwa Engg. Works, I.T. Ref. No. 397 of 1998 and 2005 (1997) CTR 53 and submitted that on the strength of the aforesaid circular of CBDT and in view of the decisions of the Bombay High Court, the appeal filed by the Revenue is not maintainable and the same is liable to be dismissed.

In the case of Commissioner of Income Tax v. A. Mohammed Mohideen (1988) 74 CTR 129 the Division Bench of the Madras High Court has held that:

Plotting and developing of land before sale by itself would not establish that the person concerned was indulging in a trading activity. It may be that for realising the maximum price, he undertakes certain acts which any other owner would undertake. Revenue has to establish by positive evidence that the purchase and sale of property was with the view to earn profits through trading transaction. In the present case, circumstances relied on by Revenue only throws suspicion on the assessee's act of purchasing a property which did not immediately yield income, but there are no materials to further prove that assessee intended to indulge in a trading activity. Transaction of assessee in purchasing and selling the property did not, therefore, amount to an adventure in the nature of trade.

The learned Madras High Court placed reliance on the judgments of the Supreme

Court in the cases of G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, ; K.T.M.T.M. Abdul Kayoom and Another Vs. Commissioner of Income Tax, and Griffiths (Inspector of Taxes) v. J.P. Harrison (Watford) Ltd. (1965) 58 ITR 328 in which observations were made by Lord Denning. (Judgment delivered by Justice S. Ratnavel Pandian, Offg. C.J. as He then was).

In the case of Indian Hume Pipe Co. Ltd. v. Commissioner of Income Tax (1992) 107 CTR (Bom) 95 Shri B.N. Shrikrishna, as He then was held:

Assessee, not engaged in real estate business, having purchased several pieces of land sporadically and sold them mainly in dribbles in different years without developing or making any improvement on them, surplus could not be assessable as business income.

Again, in the case of B. Narasimha Reddy v. Income Tax Officer (1994) 48 TTJ (Hyd.) 329 the Division Bench of I.T.A.T. Hyderabad "A" Bench has held that:

Assessee plotting out his ancestral agricultural land and selling them at the rate of per square yard after getting approval for the lay out from Gram Panchayat. It was held that assessee never dealt in purchase and sale of real estate. Land was capital asset within the meaning of Section 2(14) read with Section 2(1-A) being situated within 8 kms. of municipal limited. Transaction was, therefore, to realise the maximum from out of capital asset. Profits, therefore, not income from adventure in the nature of trade but capital gains.

In the case of Commissioner of Income Tax, Madras Vs. M/s. Gemini Pictures Circuit Private Limited, , the Supreme Court held that:

Property comprising 17 acres, 16 grounds and 825 sq. ft. was situated on Mount Road, Madras. In the sale deed, the land was described as agricultural land. After purchasing the land, the assessee itself constructed two large buildings thereon. The buildings were being used for non-residential purposes. The land was surrounded on all sides by industrial and commercial buildings. No agricultural operations were being carried out on any land nearby. In the face of the above circumstances, the mere fact that vegetables were being raised thereon at the time of the sale or for some years prior thereto did not change the nature and character of the land. Obviously, it was only a stop-gap activity. It was not a true reflection of the nature and character of the land. The land sold during the year of account was not agricultural land in India during the year of assessment and hence not liable to be excluded from the definition of the words "capital asset". The surplus raised on the sale of land was assessable as capital gains.

In the case of Commissioner of Income Tax v. Smt. Saraswati Jaiswal (2003) 184 CTR (MP) 432 the Division Bench of Madhya Pradesh under the facts held that:

Assessee had not purchased the land, but it was received by her as per the will of her late mother. Moreover, she did not sell that land, but it was compulsorily acquired by Development Authority and some plots were received in lieu of compensation on acquisition of Assessee's agricultural land inherited from her

mother constituted capital gains and not profit from adventure in the nature of trade and in such circumstances, held that assessee is liable for capital gain and not for profit from adventure in the nature of trade and the question being finding of fact, no question of law arose for reference.

Considering the aforesaid submissions, we have examined the question involved on the aforesaid fact whether that it is a matter of capital gain or a matter of profits out of the adventure of trading business. In this case, the assessee received some property, which is agricultural land, on gift and thereafter he got it diverted from agricultural to non-agricultural and thereafter developed as many as 40 plots in the name of Goyal Colony and after developing the plots like making roads, providing pipe lines for water drainage system etc., the learned Tribunal has held that the activity is not in the nature of adventure in trade and commerce and set aside the order of AO as well as CIT (A).

Considering the aforesaid facts and circumstances of the case, we are also of the view that the selling of own land after plotting it out in order to secure better price, is not an adventure in the nature of trade or business. The word "business" has been defined u/s 2(13) of the Income Tax Act, 1961, which includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. An isolated transaction or activity can also be part of business, but to consider the question of business, there must be regular activity of purchasing and selling. In this case, there is nothing on record to show that the land was purchased for the purpose of selling into plots. Basically, it is a gifted land and the land was developed and was sold after converting into the plots with a view to secure the better price, therefore, the isolated activity cannot come within the purview of adventure in the nature of trade and business. The main earning on the sale of the land was in the nature of capital gain and, therefore, not assessable as income from business and this question is essentially a question of fact. There is no dispute that circular issued by C.B.D.T. is binding on the revenue and in view of the aforesaid circular for the tax liability below Rs. 2.00 lacs, the Revenue cannot file appeal. We uphold the objections raised by the learned Counsel for the respondents and hold that the appeal is not maintainable.

The another question raised by learned Counsel for the respondent is about the filing of appeal contrary to the circular issued by the C.B.D.T., according to which, the appeal u/s 260A of the Income Tax Act on the tax effect of less than Rs. 2.00 lacs should not be filed by the Revenue and placed reliance on the decision of the Bombay High Court in the case of CIT v. Camco Colour Co. (supra). Learned Counsel for the respondent also relied upon the decision of the Supreme court in the cases of Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, ; Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, and K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , to contend that the circular issued by the Central Board of Direct Taxes is binding on all the officers and Commissioners and appeal

or reference contrary to the constructions issued in the Circular will not be considered by the Courts and the Division Bench of the Bombay High Court was satisfied that the Board has taken a policy decision not to file appeal in a type of case in hand and the same is binding on the Revenue and in the result the appeal was dismissed following the circular. The similar view was taken by the Division Bench of the High Court of M.P. in the case of Assistant Commissioner of Income Tax v. Aradhana Oil Mills (2002) 30 ITC 446 and following the circular of CBDT, the appeal was dismissed.

As concluded by us in the preceding paras that the activity of the respondent was not in the nature of adventure of trade or business, but it is in the nature of a capital gain. Learned Counsel for the respondent submitted that he has already filed Return for assessment under the capital gain and the authorities are free to take appropriate steps in this regard and may assess the Return in accordance with law. In view of the aforesaid submission, when the matter is already pending for assessment under capital gain, no case is made out for any further direction in the matter. Since we have held that the question involved in all the appeals is essentially a question of fact, therefore, we hold that no substantial question of law is involved in these appeals for consideration by this Court. We have also held that under the circular the Revenue is not entitled to file the appeal. Accordingly, all the three appeals are dismissed as held above.