

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'H' MUMBAI**

**BEFORE SHRI N.V.VASUDEVAN, JUDICIAL MEMBER &
SHRI T.R.SOOD, ACCOUNTANT MEMBER.**

I.T.A.NO.6272/Mum/2009 - A.Y 2006-07

Asst. Commissioner of I.T 5(3), Mumbai.	Vs.	M/s. S.K.M.Construction Pvt. Ltd., 111, Kika Street, 1 st Floor, Mumbai 400 004. PAN: AAACR 2884 C
<u>AND</u>		
I.T.A.NO.6499/Mum/2009 - A.Y 2006-07		
M/s. S.K.M.Construction Pvt. Ltd., MUMBAI.	Vs.	Asst. Commissioner of I.T 5(3), Mumbai.
(Appellant)		(Respondent)
Revenue by	:	Shri Y.P.Trivedi.
Assessee by	:	Shri Goli Srinivas Rao.

O R D E R

Per T.R.SOOD, AM:

These cross appeals are heard together and are being disposed of by this consolidated order.

3. I.T.A.No.6272/M/09 [Revenue's appeal]: In this appeal Revenue has raised the following grounds:

1. On the facts and in the circumstances of the case and as per law, the Ld. CIT(A) erred in holding that the assessee who is in the business of construction and development is liable to be assessed on the sale of TDR which has been accrued to him many years after the purchase of land as capital gain and not as business income.
2. On the facts and in the circumstances of the case and as per law, the assessee is assessable on the sale of TDR as Short Term Capital gain since the same accrued and was generated on 24-12-2004 and was sold by the assessee on various dates between April 2005 to November 2005.

3. On the facts and in the circumstances of the case and as per law, the assessee is liable to be assessed on the sale of TDR as income from other sources since the assessee is not in the business of purchasing and selling TDR nor was the TDR available to him at the time purchase of land, thus resulting in taxable income under the head other sources on sale of the said TDR.

4. After hearing both the parties we find that during the assessment proceedings AO noticed that assessee had declared long term capital gains on sale of TDR rights. The assessee had purchased a plot of land admeasuring 16700 sq.mts. from Shri Rooshi K. Modi & Smt. Manek. B. Coopar. The plot was purchased on 'as is where is' basis for a sum of Rs.23 lakhs. This particular land was basically reserved for a garden as per Development Plan 1987 by virtue of which no development activity was permitted on this land. However, the same was acquired by the Pune Municipal Corporation and the consideration was paid in the form of TDRs. These TDRs were sold in the open market by the assessee and the income from the same was offered under the head 'Long Term Capital Gains'. On a query by the AO that why this should not be treated as an adventure in the nature of trade, it was argued that the cost of land incurred for acquisition of the said land was reflected under the head 'investment' in the balance-sheet and, therefore, sale of investment would give rise to only capital gains. Reference was also made to the Memorandum of Association to show that the company is not permitted to engage in the business of selling of TDRs. It was pointed out that the object clause in the Memorandum only permitted the company to obtain the development rights for development and construction. The land was not purchased

for development as the development itself was not possible. The receipt of TDR was in the nature of compensation and same could be taxed only under the head 'capital gains'. However, AO did not accept these contentions because, according to him, as the land was shown as investment in the balance-sheet, it would not mean that the income was required to be computed as capital gains. He referred to the decisions of the Hon'ble Supreme Court in the cases of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT [82 ITR 363] and Sulej Cotton Mills Supply Agency Ltd. vs. CIT [116 ITR 1], wherein it was observed that the manner of writing entries in the books of account was not a decisive factor in ascertaining the true nature of the transaction. The reference to object clause was also not determinative. He observed that the land was purchased on 27-11-2001 and TDR rights were received on 21-12-2004 and as stated in a letter dated 24-10-2008, the intention was to make invest money in plot of land and to enjoy the benefits of capital assets by getting the DRC certificate from the Pune Municipal Corporation, which could be sold in the open market. Thus, from the beginning when the land was acquired for a meager consideration of Rs.23 lakhs, assessee had known that it would receive from the Pune Municipal Corporation TDR which could be sold for profit in the open market. In this regard he referred to the decisions of the Hon'ble Supreme Court in the cases of G. Venkataswami Naidu & Co. vs. CIT [35 ITR 595] & Khan Bahadur Ahmed Alladi & Sons vs. CIT [68 ITR 573], in which it was held that the real intention for buying a property has to be inferred. Since no development activity was possible

on this land and the only possibility was receipt of compensation, therefore, this has to be construed as an adventure in the nature of trade. After discussing the above noted two cases, AO concluded that it was only an adventure in the nature of trade. The income from sale of TDR rights was assessable under the head 'business income' and the same was assessed accordingly.

5. Before the Ld. CIT(A) it was submitted that the AO has wrongly treated the transaction as adventure in the nature of trade by observing that there was an element of earning profit. It was argued that profit motive would always be there in all investment transactions, but because of it, same cannot be treated as an adventure in the nature of trade and in this regard reliance was placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Raunaq Singh Swaran Singh [85 ITR 220]. It was further argued that the decision of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT [supra] has not been properly appreciated. It was argued that assessee was not a trader in land. This was the only plot purchased. No activity was done to improve the quality of land. No activity similar to the activities required for trading operations was carried on. The activity is not done on repetitive basis, therefore, the investment in the plot could not be held to be an adventure in the nature of trade. Reliance was also placed on various other case laws.

6. After examining the submissions, Ld. CIT(A) decided the issue vide paras 2.3 and 3.1 which read as under:

2.3 I have considered the submissions of the appellant and pursued the facts of the case. The Appellant purchased piece of land at Pune on 27.11.2001 and at the time of purchase the land was under reservation and therefore The Appellant cannot carry out any business activity on this piece of land. The only purpose of purchase of land is to get TDRs which The Appellant hoped that it will sale the same in the open market at higher rate. The Appellant is not in the business of dealing in TDRs. The Appellant carried out the activity to earn profit is not in doubt But profit motive can not be the decisive factor to hold that the Appellant indulged in activity which is an adventure in the nature of trade as correctly observed by the Supreme Court in the case of Raunaq Singh Swaran Singh 85 FIR 220. The issue of this nature has to be decided by taking into account all the facts and circumstances of a particular case. In the present case the Appellant purchased the land on 27.11.2001 and held the same for a period of more than three years and no act was done by the Appellant to improve the quality of Land. The Appellant got TDRs which it sold in the open market. The Appellant has shown the land as investment in its financial statement. There is no well designed plant to earn profits. The fact that on the reserve land, PMC will be allotting TDRs, was known even to the sellers at the lime of sale of land. Thus the Appellant has rightly claimed that profits on the sale of TDRs are taxable under the head "Capital Gain".

2.3.1 Since the appellant purchased the land on 24.11.2001 and sale of TDRs were made after the expiry of three years from the date of purchase of land, the gains of the Appellant are long term capital gains and not short term capital gains. The Appellant got the right to receive TDRs on 27.11.2001 when it purchased the land. This right has not obtained by the Appellant when it received the rights from Pune Municipal Corporation. 24.1 22004 is the date on which PMC allotted the TDRs to the Appellant. Therefore period of holding of asset in the case of the Appellant is more than thirty six months and the gains of the Appellant are liable to tax under the head long term capital gains The Assessing Officer will tax The gains of the Appellant under the head "Capital Gain" and treat the same as long term capital assets and the Appellant is entitled to claim indexed cost of purchase of plot while computing its long term capital gains. These grounds of appeal are allowed.

7. Before us, Ld. DR referred to the Conveyance Deed which is placed at pages 72 to 83 of the paper book. He invited our attention to recitation clause no.6 at page 74 in which it is clearly mentioned that the land was reserved for garden and the purchaser had approached the land-lord and had agreed to purchase the land on 'as is where is' basis. This means no development activity was possible and the only

motive to purchase the land was to earn profit by receiving compensation in the form of TDR rights. He then referred to various portions of the decision of Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT [supra] and submitted that since no development was possible on the said land, therefore, the same was purchased by the assessee only as an adventure in the nature of trade to earn profits by obtaining compensation in the form of TDR rights which could be sold in the open market for a premium.

8. On the other hand, Ld. Senior Advocate Shri Y.P.Trivedi, submitted that assessee was not in the business of dealing in TDR rights. In fact, assessee was not acting even as a builder during the relevant point of time and, therefore, this land was purchased only as an investment and was also reflected in the balance-sheet as an investment. He submitted that the decisions of the Hon'ble Supreme Court relied on by the AO [cited supra] are distinguishable on their own facts. He pointed out that in a case involving almost similar facts before the Pune Bench of the Tribunal in the case of Shri Jayant M. Lunawat vs. ITO in I.T.A.No.1167/PN/2001 [copy filed on record], it was held that surrender of lease rights would be taxable under the head 'capital gains'. While concluding, he strongly supported the order of the CIT(A).

9. We have considered the rival submissions carefully and find no force in the submissions of the Ld. DR because assessee has not purchased or sold any other plot immediately before this deal or after the deal. The assessee has further not done any development on this

plot. There are no repetitive transactions of this nature and, therefore, this was merely a case of investment in the hope that assessee would get good TDR rights which could be sold at profit. The presence of profit motive cannot lead to a conclusion that the transaction has been entered into as an adventure in the nature of trade as observed by the Delhi High Court in the case of CIT vs. Raunaq Singh Swaran Singh [supra] relied on before the Ld. CIT(A).

10. The Ld. DR had put lot of emphasis on the decision of Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT [supra]. In that case, the facts noted by the Hon'ble Supreme Court were as under:

"We may at this stage briefly indicate the material facts and circumstances found by the Tribunal and the inference drawn by it in regard to the character of the transaction in question. The appellant purchased the four plots under four different sale deeds. The first purchase was for Rs.521 and it covered a piece of land admeasuring 28-1/4 cents; the second purchase related to 2 acres 79-1/2 cents and the price paid was Rs.1,250; while the third and the fourth purchases were for Rs.1,942 and Rs.5,000 and they covered 28-1/4 cents and 1 acre and 90 cents respectively. The property purchased under the first sale deed was sold on 10th Nov., 1947, for Rs. 2,825 whereas the three remaining properties were sold on 1st Sept., 1947, for Rs. 49,775, the purchaser in both cases being the Janardana Mills Ltd. The purchase of the first item of property by the appellant had been made in the name of Mr. V.G. Raja, assistant manager of the Janardana Mills Ltd., who is the son-in-law of G. Venkataswami Naidu, one of the partners of the appellant firm. Naturally when this property was sold to the mills the document was executed by the ostensible owner V.G. Raja. It is not disputed that the purchase in the name of V.G. Raja was benami for the appellant. All the plots which were thus purchased by the appellant piecemeal are continuous and they adjoin the mills. On the plot purchased on 29th June, 1942, there stood a house of six rooms which fetched an annual rent of about Rs.100; and, after deduction of taxes, it left a net income of Rs.80 per year to the appellant. The other plots are vacant sites and they brought no income to the appellant. During the time that the appellant was in possession of these plots it made no effort to put up any structures on them or to cultivate them; and so it was clear that the only object with which the appellant had purchased these plots was to sell them to the mills at a profit. It was, however, urged by the appellant that the properties had been bought as an investment. This plea was

rejected by the Tribunal. The Tribunal likewise rejected the appellant's case that it had purchased the plots for building tenements for the labourers working in the Janardana Mills. Alternatively, it was urged by the appellant that the Janardana Mills decided to purchase the plots because an award passed by an industrial Tribunal in June, 1947, had recommended that the mills should provide tenements for its labourers. Thus, the appellant's case was that it had not purchased the properties with a view to sell them to the mills and the mills in fact would not have purchased them but for the recommendation made by the award which made it necessary for the mills to purchase the adjoining plots for the purpose of building tenements for its employees. The Tribunal was not impressed even by this plea; and so it ultimately held that the plots had been purchased by the appellant wholly and solely with the idea of selling them at profit to the mills. The Tribunal thought that since the appellant was the managing agent of the mill it was in a position to influence the decision of the mills to purchase the properties from it and that was the sole basis for its initial purchase of the plots. On these findings, the Tribunal reached the conclusion that the sum of Rs.43,887 was not a capital accretion but was a gain made in the adventure in the nature of business in carrying out the scheme of profit-making. The appellant contends that, on the facts and circumstances found in the case, it is erroneous in law to hold that the transaction in question is an adventure in the nature of trade."

The Hon'ble Supreme Court on these facts had made the following observations:

"As we have already observed 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 besides 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. If a person invests money in land intending to hold it, enjoys its income for some time, and then sells 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 investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. 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? Affirmative answers to these questions may furnish relevant data for determining the character of the transaction. What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold? If the commodity purchased is generally the subject-matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment. Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it

more readily resaleable? What were the incidents associated with the purchase and resale? Were they similar to the operations usually associated with trade or business? Are the transactions of purchase and sale repeated? In regard to the purchase of the commodity and its subsequent possession by the purchaser, does the element of pride of possession come into the picture? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of transactions alleged to be in the nature of trade. In considering these decisions, it would be 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."

On the above facts, the Hon'ble Supreme Court finally decided the issue vide following para-

"26. What then are the relevant facts in the present case ? The property purchased and resold is land and it must be conceded in favour of the appellant that land is generally the subject-matter of investment. It is contended by Mr. Viswanatha Sastri that the four purchases made by the appellant represent nothing more than an investment and if by resale some profit was realised that cannot impress the transaction with the character of an adventure in the nature of trade. The appellant, however, is a firm and it was not a part of its ordinary business to make investment in lands. Besides, when the first purchase was made it is difficult to treat it as a matter of investment. The property was a small piece of 28.1/4 cents and it could yield no return whatever to the purchaser. It is clear that this purchase was the first step taken by the appellant in execution of a well-considered plan to acquire open plots near the mills and the whole basis for the plan was to sell the said lands to the mills at a profit. Just as the conduct of the purchaser subsequent to the purchase of a commodity in improving or converting it so as to make it more readily resaleable is a relevant factor in determining the character of the transaction, so would his conduct prior to the purchase be relevant if it shows a design and a purpose. As and when plots adjoining the mills were available for sale, the appellant carried out his plan and consolidated his holding of the said plots. The appellant is the managing agent of the Janardana Mills and probably it

