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*IN THE HIGH COURT OF DELHI AT NEW DELHI

R-213

+ **ITA 11/2004**

RAJ DULARI BHASIN … Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. N.P. Sahni with Mr. Nitin Gulati,Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% 21.12.2015

1. This appeal under Section 260A(1) of the Income Tax Act, 1961 ('Act') is directed against the impugned order dated 12th May 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 2183/Del/2000 for the Assessment Year ('AY') 1990-91.

2. While admitting this appeal the Court by its order dated 18th May 2004 framed the following question of law for consideration:

> "Whether the Income Tax Appellate Tribunal was correct in law in holding that the amount of Rs.9,32,855 was assessable as an adventure in the nature of trade' and not lone term capital gain' as declared by the appellant?"

3. The brief facts leading to filing of the present appeal are that the Appellant, Smt. Raj Dulari Bhasin, aged about 94 years, who is having no

regular source of income, was an owner of a house property at X-24, Hauz Khas, New Delhi ('the property in question'). The land on which the property in question was located, had been acquired by her on 18th March 1958 for a sale consideration of Rs. 5,500. The land was purchased and the house so constructed was for self use and had been continued to be under her occupation for more than 30 years. The aggregate cost of construction was about Rs. 86,285.

4. On 2nd March 1988 the Assessee entered into an agreement with M/s. Mac Consolidation ('the builder') for construction of additional area on the property in question. However, this agreement did not materialize on account of financial strains, old age and ill health. Thereafter, on 1st April 1989 a fresh agreement was entered into by the Assessee with the builder, a copy of which has been placed on record, stating that the Assessee had approached the builder for their assistance in the construction of the said residential building on the terms and conditions set out in the earlier agreement dated 2nd March 1988.

5. This agreement dated 1st April 1989 clearly indicated that the agreement dated 2nd March 1988 would be treated as cancelled. It also specified that the construction charges for the residential building having area of approximately 9,900 sq.ft. @ Rs. 350 per sq.ft. was agreed at Rs. 34,65,000, which would be incurred by the contractor. Clauses 7 and 8 of the agreement dated1st April 1989 read as under:

> "7. That in lieu of clause no. 2 of this agreement the owner had authorized the contractor to have the selling rights of the new construction to be made by him on the terrace of the existing property. And in this connection a separate General Power of Attorney dated 1st April 1989 has also been given.

> 8. That in lieu of the above said clause it was mutually decided that the contractor will give one flat to the Assessee to be constructed at the second floor having cost of Rs. 5,32,855. In additions to this the Contractor will give the difference of sales price and cost of construction as mentioned in clause no. 2 of this agreement."

6. A deed of general power of attorney was executed by the Assessee in favour of the builder on 1st April 1989. The builder was *inter alia* authorized to sell the property in question to any other person, sale deed, mortgage deed/gift deed etc., to produce before the sub-Registrar concerned for registration and to get the same registered, receive the consideration thereof and to acknowledge the receipt of the same to deliver the possession.

7. The net result of the above agreement was that the entire pre-determined cost of construction was to be incurred by the builder and the Assessee was to be provided with a flat on the rear of the second floor at a pre-determined cost of Rs. 5,32,855. The Assessee was also entitled to the share of the profit on the sale of the flats.

8. The Assessee filed her return of income for the AY in question on 11th October 1990 declaring a profit of Rs. 4 lakhs under the head 'long term gain' and claimed deduction of Rs. 3,75,000 under Section 54B of the Act. The Assessee also declared net taxable income of Rs. 7,500 under the head 'capital gains'.

9. The said return of the Assessee was accepted by the Revenue under Section 143 (1)(a) of the Act. However, on 27th January 1997, after over six years, notice under Section 148 of the Act was sent by the Assessing Officer ('AO') to the Assessee asking her to file a return of income for the

AY in question inasmuch as he alleged to have reason to believe that the income of the Assessee has escaped assessment. Pursuant to the notice, the Assessee filed a return of income on 17th February 1997 declaring the original income as declared in the return initially filed. A copy of the computation of income for the AY in question was also placed on record.

10. During the course of the assessment proceedings pursuant to the queries raised by the AO, the authorised representative of the Assessee on 20th November 1997 submitted the following details regarding the extent of construction carried out on the plot:

	Existing covered area before construction Sq.ft	Covered area demolished before construction Sq.ft.	Covered construction by MAC Consolidation Sq.ft.
Basement	--	--	900
Ground Floor	780	--	--
Front first floor	1470	1357.50	2250
Rear first floor	--	--	2250
Front second floor	1125	1125	2250
Rear second floor	--	--	2250
		Total Sq.ft.	9900

11. Earlier, by a separate letter dated 22nd October 1997, the Assessee has furnished the names and addresses of the parties to whom the flats were sold. It appears that the rear and front flats on the first floor, the front flat on the second floor and the basement were sold to the different parties.

The additional fact that requires to be noticed is that construction, profit and loss account (P&L) of the builder for the year ended 31st March, 1980 was placed on record before the AO. In the 'Construction Account' in the credit column, the builder disclosed the entire consideration received "by sale value of flats received on behalf of land owners' as Rs.35,10,000/-. It is not in dispute that the Assessee received Rs.4 lakhs towards share of the profit on the sale of the flats.

12. The AO passed an assessment order under Section 147/143(3) on 5th March, 1999 in which the amount received by the Assessee was treated as business income. The AO computed the profit from the sale of the flats as Rs. 4,00,000 and then observed that if the cost of the flat on the second floor (retrained by the Assessee) was reduced from the cost of construction shown at Rs. 35,39,000 then the profit would be more. The AO then observed that "since the Assessee exploited the land owned by her to be used for construction of multi storey building, the activity undertaken is in the nature of trade and accordingly, the profit arising in sale of flats is assessable under head 'profit from business'. The AO proceeded to hold that the deduction under Section 54E of the Act was not allowable to the Assessee since the flats were sold within a period 36 months and the profit arising therefrom was not long term capital gain. The entire sum in the hands of the Assessee i.e. the cost of the flat plus a sum of Rs.4 lakhs = Rs.9,32,855/- was treated as the income of the Assessee under the head profit and gains of business.

13. The appeal filed by the Assessee before the Commissioner of Income Tax (Appeals) ['CIT (A)'] was dismissed on 8th March 2000. While dismissing the appeal filed by the Assessee against the order of the CIT

(A), the ITAT held in the impugned order as under:

> "24. It is quite apparent from the facts of the case that the intention of the Assessee at the outset was to get the flats constructed by the contractor deploying his own funds (the contractor's) and receiving in the process a sum of Rs. 4 lakhs being the excess of sale consideration over the cost of construction of the flats as also a flat on the second floor, the value of which was Rs. 5,32,855. The original property, i.e, ground floor and the mumty has remained untouched since the agreement between the Assessee and the contractor stipulated the construction of addition area of an approximately 990 sq.ft. out of which only a flat whose value was Rs. 5,32,855 came to the Assessee.....The net result of the whole exercise is that the original property remains intact and the entire new construction gets sold off and the assessee gets a flat in the additional space constructed. In our opinion, it is not possible to treat the sum of Rs.4,00,000 as falling under one head and the sum of Rs. 5,00,000 and odd as falling under a different head as according to us the aggregate amount of Rs. 9,32,885 would have to be treated as income arising from 'an adventure in the nature of trade/business'."

14. We have heard the submissions of Mr. C. S. Aggarwal, Senior counsel for the Assessee and Mr. N. P. Sahni, Senior Standing Counsel for the Revenue.

15. Mr. Sahni urged that the amount constituting the value of the flat together with the share of the profits received by the Assessee was correctly characterised as business income. Alternatively it should be treated as short term capital gains and the tax effect would be the same. He however did not dispute the fact that in computation of income, the cost of the land was not taken into account. Mr. Sahni referred to an agreement entered into by the Assessee with one of the flat buyers which showed that what was sold was also a pro-rata 17% of the share in the land. However, for the purpose of computation of taxable income arising

from the sale of the flats only the cost of construction was considered.

16. On the other hand Mr. C.S. Aggarwal, learned Senior counsel for the Assessee, placed reliance on the decision of this Court in ***Shanti Banerjee (deceased) by LRs v. Dy. Commissioner of Income Tax*** (decision dated 17th November 2015 in ITA No. 299 of 2003) where in similar circumstances the Court held that the transaction was not an "adventure in the nature of trade" and the receipt therefrom was not business income. As regards the plea that the construction took place on the additional portion of land apart from the originally constructed portion, it is pointed out that the entire facts were placed by the Assessee before the AO.

17. The Court finds that merely because the Assessee approached the builder for constructing the flats on the portion apart from the already constructed portion, would not make the transaction an 'adventure in the nature of trade.' All that the Assessee had received from the sale of the flats was a residential flat of the value of Rs. 5,32,855 and Rs. 4 lakhs in cash as a result of the agreement entered into with the builder. As explained by this Court in ***Shanti Banerjee (deceased) by LRs*** (*supra*), after considering the decision in ***G. Venkataswami Naidu & Co. v. CIT (1959) 35 ITR 594, Raja Bahadur Kamakhya Narain Singh v. CIT (1970) 77 ITR 253*** and ***CIT v. R.V. Gupta (2002) 258 ITR 261,*** where the construction and sale of the flats do not change the character of the asset and there was no material to show that the Assessee ever had the intention to exploit the plot as a commercial venture, the transaction cannot be characterized as 'an adventure in the nature of trade' leading to the resultant receipt as business income in her hand. The fact that the

Assessee got a flat on the rear second floor apart from the original constructed portion on the ground floor made no difference to the nature of the transaction. The AO, the CIT (A) and the ITAT have proceeded on an erroneous legal premise that the agreement entered into by the Assessee with the builder and the consequent sale of the flats by the builder on behalf of the Assessee was an adventure in the nature of the trade.

18. Accordingly, the question framed is answered in the negative i.e. in favour of the Assessee and against the Revenue.

19. It is seen that the Assessee, an aged lady of 94 years, has had to undergo the ordeal of litigation for more than two decades. In the circumstances, the Court is of the view that the litigation costs incurred Assessee must be compensated to some extent at least by the Revenue. Accordingly, a sum of Rs. 50,000 as costs shall be paid to the Assessee by the Revenue within four weeks from today.

20. The appeal is accordingly allowed in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

DECEMBER 21, 2015
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