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

INCOME TAX APPEAL NO. 2361 OF 2013

The Commissioner of Income Tax-12
Mumbai .. Appellant
v/s.
Abhimanyu J. Thackersey .. Respondent

WITH
INCOME TAX APPEAL NO. 2363 OF 2013

The Commissioner of Income Tax-12
Mumbai .. Appellant
v/s.
Hrishikesh J. Thackersey .. Respondent

Mr. P.C. Chhotaray for the appellant
Mr. F.V. Irani a/w Mr. Sameer Dalal for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 14th JUNE, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the common impugned order dated 8th May, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal) in respect of the two respondents. The impugned order is in respect of Assessment Year 2008-09.

2. The two appeals are being disposed of together as it is an

admitted position that the issues arising in both the appeals are identical, arising from identical facts.

3. The Revenue urges before us the following common questions of law in both the appeals for our consideration.

> *(i) Whether in the facts and circumstances of the case and in law, the Tribunal was right in holding that the income from the sale consideration of the shares has to be treated as income under the head 'Capital Gains' and not under the head 'Income from other sources'.*
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> *(ii) Whether in the facts and circumstances of the case and in law, the Tribunal has erred in upholding the decision of the CIT(A) that the scheme drawn by BIFR for pledge / transfer of shares had not been altered with as the date of sale of shares is after the date when the company HSWML ceased to be a sick undertaking even when the MOU for sale of shares had already been entered into much earlier i.e. on 08.05.2006 and the creditors of the SPV have also been paid off from the advance received on account of such sale agreement through Escrow Agent while no proof of BIFR approval for the assessee?*
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> *(iii) Whether in the facts and circumstances of the case and in law, the Tribunal has erred in upholding the decision of the CIT(A) that the sum received by the assessee was from the sale of shares and not an appropriation of the surplus of the SPV which was not an asset in the hands of the assessee?*

(iv) Whether in the facts and circumstances of the case and in law, the Tribunal has erred in holding decision of the CIT(A) that the Prabhadevi property has not been sold when the Re-conveyance deed of Prabhadevi property along with original documents of title had been acquired by the purchasers i.e. Vishal Nirman (India) Pvt. Ltd.?

(v) Whether in the facts and circumstances of the case and in law, the Tribunal has erred in upholding the decision of the CIT(A) treating the income from sale of Chaitra Realty Ltd. as capital gains as claimed by the assessee instead of income from other source as taxed by the AO by not appreciating the fact that the AO has rightly taxed surplus arising out of sale transaction ?

4. Although the respondent assessee has raised numerous questions, the basic issue which arises in the present appeals is whether the income on account of sale of shares has to be treated as 'Capital Gains' or as 'Income from other sources' i.e. question no.(i) as urged. The other questions are in the nature of arguments / submissions / evidence in support of question no.(i).

5. During the subject assessment years, the respondent assessees had declared capital gains arising out of sale of shares held by them in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. During the

course of the assessment proceedings, the respondent assessee explained that the shares in M/s. Chaitra Realty Ltd. was allotted to them as a consequence of their share holding in M/s. Hindustan Spinning and Weaving Mills Ltd., which in turn had been demerged pursuant to a Board for Industrial and Reconstruction (B.I.F.R.) scheme for rehabilitation. In terms of the scheme as approved by the B.I.F.R. a Special Purpose Vehicle (SPV) in the form of M/s. Chaitra Realty Ltd. was created for the purposes of owning Prabhadevi property which originally belonged to M/s. Hindustan Spinning and Weaving Mills Ltd. It is pertinent to note that M/s. Hindustan Spinning and Weaving Mills Ltd. continues to exist till date owning property at Karad. On 20th February, 2007 M/s. Hindustan Spinning and Weaving Mills Ltd. came out of the B.I.F.R. as it ceased to be a sick unit. Thereafter, on 8th August, 2007 consequent to an offer letter received from one M/s. Vishal Nirman (India) Ltd. dated 31st July, 2007, the respondent assessees sold their shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. The entire consideration received by the respondent assessee on the sale of its shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. was offered to tax under the head 'Capital Gains' by the respondent assessee while claiming exemption under Section 54F of the Act. The Assessing Officer did not accept the stand of the respondent assessees by principally placing reliance upon an Memorandum of Understanding (MoU) dated 8th May, 2006 to proceed on the basis that the MoU was executed by the respondent assessees along with others by which they undertook the sale of shares. It further proceeds on the basis that M/s. Vishal Nirman (India) Ltd. was providing funds to M/s. Chaitra Realty Ltd. to clear its encumbrances one by one. These funds were kept in Escrow by appointing an Escrow Agent and on getting sufficient security, the amounts were disbursed by the Escrow Agent. Consequently, the Assessing Officer holds that it is not a case of sale of shares by the respondent assessee in M/s. Chaitra Realty Ltd. which gave rise to receipt of consideration in its hands, but it was a continuance of transaction starting from the formulation of the scheme under the B.I.F.R. running through the MoU to the acquisition of Prabhadevi property of M/s. Chaitra Realty Ltd. by M/s. Vishal Nirman (India) Ltd. which resulted in income arising from other sources and not capital gains. Consequently, the claim for exemption under Section 54F of the Act as claimed was also denied.

6. Being aggrieved, the respondent assessee carried the issue in appeal to the Commissioner of Income Tax (Appeal) [CIT(A)]. In its

appeal, the respondent assessee has urged as one of the grounds that the entire basis of the order of the Assessing Officer that the respondent assessee was a party to the MoU dated 8th May, 2006 was incorrect. The respondent assessee was not a party to MoU. The CIT(A) after considering all the facts including evidences concluded that the receipt of money by the respondent assessee arose on sale of its shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. as a result of the offer letter dated 31st July, 2007 received from it. The order further notes that M/s. Chaitra Realty Ltd. continues to exist and owns the property at Prabhadevi. It observed that the value of shares of M/s. Chaitra Realty Ltd. is determined on the basis of the value of its underlying asset viz. land held by it. In the above view, the CIT(A) by an order dated 26th August, 2011 allowed the appeal of respondent assessees'. It held that the respondent assessees had sold their shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. and that gains arising from the sale thereof are to be taxed under the head “capital gains”.

7. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. The impugned order of the Tribunal while upholding the order of the CIT(A) came to the conclusion that the respondent

assessee has only sold its shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. and not its property at Prabhadevi. In fact, the impugned order holds that Prabhadevi property continues to be owned by M/s. Chaitra Realty Ltd. and mere change in the shareholders would not wipe out the existence of M/s. Chaitra Realty Ltd. In the above view, the claim of the respondent assessees of offering the gain on account of sale of shares to tax under the head 'capital gain' was upheld.

8. Mr. Chhotaray, learned Counsel appearing for the Revenue was at pains to point out that the impugned order passed by the Tribunal calls for interference. This on the ground that the real nature of the transaction was not a purchase of shares by M/s. Vishal Nirman (India) Ltd. but purchase of Prabhadevi land owned by M/s. Chaitra Realty Ltd. This according to him was not a one time sale but a result of continuous actions beginning with the sanction of the scheme in respect of M/s. Hindustan Spinning and Weaving Mills Ltd. by B.I.F.R., going through the MoU, working out of the scheme and the acquisition of property by M/s. Vishal Nirman (India) Ltd. It is submitted that sale of shares is in fact an appropriation of surplus in the hands of M/s. Chaitra Realty Ltd. and the valuation of the shares was on the basis of

the surplus in the hands of M/s. Chaitra Realty Ltd. It is submitted on behalf of the Revenue that the existence of M/s. Chaitra Realty Ltd. has to be ignored. It is submitted that in view of the B.I.F.R. Scheme, the respondent assessees were prohibited from selling and / or disposing of its shares during the pendency of the reference before B.I.F.R.. It is submitted that these respondent assessees had agreed to sell its shares in the MoU dated 8th May, 2006. This was in violation / breach of the orders passed by the B.I.F.R. Thus, on the above basis, it is submitted that the impugned order gives rise to mixed question of fact and law which deserves admission for consideration at final hearing.

9. We find that two authorities namely CIT(A) as well as the Tribunal have on consideration of facts found that the transfer by respondent assessees of its shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. took place on 8th August, 2007. This was consequent to the letter of offer dated 31st July, 2007 by M/s. Vishal Nirman (India) Ltd. and not as a consequence of MoU dated 8th May, 2006. The entire case of the Revenue as canvassed before us as also noted by the Assessing Officer proceeded on the basis that the respondent assessee had transferred its shares in M/s. Chaitra Realty Ltd. by the MoU dated 8th May, 2006 to M/s. Vishal Nirman (India) Ltd.

This has been factually found to be incorrect by both the CIT(A) and the Tribunal in the impugned order. Nothing has been shown to us which even remotely indicate that this finding of the authorities is contrary to the facts on record. In fact, no ground challenging this finding of the CIT(A) was taken in the appeal memo filed by the Revenue before the Tribunal. Thus, no submission in this regard was even urged before the Tribunal. The MoU dated 8th May, 2006 has been a sheet-anchor of the Revenue's case before us to contend that the entire transfer of shares in M/s. Chaitra Realty Ltd. by the respondent assessees took place on account of the same even when such a sale was prohibited by virtue of the order of the B.I.F.R. It is to be noted that on 8th August, 2007 when the respondent assessees sold its shares in M/s. Chaitra Realty Ltd., M/s. Hindustan Spinning and Weaving Mills Ltd. was already out of the B.I.F.R. Scheme as it was discharged on 20th February, 2007. We are unable to appreciate the submission made on behalf of the Revenue that existence of M/s. Chiatra Realty Ltd. should be ignored even when it continues to exist and also owns the Prabhadevi property. The receipt of consideration by the respondent assessee is only on account of the sale of its shares in M/s. Chaitra Realty Ltd. to M/s. Vishal Nirman (India) Ltd. This consequent to the offer letter received by it from the buyer i.e. M/s. Vishal Nirman (India)

Ltd. which in fact is a concurrent finding by the CIT(A) and the Tribunal. This view taken on facts is a possible view and not shown to be perverse. This determination of fact viz. respondent assessees had sold its shares in M/s. Chaitra Realty Ltd. was determined on consideration of all the evidences led by the Revenue and does not involve the application of any principle of law to determine the same. Thus, the above determination is not a mixed question of fact and law as urged by the Revenue but a pure question of fact. In any event, the Revenue has made no attempt to show how the receipt of consideration by the respondent assessee is on revenue account to attract its classification as 'Income from other Sources'.

10. In view of the above concurrent finding of fact, we see no reason to entertain the present appeals.

11. Accordingly, both the appeals are dismissed with no order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**