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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.642 OF 2015

Pr. Commissioner of Income Tax – 15 … Appellant
Vs.
M/s. Well Wisher Construction Pvt. Ltd. … Respondent

Mr. Suresh Kumar for the Appellant.
Ms. Ritika Agrawal for the Respondent.

CORAM : A.S. OKA &
A.K. MENON, JJ.

DATE : 27th NOVEMBER, 2017

P.C.

1 Heard the learned counsel appearing for the appellant. The respondent – assessee had entered into a joint venture agreement for acquisition of a plot from the Maharashtra Industrial Development Corporation. The allotment of plot was made by letter dated 24th February, 2006 issued by the Maharashtra Industrial Development Corporation (for short "MIDC"). It appears that the respondent – assessee relinquished or surrendered its right, title and interest in favour of the other company which was a part of the joint venture. The consideration was received in the sum of Rs.43,52,50,000/-.

2 While filing return for the assessment year 2008-2009, the respondent – assessee claimed that the liability for payment of income tax is not attracted. The said contention of the respondent – assessee was accepted by the Assessing Officer while passing an order under Sub-Section (3) of Section 143 of the Income Tax Act, 1961 (for short "the said Act of 1961"). An order under Section 263 of the Income Tax Act was passed by the Commissioner of Income Tax. The grounds on which the order under Section 263 was passed read thus :-

> "After examining the record of assessment proceedings in your case for A.Y. 2008-09 it is found
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> (a) That the AO has categorically stated that you have not done any business activity during the year or in earlier years and
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> (b) That the net receipts on transfer of MIDC plot at IT -5, Airoli Knowledge Park of TTC Industrial Area, Airoli, New Mumbai are on account of transfer of a capital right and
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> (c) That you have not declared such net receipts of Rs.43,52,50,000 received from B Raheja Developers as a taxable under the head Capital Gain and
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> (d) That the case laws relied upon in assessment proceedings to make the abovesaid receipt non-taxable are

> not attracted in your case. The case of B.C. Srinivasan Shetty 128 ITR 294 pertains to taxability of goodwill and that of D.P. Sandu Bros. Chembur Pvt. Ltd. 273 ITR 1 was on taxability of tenancy rights. In these cases the Apex Court correctly observed that it is not possible ascertain the cost of acquisition in these transactions thus the computation u/s.48 of I.T. Act, 1961 is not possible. This is not your case. The payment made by B. Raheja Developers to MIDC on your behalf represents the cost of acquisition of your capital right which was sold to B. Raheja Developers at profit of Rs.43,52,50,000/-."

3 It was this order which was subjected to Appeal before the Income Tax Tribunal, "H" Bench at Mumbai. By the impugned order, the Appellate Tribunal allowed the Appeal and proceeded to set aside the impugned order under Section 263.

4 The submission of the learned counsel appearing for the appellant – revenue is that the order of the Assessing Officer is erroneous which is prejudicial to the interest of revenue. He submitted that this was a case where the view taken by the Assessing Officer was erroneous and therefore, interference by the Appellate Tribunal is uncalled for. He would, therefore, submit that substantial question of law arises in this Appeal.

5 We have considered the submissions. In paragraph 9.1, the Appellate Tribunal has held thus :-

> "9.1 A perusal of the assessment order clearly shows that the AO has given a categorical finding that the assessee is not doing any business activity during the year under consideration. The AO has also specifically mentioned that the assessee did not carry on any business activity even during the assessment year 2006-07. A perusal of the assessment order for A.Y. 2006-07 shows that the issue relating to the plot by MIDC has been thoroughly examined by the AO during the course of the scrutiny assessment proceedings and has given a very categorical finding that any property whether connected with business or not other than stock in trade is a capital asset. Thus, the observation of the CIT that the amount received was from transfer of a trading asset is not correct. The assessee has claimed it as a capital asset, the relinquishment of the right was considered as transfer of a capital asset and the consideration received by the assessee has been claimed as a capital gain tax. As mentioned elsewhere a specific query was also raised during the course of the present assessment proceedings and a very specific reply was filed by the assessee. All these factual matrix have been thoroughly examined by the AO as is evident from the extract of the reply filed by the assessee given at para – 4.3 hereinabove. The AO has taken a view which is supported by judicial decisions relied upon by the Ld. Commissioner and assuming that the view taken by the AO is a loss to the

> Revenue but the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. (supra) has held that "every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interest of the Revenue," for e.g. when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the Income Tax Officer has taken one view with which the Ld. Commissioner does not agree, it cannot be treated as an order which is erroneous or prejudicial to the interest of Revenue unless the view taken by the Income Tax Officer is unsustainable in law."

6 The Appellate Tribunal while noting the facts has noted that in the scrutiny assessment under sub-section (3) of Section 143 of the Income Tax Act for the year 2006-2007 it was accepted that the respondent – assessee has not carried out any business activity and the business expenditure claimed in that year was disallowed. We may note here that in the order dated 21st December, 2010 passed by the Assessing Officer which was reviewed it is specifically recorded that no business activity has been undertaken by the assessee during the relevant year. Thus, the Assessing Officer while passing an order under sub-section (3) of Section 143 in respect of Assessment Year 2006-2007 has examined the issue regarding allotment of plot by MIDC. Considering the fact that the order under sub-section (3) of Section 143

for the Assessment Year 2006-2007 has become final, in paragraph 9.1 of the impugned order, the Appellate Tribunal has observed that the Assessing Officer adopted one of the two courses permissible in law. Therefore, it was held that the order was not erroneous.

7 In view of findings of fact recorded in paragraph 9.1 of the impugned judgment, we find that no substantial question of law arises as the said finding is based on order of the Assessing Officer for the Assessment Year 2006-2007.

8 Hence, no substantial question of law arises. Appeal is dismissed.

(A.K. MENON, J) **(A.S. OKA, J)**