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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 251/2016

SARAS METALS PVT. LTD.

..... Appellant

Through: Mr. Akhilesh Kumar, Arun Kumar Agarwal
& Mr. Akarsh Garg, Advocates.

versus

COMMISSIONER OF INCOME TAX-3 & ANR.

..... Respondents

Through: Mr. Ashok Manchanda & Mr. Raghvendra
Singh, Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

J U D G M E N T

04.07.2017

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Dr. S. Muralidhar, J.:

1. This is an appeal by the Assessee under Section 260A of the Income Tax Act, 1961 ('Act') against the order dated 6th May, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 2770/Del/2013 for the Assessment Year ('AY') 2009-10.

2. The Appellant/Assessee was incorporated on 15th December, 1986. There was a change of management on 29th May, 2005. According to the Assessee, by a resolution of its Board of Directors dated 24th October, 2005 it decided to commence the business of dealing in immovable property in terms of Clauses 45 and 46 of "Other Objects" of the Memorandum of Association ('MOA'). Clauses 45 and 46 of the MOA read as under:

“45. To acquire by purchase, exchange, hire or otherwise and mortgage let on hire or dispose of lands and property of any tenure or interest in the same.

46. To erect and construct houses, buildings or works of every description on any land of the company or upon any other lands or property and to pull down, rebuild, enlarge, deal, alter and improve existing houses, buildings or works thereon to convert and appropriate any such land into and for roads, streets, squares, gardens and other conveniences.”

3. It is stated that in view of the above decision, the Assessee purchased a plot in Noida. Another freehold plot in Vasundhara, Ghaziabad was purchased on 3rd March, 2006. The Assessee maintains that in showed these plots as ‘inventories’ under ‘current assets’ and as ‘stock’ in its balance sheet and profit and loss accounts. After a few months, the plot in Noida was sold and deducted from the stock. It is stated that the assessment for the AY 2008-09 during which the earlier transaction took place attained finality.

4. The Assessee states that it showed the property at Vasundhara, Ghaziabad as its stock-in-trade in the subsequent year as well. Sometime in December, 2008 and January 2009, the Assessee learnt that some unauthorised persons had illegally taken possession of the said plot. The Assessee states that it lodged a complaint dated 7th January, 2009 at the Indirapuram Police Station in Ghaziabad seeking help to regain peaceful possession of the property. It is claimed that since the said property was in adverse possession, the Assessee was compelled to sell it in March 2009 for a value much below the market value.

5. For AY 2009-10, the Assessee filed its return declaring income as 'Nil'. The return was picked up for scrutiny. By the assessment order dated 30th December, 2011, the Assessing Officer ('AO') made an addition of Rs. 39,04,000 invoking Section 50C of the Act. The AO rejected the Assessee's stand that the property in question which was sold had been held by it as 'stock in trade'. In particular, the AO noted that the said plot had been shown to be purchased by the Assessee on 1st March, 2006 for Rs. 30 lakhs. It was sold three years later at the same price. However, the value of the property calculated as per the circle rate worked out to Rs. 69,04,000. The AO concluded that the Assessee had shown its assets as 'stock in trade' in order to avoid Section 50C of the Act. The reply given by the Assessee was vague and unacceptable. Accordingly, the plot of land was treated as investment of the Assessee and Section 50C of the Act was applied to arrive at a net short term capital gain of Rs.39,04,000, which was then added to the income of the Assessee.

6. The Assessee then went in appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)']. By an order dated 1st March, 2013, while dismissing the appeal, the CIT(A) *inter alia* observed that merely showing of the plot under the head of investments with no other supporting document did not substantiate the claim of the Assessee. The transaction had resulted in short term capital gains.

7. Before the ITAT, it was argued by the Assessee that the invocation of Section 50C of the Act by the AO was based on irrelevant considerations and without any supporting material. Alternatively, it was submitted that since the plot was held as an investment for more than three years, there could only be a long term capital gain by indexing the cost in terms of Section 48 of the Act.

8. The ITAT held that the resolution passed by the Assessee's Board of Directors did not enable the Assessee to sell the property even in terms of Clauses 45 and 46 of the MOA. Only two properties were held by the Assessee. One had been sold in the AY in question. The ITAT noted that the main object for which the company was incorporated was to carry on the business of manufacturing, processing, importing, exporting and dealing in all kinds of ferrous and non-ferrous material meant for any industrial and non-industrial use and to carry on the business of casting, fabrication, cold or hot rolling, re-rolling, sheeting, stamping, pressing etc. of all kinds of steel and other metals. In that view of the matter, it was held that the Assessee had sold the property in question only as an investor. The appeal was, accordingly, dismissed.

9. This Court has heard the submissions of Mr. Akhilesh Kumar, learned counsel appearing for the Assessee and Mr. Ashok Manchanda, learned counsel appearing for the Revenue.

10. The categorical factual finding in the assessment order of the AO that

the plot was sold for Rs. 30 lakhs whereas the value of the property at the time of sale calculated using the circle rate as Rs. 69,04,000 was unable to be satisfactorily controverted by the learned counsel for the Assessee. He repeatedly urged that it was only because the property was under adverse possession that the Assessee had to go in for a distress sale. Interestingly, this was not set out as one of the grounds by the Assessee either before the CIT(A) or the ITAT. It is not even clear whether a copy of the complaint dated 7th January, 2009 filed before the police at Ghaziabad was produced before the AO. Be that as it may, it is significant that while the complaint was made on 7th January, 2009, the sale took place within a short time thereafter on 7th March, 2009. This shows that the Assessee was not really serious about taking steps to regain possession of the property. This solitary complaint before the police is hardly a convincing explanation for the so-called distress sale of the property.

11. Having carefully perused the concurrent factual findings of the AO, the CIT(A) and the ITAT based on the materials placed before them, the Court is in agreement with the conclusion reached that the Assessee failed to place relevant and satisfactory materials before the authorities in support of its claim that the property should have been treated as its 'stock in trade' and not as an investment. The mere passing of a resolution by the Board of Directors regarding commencing of a new line of business or the mere inclusion of the property in question in its 'stock in trade' in its accounts will not relieve the Assessee from satisfying the Income Tax Authorities of the genuineness of the sale of the property as 'stock in trade'.

12. Learned counsel for the Assessee sought to rely on the decisions in *Commissioner of Income Tax v. Sulej Cotton Mills Supply Agency Limited* (1975) 100 ITR 706 (SC) and the decisions in *Commissioner of Income Tax-II v. Kan Construction and Colonizers (P) Ltd.* (2012) 20 taxmann.com 381 (All.); *Commissioner of Income Tax v. Thiruvegam Investments (P) Ltd.* (2010) 320 ITR 345 (Madras); *Commissioner of Income Tax v. Mukesh & Kishor Barot Co-owners* (2013) 33 taxmann.com 87 (Gujarat) and *Commissioner of Income Tax (Central) v. Express Securities (P) Ltd.* (2013) 40 taxmann.com 427 (Delhi).

13. In *Commissioner of Income Tax v. Sulej Cotton Mills Supply Agency Limited* (*supra*) the Supreme Court noted that “the difficulty arises where the transaction is outside the Assessee’s line of business and then, it must depend upon the facts and circumstances of each case whether the transaction is in the nature of trade.” Thus, while neither continuity of similar transactions is necessary to constitute such a transaction as “adventure in the nature of trade” it will depend on the facts and circumstances of every case whether the Assessee has been able to demonstrate, by placing relevant materials that the transaction undertaken by it was, in fact, in the nature of trade.

14. The other decisions cited by the learned counsel for the Assessee turned on their own facts. For instance, in *Commissioner of Income Tax (Central) v. Express Securities (P) Ltd.* (*supra*), on facts it was noticed that the Revenue had accepted the treatment of shares as ‘inventories’ in the

previous years.

15. In the present case, there were only two properties shown as 'stock in trade' by the Assessee. The mere fact that the sale of the property in the earlier AY and the resultant reduction of the 'stock in trade' was not questioned by the AO will not relieve the Assessee from having to demonstrate that the sale of the plot in question in the AY under consideration was not by way of an investment resulting in short term capital gains.

16. The Court is unable to find anything perverse in the factual and concurrent determination of the AO, the CIT(A) and the ITAT that the plot in question was the investment of the Assessee and not its 'stock in trade'.

17. No substantial question of law arises from the impugned order of the ITAT. The appeal is, accordingly, dismissed.

S. MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 04, 2017/b'nesh