was first thought that purchasing the plots in its own name and selling them to the mills may invite criticism and so the first purchase was made by the appellant in the name of its benamidar V.G. Raja. Apparently, the appellant changed its mind and took the subsequent sale deeds in its own name. The conduct of the appellant in regard to these plots subsequent to their purchase clearly shows that it was not interested in obtaining any return from them. No doubt the appellant sought to explain its purpose on the ground that it wanted to build tenements for the employees of the mills; but it had taken no steps in that behalf for the whole of the period during which the plots remained in its possession. Besides, it would not be easy to assume in the case of a firm like the appellant that the acquisition of the open plots could involve any pride of possession to the purchaser. It is really not one transaction of purchase and resale. It is a series of four transactions undertaken by the appellant in pursuance of a scheme and it was after the appellant had consolidated its holding that at a convenient time it sold the lands to the Janardana Mills in two lots. When the Tribunal found that, as the managing agent of the mills, the appellant was in a position to influence the mills to purchase its properties its view cannot be challenged as unreasonable. If the property had been purchased by the appellant as a matter of investment it would have tried either to cultivate the land, or to build on it; but the appellant did neither and just allowed the property to remain unutilised except for the net rent of Rs.80 per annum which it received from the house on one of the plots. The reason given by the appellant for the purchase of the properties by the mills has been rejected by the Tribunal; and so when the mills purchased the properties it is not shown that the sale was occasioned by any special necessity at the time. In the circumstances of the case, the Tribunal was obviously right in inferring that the appellant knew that it would be able to sell the lands to the mills whenever it thought it profitable so to do. Thus, the appellant purchased the four plots during two years with the sole intention to sell them to the mills at a profit and this intention raises a strong presumption in favour of the view taken by the Tribunal. In regard to the other relevant facts and circumstances in the case, none of them offsets or rebuts the presumption arising from the initial intention; on the other hand, most of them corroborate the said presumption. We must, therefore, hold that the High Court was right in taking the view that, on the facts and circumstances proved in this case, the transaction in question is an adventure in the nature of trade."

Thus, it is clear from the above that the land was acquired in a systematic way in small pieces and lands were purchased in benami names with a clear intention to sell the same to the mill for which assessee firm was managing agent. Thus, facts are quite distinguishable, as in the case before us, purchase of land was a solitary transaction and no other activity was conducted on the same.

No repetitive transactions of similar nature have been undertaken. Therefore, it is a clear case of investment and the same has been realized after a gap of 4/5 years and same was rightly held to be resulting in long term capital gains by the Ld. CIT(A). Therefore, we find nothing wrong in the order of the Ld. CIT(A) and confirm the same.

11. In the result, Revenue's appeal is dismissed.

12. I.T.A.No.6499/M/09 [Assessee's appeal]: In this appeal, the assessee has taken the following ground:

"On the facts and in law, the learned CIT(A) erred in treating investment in shares as trading activity and thereby treating the profit on sale of shares of Rs.13,72,798 as Business Income against capital gains shown by appellant on the ground of frequency, quantity, turnover and regularity of transactions without appreciating the fact that intention of buying shares was for investment purposes, main business of appellant is not of trading in shares, ratio of purchase and sales is very low at 32%, outstanding shares were shown as 'Investments' in books of accounts and investments were made from the reserves and not out of borrowed funds."

13. After hearing both the parties we find that during the year assessee has entered into transactions of purchase and sale of shares and the surplus amounting to Rs.13,72,958/- was declared as short term capital gains. The AO was of the view that same was in the nature of business and, therefore, relevant query was raised. In response, it was stated that the investment activity in shares was started in order to utilize the surplus fund of the company for earning dividend and capital appreciation. It was further pointed out that wherever transactions have taken place on delivery basis, same have been offered as capital gains and when no delivery has taken place, same has been taken as business activity. No borrowings were made.

It was also pointed out that some of the shares were sold in short period either to safeguard the investment from further loss or from anticipated fall in the open market. Reference was also made to the main object which allows the investment activity. The AO did not find force in these submissions. He observed that merely treating a transaction in a particular way will not be a decisive factor for ascertaining the true nature and in this regard reliance was placed on the decision of the Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT [82 ITR 363] and Sutlej Cotton Mills Supply Agency Ltd. vs. CIT [116 ITR 1]. Reference to Memorandum of Association was also rejected because some of the transactions were shown as business income by assessee itself. He also observed that clear details of loans were not available and there was a loan of Rs.33 lakhs at the beginning of the year which increased to Rs.35 lakhs, which only indicated that some borrowings were made. In this background, the income from shares was treated as income from business.

14. Before the Ld. CIT(A) the submissions made before the AO were reiterated and reliance was also placed on case laws. The Ld. CIT(A) after examining the submissions, decided the issue against the assessee vide para 3.3.3 which is as under:

3.3.3 In the case of the Appellant it is seen that the Appellant has as investment as is evident to the financial statements. However if one takes into account frequency, quantity, turnover and regularity of transactions, there is only irresistible conclusion that Appellant is a trader in shares This is the first year of this activity and yet the turnover of the Appellant is 6.52 crores for purchases and Rs.2.14 crores for sales. The Appellant indulges in purchase of shares on 180 times and entered into sale transaction on 97 times. The Appellant

has purchased and sold shares in lots. The Appellant also indulged in repeated purchase and sale of shares of a particular company. For examples shares of M/s Granules were purchased in the month of December 05 and were sold in the month of December, 05 and these shares were again purchased. Similarly the Appellant purchased shares of M/s Triveni Engg. in the month of December, 05 and sold in the month of December, 05 and these shares were again purchased in the month of March, 06. Chart furnished by the Appellant shows that shares were sold within short time from the date of purchase and some times even sold on the date of purchase itself. These transactions of the Appellant are regular in nature and are carried out by the Appellant through out the year and it can not be said that these transactions are carried out by the Appellant to protect the value of investment when the fact is that the Appellant earned profit of Rs.13,72.798/-. Taking into accounts all these facts, it is held that the Appellant has traded in shares and this activity of the Appellant is not investment activity. The action of the Assessing Officer is upheld. This ground of appeal is not allowed.”

15. Before us, Ld. Senior Advocate Shri Trivedi, reiterated the submissions made before the AO and the CIT(A). He vehemently argued that wherever no delivery was taken the assessee has itself shown those transactions as income from business. Therefore, the other transactions could have been held to be of capital nature.

16. On the other hand, Ld. DR strongly supported the order of the CIT(A). He also referred to pages 44 to 51 of the paper book, which are details of total transactions carried out by the assessee, and pointed out that in view of high frequency of transactions and also the fact that in some cases shares have been purchased and sold on the same day, clearly indicate that the intention of the assessee was to act as a trader.

17. We have considered the rival submissions carefully and find force in the submissions of the Ld.DR. As pointed out by the Ld. CIT(A) considering the frequency and volume etc. carried out by the assessee it seems to be a case of trading only. If the intention was to invest,

then why shares of M/s. Granules were purchased in December 2005 and sold in December 2005, but the same were purchased again. Similarly, in the following cases shares have been purchased and sold on the same day:

NAME OF SCRIPT	PURCHASE			SALE		
	Date	Qty	Value	Date	Qty	Value
Associated C	13-12-05	217	116746	13-12-05	217	16447
Balarampur CH	26-9-05	2000	178200	26-9-05	2000	180900
Granules	13-12-05	1000	110300	20-12-05	1000	117410
Granules	15-12-05	1000	110060	22-12-05	1000	117410
Grawedm	8-3-06	1817	167582			
Grawedm	9-3-06	183	17189			
Hindustan	3-2-06	100	40000	3-2-06	100	41179
ITC LTD.	22-9-05	4500	653040	22-9-05	4500	614250
ITC LTD	23-9-05	4500	614250	23-9-05	4500	619875
ITC LTD	26-9-05	4500	619875	26-9-05	4500	644175
ITC LTD	27-9-05	4500	644175	27-9-05	4500	637875

The above clearly shows that the intention of the assessee was to trade in shares and, therefore, we are of the view that the Ld. CIT(A) has correctly held the profits generated from the sale transactions as business profits. Accordingly, we confirm the order of the Ld. CIT(A).

18. In the result, assessee's appeal is dismissed.

Order pronounced in the open Court on this day of 30/6/2011.

Sd/-	Sd/-
(N.V.VASUDEVAN)	(T.R.SOOD)
Judicial Member	Accountant Member

Mumbai: 30/6/2011.

P/-*

