

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 6534/MUM/2018
Assessment Year: 2013-14**

Haresh Khiamal Nanwani,
1017/1018, Dalamal Tower,
Free Press Journal Marg, 211,
Nariman Point, Mumbai-
400021.

PAN No. ADGPN9628J

Appellant

Vs. ACIT-17(1), Room No. AB-117,
Staff Room-135, Aayakar Bhavan,
Mumbai-400020.

Respondent

Assessee by : Shri Satish R. Mody, AR
Revenue by : Smt. Jothilakshmi Nayak, Sr. DR

Date of Hearing : 27/11/2019
Date of pronouncement : 27/12/2019

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-56, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. The Ld. CIT erred in confirming the order of ACIT in treating the sale of investments in immovable properties as a business activity and adding the gains/loss on the same to the business income of the appellant, in spite of the appellant holding the flats for more than 36 months.

2. The ACIT erred in initiating penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income and for concealing the income.

3. Briefly stated, the facts of the case are that the assessee filed his return of income for the assessment year (AY) 2013-14 on 25.09.2013 declaring total income of Rs.28,20,630/-. He revised his computation of total income and such revised return of income was filed on 31.03.2015 declaring total income at Rs.46,83,050/-, claiming current year loss of Rs.1,94,05,149/-.

The assessee is engaged in the business of dealing in shares and securities and jewellery during the year under consideration. Also the assessee sold three flats and a parking lot during the financial year (FY) 2012-13. The said assets were appearing under 'Investments' in the balance sheet of the assessee. During the course of assessment proceedings, the AO asked the assessee to explain as to why income from sale of property which has been done in a systematic, repetitive manner should not be treated as income from business and the profit working be modified accordingly. In response to it, the assessee filed a reply stating as under:

"Assessee had purchased some flats in Financial Year 2007-08 and shown under the head "Investments" in his Financial Statements. Further every year assessee offered the rental income from those flats under the head Income from house property. After holding it for the period of more than 2 years and 3 years, he sold the flats in accordance with the need of funds.

Please note that the assessee is not involved in any frequent and systematic buying and selling of flats on a regular basis. Assessee has held the flats for longer period of 2 years, 3 years and even more than that. Had it been motive to earn short term business profit, assessee wouldn't have held the flats for so many years."

However, the AO was not convinced with the above explanation for the reason that the assessee had not purchased fully constructed flats but had booked flats in FY 2007-08, which were proposed to be constructed later on; that only agreement to purchase/sale was entered on 27.03.2008 and property was fully constructed much later ; promoter had incorporated Kalpataru Estate Building 1B & 1C Co-operative Housing Society Ltd. on 15.04.2010 of which the assessee got shares on 14.03.2011 in relation to above said flats. It is further found by the AO that when the construction of flats was fully completed during FY 2010-11, the assessee transferred or sold those assets within a short span of approximately two years from getting its ready for occupation. Further, the assessee had sold three flats for Rs.5,06,07,200/- and four flats for Rs.6,33,01,000/- during FY 2010-11 and 2011-12 respectively for which agreements to purchase were also entered on 27.03.2008. All the flats sold during FYs 2010-11, 2011-12 and 2012-13 are flats of the same Project/Society i.e. Kalpataru Estate Building 1B & 1C Co-operative Housing Society Ltd. Also the assessee is holding four more flats as on 31.03.2013 in the same Society.

In view of the above facts observed by him, the AO came to a finding that the assessee had purchased those flats and the same being repetitive is nothing but business activity. Accordingly, he worked out the profit and made an addition of Rs.41,64,507/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 01.08.2018, the Ld. CIT(A) observed that several flats in bulk were purchased and such bulk purchases can never be for occupation, therefore, at purchase stage itself it is not an investment

and the intention for profit is deeply embedded. Further, it is found by him that the assessee himself is a partner in the firm where he has purchased the flat and he uses his share of credit in capital account to pass journal entries to take credit for the purchase of flat and in fact registration made on 25.03.2008 is without paying any sum to the firm and the journal entry on proceeds was entered on 31.03.2008. Considering the above, the Ld. CIT(A) held that in the instant case the transaction is one where income is to be assessed as profits and gains of business and profession and not capital gains. Accordingly, he confirmed the order of the AO making an addition of Rs.41,64,507/-.

