

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
'C' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं डॉ एम एल मीना, लेखा सदस्य के समक्ष  
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**  
**Dr. M.L. MEENA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: 2915/CHNY/2018  
निर्धारण वर्ष /Assessment Year: 2011-12

**Smt. G. Neelavathy,**  
No. 30, Angalamman Koil Street,  
Muthialpet,  
Pondicherry – 605 003.

**The Income Tax Officer,**  
v. Ward -5,  
Pondicherry.

**PAN: ALXPN 8234B**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri T. Vasudevan, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri AR V Sreenivasan, Addl. CIT

सुनवाई की तारीख/Date of Hearing

: 07.03.2022

घोषणा की तारीख/Date of Pronouncement

: 09.03.2022

**आदेश /O R D E R**

**PER BENCH:**

This appeal by assessee is arising out of the order of the learned Commissioner of Income Tax (Appeals)-Puducherry in ITA No.582/CIT(A)-PDY/2013-14, dated 24.07.2018. The assessment was framed by the ITO, Ward-1(1), Puducherry for assessment year

2011-12 u/s. 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act'), vide order dated 30.09.2013.

2. At the outset, the Id.counsel for the assessee stated that the appeal filed by the assessee is barred by limitation by 16 days and for this, he has filed condonation petition along with affidavit. The Id.counsel stated that the assessee is aged and uneducated, so without understanding the importance of order, forgot to take steps to file appeal. Only when auditor enquired about the hearing having been completed, she reminded of the order and steps were taken immediately to file appeal, which resulted in delay of 16 days. The Id.counsel stated that the delay is neither willful nor wanton and requested to condone the delay. When these facts were confronted to Id. Senior DR, he has not raised any objection. Hence, we condone the delay and admit the appeal.

3. The short point in this appeal of assessee is as regards to the order of CIT(A) confirming the action of AO in treating the income declared by assessee under the head 'capital gains' as 'business income' on account of construction and sale of apartments. For this, assessee has raised various grounds numbering 12, but the issue is exactly one, hence we need not to reproduce.

4. Briefly stated facts are that the assessee is an individual and purchased two plots each costing Rs.2,00,000/- on 05.05.2003 vide document Nos.1940 & 1941 registered at SRO, Oulgaret. The assessee filed copy of building permission from Pondicherry Planning Authority vide its approval letter No.PPA/2215/1089/(3)/2006 dated 26.06.2006 for two storeyed residential building in Plot No.42 admeasuring 2070 sq.ft. as per document No.1941 dated 05.05.2013. The approval was valid upto 25.06.2009. Subsequently, the assessee filed another approval vide No.PPA/2566/323/2(SB/4) 2010 dated 30.12.2010 as per application dated 09.12.2010 to carry out addition of lift at ground and first floor and additional constructions in the existing second floor residential flats building (executed) in Plot No.42 & 43, 7<sup>th</sup> Cross st., Mahaveer Nagar, Karuvadikuppam, Pondicherry. The assessee constructed 9 flats in the above two plots and declared capital gain on sale of 3 flats (rest of the flats were sold in other assessment years) claiming the cost of construction from the stage of starting construction in financial year 2003-04 till financial year 2010-11. The assessee claimed cost inflation index on the plot and construction cost. The AO during the course of assessment proceedings noted that the assessee is carrying out systematic

business activity to earn profit and hence, he assessed the income of the assessee by changing the head from 'capital gains' to 'business income' thereby the AO reassessed the head of income, also made disallowance of cash purchases u/s.40A(3) of the Act and estimated profit from sale of these 3 flats and assessed the total business income at Rs.28,26,258/-. Aggrieved, assessee preferred appeal before CIT(A).

5. The CIT(A) also confirmed the action of AO vide para 5.4 of his order and in para 5.4, he discussed the case law of Hon'ble Delhi High Court in the case of CIT vs. RV Gupta, 258 ITR 261 and the facts of this case, he discussed that the assessee purchased two plots in financial year 2003 and systematically started construction activity on these plots and assessee also employed agents to sell the flats and paid commission. Hence, he agreed with the AO by observing as under:-

“In the above facts and circumstances, I hold that the income earned by the assessee is from “Adventure in the nature of trade” and not to be assessed as Long Term Capital Gains. The grounds on the above addition are dismissed.”

Aggrieved, assessee is in second appeal before the Tribunal.

6. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the assessee has purchased these two plots on 05.05.2003, the detailed facts are given in para 4 of our order, which are undisputed. The assessee carried out the construction from the year 2003 till 2010. The assessee was not owning any other house property and the subject houses, which the assessee sold was exclusively for the purpose of her own occupation. But the assessee has obtained loan for construction of flats and since, the debt burden increased she decided to sell and sold the property and declared the income on account of sale of one flat in assessment year 2009-10 and declared the head 'capital gains' and the same was accepted by the Department as it is. The second flat was sold in assessment year 2010-11 and also declared under the head 'capital gains' and Department accepted the same as capital gains. But, now the assessee has sold 3 flats in assessment year 2011-12, the present year under consideration, the assessee declared the same as 'capital gains' but the AO suddenly changed the stands and assessed the income under the head 'business income'. Before us, the Id.counsel for the assessee filed the case law of Hon'ble Karnataka High Court in the case of PCIT vs. Smt. Chamundeswari, 2019 (1) TMI 861, wherein the Hon'ble Karnataka High Court following the decision of

Hon'ble Supreme Court in the case of G. Venkataswamy Naidu vs. CIT, 35 ITR 594 held that property purchased with the intention of profit is business income but in case, assessee holds the property for a long period and investing in the property in an intention to hold and enjoy the property and sells it for capital appreciation, the profit deriving there from is taxable under the head 'capital gains'.

The Hon'ble Karnataka High Court held as under:-

“6. The assessee was an employee with Syndicate Bank. He purchased a land measuring 2800 sq.ft. in the year 2001. He put up a construction of 12 apartments out of which 8 apartments were sold and 4 apartments were retained for himself. The profits made out of sale of 8 apartments were offered as 'short-term capital gains' and the profits made on sale of the land was offered as 'longterm capital gains', after claiming exemption to an extent of Rs.22,50,171/-.

7. The Tribunal on considering the material on record, was of the view that since the assessee sold the flats for profit in the subsequent period, the said transaction does not tantamount to adventure in the nature of trade. When the assessee invests money in a property with an intention to hold it or enjoys the property and sells it for profit thereafter, then it is a case of capital appreciation and the profit derived there from is taxable under the head 'capital gains'. Therefore, the judgment of the Hon'ble Supreme Court in the case of G. Venkataswamy Naidu vs. CO. vs. Commissioner of Income Tax, reported in 35 ITR 594, was followed.

8. On considering the reasons assigned by the Tribunal, we do not find any substantial question of law that arises for consideration in this appeal. The reasoning of the Tribunal is based on the judgment of the Hon'ble Supreme Court referred to supra. Even on facts, there was no material on record for the Commissioner of Income Tax (Appeals) to hold that the assessee had purchased the property with an intention of reselling the same for profit. There is no material on record to trigger such a

contention. Hence, there is no substantial question of law that arise for consideration in this appeal.”

6.1 We also noted that the Hon'ble Supreme Court in the case of Janki Ram Bahadur Ram vs. CIT, (1965) 57 ITR 21 (SC) categorically held that commodity purchased and sold, not in ordinarily commercial sense and the manner of dealing with the commodity does not term the transaction as trading venture. Further, Hon'ble Gujarat High Court also held in the case of CIT vs. Nathalal Dahyabhai, (1980) 126 ITR 555 that mere ownership of an immovable property, even if acquired in the course of a money-lending business, does not automatically make such property a part of such business. No presumption can be made that the property was still a part of the money-lending business.

6.2 In the present case before us, the intention was to construct property, to hold property and to enjoy the property as the assessee was enjoying this property since 2003, as she was not having any other house property. The compulsion to the assessee for sale of this property was only that she was under heavy debt and to release the debt she has to sell the property and actually by selling these flats she has settled the loans and hence in the given facts, we cannot say that the assessee has entered into any trade or any case

'adventure in the nature of trade'. Hence, we reverse the orders of lower authorities and direct the AO to assess the profit arising out of sale as 'capital gains' and allow the appeal of the assessee.

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

Order pronounced in the court on 9<sup>th</sup> March, 2022 at Chennai.

Sd/-

(डॉ एम एल मीना)

**(Dr. M.L. MEENA)**

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह )

**(MAHAVIR SINGH)**

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 9<sup>th</sup> March, 2022

**RSR**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT    | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF.            |