IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, AM AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 123/Mum/2022
(Assessment Year: 2016-17)

ACIT-17(1) O/o The Government of India O/o The Dy. CIT CIRR 17(1), Kautilya Bhavan, Room No. 117, BKC, Bandra (E), Mumbai-400 051	Vs.	Gupta C K 21, K. T. Building, Devji Ratansey Marg, Masjid Bunder, Mumbai-400 009
PAN/GIR No. AABHG 8349 D		
(**Assessee**)	:	(**Respondent**)

Assessee by	:	Shri Rajen Damani
Respondent by	:	Dr. Kishor Dhule

Date of Hearing	:	04.04.2024
Date of Pronouncement	:	01.07.2024

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the Revenue, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2016-17.

2. The brief facts of the case are that the assessee is a Hindu Undivided Family (HUF for short) and had filed return of income declaring total income at Rs.22,56,02,510/- out of 'income from capital gains' and 'income from other sources'.

3. The assessee's case was selected for scrutiny and the ld. Assessing Officer ('A.O.' for short) during the assessment proceedings contended that the assessee had entered into

a development agreement with M/s. Regency Nirman Limited (Developer) for developing the land held by the assessee for 20% gross revenue receipts as consideration on the sale of constructed portion. The assessee offered long term capital gain as and when it had received consideration from the developer, the ld. A.O. regarded the same as to be taxed under the head 'business income' instead of 'long term capital gain (LTCG for short)'. The assessee's contention was that the HUF was formed in 1945 during which the land was agricultural land situated at Titwala which was acquired in 1959 by Mrs. Kashmiradevi Gupta, mother of Karta Vijay Gupta and subsequently transferred to HUF after her lifetime which was in the balance sheet shown as 'capital asset'. The said land was then converted to non agricultural land on signing the Joint Development Agreement (JDA for short) vide order dated 25.05.2011 and continued to be shown as 'capital asset' and not 'stock in trade'. Further, the assessee contends that it was not in the business of development/construction of land/building. As per the JDA dated 28.05.2008, the development activity was carried out in May, 2011 after due approval and permission from the concerned departments. The assessee offered the sale receipts received as consideration to tax from A.Y. 2013-14 onwards as and when it receives the sale consideration. The assessee alleges that it was in possession and control of the property until the receipt of commencement certificates in 2011-12, implying that there was no extinguishment of rights by the assessee. The assessee contends that as per the JDA, there was no role on the part of the assessee in the development and the construction of the building and only for the reason of getting a higher consideration, instead of outright sale, the assessee entered into a development agreement. The assessee denies complete nexus of business income. The assessee has further stated that owing to inadequacy of fund, the

assessee was unable to pay taxes on the future income as per section 50D of the Act and relied on the CBDT Circular No. 3rd March, 2016 for deferment of tax. The contention of the assessee has not been satisfactory to the ld. A.O. who then passed the assessment order dated 30.12.2018 making an addition towards conversion of 'capital gain' to 'business income' of Rs.21,01,86,798/-. The ld. A.O. also disallowed the exemption claimed by the assessee u/s. 50EC of the Act, thereby determining the total income at Rs.23,06,02,509/-.

4. The assessee was in appeal before the first appellate authority, who vide order dated 25.11.2021 allowed the appeal filed by the assessee, by holding that the income of the land owner from a JDA is to be charged as 'capital gains' and not as 'business income'. The ld. CIT(A) also allowed the exemption claimed by the assessee u/s. 54EC of the Act.

5. We have heard the rival submissions and perused the materials available on record. The learned Departmental Representative (ld. DR for short) for the Revenue contended that since the assessee has jointly entered into an agreement with the developer, the assessee is also said to have involved in the activity of the construction and development and further the ld. A.O. has specified that the details of the said project in the website of MAHA RERA (Real Estate Regulation Act) contains the name of the assessee as Promoter to the said project which evidences a joint liability on the assessee. The ld. DR further contended that the assessee has received commercial benefits out of the said transaction which involves the risks and rewards alongside the developer. The ld.