5. Before us, the Ld. counsel for the assessee submits that the assessee had sold three flats during the year and also a parking lot and all these properties were acquired on 27.03.2008; the assessee had offered the income from the above sale under the head "capital gains", as the business of the assessee is dealing in shares and securities and jewellery ; further, the gains offered were long term in nature because the assessee held those flats for more than 36 months and accordingly the indexed cost of acquisition was claimed while claiming the above capital gains as per section 48 of the Act. It is further explained that if the intentions were to deal on a systematic and a repetitive manner, then no businessman will lock his funds for three years for his trading activities; the assessee after selling these flats has not acquired any additional flats by re-investing the sale proceeds of those sold flats ; if the assessee was a dealer, then the assessee would have invested the sale proceeds of those sold flats as a working capital in acquiring the additional flats and the same additional flats could have been sold later on and this cycle could have been repeated again and again. It is clarified by him that the

assessee has acquired a duly constructed property and the construction of those flats was completed in March 2008 itself. Filing a copy of the Occupancy Certificate, it is explained by him that the construction was also completed in 2008 and there was no gains at the booking level. Thus, it is stated by him that the return filed by the assessee should have been accepted and the transaction should not have been treated as business income. Also it is stated by the Ld. counsel that the assessee had sold such flats in earlier years and the Department has accepted the return of income, wherein the assessee has considered gains/loss from sale of such flats under the head 'capital gains'.

6. On the other hand, the Ld. Departmental Representative (DR) referring to the order of the Ld. CIT(A) argues that the flats are sold stage by stage, there is organized thought and decision making in the whole exercise and the transaction is one where income is to be assessed as profits and gains of business and profession and not capital gains. Regarding the claim of the assessee that consistency should be followed taking into account the treatment given in the past to the transaction, the Ld. DR submits that in income tax proceedings, each year is a separate unit and as a general rule the principle of *res-judicata* is not applicable to decisions of income tax authorities, an assessment for a particular year is final and conclusive between the parties only in relation to that year. Thus the Ld. DR submits that the order passed by the Ld. CIT(A) be affirmed.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We refer here to the following computation arrived at by the AO at page 6 of his assessment order :

Flat No.	Date of agreement - purchase (sale) entered by assessee with M/s Habitat	Purchase Cost	Sale Date	Sale value	Commission paid as furnished by assessee	Profit
Flat-91-1B	27.03.2008	1,42,82,000	14.01.2013	1,63,00,000	2,43,585	17,74,415
Flat-92-1B	27.03.2008	1,42,82,060	17.04.2012	1,35,00,000		(7,82,060)
Flat-133-1B	27.03.2008	1,42,82,060	04.02.2013	1,75,00,000	2,45,788	29,72,152
Parking lot	27.03.2008	3,00,000		5,00,000		2,00,000
Total		4,31,46,120		4,78,00,000	4,89,373	41,64,507

It is found that the assessee sold three flats during the year under consideration and also a parking lot and all those properties were acquired on 27.03.2008. The assessee had acquired a duly constructed property and the construction of these flats was completed in March 2008 itself. As evident from the above chart, the assessee entered into agreement to purchase these flats on 27.03.2008. Flat No. 91-IB was sold on 14.01.2013; flat No. 92-IB on 17.04.2012; flat No. 133-IB on 04.02.2013. We find merit in the contentions of the assessee that if the intentions were to deal on a systematic and repetitive manner, then no businessmen will lock its funds for three years for his trading activities.

We further find that the assessee, after selling these flats has not acquired any additional flats by re-investing the sale proceeds of these sold flats.

Also the fact remains that the above assets are appearing under 'investments' in the balance sheet of the assessee.

The principle underlying the distinction between a capital sale and an adventure in the nature of trade were examined by the Hon'ble Supreme Court in *Venkataswami Naidu & Co (G) v. CIT* (1959) 35 ITR 594(SC), where it was held that the character of a transaction cannot be determined solely on the application of any abstract rule, principle or test but must depend upon all the facts and circumstances of the case. Also in *Janki Ram Bhadur Ram v. CIT*(1965) 57 ITR 21 (SC), the Hon'ble Supreme Court held that if the assessee, even at the time of acquisition had a clear intention to resell it, that would be material but not a decisive consideration.

On the totality of the facts and circumstances of the case, we are inclined to agree with the treatment given by the assessee in his return of income as gains/loss from sale of such flats under the head 'Capital Gains'.

8. In the result, the order passed by the Ld. CIT(A) is set aside and the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 27/12/2019.

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER
Mumbai;
Dated: 27/12/2019

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai