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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.94 OF 2014

Commissioner of Income Tax-Central-IV ..Appellant
-***Versus***-
M/s. Ruby Mills Limited ..Respondent

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Mr. Tejveer Singh for the Appellant.
Mr. R. Murlidhar a/w Mr. B. G. Yewale i/b. M/s. Rajesh Shah & Co. for the Respondent.

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CORAM: S. C. DHARMADHIKARI &
A. K. MENON, JJ.

DATE :- 23rd APRIL, 2015.

P.C.:

We have heard Mr. Tejveer Singh, the learned counsel, appearing in support of this Appeal for the revenue and Mr. R. Murlidhar, the learned counsel, appearing for the assessee-respondent. The revenue is in appeal against the order dated 26th April, 2013 of the Income Tax Appellate Tribunal, Bench at Mumbai. That order was passed in Income Tax Appeal No.2694/Mum/2009. The assessment year is 2005-06.

2] Mr. Tejveer Singh submits that the conclusion of the Tribunal that the gains derived by the assessee from the transaction and which is tripartite in nature could not be termed as arising out of the rights in the immovable property but it was adventure in the nature of trade. In other words, the assessee only had a leasehold interest in the immovable property which belong to the public body, namely, City Industrial and Development Corporation of Maharashtra (for short "CIDCO"). The lease was obtained by the assessee for construction of a corporate office on the land. That the office could not be set up but the assessee approached the CIDCO so as to assign leasehold interest for the remainder of the term in favour of a third party but incurred expenditure, took steps for conversion of the user of the land would denote that this is an adventure in the nature of trade. The gains cannot be said, therefore, capital gains. They were rightly not termed by the Assessing Officer and the Commissioner as such. The Tribunal has reversed these concurrent orders and only by relying upon the judgment of the Hon'ble Supreme Court in the case of ***G. Venkataswami Naidu and Co. V/s. Commissioner of Income Tax 35 ITR 594***. Therefore, the questions of law are substantial and the appeal deserves to be admitted.

3] With the assistance of Mr. Tejveer Singh, we have perused the appeal paper book including the impugned order. The Tribunal noted the rival contentions. The stand of the assessee was that the assessee company was allotted a plot of land on lease by CIDCO on 18th December, 1993 under Corporate Shifting Scheme with a specific condition that the plot must be used for construction of office building only. Therefore, when this agreement was executed and possession was taken the intention was to construct a corporate office. The assessee did not acquire this land for the purpose of resale. However, for more than 10 years it could not set up a corporate office and, therefore, an application was made to the CIDCO on 13th February, 2004 to consider the change of user to residential-cum-commercial complex. The CIDCO granted permission on 15th July, 2004. The permission was granted subject to the condition that construction should be done within two years otherwise a penalty would be imposed by CIDCO. Therefore, the matter was placed before the Board of Directors in March 2005 and it was decided to transfer the leasehold rights to the buyer for a consideration of Rs.2,95,55,000/-. Thereafter application was made to the CIDCO for grant of permission to assign these leasehold rights in the plot to the buyer. The CIDCO granted such permission, the tripartite agreement dated 24th March, 2005 was executed and the assessee received the impugned consideration. It is in this overall perspective that the Tribunal considered the matter. It applied the relevant tests and as laid down by the Hon'ble Supreme Court in the case of G. Venkataswami Naidu and reaffirmed later. The Tribunal concluded that having regard to these tests, it is clear that a solitary or single transaction may be termed as adventure in the nature of trade even though the assessee, in a normal course, is not engaged in such business. But there is no formula and which can be applied generally. Ordinarily an isolated transaction cannot be the sole criterion to test as to whether it is in the nature of trade or sale of investment. A holistic and overall view of the transaction has to be taken. Upon taking that and finding that the plot was allotted but could not be utilized by manufacturer of cotton and yarn that the subsequent developments took place. It is only in the year 2005 and for the first time the assignment of leasehold interest took place. It was not a sale or transfer of property by the assessee for a profit but since use could not be made, that initially a conversion permission was sought but even thereafter a utilization of the property for the assessee's purpose did not come through. It is in these circumstances that the assignment with the consent of CIDCO has taken place. Therefore, the Tribunal termed that the amount received pursuant to the tripartite agreement is assessable to tax under the head “Capital Gains” only. The reasons assigned in para 11 of the order under challenge and particularly that the revenue did not set up a case that the assessee was engaged in such activity in respect of any other piece of land or property that the single or isolated transaction was not termed as an adventure in the nature of trade. To our mind, such conclusion arrived at and consistent with the factual data does not raise any substantial questions of law. The Tribunal has taken a view which is possible bearing in mind the peculiar facts and circumstances. Hence the appeal cannot be entertained, more so, when the Tribunal's view as above, is not perverse or vitiated by any error of law apparent on the face of the record. The appeal is devoid of merits and is dismissed. No costs.

(A. K. MENON, J.) **(S. C. DHARMADHIKARI, J.)**

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