DR further stated that the transaction pertains to "adventure in the nature of trade and commerce". The ld. DR stated that the decisions relied upon by the assessee in the case of Hon'ble High Court of Andhra Pradesh and Telangana in *DevineniAvinash vs. Pr. CIT* [2018] 100 taxmann.com 75 and the decision of the co-ordinate bench in *Vikas Solvextracts Pvt. Ltd. vs. DCIT* (in ITA Nos. 1925 to 1929/Kol/2014 vide order dated 20.12.2017) does not have any relevance to this case as they are factually distinguishable to the assessee's case.

6. The learned Authorised Representative (ld. AR for short), on the other hand, controverted the submission of the ld. DR by stating that only 20% of the sale realization was received by the assessee which cannot be treated as 'business income' while the risks and rewards are with the developer. The permission from various authorities was in the name of the assessee for the reason that only the land owner is entitled to such license/permission. The ld. AR further stated that the assessee has been holding agricultural land as 'capital asset' and not as 'stock-in-trade' and reiterated the assessee's submission and prayed that the appeal of the Revenue be dismissed.

7. From the above submissions made by the rival parties, it is evident that the assessee has all along shown the land for which the JDA was entered as 'capital asset', without converting the same to 'stock-in-trade' as per the return of income of the assessee. For this, the assessee had relied on the decision of the co-ordinate bench in the case of *Vikas Solvextracts Pvt. Ltd.* (supra) which holds that the ld. A.O. cannot presume that the assessee had converted the 'capital asset' into 'stock-in-trade' without any positive act on the part of the owner of the asset and without any evidence for such

conversion. The ld. CIT(A) has also relied on the said decision holding that there was no conversion of 'capital asset' to 'stock-in-trade'. The ld. CIT(A) further held that the assessee had merely contributed the land for the said project, but had not actively involved in the development and construction process. The assessee had placed reliance on the decision of *Fakirchand Gulati vs. Upal Agencies Pvt. Ltd.* in which case on a consumer dispute against the builder by the land owner, it was held that in case of breach of obligation between the two, the builder is the service provider and there is no joint venture in the said transaction. The ld. CIT(A) also relied on the decision of Hon'ble High Court of Andhra Pradesh and Telangana in the case of *DevineniAvinash* (supra) in which it was held that mere execution of the JDA between the land owner and the developer would not be sufficient to treat the land as 'stock-in-trade' for the purpose of carrying on the business and only when the owner have decided to part with the property, for the said purpose the land can be treated as 'stock-in-trade'. Though the said decision pertains to a different issue where the assesse/land owner wanted the land to be treated as 'stock-in-trade' and not 'capital asset' and the income to be 'business income', the proposition laid down in this case ought to be considered for deciding this issue. The Hon'ble High Court in this has held that an isolated transaction cannot be termed as a 'trade' or 'business' and that the initial intention of the owner while purchasing the property must have been for an adventure in the nature of trade. The relevant extract of the said decision is cited hereunder for ease of reference:

> *12. The purchase of property by the appellants is an isolated transaction, and they have not carried on any business either before or thereafter. Granting that the appellants made a profitable bargain when they purchased the property, and granting further that the appellants had, when they purchased it, a desire to sell the property would not, without other circumstances, justify an inference that the appellants intended, by purchasing the property, to start a venture in the nature of business or trade. (Janki Ram Bahadur Ram) (supra).*

13. The words adventure in the nature of trade clearly suggest that the transaction cannot properly be regarded as a trade or business. It is allied to transactions that constitute trade or business, but may not be trade or business itself. It is characterised by some of the essential features that make up trade or business but not by all of them; and so, even an isolated transaction, can satisfy the description of an adventure in the nature of trade. (G. Venkataswami Naidu &. Co.) (supra).

14. Even a single and isolated transaction can be held to be capable of falling within the definition of an adventure in the nature of trade if it bears the clear indicia of trade (Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits [1954] 26 ITR 765 (SC); G. Venkataswami Naidu & Co. (supra); Saroj Kumar Mazumdar v. CIT [1959] 37 ITR 242 (SC); Dalmia Cement Ltd. (supra). The fact that the transaction is not in the way of business of the assessee does not alter the character of the transaction (G. Venkataswami Naidu & Co. (supra); Saroj Kumar Mazumdar (supra); Dalmia Cement Ltd. (supra).

