

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.568/Ind/2016
Assessment Year: 2011-12**

Smt. Sangeeta Nayar R/o J-46, Upper Ground Floor Saket, New Delhi (Appellant)	बनाम/ Vs.	ITO 1(2) Bhopal (Revenue)
P.A. No.AAKPN3103B		

Appellant by	Shri Ashish Goyal & Shri N.D. Patwa, A.Rs
Respondent by	Shri P.K. Mishra, DR
Date of Hearing:	03.10.2018
Date of Pronouncement:	27.11.2018

आदेश / O R D E R

PER KUL BHARAT, J.M:

Appeal by the assessee is directed against order of the
CIT(A)-1, Bhopal dated 29.2.2016 pertaining to the

assessment year 2011-12. The assessee has raised following grounds of appeal:

1. *That the learned first appellate authority has erred in arbitrarily confirming the addition of Rs.3,91,250/- made by the learned assessing authority by treating the same as undisclosed short term capital gain which is neither correct nor justified therefore same is liable to be deleted.*
2. *That the learned first appellate authority has erred in arbitrarily confirming the addition of Rs.42,30,092/- made on account of sale proceed of the flats as business income by applying the provision u/s 45(2) of the I.T. Act 1961 and imposing the tax on the same which is neither correct nor justified therefore same is liable to be deleted.*
3. *That the learned first appellate authority has erred in arbitrarily confirming the addition of Rs.20,43,000/- made by the learned assessing authority by disallowing the expenses u/s 40A(3) of the I.T. Act, 1961 which is neither correct nor justified therefore same is liable to be deleted..*

2. Briefly stated facts are that case of the assessee was picked up for scrutiny assessment and the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') vide order dated 11.2.2014. The assessee derived its income from land, interest on savings. While framing the assessment, the A.O. made addition on account of undisclosed short term capital gain of Rs.3,91,250/- undisclosed profit from sale of flats of Rs.42,30,092/- and disallowance u/s 40A(3) of the Act of Rs.20,43,000/-.

3. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A) who after considering the submissions, dismissed the appeal of the assessee. Now the assessee is in appeal before this Tribunal. Ground Nos.1 to 3 of this appeal are inter connected. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. For the sake of clarity, submissions of the assessee are reproduced as under:

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1. **FACTS OF THE CASE :**

1. That appellant is married individual derived income rent interest and submitted the return of his income on its basis.
2. That during the period under appeal appellant constructed the house on his own residential plot which was acquired on 02.06.2008 and sold the same and received the part consideration the activity is treated by the learned lower authority as an adventure in the nature of trade and presumed the entire receipt out of the business activity.
3. That learned lower authority also determined the short term capital gain amounting Rs. 3912550/- and imposed the tax on the same.
4. That learned lower authority also made addition in the total income by disallowing various expenses amounting Rs. 20,43,000/- incurred by the appellant in construction of house by holding the view that appellant violated the provisions of Sec 40(A)(3) of the I.T.Act 1961 and determined

the total income on a higher side and created a heavy demand of tax amounting Rs. 2846970/- therefore being aggrieved of the above order the appeal is submitted before the learned CIT(A)-1 Bhopal which is arbitrarily rejected and the additions made by the learned lower authority were conformed therefore being aggrieved of the above mentioned order the present appeal is submitted before your honor for adjudication.

2. **GROUND OF APPEAL:**

1. That as regards the 1st ground of appeal related to the determining the value of Short Term Capital Gain amounting Rs. 391250/- it is submitted that the said plot was acquired in the year 02.06.2008 and the construction on the same started from 01.09.2008 after the approval of map by obtaining building permission in her name with the purpose to construct the house for her own use thereafter due to the change of need some modification were required which cannot be made without dismantling of the building therefore it was decided to sale the same ,but appellant could not get the purchaser who could purchase the whole property, however 9 families agreed, therefore with the intention to obtain the proper consideration slight modifications were made as per their need.
2. That the property neither sold nor transferred to the prospective buyer and remain in the possession of the appellant therefore as per the provision of the transfer of property act the it cannot be hold that the assets is transferred during the period under consideration here it is pertinent to mention that the construction of the building is not completed as appellant out of the total payment of Rs. 63,54,000/- made the payment of Rs. 25,45,000/- only in the year 2011.12 against the construction work copy of the chart along with the supporting vouchers were submitted at the time of assessment and the same is again submitted herewith for kind perusal and marked as **ANNEXURE A-1** therefore the determination of the sale value and cost price of the house property hypothetically without any basis is neither correct nor justified and due to this reason the quantum of capital gain determined become baseless at the same time the property (Capital asset) is not transferred, Copy of the possession letter is submitted along with the completion certificate were submitted at the time of assessment and the

copy of the same is again submitted herewith for kind perusal and marked as **ANNEXURE A-2 to A-3 & A-4** but the same were not considered at the time of assessment and also at the time of first appeal therefore the calculation and determination of capital gain and imposing the tax on the same is neither correct nor justified also against the existing fact.

