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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jun-14-2005

Reported in : (2006)7SOT657(Mum.)

Appellant : Vikram International

Respondent : Assistant Cit

Judgement :
These are cross appeals filed by both the parties against the order of the learned Commissioner (Appeals) (Shri R.C. Sethi) for the assessment year 1991-92. They are being disposed of by a consolidated order for the sake of convenience.

The assessee has now filed concised/revised grounds of appeal in place of the original grounds of appeal filed along with the Appeal Memo.

Ground Nos. 1 & 2 are interlinked and read as under: 1. The learned Commissioner (Appeals) erred in confirming addition of Rs. 39,95,000 on account of receipt of a residential flat by the appellant on surrender of tenancy right.

2. Without prejudice to the above, the learned Commissioner (Appeals) failed to appreciate that even if tenancy was not genuine, value of the flat received could not have been treated as income.

Briefly stated, the facts of the case are that the assessee, during the previous year relevant to the assessment year under appeal, had received one flat admeasuring 1,500 sq.ft. in a building known as 'Milton Tower', Khar, Mumbai, from its own

sister concern, namely, M/s.

Ajay Builders. The value of the said flat was shown at Nil. The assessing officer took the value of the said flat at Rs. 40,00,000 and added the same, after giving statutory deduction under section 10(3) of the Income Tax Act, 1961, to the total income returned by the assessee.

It was contended by the assessee before the departmental authorities that the assessee was a tenant of the outhouse standing on the plot of land on which M/s. Ajay Builders (sister concern) had subsequently constructed 'Milton Tower' after demolishing the old building including the outhouse standing on the said plot. It was further submitted that the said flat was given free of cost to the assessee by M/s. Ajay Builders in lieu of the assessee having surrendered its alleged tenancy rights over the said outhouse. The assessing officer asked the assessee to prove its tenancy rights in response to which the assessee submitted a detailed explanation before him.

The facts surrounding the controversy are that the assessee had claimed before the assessing officer that it was a tenant of Shri Virendra Madhavlal since November, 1980 in the outhouse (known as 'Janu Kunj') of the property belonging to the said Shri Virendra Madhavlal. A co-operative housing society known as 'Khar Milton Co-operative Housing Society' ('KMCHS') purchased the said plot of land including the outhouse of which the assessee was reported to be a tenant from Shri Virendra Madhavlal and consequently entered into development agreement with M/s. Ajay Builders, a sister concern of the assessee. In order to facilitate the development of the property in question, the assessee-firm reportedly surrendered its tenancy rights in consideration of an alternative permanent accommodation, which it subsequently received in the form of a flat admeasuring 1,500 sq. ft.

in the building known as 'Milton Tower' from Ajay Builders. This arrangement was reportedly a part of the consent terms settled between the concerned parties. As stated above, the said flat was disclosed in the balance sheet at Nil value. The assessing officer estimated the value of the flat at Rs. 40 lakhs and, after giving deduction of Rs. 5,000 under section 10(3) made the impugned addition of Rs.

39,95,000 for the detailed reasons given in the assessment order. The assessing officer noted in particular the following facts : (b) Shri Virendra Madhavlal was not produced for examination to establish the genuineness of the tenancy though the assessee had stated to be his tenant.

(c) Investigation report of solicitors does not mention about the assessee as a tenant.

(a) The assessee could not produce any independent evidence like telephone bill, electricity bill, water bill or any other oral or documentary evidence to factually substantiate its claim that it was a tenant of Shri Virendra Madhavlal.

Being aggrieved by the order of the assessing officer, the assessee carried the matter in appeal before the Commissioner (Appeals). The learned Commissioner (Appeals) identified two issues for determination.

First issue was whether there was any genuine tenancy between the assessee and Shri Virendra Madhavlal and later between the assessee and its sister concern, M/s Ajay Builders. The second issue was as to what was the nature of receipt in the hands of the assessee if there was no genuine tenancy or agreement, as aforesaid. The learned Commissioner (Appeals) examined the matter in detail and confirmed the action of the assessing officer by a well reasoned order against which the assessee is in appeal before the Tribunal.

In support of the appeal, the learned Authorised Representative for the assessee ('AR' in short) invited our attention to the aforesaid factual aspects of the case and submitted that tenancy was genuine and supported by the following evidence : (i) Copies of rent receipts showing receipt of rent from the assessee by Shri Virendra Madhavlal for the months of (i) May to December 1981, (ii) January to December 1982, (iii) January to December 1983, and (iv) January and February 1984. They have been placed at pages 7-18 of the paper book filed by the assessee before us.

(ii) Copies of rent receipts issued by M/s. Ajay Builders showing receipt of rent by M/s. Ajay Builders (a sister-concern of the assessee) from the assessee for the

months of (i) March 1984 to April 1985 vide rent receipt dated 12-4-1985, (ii) May to October 1985, vide rent receipt dated 6-11-1985, (iii) November 1985, vide rent receipt dated 6-12-1985, and (iv) December 1985, vide rent receipt dated 31-12-1985. They have been placed at pages 19 to 22 of the paper book filed by the assessee before us.

(iii) Copy of Consent Terms in Suit No. 385 of 1984 between (i) D.I.Vaghani and M/s. Ajay Builders being plaintiffs, and (ii) Virendra Madhavlal Bhatt and others being defendants. At page 3 of the said Consent Terms, it is stated that "the outhouse in the said 'Janu Kunj' has been let out to M/s. Vikram International as a monthly tenant thereof and the sale is subject thereto". A copy of the said Consent Terms has been placed at pages 32 to 42 of the paperbook filed by the assessee before us. A copy of the order passed by the Hon'ble Bombay High Court on 24-2-1984 setting out the Consent Terms in the dispute between Ajay Builders (represented by D.T. Vaghani, partner) and Virendra Madhavlal Bhatt in the aforesaid suit, i.e., Suit No. 385 of 1988 has also been placed at pages 23 to 30 of the said paper book. In para 4(c) of the said order a reference has been made that the outhouse in the said Janu Kunj was let out to the assessee as a tenant thereof and sale of the property by the landlord to the society was subject thereto.

(iv) A copy of the Consent Terms between (i) KCMHS and Ajay Builders being the plaintiffs, and (ii) the assessee being the defendant filed before the Hon'ble Bombay High Court in suit No. 4495 of 1986. In the said Consent Terms it is stated that the assessee would hand over vacant and peaceful possession of the suit premises to M/s. Ajay Builders and Khar Milton Co-op. Housing Society Ltd. in consideration of their agreeing and undertaking to offer in writing to the assessee making available and handing over vacant and peaceful possession of the permanent and alternative accommodation and share certificates together with Letter of Allotment of the said permanent alternative accommodation. A copy of the said Consent Terms is placed at pages 57 to 60 of the paper book.

It is on the basis of the aforesaid pieces of evidence that the assessee contended that its tenancy which had commenced prior to the allotment of flat was genuine and that the flat in question was given to it in consideration of its having

surrendered the said tenancy rights in favour of the builders and Khar Milton Co-op. Housing Society Ltd. The learned authorized representative for the assessee further submitted that since the flat was allotted in consideration of surrender of tenancy rights, it was not liable to be taxed in the hands of the assessee in view of the decision of the Hon'ble Supreme Court in Cadel Spinning & Weaving Mills Ltd. (2005) 273 ITR 1 (SC).

As regards the non-production of Shri Virendra Madhavlal who had reportedly given the premises on tenancy to the assessee before the assessing officer, the learned Authorised Representative submitted that it was the duty of the assessing officer to have issued summons to Shri Virendra Madhavlal if he wanted to make the enquiries from him.

According to him the attendance of Shri Virendra Madhavlal was not at all necessary as the Consent Terms between Shri Virendra Madhavlal and Khar Milton Co-op. Housing Society Ltd. conveying the property clearly showed that the assessee was a tenant of Shri Virendra Madhavlal. As regards the certificate given by the solicitor, in which the name of the assessee is not shown as a tenant, the learned Authorised Representative submitted that the said certificate was given by the solicitor after search and verification of encumbrance in the Registrar's office where the tenancy rights are not registered and therefore, the mere absence of assessee's name in the title certificate given by the solicitor did not in any manner affect the genuineness of the assessee's tenancy.

In reply, the learned Departmental Representative strongly relied upon the orders of the departmental Authorities. He took us through the observations made by the learned Commissioner (Appeals) in his order to show that creation of tenancy was a colourable transaction and was not genuine at all.

We have considered the rival submissions and perused the materials placed before us. The first issue before us is whether the tenancy claimed by the assessee is genuine or not. It was the case of the assessee before the Departmental Authorities and indeed before us also that it was not only a tenant of Shri Virendra Madhavlal but also that its tenancy with him was genuine. The burden was, therefore, wholly on the assessee to adduce reliable and cogent

evidence to establish the genuineness of its tenancy. The assessee was also obliged to adduce best evidence available with it or within its reach to prove the genuineness of tenancy. It is well-settled that a party fails in its case if it fails to prove its case. It is equally well-settled that adverse inference against a party may be drawn if the party fails to adduce best evidence available within its reach at the earliest possible opportunity. Keeping these broad guiding principles in mind, we shall now examine as to whether (i) the assessee has discharged the burden that lay upon it to prove the genuineness of its tenancy; (ii) the assessee has filed the best evidence available with it or within its reach at the earliest possible opportunity before the concerned revenue authorities; and (iii) the facts available on record to justify the finding concurrently recorded by both the Departmental Authorities below that the tenancy claimed by the assessee was not genuine.

We have perused the materials placed by the assessee before us in support of the genuineness of its tenancy in the light of the order of the learned Commissioner (Appeals). Learned Commissioner (Appeals) has examined in detail the evidentiary value of all the pieces of evidence placed by the assessee before him including the so-called rent receipts produced by the assessee in support of the genuineness of tenancy. We have perused his order and find the same to be well founded for rejecting the copies of rent receipts as reliable pieces of evidence.

We are in complete agreement with his finding in this behalf and, therefore, do not wish to encumber this order by repeating what the learned Commissioner (Appeals) has already mentioned in his order with utmost clarity. Nevertheless we have also perused the copies of rent receipts placed by the assessee in its paper book. Their perusal would show that they were prepared at one stretch and on the same typewriter.

Secondly, the contents of the receipts, the font (i.e., letter size and letter style) used, the space (between the letters/words and lines) given, the erasures/corrections made and the text of all the receipts allegedly issued by Shri Virendra Madhavlal are exactly the same though they were issued over a period of 3-4 years. Thirdly, though all the receipts are typed ones, the month for which the rent was reportedly paid is handwritten in all the receipts without any exception.

Fourthly, date of issue as given on all the rent receipts is rubber-stamped without any exception. All the rubber stampings have same set of letters (i.e., letter size and letter style) on all the receipts. Such striking similarities in all the rent receipts over a period of 3-4 years do not appear to be natural and is indeed absent in the ordinary course of human conduct. Fifthly, all the receipts are conspicuously silent as to whether the rent was paid in cash or by cheque. Sixthly, the copies of rent receipts given by the assessee relate to the period commencing May 1981 though it claims tenancy from November 1980. The assessee has not given any evidence to support the tenancy from November 1980. Seventhly, Shri Virendra Madhavlal who had reportedly given the tenancy, received the rent and issued the rent receipts in question did not come forward before the assessing officer to testify and admit the correctness of the aforesaid facts. Even the assessee could not produce him for examination before the Departmental Authorities and hence, the rent receipts issued by Shri Virendra Madhavlal remained unsubstantiated and unconfirmed/ unverified by that very person who had allegedly issued them. As regards the rent receipts allegedly issued by the assessee's sister concern M/s. Ajaya Builders, the learned Commissioner (Appeals) has rejected them on the ground that the said firm was entrusted with the development of the property and was not conferred the rights of a landlord of the premises in question and hence, had no legal authority to issue the said rent receipts.

Having carefully perused them, we find no reason to take a view different from the one taken by the learned Commissioner (Appeals) in the matter. On the facts of the case so elaborately brought on record, we are unable to disturb the finding of the learned Commissioner (Appeals) in this behalf.

Apart from the rent receipts, the learned Commissioner (Appeals) has, in his elaborate order, considered all the other pieces of evidence including the photographs of the premises in question and found them to be unreliable in material respects. He, therefore, held that there was a failure on the part of the assessee to prove the genuineness of tenancy which the assessee claimed to have acquired from Shri Virendra Madhavlal. He noted, in particular, that the assessee's representative had, in his letter dated 28-12-1993 spoke of the assessee's tenancy of "Virendra Villa" whereas the assessee claimed the tenancy

of "Janu Kunj". According to the learned Commissioner (Appeals), this uncertainty with regard to the premises that the assessee had reportedly taken on tenancy was sufficient to dislodge the claim of the assessee regarding the genuineness of the alleged tenancy. For the detailed reasons recorded by him in his order, the learned Commissioner (Appeals) has held that the assessee was never a tenant of the property in question and that it had obtained the flat from its sister-concern without surrendering any tenancy right. Having perused his order and examined the matter, we are inclined to agree with the Commissioner (Appeals).

The learned Authorised Representative has placed strong reliance on the Consent Terms dated 30-9-1986 (pp. 57 to 60 of the paper book) agreed upon between (i) KMCHS and Ajaya Builders being the plaintiffs, and (ii) the assessee being the defendant in Suit No. 4495 of 1986. We have perused the aforesaid Consent Terms. It is mentioned in the said Consent Terms that the assessee would be given an alternative permanent accommodation in consideration of its surrendering the tenancy rights in favour of the said plaintiffs. They do not however indicate the precise description of the property in which the assessee had tenancy rights and which it wanted to surrender in favour of the plaintiffs.

The learned Authorised Representative has also placed strong reliance on the averments made in the Consent Terms settled by the Hon'ble Bombay High Court in Suit No. 385 of 1984 (supra). Assessee itself is not a party in the said suit. The short question is whether the aforesaid Consent Terms agreed to between the parties have the effect of creating tenancy. In our view, the answer is in negative for several reasons; one, genuineness of assessee's tenancy was not the subject matter of dispute in any of the aforesaid suits and hence, the Consent Terms as agreed to between the concerned parties in the aforesaid suits would not have the same effect as the judgment or order of a competent court would have had if the said issue had directly been the subject matter of dispute or judgment; two, the said Consent Terms were based upon consent and not upon adjudication by a competent court of law; three, the said Consent Terms would not bind the Income-tax authorities as they were not a party to those Consent Terms; and four, the said Consent Terms did not prevent the department from exercising their statutory powers in accordance with law and hence, they had the statutory authority to

examine the existence of tenancy in order to correctly determine the tax liability and then come to the conclusion whether any genuine tenancy was at all in existence. There is no doubt that the judgment or an order of a competent court of law is highly relevant and hence, it should not be overlooked or ignored by the Income Tax authorities. However, this principle cannot, in our humble view, be applied universally without having regard to the facts and materials brought on record. Cases where the necessary parties have not been joined or where issues under consideration have not been directly raised, argued or considered and adjudicated on merits by the competent court would, inter alia, be cases where the judgment or order would be binding between the parties to the suit only and not on other statutory authorities and bodies who/which are mandated by law to dispose of the matters falling under their jurisdiction in accordance with the law governing them. A judgment or order binds the parties on what it decides and not on what it does not decide. Decisions in V Datchinamurthy v. Asstt. Director of Inspection (1984) 149 ITR 341 (Mad.); CIT v. Tribhandas Jivanlal Gajjar (1977) 109 ITR 296 (Guj.); Keshavlal Punjaram v. CIT (1983) 141 ITR 466 (Guj.) and CIT v. C.K .Thakore (1982) 136 ITR 464 (Bom.) are also apposite, In our humble view, the Consent Terms as agreed upon between the parties in the matter before us are not by themselves sufficient to establish the genuineness of the alleged tenancy claimed by the assessee. They may be relevant but are not sufficient to decide the matter in favour of the assessee considering other factors brought on record by the Departmental Authorities.

Let us now turn to the question as to whether the assessee had adduced best evidence available with it or within its reach at the earliest possible opportunity before the departmental authorities. A matter is treated as proved not on the basis of quantity of evidence but on the basis of quality of evidence. Pieces of evidence emanating, inter alia, from independent sources, Governmental authorities /bodies, or from ordinary course of business carry qualitatively better evidentiary value than those coming from interested parties or which tend to serve ones own self interest. The assessee claimed that it was a tenant of Shri Virendra Madhavlal since November, 1980. But there is no tenancy agreement. It is quite possible to say that tenancy was orally agreed upon between the assessee and the landlord. But the landlord was not produced for oral evidence or examination before the

assessing officer despite the assessing officer having insisted upon it. So much so even the current address of the landlord was not furnished to the assessing officer and hence, he could not issue the summons to the landlord at his current address. And the summons issued by the assessing officer at the old address furnished by the assessee was returned unserved. Thus, there is no oral or documentary evidence to establish that the assessee was a tenant at the premises in question. The very foundation on which the tenancy could have come into existence if it had been genuine was absent in the matter before us. Secondly, the assessee is a firm. But the assessee could not give any explanation as to what was done at the tenanted premises or why the premises in question was taken on rent.

Thirdly, the assessee claims to have occupied the premises in question since November 1980 but the assessee could not give even a single copy of any electricity bill. It is not possible to believe that any person in the position of the assessee would have stayed at the place in question without any electricity connection. Fourthly, the assessee could not give even a single telephone bill to show that it was in occupation of the premises in question since November, 1980. Fifthly, the assessee could also not furnish any bill for water charges, maintenance, etc., to show that it was in occupation of the premises in question. It can be nobody's case that the aforesaid pieces of evidence were not vital. Sixthly, there were hosts of other independent pieces of evidence that could have been adduced by the assessee to prove the genuineness of tenancy or, at least, the fact that it was actually occupying the said flat during the period of tenancy. In the absence of such better and independent pieces of evidence which were either available with the assessee or were within its reach, the departmental authorities, in our view, were justified in taking the view that they have taken in the matter.

It was also contended by the learned Authorised Representative that payment of rent was supported by the entries in the books of account of the assessee. In our view, such entries are in the nature of self-serving pieces of evidence. There is no independent evidence like electricity bill, water charges bill, telephone bill, payment of maintenance charges or any relevant record like bank account to establish the address of the assessee at a place which it reportedly occupied as a tenant. The genuineness of tenancy is essentially a question of fact and not a

question of legal argument. It was the duty of the assessee to adduce best possible evidence, whether oral or documentary, to establish the genuineness of its tenancy. The assessee did not adduce the best possible evidence within its reach and, therefore, the case of the assessee falls flat on this ground alone.

Besides, the departmental authorities have brought sufficient materials on record to show as to why the evidence adduced by the assessee was not at all reliable and sufficient to accept its claim of the tenancy.

We see no infirmity in their orders. We, therefore, confirm their finding that the assessee has not been able to establish its claim of tenancy. Ground No. 1 taken by the assessee is dismissed.

"Without prejudice to the above, the learned Commissioner (Appeals) failed to appreciate that even if tenancy was not genuine, value of the flat received could not have been treated as income".

The aforesaid ground was not raised before the learned Commissioner (Appeals). The assessee has urged before us that the issue raised in the said ground was purely legal and hence, should be admitted for adjudication. We are of the view that the aforesaid ground is a legal ground interlinked with the first ground. Hence, we admit the same for adjudication.

Perusal of the orders passed by the departmental authorities show that the value of the flat received by the assessee from M/s. Ajaya Builders was assessed in the hands of the assessee as income in the nature of casual or non-recurring receipt and brought to tax accordingly under section 10(3) relying upon the decision in CIT v. Gulab Chand (1991) 192 ITR 495 (All.). The grievance of the assessee is that the flat in question received by the assessee from its sister concern M/s. Ajaya Builders cannot be treated to be income in its hands. It is submitted that the said flat was, at the most, a gift received from the sister concern without consideration and hence, not exigible to tax. It was emphasized by the assessee before us that the receipt of the flat in question was not in the course of the assessee's business and, therefore, it cannot be treated as income at all in the hands of the assessee.

The learned authorized representative for the assessee submitted that the decision in CIT v. Gulab Chand (1991) 192 ITR 495 is no longer valid in view of the decision in Hon'ble Supreme Court in CIT v. D.P Sandhu Brothers Chembur (P) Ltd. (2005) 273 ITR 1 (SC). He pointed out that the Hon'ble Supreme Court has held in the aforesaid case that capital gains cannot be brought to tax as casual or non-recurring receipt where no cost of acquisition can be computed. He reiterated his submission that the assessee had received the flat in consideration of its surrendering the tenancy right and hence, there was no cost of acquisition though the said flat received from M/s. Ajay Builders was a capital receipt within the meaning of section 2(14). His alternative submission was that even if his plea regarding the receipt of the flat from M/s. Ajay Builders in consideration of his said surrendering its tenancy right is not accepted, the receipt of flat by the assessee would still not be taxable as it would be a gift received from the sister concern without any consideration.

In reply, the learned Departmental Representative supported the orders of the departmental authorities.

We have considered the rival submissions. In the case before us what is being taxed is the receipt of amount represented by the value of the flat treating the same to be income in the nature of casual or non-recurring receipt. The first issue is whether the provisions of section 10(3) are at all applicable on the facts of the case.

Sub-section (3) of section 10 stood, at the material point of time, as under: "10. Incomes not included in total income.In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included (3) any receipts which are of casual and non-recurring nature, to the extent such receipts do not exceed five thousand rupees in the aggregate : (ii) receipts arising from business or the exercise of a profession or occupation; or It is evident from the above that section 10 deals with exemption of particular types of income from being included in the total income of an assessee. Casual and non-recurring receipts to the extent of Rs. 5,000 alone are exempt from taxation under section 10(3). It is, therefore, clear that receipts of casual and non-recurring nature

exceeding Rs. 5,000 are exigible to tax. It is equally relevant to note that clause (3) of section 10 uses the expression "any receipts". In our view, the expression "receipts" is synonymous with "income" since that is the dominant theme and purpose of section 10. The expression "income" has been defined in clause (24) of section 2 to include capital gains. It is precisely for this reason that proviso (i) to clause (3) of section 10 expressly excludes "capital gains chargeable under the provisions of section 45" from the ambit of the said clause.

What is however important to observe is that capital receipts are not excluded from the inclusive definition of "income" as given in subsection (24) of section 2. It may also be relevant to observe that the definitions given in section 2 are subject to the context and hence, the dominant theme and purpose of section 10(3) cannot be lost sight of while construing the meaning of "income". We are, therefore of the view that it is the receipt as such which is the subject-matter of taxation and exemption, to a limited extent, under section 10(3).

In order to attract the provisions of section 10(3) what is required to be shown is that the receipt in question is of a casual and non-recurring nature and that such (i) receipt is not chargeable as a capital gain under the provisions of section 45 (ii) receipt does not arise from business or the exercise of a profession or occupation; and (iii) the receipt is not by way of addition to the remuneration of an employee. Now, the question is whether the receipt in question can be characterised as a casual and non-recurring one and if it can be, the further question would be whether it is exempted under any of three sub-clauses from the purview of being a receipt of casual and non-recurring nature On the first aspect of the question there can hardly be any doubt; it is certainly a receipt of a casual and non-recurring nature. Coming to the second aspect of the question, sub-clauses (ii) and (iii) are, admittedly, not relevant. Sub-clause (i) is also not applicable on the facts of the case as it is applicable where the capital asset is transferred and there is a resultant gain.

In the case before us, the assessee has neither transferred any asset nor the department has even attempted to invoke section 45. The case before us is of receipt of asset and not receipt of money on sale of asset. We have already

rejected the submission of the assessee that the receipt of flat from its sister concern was in consideration of surrender of tenancy rights. Thus, the case of the assessee is not excluded by any of the sub-clauses of section 10(3) and hence, the receipt of flat in question is liable to be taxed as a casual and non-recurring receipt under section 56 read with section 10(3).

As regards the reliance placed by the assessee on the decision in D.P.Sandhu Brothers Chembur (P.) Ltd. (supra) it should be sufficient to observe that the said decision is an authority for the proposition that that tenancy right is a capital asset and its surrender could attract section 45 and resultant gains would be assessable, if at all, only under the head "Capital gains". The Hon'ble court has further held that such capital gains cannot be treated as a casual and non-recurring receipt under section 10(3) and be subjected to tax under section 56.

The decision of the Hon'ble Supreme Court in the said case is to the effect that an item of capital gains, which has no cost of acquisition cannot be taxed as a casual or non-recurring receipt. In the case before us, it is not the capital gain, which is being brought to tax by the departmental authorities but the acquisition of flat without transferring or surrendering any asset or the so-called tenancy rights.

There is no element of parting with any asset for consideration in the case before us. The assessee has transferred nothing to get the flat.

Section 45 is not at all applicable on the facts. The assessee has simply received a flat, which the department has taxed as a casual and non-recurring receipt. In our view, the decision of the Hon'ble Supreme Court in D.P. Sandhu Brothers Chembur (P) Ltd.'s case (supra) is not applicable on the facts of the case.

It was contended by the learned Authorised Representative that the value of the flat received by the assessee was a capital receipt in its hands and hence, not exigible to tax. The term "capital asset" is defined by section 2(14) to mean "property of any kind held by an assessee, whether or not connected with his business or profession, but does not include..." Capital receipt would therefore, mean receipt of a sum of money on transfer of any property held by an assessee. In the present case, the assessee has neither transferred any capital asset held by

it nor received any sum of money in consideration of such transfer. On the other hand, the assessee has simply received the flat in question. There is, therefore, no question of treating the value of the flat in question received by the assessee as capital receipt. In any case, the distinction between capital receipt and revenue receipt is immaterial for the purposes of section 10(3) as it is the "receipt" per se of a casual and non-recurring nature that is the subject-matter of taxation under section 10(3) read with section 56.

We have also considered the submission of the assessee that the receipt of flat by the assessee should be treated to be a gift having been made by the sister concern, M/s. Ajay Builders to the assessee without consideration. We are unable to accept the aforesaid submission of the assessee either. Section 122 of the Transfer of Property Act defines gift to mean transfer of movable or immovable property made voluntarily and without consideration by one person called the donor to another, called the donee and accepted by or on behalf of the donee. No evidence has been placed either before the departmental authorities or before us that the flat was given by the sister concern to the assessee by way of gift. In fact, the stand taken by the assessee that it had received the flat in lieu of surrendering the alleged tenancy right itself contradicts the claim of the assessee that the flat was received by way of gift. Receipt of gift and that too of immovable property of the value of Rs. 40 lakhs cannot be accepted unless relevant materials in support of the gift are placed on record. The factum of gift having been made by Ajay Builders to the assessee has to be established with reference to the ingredients of section 122 and other provisions of the Transfer of Property Act and the Registration Act. No gift deed either registered or un-registered has been placed before us to substantiate the claim of the gift though the assessee wants us to believe that it received the immovable property in question valued at Rs. 40 lakhs by way of gift. In the absence of any evidence establishing the gift, it is not possible for us to act upon the bald statement made by the assessee in this behalf. In this view of the matter, Ground No. 2 taken by the assessee is dismissed.

"The learned Commissioner (Appeals) erred in confirming the disallowance of Rs. 1,00,000 being commission paid." At the time of hearing, the learned authorized

representative for the assessee did not seriously press the aforesaid ground of appeal. We have perused the order of the learned Commissioner (Appeals) in this behalf. We are in agreement with him. Ground No. 3 is, therefore, dismissed.

(a) Addition of Rs. 39,95,000 on account of receipt of a residential flat by the appellant on surrender of tenancy rights may be deleted.

5. "The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal." We have already dealt with the issues raised in ground No. 4. For the reasons given above, ground No. 4 is dismissed.

Ground No. 5 is general in nature and does not call for any adjudication.

"On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in:- (a) deleting the addition of Rs. 5,50,000 and disallowance on loss on sale of import raw-material of LDPE; (b) not appreciating the fact that other sister concern of the assessee has earned GP margin of about 5 per cent in the same kind of trade; (c) ignoring the fact assessing officer estimated a GP of about 5 per cent on the sale of two import of LDPE as compared with preceding year of GP of 6.79 per cent which is quite reasonable; (d) not appreciating the fact that the assessee has been carrying out this business of import and selling plastic raw materials of High Seas and Sales basis for number of years; and (e) deleting the disallowance on account of GP and loss instead of setting aside the assessment." In support of the appeal, the learned Departmental Representative relied upon the order of the assessing officer and submitted that the addition made by the assessing officer was based on proper grounds and hence, the same should be restored.

In reply the learned Authorized Representative for the assessee supported the order of the learned Commissioner (Appeals). He relied upon the following decisions of the Tribunal, which, according to him, covered the issue against the department : (i) Order dated 23-3-2004 passed by 'G' Bench Mumbai in Asstt.

Commissioner v. Milton Plastics. (IT Appeal No. 2004 (Mum.) of 1998) for the assessment year 1992-93.

(ii) Order dated 11-11-2003 passed by Mumbai Bench 'I' of the Tribunal in Asstt, CIT v. Rising Star Plastics (P.) Ltd. (IT Appeal No. 5693 (Mum.) of 1998) for the assessment year 1992-93.Asstt. CIT v. Stead Fast Holdings (P) Ltd. (IT Appeal No. 4453 (Mum.) of 1998) for the assessment year 1991-92.

We have perused the order of the learned Commissioner (Appeals) and also considered the decisions relied upon by the learned counsel for the assessee. He has dealt with his issue in para 3.1 to para 3.5 of his order. In our view the learned Commissioner (Appeals) has correctly appreciated the factual and legal aspects of the case. No infirmity in his order has been brought to our notice requiring our interference with his decision. His order is, therefore, confirmed. Appeal filed by the department is dismissed.

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