

आयकर अपीलीय अधिकरण न्यायपीठ, नागपुर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR

(At e-Court, PUNE)

BEFORE SHRI INTURI RAMA RAO, AM
AND SHRI S. S. VISWANETHRA RAVI, JM

आयकर अपील सं. / ITA No.98/NAG/2019
Assessment Year : 2015-16

Mujib Salmanbhai Pathan,
House No.242, Ward No.2,
Old Area, Wardha Road,
Butibori, Nagpur-441108.

.....अपीलार्थी / Appellant

PAN : AEFPP0269M.

बनाम / V/s.

The Asst. Commissioner of Income Tax,
Circle-3, Nagpur.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Veena Agrawal
Revenue by : Smt. Agnes P. Thomas.

सुनवाई की तारीख / Date of Hearing : 17.06.2021
घोषणा की तारीख / Date of Pronouncement : 24.06.2021

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee directed against the order of the
1d. Commissioner of Income Tax (Appeals) – 2, Nagpur [‘the CIT(A)'] dated
12.03.2019 for the assessment year 2015-16.

2. The appellant raised the following grounds of appeal :-

“1. On the facts and in circumstances of the case and in law, the learned
CIT(A) erred in stating that the subject, whether proper approval was taken
before converting limited scrutiny into complete scrutiny being administrative
measure cannot be taken up.

2. On the facts and in the circumstances of the case and in law the learned
CIT (A) erred in upholding the addition of Rs 1,00,85,013/- made by the AO as
income under the head business and profession rightly declared as income
under the head capital gains.

3. *On the facts and in circumstances of the case and in law, the learned CIT(A) ought to have considered (i) intention of the assessee (ii) period of holding (iii) consistency in treating the sale of another pieces of same land as income under the head capital gain in subsequent years.*

4. *On the facts and in circumstances of the case and in law, the learned CIT(A) erred in upholding the denial of exemption u/s 54F of Rs 51,31,063/- made by the AO rightly claimed as exemption u/s 54F by the appellant.*

5. *Any other ground which may be preferred at the time of hearing.”*

3. Briefly, the facts of the case are as under :-

The appellant is an individual engaged in the business of builders and land developers. The return of income for the assessment year 2015-16 was filed through e-filing on 25.03.2016 declaring a total income of Rs.49,64,470/-. Against the said return of income, the assessment was completed by the Assistant Commissioner of Income Tax, Circle-3, Nagpur (‘the Assessing Officer’) vide order dated 28.12.2017 passed u/s 143(3) of the Income Tax Act, 1961 (‘the Act’) at a total income of Rs.1,01,58,080/-. While doing so, the Assessing Officer made addition of Rs.1,00,85,013/- being the profits arising out of the sale of land, treating as an income from business as against the claim of the appellant that it is a nature of capital gains. The factual background leading to the above additions as follows :

The appellant along with one Shri Sadik F. Kachchhi purchased a land bearing Khasara No.73/1, Area 0.60 Hectare for a consideration of Rs.2,00,000/- on 25.05.2005. The cost of investment on the said land was shown in the balance sheet as on date of acquisition and continued to be shown so till the date of sale. During the previous year relevant to the assessment under consideration, the said land was sold to 21 different parties for a consideration of Rs.1,01,44,000/- and, accordingly, the appellant had computed the capital gains and sought exemption on the capital gains on investment in the residential property as prescribed under

the provisions of section 54F of the Act. The claim for exemption u/s 54F of the Act was denied by the Assessing Officer on the following grounds :-

- (i) The appellant is engaged in the business of builders and developers and a dealer of land.
- (ii) The appellant had indulged into transactions of purchase and sale of land in the earlier years also and same was treated as business income.
- (iii) The land was sold to 21 different parties after dividing the plots into 21 pieces, which according to the Assessing Officer indicate the intention of the appellant is only to hold it as business asset.
- (iv) The Assessing Officer also held that the mere reflecting concerned asset as investment in fixed asset in the balance sheet does not conclusively prove that it is investment not stock in trade and there was no agricultural activity on the said land was carried out.

4. The assessee also held other asset of investments. The sum and substance of the conclusion of the Assessing Officer is that since the appellant is a dealer in land and sold the land by dividing plots into 21 different pieces, the land was only as business assets and, therefore, the profit arising on the sale of said land only results in the business profits not as a capital gains. The Assessing Officer also referred to the decision of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT, 35 ITR 594 in support of the proposition that when the land was purchased with the intention of re-sell of profits, it is a transaction in the nature of trade and, accordingly, the Assessing Officer assessed the profits arising on sale of said land as "business profits" as against the claim of the appellant that the

profits are in the nature of “capital gains”. Accordingly, denied the claim of exemption u/s 54F of the Act.

5. On an appeal before the ld. CIT(A), the CIT(A) after referring to the plethora of judgements upheld the findings of the Assessing Officer.