15. It is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the Courts in tax proceedings. It would also be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases, on the border line, that cause difficulty. (G. Venkataswami Naidu & Co.1).

16. Sometimes it is said that a single plunge in the waters of trade may partake the character of an adventure in the nature of trade. This statement may be true; but in its application due regard must be shown to the requirement that the single plunge must be in the waters of trade. In other words, at least some of the essential features of trade must be present in the isolated or single transaction. On the other hand, it is sometimes said that the appearance of one swallow does not make a summer. This may be true if, in the metaphor, summer represents trade; but it may not be true if summer represents an adventure in the nature of trade because, when the Section refers to an adventure in the nature of trade, it obviously refers to transactions which, individually, cannot themselves be described as trade or business but are essentially of such a similar character that they are treated as in the nature of trade. (G. Venkataswami Naidu &. Co.1).

17. In Leeming v. Jones [1930] 15 T.C. 333 a syndicate was formed to acquire an option over a rubber estate with a view to resell it at a profit. On finding the estate too small, the syndicate acquired another estate and sold the two estates at a profit. It was held that the transaction was not in the nature of trade. The same view was expressed in Saroj Kumar Mazumdar7, wherein the assessee, who carried on business in engineering works, purchased land which was under requisition by the Government, negotiated a sale before the land was de-requisitioned, and sold it after the land was released. In Commissioner of Inland Revenue v. Reinhold 34 Taxes 389 the respondent, who carried on business of warehousemen, bought four houses in January 1945, and sold them at a profit in December, 1947. He admitted that he had bought the property with a view to resell, and had instructed his agents to sell whenever a suitable opportunity arose. On behalf of the Crown it was contended that the purchase and sale constituted an adventure in the nature of trade and the profits arising therefrom were chargeable to income tax. It was held by the Court of Sessions that the initial intention of the respondent to purchase the property, with a view to resell, did not per se establish that the transaction was an adventure in the nature of trade. (Khan Bahadur Ahmed Alladin and Sons.

18. In considering judicial decisions on this question, it is necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the Court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction; and so, though we may attempt to derive some assistance from decisions bearing on this point, we cannot

seek to deduce any rule from them and mechanically apply it to the facts before us. (G. Venkataswami Naidu & Co. (supra).

19. Judges appear to be agreed that no principle can be evolved which would govern the decision of all cases in which the character of the impugned transaction falls to be considered. G. Venkataswami Naidu & Co. (supra). No general principle can be laid down to cover all cases because of their varied nature, and each case should be decided on the basis of its own facts and circumstances. (Dalmia Cement Ltd.2). The decision, about the character of a transaction in the context, cannot be based solely on the application of any abstract rule, principle or test and must, in every case, depend upon all the relevant facts and circumstances. G. Venkataswami Naidu & Co. (supra). The answer to the question will depend on a consideration of all the facts and circumstances. Dalmia Cement Ltd. (supra).

20. In deciding the character of such transactions several factors are treated as relevant. Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? An affirmative answer to this question, among others, may furnish relevant data for determining the character of the transaction. (G. Venkataswami Naidu & Co.1). Another test, sometimes applied in determining the character of the transaction, is whether the purchase was made with the intention to resell it at a profit ? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no half-way house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test, distinction will have to be made between initial intention to resell at a profit which is present but not dominant or sole; in other words, cases do often arise where the purchaser may be willing and may intend to sell the property purchased at a profit, but he would also intend and be willing to hold and enjoy it if a really high price is not offered. The intention to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise where the purchase has been made solely and exclusively with the intention to resell it at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention is no doubt a relevant factor, and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the Court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. (G. Venkataswami Naidu & Co.1). A profit motive, in entering into a transaction, is not decisive, for an accretion to capital does not become taxable income, merely because an asset was acquired in the expectation that it may be sold at a profit. (Janki Ram Bahadur Ram).