3. That as regards the execution of the sale deed it is submitted that under signed appellant has executed the sale deed merely with the purpose to facilitate the purchaser to obtain the funds from the financial institution as per their request but the actual physical possession is handed over as per the possession letter issued after the completion of construction therefore learned lower authority has erred in holding the view that appellant transferred the assets during the period under consideration, mere execution of the sale deed is not sufficient to establish the date of transfer as the document executed is not supported with the conduct and the actual physical possession remain with the seller therefore the capital gain will be calculated from the date of actual transfer.
4. That as regards the 2nd ground of appeal related to the application of the provision of sec 45(2) of the I.T.Act1961 for treating the same as business income and making addition of Rs. 42,30,092/- in the total income; In this reference it is submitted that applicant derived income from rent, interest and also from capital gain, the said plot was acquired in the year 02.06.2008 and the construction on the same is started from 01.09.2008 after the approval of map ,here it is pertinent to mention that applicant obtained the building permission in her name with the purpose to construct the house for their own use and started the construction thereafter copy of the building permission is already submitted at the time of assessment and the same is again submitted herewith for kind perusal and marked as **ANNEXURE A-5** due to the change of need some modification were found necessary which require dismantling of the building therefore it is decided to sale the same by making slight modification as a result the same the properties is sold to 9 families with the purpose to get the suitable consideration to acquire the better property for her own use the property is never converted in to stock in

trade as the same is not sold with the motive of business the ratio is decided in the following decisions:

- ii. **CIT Vs. Sushila Devi Jain (2003)259 ITR 671(P&H)**
- iii. **CIT Vs. Shashi Kumar Agrawal (2003)131 Taxman823(All)**

5. That appellant sold the property for the first time and the plot was not acquired with the motive to sale the same with the motive to earn profit as per the return of earlier years appellant derived income from rent & interest only accordingly appellant never evolve in construction and sale of houses in the past therefore in the above facts and in circumstances it is not justified to invoke the provision U/S 45(2) of the I.T.Act 1961 against the appellant by treating the sale proceed as business receipt and determined the income under the head of business income therefore the addition in this account is neither correct nor justified and the same is liable to be deleted.

6. That as regards the 3rd ground of appeal related to the addition of Rs. 20,43,000/- in the total income by disallowing the expanses due to violation of provisions contained U/S 40A(3) of the Intact 1961 it is submitted that the restriction U/S 40 & 40 A are imposed in the case of a person derived income from business of profession and claims deduction on account of expanses permissible U/S 30 to 38 only, while in the present case appellant is not dealing in the business activity, at the same time the activity is determined as an adventure in the nature of trade or commerce as mentioned in Sec 45(2) of the I.T.Act 1961 therefore the disallowance of expanses by applying the provision U/S 40A(3) of the ITAct 1961 is neither correct nor justified in the light of the fact that this is an isolated single transaction not pertaining to business; and the addition in the total income in this account is liable to be deleted. / /

Submitted

4. He submitted that authorities below have failed to appreciated the fact that assessee is not engaged into any business of construction/sale/purchase of house property. The revenue has not brought any material on record suggesting that the assessee was engaged in any kind of business. In fact, initially, the assessee wanted to construct house for self-occupation and the construction plan was duly filed for approval of local authority. But due to change in circumstances and compelling needs, assessee decided to dispose of the property. Owing to the fact that no single buyer was available and also to fetch a better price, the property was sold by constructing flats/units. This act from no stretch of imagination can be treated as adventure in nature of trade and commerce and provisions of section 45(2) of the Income Tax Act, 1961 (hereinafter called as 'the Act') have been wrongly invoked by the A.O. Same cannot be applied under the facts of the present

case. In support of this, Ld. Counsel relied upon the case laws as mentioned in the written submissions. Per contra, Ld. D.R. vehemently opposed the submissions of the Ld. Counsel for the assessee and supported the orders of the authorities below. He submitted that even a single transaction can be treated as adventure in the nature of trade and commerce. He submitted that the facts and circumstances surrounding the impugned transaction clearly prove it being an act of adventure in the nature of trade and commerce. However, Ld. A.R. in the rejoinder submitted that if this yardstick is to be applied, then every transaction would be treated as adventure in the nature of trade and commerce. Ld. Counsel submitted that it was purely for the purpose of getting better price of the capital asset. He further contended that from the material placed on record, the intention of the assessee can be very well inferred that the assessee intended for self-use and

occupation of the property. But due to change in the circumstances and compelling reason, the assessee had to dispose it off. This does not mean that assessee was engaged in the business.

5. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The only issue germane to dispute is whether the transaction in question is in the nature of adventure in trade and commerce as treated by the A.O. The case of the assessee is that she wanted to construct house for self-occupation but due to change in the circumstances, she had to dispose of the property as no single buyer was available and in order to fetch higher consideration, the property was constructed into flats and sold to different individuals. It is averred the assessee is not involved at any point of time in the business of building construction, except this transaction, no such other

transaction is made previously or subsequently. Under these undisputed facts, revenue was not justified to treat the same as adventure in the nature of trade and commerce. Whether a particular transaction is adventure in the nature of trade and commerce is to be decided on the principles laid down by various judicial pronouncements, the Hon'ble M.P. High Court in the case of CIT Vs. Suresh Chand Goyal 298 ITR 277 (MP) has decided the issue that whether an agricultural land converted to non-agricultural land sold after developing 40 plots was business activity or sale of capital asset. The Hon'ble High Court after considering the various case laws held as under:

14. 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 pipelines for water drainage system, etc., the learned Tribunal has held that the activity is not the nature of adventure in trade and commerce and set aside the orders of Assessing Officer as well as CIT(A).

15. 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 under section 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 cannot be part of business. 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 his income from business and this question is essentially a question of fact. There is no dispute that circular issued by CBDT is binding on the revenue and in view of the aforesaid circular for the tax liability below Rs. 2 lakhs, the revenue cannot file appeal. We uphold the objections raised by the learned counsel for the respondent and hold that the appeal is not maintainable.

16. The another question raised by learned counsel for the respondent is about the filing of appeal contrary to the circular issued by the CBDT, according to which, the appeal under section 260A of the Income-tax Act on the tax effect of less than Rs. 2 lakhs should not be filed by the revenue and placed reliance on the decision of the Bombay High Court in the case of *Camco Colour Co.* (*supra*). Learned counsel for the respondent also relied upon the decision of the Supreme Court in the cases of *Navnit Lal C. Javeri v. K.K. Sen*, AAC [1965] 56 ITR 198, *Ellerman Lines Ltd. v. CIT* [1971] 82 ITR 913 and *K.P. Varghese v. ITO* [1981] 131 ITR 597¹, to contend that the circular issued by the CBDT is binding on all the officers and CIT's and appeal or reference contrary to the instructions 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 MP in the case of *Asstt. CIT v. Aradhna Oil Mills* [2002] 30 ITC 446 and following the circular of CBDT, the appeal was dismissed.

17. 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 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. 1

6. The Ld. Counsel has also placed reliance on judgement of Hon'ble High Court of Punjab & Haryana rendered in the case of CIT Vs. Sushila Devi Jain (2003) 259 ITR 671, wherein the Hon'ble High Court has held as under:

“2. We have heard the learned senior counsel for the department and find no ground to entertain the appeal. The Tribunal and the Commissioner (Appeals) have both rightly held that the sale of land by the assessee was not in the nature of business because there is no continuous activity. It is true that even a single venture could be regarded as a trade or business but there have to be circumstances which should give rise to such a conclusion. There are no such circumstances existing in the present case. What is necessary is to find out the intention of the assessee at the time of the purchase of land. In the case before us, the land was never purchased by her. She acquired the same on the basis of a will on the death of her husband. She sold the same in parcels because the huge area could not be sold in one go. Such an activity, in our opinion, cannot amount to trade or business within the meaning of the Act. Both the Commissioner and the Tribunal have followed the correct principles of law and no factual or legal error could be pointed out by the Department. In this view of the matter, we are of the opinion that no substantial question of law arises from the order of the Tribunal so as to warrant the entertainment of this appeal.”

7. In the written synopsis by the assessee, it is treated that the income from sale of all the 9 flats was Rs.39,62,290/- only. The figures at paper book page 5 are undisputed by the revenue. The income of Rs.6 lakhs on which registry was done during the year, even if taken as per the computation of the assessing officer should be

Rs.26,66,597/-. The A.O. has come at the figure of Rs.66,66,852/-. It is also stated that if the contention of the A.O. that land was converted into stock entry is adopted, the project would be complete only when the possession was handed over. Completion contract method is a well recognised method for computation of profit. It is also stated that the authorities below assumed that possession is invariably handed over at the time of the sale deed. It is stated that the possession was handed over subsequently. It is also stated that the calculation is based on pure guess work. We find some merit in the contention of the Ld. Counsel for the assessee in view of the judgement of the jurisdictional High Court and the facts placed before us, we deem it proper that the assessing officer should give a specific finding with regard to the contentions of the assessee after conducting proper enquiry. The impugned order is set aside. The A.O. is

hereby directed to frame de-novo assessment. The grounds raised in this appeal are allowed for statistical purposes.

8. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order was pronounced in the open court on 27.11.2018.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 27/11/2018
VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore