ito Vs. Sitaram Chamaria

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Dec-22-2005

Reported in : (2006)6SOT594(Mum.)

Appellant : ito

Respondent : Sitaram Chamaria

Judgement :
These appeals filed by the revenue are directed against separate orders both dated 15-2-2002 of the Id. Commissioner (Appeals) XXI, Mumbai, pertaining to the assessment year 1998-99. Since common issue is involved in both the appeals, they are disposed of by this common order for the sake of convenience.

"On the facts and the circumstances of the case and in law, the Id.

Commissioner (Appeals) has erred in directing to tax the sale consideration of Rs. 71,13,670 in respect of both the assessees as capital gains in terms of section 45(1) read with section 2(47)(v) of the Income Tax Act instead of taxing it as business receipts." Since the facts in both the assessees are identical, we discuss the brief facts in the case of Shri Sitaram P. Chamaria (L/H), which are as under:- The facts in brief are that Shri Sitaram P. Chamaria (L/H) alongwith his wife and a son Shri Sushil S. Chamaria, owned three plots of land at Malad, Mumbai. All these three persons have entered into ajoint development agreement separately with M/s. Vinayak Developers to develop the land in the previous year relevant to the assessment year 1994-95. In the return of income for the assessment year

under review the assessee claimed that the land situated in Malad being his capital asset and claimed to have earned profit on sale as chargeable to tax as long-term capital gain. Accordingly, a sum of Rs. 34,91,089 was offered for tax under the said head. The assessing officer on the other hand after due examination of the facts of the case came to the conclusion that the assessee had indulged in an adventure in the nature of trade of development of the said land and hence income arisen to the assessee by way of profit has to be charged as business income. The assessing officer, therefore, taxed the income under the head "Income from business and profession" and "Capital gains". In arriving at the said conclusion, the assessing officer further held that in the accounting year relevant to the assessment year 1994-95, the assessee had converted his capital asset into stock-in-trade and hence capital gains is liable for tax in terms of the provisions of section 45(2) of the Act. The capital gains computed in terms of the said section was arrived at a loss of Rs. 9,41,755. The assessing officer held that the said loss is not allowed to be carried forward in view of the provisions of section 80 of the Act as the return of income for relevant assessment year was filed late and hence cannot be earned as a return under section 139(3) of the Income Tax Act, 1961 and computed income from business of Rs. 52,73,670.

In the assessment order, the assessing officer also mentioned that on 8-5-1993, the assessee owned an immovable property being a plot of land at Malad. He entered into an agreement on the said date with one M/s.

Vinayak Developers for the development of the said property. As per the said agreement, the developer was to develop the plot by constructing a building as per the approved plan and sell the flats constructed therein to the flat owners. The developer was to pass 30% of the sales consideration of the flat constructed to the assessee as the sales consideration of the land transferred. The assessing officer observed that M/s. Vinayak Developers the entity which carried on the development of land is a partnership firm comprising of four partners out of which two are close relatives of the assessee, There was no absolute transfer of the plot of land as even till the agreement was entered into for the sale of flats constructed therein, the land was not transferred either in the name of the individual flat owners or in the name of any society of the flat owners formed for this purpose.

The assessing officer accordingly concluded that there was no absolute transfer within the meaning of section 2(47) of that Act. Further, in terms of clause 2 of the agreement, the assessee continued to have the right to decide and determine the area of the building to be constructed. In terms of clause 8, the assessee had the right to appoint an architect and issue necessary certificates though the names of the architects have to be nominated by the developers. The assessing officer further concluded that as per the power of attorney given to the developers by virtue of which the developer carried on the development of the land was in effect the right given to the developer to carry on the business of joint venture as the representative of the assessee. According to the assessing officer, this was something unique as in other development agreements; the consideration for the land was clearly defined and is no where linked with the sale of property to be constructed thereupon.

in view of the aforesaid reasons, the assessing officer took the view that transaction did not involve the transfer of the capital asset as the consideration received or receivable cannot be quantified to a fixed sum. The considerations were to be received when only the sale of property constructed by the developers takes place. There was therefore, an element of risk and hence an adventure in the nature of business is involved. The assessing officer accordingly held that income accruing to the assessee is to be taxed as business profits and not under the head "Capital gains" as declared by the assessee.

On appeal, the assessec contended that the assessee had never carried on any business of land development or sale and purchase of immovable property in the past as alleged by the assessing officer. it was claimed that the assessee had never converted the capital asset owned by her into stock-in-trade as has been held by the assessing officer to have done so on the date on which the assessee has entered into the development agreement. In the return of wealth, the plot in question was shown as capital asset even after entering into the agreement and it paid the wealth tax thereon. Even in the income-tax return, the said land was shown as capital asset and this fact was accepted by the assessing officer. Before the Commissioner (Appeals), it was further stated that clause 7 of the agreement which provides for issue of power of attorney by the assessee in favour of the

developer merely enable the assessee to grant license to the developer to develop and carry on the construction work. The assessee retained all proprietary and ownership rights. The assessee had not contributed in any manner in the construction of the immovable property. The transfer of land became operative only when the building was completed and sale proceeds were collected. The transfer as envisaged under section 2(47) takes place only in the year in which the agreement of sale was entered into and consideration received and not in the earlier years. It was also submitted that even provision of section 2(47)(iv) relating to conversion of capital assets into stock-in-trade is attracted only on the action of the owner and it the choice of the owner to do so. In the instant case, the assessee continued to be owner of the land in question as capital asset and show the same as such in both the wealth tax and income-tax returns.

it was further submitted before the Commissioner (Appeals) that with regard to contents of the agreement dated 8-5-1993 by virtue of which the assessee entered into the agreement with the developers for the development of the plot of land owned by the assessee, clauses 4 and 5 clearly specify that the fund required for the development shall be brought by the developers alone clearly indicating that the assessee had not entered into any business or adventure in the nature of trade.

Clause 7 specifies the owner permitting the developer to enter the property with a view to carry on the construction, such license or possession as licencee does not amount to the possession of the property. Clause 2 of the agreement stipulated that the developers shall construct the building and the owner shall not interfere with the construction subject to the stipulation that the total build up area of new building shall not go below the permissible area allowed by the Municipal Corporation. The owner had the right to determine the area of the building to be constructed. Regarding appointment architect, it was submitted that the architects were to be nominated by the developer and the owner was to give the consent only. The gross sale proceeds on sale of flats constructed were to be received by the developer on behalf of the owner. Clause 17 specified that a part of the sale consideration was for allowing utilization and transfer of the land component. It was also submitted that merely on the term that the assessee was to get her sale

consideration on transfer of land in the form of a part of the sale consideration of the flat, which had to be agreed upon in view of the circumstances prevailing it was not correct on the part of the assessing officer to conclude that the assessee had entered into a joint venture arrangement through the developer to carry on the business of development and consequential sale of flats.

After considering all the facts narrated by the assessee, the Id.

Commissioner (Appeals) in para 8 on page 7 of the impugned order held that one thing is very clear that as on 1993 the assessee had only granted the right of a licence to the developer to carry out the work of construction. For this purpose the developer was to bring in its own fund to meet the day-to-day expenses of the cost. Hence, on that day the agreement only provided the developer the license to carry out the construction and sale has taken place only when the transfer of the flat had taken place by virtue of tripartite agreements entered into by the assessee as the owner, the developer and the flat owner. in the said agreement, the right of the assessee as the owner has been duly recognized. For this reason, the Commissioner (Appeals) held that so far as the transfer is concerned in view of the possession of the immovable property the said transfer stands complete in terms of section 2(47)(v) of the Income Tax Act in the year in which the agreement with the flat owners has been entered into.

In para 9 of the impugned order on page 8, the Commissioner (Appeals) held that the plot of land owned by the assessee all along remained as capital asset and he had carried on an activity in the nature of trade and therefore, the profits earned on transfer was liable for tax as capital gains and not as business profits. In support of this, the Commissioner (Appeals) relied on the decision of Delhi High Court in the case of CIT v. B.K. Bhaumik (2001) 116 Taxman 189 (Del) wherein, it was held that what is important to decide whether the sale is for realization from the capital asset or profits from the adventure in the nature of trade is the intention at the time of the purchase of the property by the buyer and his contemporaneous conduct. The Commissioner (Appeals) further relied on the decision of the Supreme Court in the case of Janki Ram Bahadur v. CIT (1965) 57 ITR 21 (SC), wherein it was held that profit motive in entering into a transaction is not a decisive one for an

accretion to capital does not become profit merely because of an asset was acquired in the expectation that it may be sold at a profit, In para 10, the Commissioner (Appeals) held that only because the consideration for sale of land was fixed with reference to the total gross sale proceeds of the profit the assessee ensured certain safeguards in the development agreement such as prescribing minimum FSI to be constructed on the land and the appointment of the architect etc.

These conditions prescribed do not by themselves indicate to conclude that the activities of the assessee were that of a businessman. Further by ensuring that the sale consideration of land was to be a percentage of total gross sale realized by the developer the assessee never sought to share profit earned from the construction activity of the developer.

Finally, for the reasons given in para 11, the Commissioner (Appeals) directed the assessing officer to take consideration as capital gains in terms of section 45(1) read with section 2(47)(v) of the Income Tax Act as disclosed by the assessee. The said para is reproduced in its entirety as below :- "In view of the above, it is clear that in the instant case the conduct of the appellant is not that of a businessman engaged in an adventure in the nature of trade by sharing the profits earned by the developer.

The appellant merely accepted the sale consideration of the land which was part of the total sale consideration of the flat sold. The assessing officer was therefore not correct as per law to hold that the appellant has engaged in an adventure resulting in his receipt being chargeable to tax under the head 'Income from business and profession'.

It is a clear case where a transfer has arisen in terms of section 2(47)(v) of the Income Tax Act on account of handing over the possession of the land to the flat owners and the receipt of sale consideration. Consequently, the sale consideration has to be charged to tax under the head 'Capital gain' as has been rightly offered by the appellant. The decision of the assessing officer to hold that the capital asset has been converted into stock-in-trade and subsequently sold for business profits, therefore, cannot be upheld. The assessing officer is therefore directed to tax the

sale consideration as capital gains in terms of section 45(1) read with section 2(47)(v) of the Income Tax Act as has been disclosed by the appellant." At the time of hearing before us, on behalf of the revenue, Shri Ankur Garg, Id. D.R. appeared and heavily relied on the reasoning given by the assessing officer in the assessment order. The Id. D.R. contended that till the plot in question was converted into stock-in-trade i.e., in the year 1993, the difference is liable to be taxed under the head 'Capital gains'. Thereafter, the difference is taxable as business profit as rightly done by the assessing officer.

On the other hand, the Id. Counsel for the assessee reiterated the submissions made before the authorities below. The counsel relied on the decision of the Madras High Court in the case of CIT v. MLM Mahalingam Chettiar (1977) 107 ITR 236 (Mad), wherein, the High Court following its earlier decision in the case of CIT v. Kasturi Estates (P.) Ltd (1966) 62 ITR 578 (Mad.) on identical facts, held that the developing of lands into building sites with a view to realize the best price without anything more, is consistent with the realization of the capital investment and the surplus received by the assessee will not be a trading or business profit. The counsel concluded that in this case also the agreement entered into by the assessee with M/s. Vinayak Developers was for sale of the plot of land owned by the assessee and nothing more. Therefore, the surplus is rightly declared by the assessee under the head 'Capital gains'. Hence, the order of the Commissioner (Appeals) be upheld.Both the parties conceded that the facts in ITA No. 2025/M/02 is almost identical to that of IT Appeal No. 2021 /M/02.

Having heard both the sides, we have carefully gone through the orders of the authorities below as well as the agreement entered into by both the assessees. As per development agreement, the developer, namely, M/s. Vinayak Developers was to develop the land to construct the building as per approved plan and sell the building constructed thereon to the flat owners. It was to pass 30% of the sale consideration of the flat constructed to the assessee as the sale consideration of the land transferred. From the perusal of various clauses of the deed, it is clear that as on 1993, the assessee had only granted the right of a licence to the developer to carry out the work of construction. The sales took place only when the transfer of the flat had taken place by virtue of tripartite agreements entered

into by the assessce as the owner, the developer and the flat owner. Till such time, the assessee contained to own the said land as capital asset as shown in the wealth tax and income-tax returns. In the sales agreement, the right of the assessee as owner has been duly recognized. In the assessment order, the assessing officer prima facie took the view that the assessee has indulged in an adventure in the nature of trade as the sale consideration of the land was not fixed and the land was not even registered on transfer. It is pertinent to note that the land has not been registered in the name of the flat owner or cooperative body even on some compulsions, but so far as the assessee is concerned, the possession over the said land has been given to the flat owners by virtue of the agreement entered into with the flat owner's by the developers and the assessee on the land owner jointly. In view of this, so far as the transfer is concerned, the position of immovable property, the said transfer has been completed in terms of section 2(47)(v) of the Income Tax Act in which agreement with the flat owner has been entered into. The assessee has not indulged any adventure in trade of development of land in question because the facts of the assessce are identical with that of Madras High Court decision in the case of MLM Mahalingam Chettiar (supra), wherein, the High Court held that the developing of lands into building sites with a view to realize the best price without anything more is consistent with the realization of the capital investment and the surplus received by the assessee will not be a trading or business profit.

In view of the foregoing and keeping in view the totality of the facts and circumstances of the case, in our considered opinion, the Id.

Commissioner (Appeals) is legally and factually correct in holding that both the assessees have not engaged in an adventure resulting in their receipts being chargeable to tax under the head "Income from business and profession". We, therefore, endorse the reasoning as well as conclusion of the Commissioner (Appeals) and reject both the appeals of the revenue.