6. Being aggrieved, the appellant is before is in the present appeal.

7. The ld. AR submitted that the asset was purchased in the year 2005 and was shown as a part of the fixed asset in the balance sheet. It is contended that the finding of the Assessing Officer that the assessee himself had divided the land into pieces is contrary to the facts as the layout of the said land was approved by local authority much before the acquisition by the appellant. He also filed the copy of the permission of the local authorities. He further contended that :-

- (a) The land was continued to be investment in the books of account till the date of sale.
- (b) The assessee is entitled to hold two different portfolios i.e. (i) stock in trade and (ii) investment.
- (c) The fact that the land was sold after gap of decade, no borrowed funds were utilized for the purpose of acquiring the said lands indicates the intention of the party to hold against on investment.

8. In the light of the above submissions, she pleaded that the orders of the lower authorities should be reversed and set-aside.

9. On the other hand, ld. CIT-DR placing heavily reliance on the orders of the lower authorities submitted that when the land was divided into pieces it clearly establish motive of assessee to hold the land 'stock in trade'.

10. We heard the rival submissions and perused the material on record. The issue in the present appeal relates to whether or not the surplus arising from the sale of land constitutes "capital gains" or "business income". It is undisputed fact that the appellant had acquired the subject land in the year 2005 for consideration of Rs.1,01,44,000/- along with one Shri Sadik F. Kachchhi and the land was shown as a part of the fixed asset in the balance sheet and this treatment in books of account continued to be so till the sale of land. Admittedly, no borrowed funds were utilized for acquisition of the said land and assessee also holding some other lands as a part of investment and is also a dealer in lands. In the return of income, the appellant had offered the profit arising on sale of land as "capital gains" and sought the exemption of capital gains by investing of this sale proceeds in the residential house u/s 54F of the Act. The assessee also maintained the distinction between the "stock in trade" and "investment". The appellant is also a dealer in land and the profits on the sale of land in the earlier year were shown as "business profits". The Assessing Officer relying upon the decision of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. (supra) held that the assessee acquired the land only with the intention to re-sell the property since he had not carried out any agricultural activity on the said land. The Assessing Officer took into consideration the fact that the land was sold to 21 different parties and, accordingly, denied the claim for exemption u/s 54F of the Act.

On appeal before the Id. CIT(A), the Id. CIT(A) referred to plethora of decisions confirmed the findings of the Assessing Officer relying on two factors i.e. (i) the business of the appellant has been to carry out the regular transaction in purchase and sale of different pieces of land and (ii) the assessee is a dealer in the land. This approach of the Id. CIT(A) while confirming the action of the Assessing Officer cannot be appreciated as it is settled position of law that the assessee is entitled to maintain two different portfolios i.e. stock in trade as well as the investment. This is also clarified by the CBDT in the context of taxing the profits in respect of sale transaction and shares and securities vide CBDT Circular No.4 of 2007 dated 04.05.2007. The assessee had treated the transaction of purchase of land as investment in the books of account by showing this as a part of the fixed asset. It is settled position of law that to determine whether a particular transaction is an adventure in the nature of trade or investment, the test to be applied is intention of the party at the time of acquisition of the property as held by the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. (supra). If there is any material on record to indicate that the intention of the party is only to re-sell the asset for profit, no doubt it is a stock in trade. In the present case, the land was sold after the gap of decade and there was no material to show that the appellant had acquired the land only with the intention to re-sell the land for profit. The assessee is undoubtedly entitled to hold two different portfolios in respect of the same kind of asset i.e. stock in trade and investment. The Hon'ble Gujarat High Court in the case of CIT vs. Rewashanker A. Kothari, 283 ITR 338 held as under :-

“The Commissioner had expressed prima facie opinion to the effect that the assessee was doing business in shares and the shares purchased by him were held as stock-in-trade. By holding that the Assessing Officer had failed to inquire about the real nature of the transaction, the Commissioner also opined prima facie that the transactions available on record revealed that the assessee was a dealer in shares. [Para 6]

However, even if one proceeds on the footing that the Commissioner had not expressed any opinion and had merely set aside the assessment while exercising powers under section 263, nonetheless, when an appeal is preferred against such an order, the Tribunal is well within its jurisdiction to examine as to whether the Commissioner had rightly exercised jurisdiction under section 263. In the process, if the Tribunal examines the facts and evidence which are available on record before the Commissioner at the time of framing of order under section 263, it cannot be stated that the Tribunal has committed any error in recording findings in relation to such facts and evidence on record. In the instant case, all that the Tribunal had done was whether, in light of the record which was available before the Commissioner when he exercised the jurisdiction under section 263, it was possible to come to the conclusion that the assessment order was both erroneous and prejudicial to the interest of the revenue. [Para 7]

In each case, it is the total effect of all relevant factors and circumstances that determine the character of the transaction. Each case has to be determined on the total impression created on the mind of the Court by all the facts and circumstances disclosed in a particular case. One of the principal tests is whether the transaction is related to the business normally carried on by an assessee. The nature of the commodity would also be a relevant factor. It is equally well-settled that, merely because the original purchase was made with the intention to re-sell, if an enhanced price could be obtained, that by itself is not enough to infer that an assessee is carrying on business. However, though profit motive in entering into a transaction is not decisive, if the facts and circumstances indicate that the purchase of the asset was made solely and exclusively with an intention to re-sell the asset at a profit, it would be a strong factor for inferring that the transaction was in the nature of business. [Para 10]

On the application of the aforesaid tests, if the matter was examined, it was apparent that not only the Tribunal had applied the correct tests, but had also drawn the right inference. The findings of fact recorded by the Tribunal on the basis of evidence available before it could not be termed to be without any evidence, and once that was so, it was not possible to state that the Tribunal committed any error when it concluded that the assessment order was not erroneous. That as a consequence, the Commissioner could not have assumed jurisdiction under section 263 as stated hereinbefore, once an assessee has exercised its right to file a statutory appeal against the order of Commissioner made under section 263, the Tribunal is bound to examine whether Commissioner had rightly invoked provisions of section 263. The basic requirement for this is satisfaction of the twin conditions envisaged by the section, namely, the assessment order is erroneous and prejudicial to the interests of the revenue. It is equally well-settled that if the Assessing Officer has taken a view of the matter which is reasonably possible in the factual matrix, the Commissioner cannot exercise powers under section 263, merely because it is possible to record a different conclusion on the same set of facts and circumstances. [Para 12]

On facts, the Tribunal had taken note of the fact that there was a long gap between the date of acquisition of the shares and their sale and that some of the shares sold in the relevant accounting period were purchased at least 3 years ago, while some other shares were purchased as far back as in 1971, i.e., a period of about 14 to 15 years. Furthermore, in the reply to the show-cause notice issued, the assessee had categorically stated that he was a partner in a firm having business of building materials, hardware items, etc., and neither the firm nor the assessee were carrying on any business in shares. That the assessee had been duly filing wealth-tax returns right from assessment year 1957-58 and the shareholding on respective valuation dates had duly been shown as wealth on account of investment. These facts had not been disputed by the Commissioner. [Para 13]

Therefore, in the light of above discussion, the impugned order of the Tribunal did not suffer from any infirmity. The Tribunal had rightly concluded that the order made by the Commissioner under section 263 was not sustainable, and that, on facts, the income was required to be taxed under the head 'Capital gains' and not as 'Income from business'. [Para 14]"

11. In the facts and circumstances of the present case, it does not indicate that the purchase of land was made with the intention to re-sell. The Hon'ble Supreme Court in the case of CIT vs. Associated Industrial Development Co. (P.) Ltd., 82 ITR 586 held as under :-

"The High Court went beyond the matters which were the subject-matter of controversy before the departmental authorities and the Tribunal. It was never the case of the assessee at any stage that although it was a dealer in shares those shares which were the subject-matter of sale were held by way of investment. It had maintained throughout that all the shares were held by it as an investor and that it could not be regarded as a dealer because the shares did not form its stock-in-trade. That case of the assessee was negated because of the extensive dealings and other facts and circumstances which were taken into consideration. The figure of purchases and sales as also of the profits relating to the years 1954 to 1957 justified the view that although up to a certain point of time it had been assessed as an investor, the multiplicity of the transactions occurring successively over the years supported the departmental stand that the assessee had ceased to be an investor and had become a dealer. Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment. The assessee, in the instant case, made no attempt whatsoever to make out a case that the shares which had been sold were a part of its capital investment. Nor did it place any material from which it could be established that those shares had been treated in its books differently from other shares held by it. The mere fact that the sale proceeds were paid into the overdraft account in which admittedly proceeds of sale of all the shares held by the assessee were being credited as and when the sales were made and that these shares had not been sold with any amount of frequency could not be regarded as sufficient to establish that these shares had been held by way of investment. Even otherwise it was for the Tribunal to give its decision on facts and since no decision was invited from the Tribunal as to whether the shares in question had been held by way of investment it was not open to the High Court to give its finding on that question which was essentially one of fact and which it was within the jurisdiction of the Tribunal to determine.

Hence, the Tribunal was justified in holding that the profit arose to the assessee in the course of its business as a dealer in shares and as such was liable to be assessed as a revenue receipt."

12. In the present case, undisputedly the appellant had made a distinction between those lands which are stock in trade and those lands which are held by investment. Therefore, none of the factors considered by the Assessing Officer can militate against the claim of the appellant that it is an investment and the profit arising out of the sale of this land is assessable to tax under the head "capital gains". Therefore, the orders of the lower authorities are hereby reversed and set-aside. Thus, the grounds of appeal raised by the assessee are allowed.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this the 24th day of June, 2021.

Sd/-
(S. S. VISWANETHRA RAVI)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 24th June, 2021.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-2, Nagpur
4. The CIT (TDS), Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, नागपुर / DR, ITAT, "Nagpur".
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.