

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

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

श्री चन्द्रमोहन गर्ग, न्यायिक सदस्य

तथा

श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL
MEMBER**

AND

SHRI O.P.MEENA, ACCOUNTANT MEMBER

ITA No.170/Ind/2014

Assessment Year: 2008-09

Shri Chandrabhan Singh Choudhary S/O Late Kuber Singh Choudhary, Near Alka Talkies Chhindwara, M.P.	बनाम/ Vs.	DCIT 1(2) Bhopal, M.P.
(Appellant)		(Revenue)
P.A. No.AZOPS3300G		

Appellant by	Shri Pankaj Shah, CA
Revenue by	Shri M. Javed (CIT-DR)
Date of Hearing:	22.03.2017
Date of Pronouncement:	31.03.2017

आदेश / O R D E R

PER CHANDRAMOHAN GARG, J.M:

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax(Appeals)-1, Bhopal [in short 'CIT(A)'], dated 23.12.2013 passed in first appeal No. CIT(A)-I/BPL/IT-558/10-11 u/s 143(3) of the Income Tax Act [(in short ('the Act'))] for the A.Y. 2008-09.

2. The grounds raised by the Assessee reads as follows:

“That on the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax(Appeals)-1, Bhopal erred in conforming that the transaction of sale of land by the assessee was in the nature of adventure in the of trade and not a capital gain transaction as claimed by the assessee in his return and thereby treating Rs.26,84,744/- as business income of the assessee.

2. That on the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals)-1 Bhopal erred in not accepting the assessee’s claim of deduction u/s 54F on account of investment in construction of residential house out of the long term capital gains from the sale of land.”

3. We have heard both the parties and also perused the relevant material placed on the record of the Tribunal, *inter alia*, assessment order, first appellate order along with paper book filed by the assessee spread over 27 pages and report of the Income Tax Inspector dated 25.08.2016 placed on the record by the Ld. Senior DR on 22.03.2017. First of all, we may point out that on the direction of the Tribunal to verify of the status of the land in question measuring 22,364 sq.ft. which was sold by the assessee after diversion, has been placed on record by the Ld. Senior DR and copy of the same was provided to the Ld. Assessee’s Representative(AR). The Ld. AR submitted that the assessee does not want to raise any objection to verification and status report submitted by the Income Tax Inspector dated 25.08.2016 and Ld. Senior DR also submitted that the AO has nothing to say on this report and the same may be taken on record for consideration.

4. The Ld. AR submitted that the appellant is an agriculturist and besides having taxable income as allowances received as MLA he also having agricultural income from own land as well as from the ancestral agricultural land received in family partition long back on 08.09.1970. The Ld. AR further submitted that the impugned own agricultural land situated at village Imalia Bohta was purchased on 03.06.1988 measuring total area of 5.15 hectares and the assessee was continuously using said land for cultivation being the major source of his income. The Ld. AR further submitted that considering his requirements of funds the assessee planned to materialize suitable portion of his investment and accordingly, he get the small part portion of the land measuring 0.201 hectares diverted in 2007 by SDO(Revenue) vide order dated 27.02.2007 for non-agriculture purposes and continued cultivation on remaining portion of land. The Ld. AR further elaborated that out of the total diverted land area of 22,364 Sq. Fts., total saleable area was 21,600 Sq. Ft. which was sold by way of 3 registered sale deeds after leaving the space for road, entire diverted land was sold.

5. The Ld. AR further submitted the diversion of land was carried out only because the areas of land was big in size, finding a buyer to sold out such a big piece of land was tough and on top of that the assessee was no in need of that much money so he decide to divert a limited portion of the land as per his monetary requirements and continue his regular agriculture activities on rest of the major part. The Ld. AR

further submitted that the diverted land being capital asset, the said land transaction is covered under Capital Gains Head as per provisions of the Act, and accordingly, the assessee offered income out of transaction of sale of land to tax as “long term capital gains”. The Ld. AR vehemently pointed out that according to the Assessing Officer the income accrued to the assessee from sale of land gets covered under the head of “profits and gains from Business & Profession” as the transaction carried out by the assessee is an adventure in nature of trade and the assessee failed to justify or substantiate that the land was diverted and sold in pieces with the view to secure better price or in other sense, better realization of his investment.

6. The Ld. AR placing reliance on the various decisions of Hon’ble Supreme Court, Hon’ble High Court and Coordinate Benches of the Tribunal including judgment of **Hon’ble jurisdictional High Court of Madhya Pradesh in the case of CIT v. Suresh Chand Goyal (2008) 298 ITR 277(MP)** submitted that the assessee’s sole activities of sale of land did not constitute business or adventure in nature of trade, and the income arising from sale proceed of the said land was only capital gain. He was further submitted there is no regular activity of selling and purchasing of the land, there is nothing on the record to show that the agricultural land was purchased for the purposes of selling into plots. The land was also not fully developed as required under Town and Country Act. The Ld. AR further submitted that the assessee out of

5.15 hectares of land purchased in 1988, after 19 years simply diverted a pieces of land and sold the same in 3 pieces with the view to secure better price and better realization of his investments.

7. The Ld. AR vehemently pointed out that the only and isolated activity sale of land cannot come within the purview of adventure in the nature of trade and business. Therefore, the earning/income on the sale of land was nothing but 'long term capital gain' and therefore, the assessee correctly and properly offered the same for taxation under the head of "long term capital gain".

8. The Ld. AR further submitted that even the First Appellate Authority did not properly appreciated the totality of the facts and circumstances of the case and dismissed appeal of the assessee by considering irrelevant facts and he wrongly held that impugned transactions of sale of land is in the nature of trade and profits accrued therefrom were assessable as "business profits". The Ld. AR lastly, drew our attention towards para 15 of the judgment of Hon'ble High Court in the case of CIT vs. Suresh Chand Goyal (Supra) and submitted that the word 'business' has been defined under section 2(13) of the Act, which includes any trade, commerce or manufacture or nay adventure in the nature of trade, commerce or manufacture. An isolated transaction or activity cannot be a part of business and thus, as per ratio of this decision the appeal of the assessee may kindly be allowed.

9. Replying to the above, the Ld. Departmental Representative (DR) supporting the assessment order as well as first appellate order contended that the assessee sold 3 plots of land measuring 22,364 sq. ft. after diversion on 27.07.2007 for Rs.27,50,000/- at Chhindwara and income therefrom was wrongly offered to tax as long term capital gain. The Ld. DR submitted that the plot of land was diverted by the order of SDO(Revenue) order dated 27.02.2007 and land was diverted for non-agriculture purposes. The Ld. DR further submitted that after 5 months of diversion on 27.07.2007, the assessee sold entire diverted land in to three plots. Thus, the main intention of the assessee was to cut the plots in sizes and to sale the same in open market on higher prices and he also did so. Therefore, the activity of the assessee getting the land diverted and immediately after diversion selling it into plot was nothing but an activity of adventure in the nature of trade, therefore, the AO was quite justified and correct in treating income from sale of land as “business income” instead of “long term capital gain” as offered to tax by the assessee under the wrong head. The Ld. DR placing reliance on the decision of **Hon’ble High Court of Madhya Pradesh in the case of CIT v. Suresh Chand Goyal, decision in Hon’ble Supreme Court in the case of Raja J. Rameshwar Rao vs. CIT 42 ITR 179 (SC) & decision of Hon’ble Karnataka High Court in case of CIT vs. B. Narasimha Reddy 150 ITR 347(Kar)** submitted that when land is situated in a village, but located within the urbanized area and kept it uncultivated for several years and

after obtaining permission to convert the land for non-agricultural purposes, layouts for house sites were formed some of them were sold, then taking into consideration the cumulative effect of the entire activities undertaken by the assessee for realizing high value of land is nothing to adventure in the nature of trade and business. Therefore, profit arose therefrom on the sale of such land/plots was assessable as “business profits” and the AO was right and quite justified in treating the same as “business income” and thus the first appellate authority uphold the assessment order on correct premises.

10. Placing rejoinder to the above submissions of the Ld. DR, the assessee’s representative(AR) submitted that even in the case of CIT vs. Suresh Chand Goyal (Supra) which has also been relied by the Ld. DR, it has been explicitly held that to consider question of business, there must be regular activity of purchasing and selling of land and there is nothing on the record to show that the assessee is continuously in the activity of purchase and sale of land as an adventure in the nature of trade and business. The Ld. AR strongly pointed out that except impugned transaction on sale of land that too after 19 years of purchase of big land, there is no earlier or subsequent transaction of purchase or sale of land by the assessee during preceding and subsequent period till date. Therefore, sole transaction of sale of land cannot be treated as adventure in the nature of trade business and therefore, the income of the assessee from sale of plots/land cannot be assessed as

“business income” and the same was rightly offered to tax as “long term capital gain” by the assessee.

11. At the very outset, on careful perusal of the decision of Hon’ble High Court of Madhya Pradesh in the case of CIT vs. Suresh Chand Goyal(Supra), we observe that their lordship speaking for the jurisdictional High Court held Thus:

“ 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 nay 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 or 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.

12. In view of above ratio, when we logically analysed the facts and circumstances of the present case, then, first of all, we may point out that on specific query from the Bench the Ld. DR fairly accepted that there was sole transaction of sale of land by the assessee during F.Y. 2007-08 pertaining to A.Y. 2008-09 which was undertaken by the assessee by way of execution for sale deed of three plots on 27.07.2007. It is also not in dispute that the assessee owns various agricultural

land and out of these land the assessee get diverted a piece of land measuring 22,364 sq. ft. on 27.02.2007, by the competent authority i.e. SDO(Revenue), with an intention to liquidate his capital asset/investments on higher price and to satisfy his need of funds. At this juncture, it is also relevant to note that the piece of land which was sold by the assessee was a small portion of total area of 5.15 hectare of land which was purchased by the assessee on 03.06.1988 i.e. about 19 years before the sale of land. There is no another transaction of sale of land by the assessee and as per return of income filed by the assessee for A.Y.2008-09. It is amply clear that the assessee only offered to tax the allowance received by him as Member of State Legislative Assembly and there is no other to taxable income under any head, except exempt agricultural income accrued to the assessee from the agricultural activities under taken on the land owned by him.

13. In view of above, we are unable to agree with the contention of the AO as well as observations of the Ld. CIT(A) that the sale of land immediately after 5 months of diversion is an activity of adventure in the nature of trade and business because as per ratio laid down by Hon'ble High Court of Madhya Pradesh in the case of CIT vs. Suresh Chand Goyal (supra), as reproduced hereinabove, Section 2(13) of the Act, defines the word 'business' which includes any trade, commerce or manufacture or any other adventure or concerned in the nature of trade, commerce or manufacture. Their lordship clearly held that an isolated transactions or

activity cannot be a part of business and to consider the question of business there must regular activity of purchasing and selling. In the present case there is no iota of evidence on the record to show that the assessee was regular in the business of purchase and sale of land or plots, therefore, conclusion drawn by the AO and upheld by the Ld. CIT(A) cannot be held as valid and sustainable as per provisions of the Act, as well as in the light of the ratio laid down by the Hon'ble High Court in the case of Suresh Chand Goyal(supra). Thus, respectfully following the same Ground No.1 of the assessee is allowed, and the AO is directed to treat the income accrued to the assessee from sale of land/plots as "long term capital gain". Accordingly, Ground No.1 is allowed.

14. Ground No.2 of the assessee: Apropos this ground the Ld. AR submitted that the AO as well as Ld. CIT(A) erred in not accepting the assessee's claim of deduction u/s 54F on account of investment in construction of residential house out of the long term capital gains from the sale of land. The Ld. AR submitted that the claim of the assessee was dismissed at the threshold by treating the income from sale of land as business income and in the similar manner the Ld. CIT(A) also did not consider the claim of assessee for exemption u/s 54F of the Act. The Ld. AR lastly, pointed out that AO may kindly be directed to allow deduction u/s 54F of the Act, on the amount of investment made by the assessee for construction of residential house by using the amount of long term capital gain. Alternatively, he prayed that as the AO as well as Ld.

CIT(A) have not adjudicated the issue properly, therefore, the same may kindly be restored to the file of AO for afresh adjudication.

15. Replying to the above, Ld. DR submitted that when the authorities below did not agree with the contention of the assessee that the income accrued to him from sale of land/plots was long term capital gain, then there was no point to grant exemption/deduction u/s 54F of the Act to the assessee, therefore, there is no adjudication on this issue by the AO as well as by the Ld. CIT(A).

16. On careful consideration of above submissions, assessment order and the impugned first appellate order, it is clearly discernable that the authorities below, after treating the income as business income of the assessee, preceded to frame assessment and the issue of exemption/deduction u/s 54F of the Act was not properly adjudicated by them. Since by the earlier part of this order, we have allowed ground no.1 of assessee and we have directed the AO to treat the income from sale of plots/land as long term capital gain. Therefore, consequently, the assessee is entitled to claim exemption u/s 54F of the Act, on the expenditure incurred for construction of residential house. However, since there is no adjudication either by the AO or by the Ld. CIT(A) on this issue requires proper examination and verification at the end of the AO. Therefore, the issue is restored to the file of the AO with a direction that the claim of assessee for exemption u/s 54F of

the Act, shall be adjudicated afresh after proper verification and examination of claim of the assessee and after allowing due opportunity of hearing to the assessee. Accordingly, ground no.2 of the assessee is allowed for statistical purposes with the direction to the AO as mentioned hereinabove.

17. In the result, the appeal of the Assessee is partly allowed on ground no.1 and partly allowed for statistical purposes on ground No.2.

Order was pronounced in the open court on 31.03.2017

Sd/-
(O.P. Meena)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(CHANDRA MOHAN GARG)
न्यायिक सदस्य / JUDICIAL MEMBER

Indore; दिनांक Dated :31/ 03/2017

Patel, P.S./नि.स.