21. It must also be borne in mind that, unlike cases of commercial commodities, a transaction of purchase of land cannot be assumed, without anything more, to be a venture in the nature of trade, as these are cases in which the commodity purchased and sold is not ordinarily commercial, and the manner of dealing with the commodity does not stamp the transaction as a trading venture. (Janki Ram Bahadur Ram4; Reinhold9; Saroj Kumar Mazumdar7; Leeming8). If a person invests money in land intending to hold it, enjoys its income for some time, and then sell it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realisation of investment consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. (G. Venkataswami Naidu & Co.1).

22. While even a single instance can constitute an adventure in the nature of trade and would suffice to treat the asset, used for the purpose of business, as stock-in-trade, the question whether purchase of the subject land is a single instance of an adventure in the nature of trade must be examined in the light of the surrounding facts and circumstances, and not in isolation. While it does appear that the appellants-assessees had purchased the subject land on 30.07.2007, and had entered into a joint development agreement on the very next day i.e. on 31.07.2007, the question

which necessitates examination is whether that, by itself, would reflect the appellants intention to treat the land as stock-in-trade for the purpose of carrying on business, in which event alone would it not fall within the definition of asset under Section 2(ea)(v) of the Act; and would, consequently, not be included in his net wealth liable to tax under Section 3(2) of the Act.

23. The Tribunal, and the authorities below, have relied on the fact that the appellants-assessees had filed their return, for the year ending 31.03.2008, in Form No.ITR-2; they had shown the asset as a fixed asset (immovable property) in their balance sheet for the year 31.03.2008 and 31.03.2009; and, except for their self-serving statement that the subject land was intended to be used as stock-in-trade for the purpose of carrying on business, no other evidence had been adduced by the assessees in support of such a claim, though the onus was on them to prove the same.

24. In this context, it is useful to note that Rule 12 of the Income Tax Rules, 1962 (the Rules for brevity), as it then stood, related to the return of income required to be furnished under Section 139 or 142 or 148 or 153 of the Income-tax Act, 1961. Rule 12(1)(b) of the Rules stipulated that the return of income shall in the case of a person being an individual, where the total income does not include any income chargeable to income-tax under the head Profits or gains in business or profession, be in Form No.ITR-2, and be verified in the manner indicated therein. Form No.ITR-2 is the return of income, for individuals not having income from business or profession, in terms of Rule 12 of the Rules. Rule 12(1)(d) of the Rules, as it then stood, stipulated that the return of income, in the case of an individual deriving income from a proprietary business or profession, shall be in Form No.ITR-4, and be verified in the manner indicated therein. Form No.ITR-4 is the return of income, for individuals having income from a proprietary business, in terms of Rule 12(1)(d) of the Rules.

25. The appellants-assessees had filed their return, for the assessment years subsequent to the date of purchase of the property, in Form No.ITR-2 and not in Form No.ITR-4, thereby treating the subject land as an investment or a capital asset, and not as stock-in-trade under the head current assets. Further, in their Balance Sheet, filed in the immediately following assessment years (i.e. after the date of purchase of the subject land), the subject land was shown as a fixed asset (immovable property), and not as a current asset (stock-in-trade). If the appellants-assessees had intended to use the land for the purpose of carrying on business, it would have been shown in the Balance Sheet as stock-in-trade under the head current assets, and not as immovable property under the head fixed assets. Further, if the subject land was intended to be used for the purpose of business, the appellants-assessees would have filed their return in Form No.ITR-4, and not in Form No.ITR-2. The fact that the appellants-assessees had filed their return only in Form No.ITR-2 also lends support to the contention of the revenue that they intended to treat the subject land only as a capital asset and as an investment, and not to carry on business treating the subject land as stock-in-trade. It is also not in dispute that, even though a joint development agreement was executed on 31.07.2007, no development has taken place on the subject land for the past more than a decade. Yet another factor which would belie the appellants-assessees claim to have intended to use the subject land for the purpose of carrying on business, is that they had not, either before or after purchase of this land, carried on any business, much less in relation to land.

26. In Chaturbhuj Dwarkadas Kapadia3, the Division bench of the Bombay High Court held that the agreement in question was a development agreement; such development agreements did not constitute transfer in general law; they are spread over a period of time; they contemplate various stages; the Bombay High Court, in various judgments, has taken the view in several matters that the object of entering into a development agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats at a profit; the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land was created in their favour under such agreements; such agreements were only a mode of remunerating the builder for his services of constructing the building Gurudev Developers v. Kurla Konkan Niwas Co. Operative Housing Society [2000] 3 Mah. LJ 131; and if the contract, read as a whole, indicated passing of or transferring of

complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability.
27. On the execution of a joint development agreement, the developer would undoubtedly be carry ing on business. The mere fact that the appellants-assessees had entered into a joint development agreement with a builder, the very next date of purchase of the subject property, would not, in the absence of any other material on record, by itself amount to the assessees having treated the said subject land as stock-in-trade for the purpose of carrying on business. Mere execution of a development agreement would not, by itself and without anything more, mean that the owner of the land also intended to carry on business using the subject land as stock-in-trade, for the owner may well have decided to part with the said land for other reasons also.

8. From the above observation, it is evident that the ld. A.O. cannot draw an inference that the assessee vide a JDA has entered into a commercial transaction where the consideration received is to be treated as 'business income', in the absence of cogent evidence that it was an adventure in the nature of trade and not merely an investment and the land is not a 'capital asset' but a 'stock-in-trade'. We would also like to draw support from the decision of the Hon'ble Apex Court in the case of *Janki Ram Bahadur Ram vs. CIT* (Calcutta) 1965 AIR 1898 which has also held that no inference can be drawn that a venture is in the nature of trade without substantive evidence. It is also pertinent to point out that the co-ordinate bench in the case of *M/s. Medravathi Agrofarms Pvt. Ltd. Hyderabad and others* (in ITA No. 943/Hyd/2014 and others vide order dated 22.05.2015) has discussed the issue in hand elaborately by holding that for determining whether the land is 'capital asset' or 'stock-in-trade', it is essential to test the initial intention at the time of purchasing/acquisition of the property and the subsequent events can nevertheless change the nature of such asset where the intention of the assessee prevails. Identical to the case in hand, the assessee was carrying out agricultural activities in the said land and the development agreement cannot in any way change the nature and character of the land into 'stock-in-trade' and the profits arising out of the said transaction is to be chargeable as 'capital gain' and not as 'business income'. In this case,

the Tribunal has considered the portion of built up area which was retained and held by the land owner for his own use or as long term investment and the sale of which amounts to capital gains and that portion of the built up area in which the land owner becomes dealer with the intention to make more profit which involves risks associated with the same is to be in the nature of stock-in-trade. But in the case of the present assessee, there is no such bifurcation as the assessee was merely entitled to 20% of the sale proceeds from the builder and it was only on the builder that the risks and reward are entrusted upon. We hereby hold that the said transaction is not an adventure in the nature of trade as per section 2(13) of the I. T. Act which defines the term 'business'.

9. Pertinently, we are inclined to deal with the amendment brought about in the Finance Act, 2017 while introduction of the new provision of section 45(5A) of the I. T. Act which was w.e.f. 01.04.2018, was to minimize the hardship caused to the assessee with regard to the transfers that took place with a significant time gap between the year of transfer and when consideration was received, in which case the capital gain shall be chargeable as income of previous year in which the certificate of completion for whole or part of the project is issued by the Competent Authority. Though, this does not relate to the impugned year under consideration, it is necessary to consider the intention of the Legislature where in case of assessee who is a individual or HUF, the building or land is to be treated as 'capital asset' by the land owner, further the income out of a registered agreement is liable to be treated as 'capital asset' in the hands of the assessee/land owner.

10. From the above observation, we deem it fit to hold that the income received as sale consideration by the assessee out of the JDA is to be treated as 'capital gain' in the hands

of the assessee and that the assessee is entitled to claim exemption u/s. 54EC of the Act, if the assessee satisfies the conditions as per the said provision. On this note, we do not find any infirmity in the order of the ld. CIT(A) and, therefore, the order of the ld. CIT(A) is upheld.

11. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 01.07.2024

Sd/-	Sd/-
(Om Prakash Kant) Accountant Member	(Kavitha Rajagopal) Judicial Member

Mumbai; Dated : 01.07.2024
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai