

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A', BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER
AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

**ITA Nos.596 (Bang)/2013 & 42(Bang) 2015
(Assessment years : 2008-09)**

M/s Embassy Brindavan Developers,
1st Floor, Embassy Point,
No.105, Infantry Road,
Bangalore-560 001

AABFE7944G

Appellant

Vs

The Commissioner of Income Tax,
Bangalore-IV,
Bangalore

Respondent

**Assessee by : Shri G. S. Sitaraman, CA
Revenue by : Shri G.R.Reddy, CIT -DR-I**

**Date of hearing : 17-04-2017
Date of pronouncement : 21-04-2017**

ORDER

PER SHRI A.K.GARODIA, AM

Out of this bunch of two appeals, which are filed by the assessee for the same assessment year, it is seen that one appeal is directed against the order passed by the ld. CIT, Bangalore-IV, Bangalore dated 05-03-2013 passed by him u/s 263 of the IT Act, 1961 and the remaining appeal is directed against the order of the ld. CIT(A)-V, Bangalore dated 12-09-2014 and this appeal is arising out of the

assessment order passed by the AO u/s 143(3) r.w.s.263 of the IT Act, 1961. Both these appeals were heard together and are being disposed of by this common order for the sake of convenience.

2. First we take up appeal of the assessee arising in course of proceedings u/s 263 of the IT Act i.e. in ITA No.5969B)/2013. The grounds raised by the assessee in this appeal are as under;

“1. The CIT, Bangalore-IV erred in both in law and on the facts of the case in setting aside the assessment.

2. He erred in holdings that the purchase and sale of land should be treated as an adventure in the nature of trade and not as capital gains.

3. He failed to appreciate that AO has assessed it as capital gains, after considering all the material furnished by the appellant during the assessment and that, therefore, provision of Sec.263 would not apply.

4. The appellant therefore, prays that the order passed u/s 263 may be annulled and that the assessment order may be restored”.

3. It was submitted by the ld. AR of the assessee that on page-10 of the paper book is the copy of notice dated 09-08-2010 issued by the AO in course of original assessment proceedings and as per point no.8 & 9 of this notice, a query was raised regarding the details of LTCG along with copy of purchase & sale deeds and the assessee was also asked to provide proof of expenses incurred on transfer of assets for earning capital gains. At this juncture, the Bench wanted to know as

to whether any query was raised by the AO on this aspect of the matter as to whether this income is assessable under the head "*Income from capital gains or income from business*". In reply, it was submitted by the ld. AR of the assessee that no such specific query was raised by the AO but he examined the claim of the assessee regarding the LTCG declared by the assessee in the return of income and therefore, a view has been formed by the AO which is a possible view and therefore, the ld. CIT cannot replace his own view in place of the view of the AO by exercising his powers u/s 263 of the IT Act, 1961. In support of this contention, he placed reliance on the following judicial pronouncements;

- 1) CIT Vs Kelvinator India Ltd. 256 ITR 1 (Del.)
- 2) Malabar Industrial Co. Ltd. Vs CIT 243 ITR 83 (SC)

4. As against this, the ld. DR of the revenue supported the order of the ld. CIT. He also submitted that it is noted by the CIT in para-8 of his order that the property in question was claimed as stock in trade in previous years and a finding has been given by the CIT that as per the provisions of the Act, stock in trade cannot be considered as a capital asset and therefore, a profit on sale of land in question cannot be assessed as capital gain. He has also drawn our attention to para-11 of the order of the ld. CIT and pointed out that in this Para, it is noted by the ld. CIT that the assessment order does not speak about the exact nature of the expenses to the tune of Rs.13,01,77,300/- claimed out of the capital gains offered to tax which is marked as Annexure-3 in the

assessment order. The Bench wanted to see Anneuxre-3 and in reply, ld. AR of the assessee submitted a copy of the same as per which it is seen that these expenses include Rs.1099.98 lakhs being compensation paid to Sanjay Godhawath, Rs.127.85 lacs being interest paid to Brindavan Beverages Pvt. Ltd., Rs. 90,000/- being professional charges to Anup Shah, Rs.11.24 Lacs being professional charges to Ahir Consultancy, Rs.33.71 Lacs being brokerage to Daulat Chhabria and Rs.28.09 Lacs being brokerage to Sadhawani International.

5. He also placed reliance on the following judicial pronouncements:-

- a) Rampyari Devi Saraogi Vs CIT 67 ITR 84(SC)
- b) CIT Vs Infosys Technologies Ltd. 341 ITR 293(Kar.)
- c) Swarup Vegetable Products Vs CIT 187 ITR 412(Alld.)
- d) Malabar Industrial Co. Ltd. Vs CIT 243 ITR 83 (SC)

6. We have considered the rival submissions. We find that there is no dispute on this aspect that the property in question was always shown by the assessee in the previous years as stock-in trade and this is not the case of the assessee that at any point of time before the sale of such stock in trade, it was converted into capital asset because if that is the case then it has to be shown then on the date of such conversion, profit earned by the assessee till the date of conversion being the market value of property on that date and cost of property has to be assessed as business income and only further accretion in

value of property after such conversion can be taken as capital gain. In the present case, there is no such claim of the assessee regarding conversion of stock in-trade in to capital asset. The claim of the assessee is this that the property in question was no doubt shown as stock-in trade in all the previous years but because no expenses were incurred and no step was taken to commence the business of dealing in real estate, the business has not been commenced and therefore, the stock-in trade has to be construed as capital asset from day one. We find no merit in this claim of the assessee because as per the P&L account for the year ending 31-03-2007 available on page-20 of the paper book, the assessee has incurred an expenditure of Rs.267,540/- on account of professional and consultancy charges and the same was shown as net loss for that year. As per the details of expenses of Rs.13,01,77,300/- in Annexure-3 brought on record and which is referred to by the Id. CIT in para-11 of his order, it is seen that this includes professional charges of Rs.12,13,600/- out of which a part of Rs.2,67,540/- was incurred during the FY 2006-07 which was claimed as business expenses in that year. As per schedule Annexed to balance sheet as on 31-03-2005 available on page-29 of the paper book, the value of land under the heading 'inventories' is shown at Rs.2,64,30,250/- and as per schedule-3 annexed to balance sheet as on 31-03-2006 available on page-25 of the paper book, the value of land under heading 'inventories' is shown at Rs.2,69,63,010/- which means that there is addition of Rs.5,32,760/- in the value of land

during financial year ending on 31-03-2006. Hence, it is seen that this contention is not factually correct that no expenses were incurred by the assessee in respect of land acquired during the financial year 2004-05. This contention being factually incorrect, no discussion is called for in respect of various judgments cited by Id.AR of the assessee in support of this contention that when no expense were incurred in respect of land, it cannot be considered as stock-in trade and it should be accepted as capital asset.

7. Now, we examine the applicability of the judgment of the Hon'ble Apex Court rendered in the case of Malabar Industrial Co. Ltd (Supra) on which reliance has been placed by both sides. In para-10 of this judgment, it is noted by the Hon'ble Apex Court that the AO had accepted the entry in the statement of account filed by the assessee in the absence of any supporting material and without making any enquiry and under these facts, it was held that the assessment order passed by the AO was erroneous. In the present case also, no enquiry was made by the AO on this aspect that whether the income in question is assessable under the head "*Business income or under the head capital gains*" and therefore, in our considered opinion, this judgment of the Hon'ble Apex Court is squarely applicable and by respectfully following this judgment of the Hon'ble Apex Court, we hold that there is no infirmity in the order passed by the CIT u/s 263 of the IT Act, 1961.

8. In the result, appeal of the assessee in the proceedings u/s 263 of the IT Act is dismissed.

9. Now, we take up the second appeal of the assessee for the same year in the proceedings u/s 143(3) r.w.s. 263 of the IT Act, 1961.

It was submitted by the ld. AR of the assessee that as per the impugned order passed by the ld. CIT(A), it is held by him that as per order passed by the ld., CIT u/s 263 of the IT Act, a categorical finding has been given that the receipts cannot be assessed as capital gains in the facts of the present case and it has to be assessed as profits and gains from business and profession and therefore, in view of conclusive finding of CIT in the order passed by him u/s 263 of the Act, this appeal of the assessee is not admissible and not maintainable. Thereafter, he submitted that in the order passed by ld. CIT u/s 263 of the Act, he has not decided the issue regarding taxability of this income under the head "*income from business and profession*". He has set aside the assessment to the AO for re-doing the same and therefore, the issue on merit has to be decided by the ld. CIT(A) and since this has not been done by the ld. CIT(A), the matter has to be restored back to his file for decision on merit.

10. The ld. DR of the revenue supported the order of the ld. CIT(A).

11. We have considered the rival submissions. We find that the ld. CIT(A) has followed the judgment of the Hon'ble Madras High Court

rendered the case of CIT Vs Geo Industries & Insecticides (I)Pvt. Ltd 234 ITR 541 and the relevant portion of this judgment has been reproduced by the ld. CIT(A) in his order. As per the same, in that case, the Commissioner in his order passed u/s 263 of the Act has set aside the assessment order for two years i.e. 1974-75 & 1975-76 and directed the ITO to make a fresh assessment in accordance with the law so as to exclude the losses of the Cashew Department and Hessain Department, if any, after giving adequate opportunity to the assessee. Hence, it is seen that as per the facts of that case, there was specific direction to ITO by the ld. CIT to the effect that the AO has to exclude losses of Cashew Department and Hessain Department, if any, after giving adequate opportunity to the assessee. Hence, it is seen that in that case, the direction to the AO was specific for exclusion of losses for two departments and only for the purpose of verifying the actual amount of losses of these two divisions, the AO was required to quantify after giving opportunity to the assessee. In the present case, there is no such specific direction by the ld. CIT to the AO and the direction of the CIT in the present case is as under;

“ I hereby cancel the assessment order and set aside the assessment thus made for re-doing the same.”

12. In addition to this direction, the ld. CIT has given some other directions also that the AO should verify the veracity of compensation

claimed to have been paid to Shri Sanjay Godhath. Hence, the facts being different, this judgment of the Hon'ble Madras High Court followed by the Id.CIT (A) is not applicable in the present case in our humble opinion. We therefore, set aside the order of the Id. CIT(A) and restore the matter back to his file for a decision on merit after affording adequate opportunity of being heard to both sides.

13. In the result, the appeal of the assessee in ITA No.596(B)/2013 is dismissed and the second appeal of the assessee in ITA No.42(B0/2015 is allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

(VIJAY PAL RAO)
JUDICAL MEMBER

Place: Bangalore:
D a t e d : .04.2017

am*

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

(A.K. GARODIA)
ACCOUNTANT MEMBER

By order, AR, ITAT, Bangalore

1. श्रुतलेख की तारीख.....
DATE OF DICTATION.....
2. तारीख, जिस पर टाइप किया हुआ मसौदे, संबंधित सदस्य के सामने रखा गया है
DATE ON WHICH TYPED DRAFT IS PLACED BEFORE THE DICTATING MEMBER.....
3. तारीख जिस पर अनुमोदित मसौदे व. निजी सचिव/निजी सचिव के पास वापस आए
DATE ON WHICH THE APPROVED DRAFT COMES TO THE PS/Sr.PS.....
4. घोषणा के लिए आदेश संबंधित सदस्य के सामने रखने की तिथि
DATE ON WHICH THE ORDER IS PLACED BEFORE THE DICTATING MEMBER FOR PRONOUNCEMENT.....
5. आदेश नि.सचिव/व.नि.सचिव के पास वापस आने की तिथि
DATE ON WHICH THE ORDER COMES BACK TO THE PS/Sr.PS.....
- 6 आदेश अपलोड करने की तिथि
DATE OF UPLOADING THE ORDER ON WEBSITE.....
7. अगर अपलोड नहीं किया तो, उसका कारण
IF NOT UPLOADED, FURNISH THE REASON FOR DOING SO.....
8. बेंच लिपिक के पास फाइल जाने की तिथि
DATE ON WHICH THE FILE GOES TO THE BENCH CLERK.....
9. आदेश ज़ेरोक्स/पृष्ठांकन के लिए भेजने की तिथि
DATE ON WHICH ORDER GOES FOR XEROX &ENDORSEMENT.....
10. फाइल मुख्य लिपिक के पास जाने की तिथि
DATE ON WHICH THE FILE GOES TO THE HEAD CLERK.....
11. आदेश पर हस्ताक्षर के लिए फाइल सहायक रजिस्ट्रार के पास जाने की तिथि
THE DATE ON WHICH THE FILE GOES TO THE ASSISTANT REGISTRAR FOR SIGNATURE ON THE ORDER.....
12. अधिकरण आदेश के प्रेषण के लिए फाइल प्रेषण विभाग में जाने की तिथि
THE DATE ON WHICH THE FILE GOES TO DESPATCH SECTION FOR DESPATCH OF THE TRIBUNAL ORDER.....
13. आदेश की प्रेषण की तिथि
DATE OF DESPATCH OF ORDER.....