IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Date of Decision: 4.3.2009

The Commissioner of Income Tax, Patiala ---Appellant

Versus

S.K.Kaintal, Prop.. Kaintal School, Patiala

---Respondent

CORAM:- HON'BLE MR.JUSTICE J.S.KHEHAR
HON'BLE MR.JUSTICE NAWAB SINGH

Present:- Ms.Urvashi Dhugga, Advocate for the appellant.

J.S.KHEHAR, J. (ORAL)

1) The controversy in hand pertains to the assessment year 2005-06. The respondent-assessee filed his return declaring his taxable income at Rs.12,90,630/-, and in addition thereto, agricultural income of Rs.2,34,000/-. The aforesaid return was filed on 30.9.2005. The return submitted by the respondent-assessee came to be examined by the Assessing Officer under Section 143 (1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). Later on, vide an order dated 2.11.2005 the return submitted by the respondent-assessee was subjected to scrutiny under Section 143 (3) of the Act. It is not a matter of dispute that the respondent-assessee is running a school, and is deriving income therefrom, which is assessed under the head "Income from other sources". The income derived by the respondent-assessee as a consequence of running the said school, is not subject matter of dispute in the instant appeal.

2) The issue which is subject matter of consideration is, the sale of agricultural land at the hands of the respondent-assessee. The aforesaid agricultural land which was located in village Sanaur/Ghalori was sold by the respondent-assessee for a consideration of Rs.44,75,500/-, while the

claim of the respondent-assessee was, that the aforesaid consideration should be considered as capital gain; the determination at the hands of the Assessing Officer was that the sale of agricultural land for a total consideration of Rs.44,75,500/- should be treated as income under the head "Profit and gain from business and profession". This assertion at the hands of the Assessing Officer was primarily based on the fact, that the respondent-assessee had purchased agricultural land at substantially lower rate, and had sold it at a substantial profit. In fact the respondent-assessee is stated to have purchased the entire land for a sum of Rs.46,840/-, and thereafter had sold it for Rs.44,75,000/-..

3) Having considered the sale of agricultural land at the hands of the respondent-assessee for a consideration of Rs.44,75,500/- under the head "profit and gain from business and profession", the Assessing Officer made an assessment under Section 143 (3) of the Act vide an order dated 1.8.2007.

4) The aforestated action of the Assessing Officer was sought to be challenged by the respondent-assessee by preferring an appeal before the Commissioner of Income Tax (Appeals), Patiala (hereinafter referred to as "the CIT"). The Appellate Authority accepted the claim of the respondent-assessee by arriving at the conclusion, that the sale of agricultural land referred to here-in-above, was liable to be treated as capital gain. As such the determination rendered by the Assessing Officer, whereby, the sale of the aforesaid land was treated as falling under the head "Profit and gain from business and profession" was set aside.

5) Aggrieved with the determination rendered by the CIT dated 24.10.2007 the Revenue preferred an appeal before the Income Tax

Appellate Tribunal, Chandigarh (hereinafter referred to as "the ITAT"). The ITAT did not accept the pleas raised by the revenue, and as such, dismissed the appeal filed by the Revenue vide an order dated 26.6.2008.

6) We have considered the sole contention of the learned counsel for the appellant, namely, that the agricultural land under reference having been sold by the respondent-assessee piecemeal must be treated as a sale under the head "Profit and gain from business and profession." In this behalf it is the submission of the learned counsel for the appellant-revenue, that the intention of the respondent-assessee was to earn the maximum profit in the nature of business transaction, and as such, submitted that the sale of agricultural land at the hands of the respondent-assessee should be treated under the head "Profit and gain from business and profession".

7) Despite the aforesaid submission of the learned counsel for the appellant-revenue, it is not possible for us to accept the submission noticed in the foregoing paragraph.

8) First and foremost, it must be kept in mind that the land under reference was purchased by the respondent-assessee on 9.2.1983. The sale transactions were eventually made by the respondent-assessee on 18.6.2003 and 16.2.2004 i.e. after a period of two decades. Secondly, for the period of two decades intervening the sale of agricultural land referred to above, the respondent-assessee continued to use the land in question for agricultural purposes, and as such, continued to derive income therefrom through the sale of agricultural produce. Even for the assessment year under reference the respondent-assessee declared his agricultural income at Rs.2,34,000/-. Thirdly, there is no material on the record of this case (either in the pleadings of the instant appeal, or in the orders passed by the Assessing

Officer, the CIT and the ITAT) to suggest that the respondent-assessee affected any kind of improvement in the land, so as to be able to sell the same at higher price. It is in the background of the aforesaid admitted facts that we have been called upon to determine, whether the earnings from sale of agricultural land at the hands of the respondent-assessee, should be treated as a "capital gain" or should be treated as income under the head "Profit and gain from business and profession".

9) For the aforesaid determination, reference may be made to the decision rendered by the Supreme Court in G.Venkataswami Naidu & Co. v. Commissioner of Income-Tax, (1959) 35 ITR 594. So as to record a finding on the issue under reference, guidelines laid down by the Supreme Court in the aforesaid judgment are extracted hereunder:-

> "As we have already observed it is impossible to evolve any formula, which can be applied in determining the character of isolated transactions which come before the courts in tax proceedings. It would besides be inexepedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the border line that cause difficulty. If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not provide derived from an adventure in the nature of trade. Cases of realisation of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the

character of such transactions several factors are treated as relevant. Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Affirmative answers to these questions may furnish relevant date for determining the character of the transaction. What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold? If the commodity purchased is generally the subject-matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment. Did the purchaser by any act subsequent to the purchase improve the quantity of the commodity purchased and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? Were they similar to the operations usually associated with trade or business? Are the transactions of purchase and sale repeated? In regard to the purchase of the commodity and its subsequent possession by the purchaser, does not element of pride of possession come into the picture? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of

transactions alleged to be in the nature of trade. In considering these decisions it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transactions; and so, though we may attempt to derive some assistance from decisions bearing on this point, we cannot seek to deduce any rule from them and mechanically apply it to the facts before us.

In this connection it would be relevant to refer to another test which is sometimes applied in determining the character of the transaction. Was the purchase made with the intention to resell it at a profit? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no half-way house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test distinction will have to be made between initial intention to resell at a profit which is present but not dominant or sale; in other words, cases do often arise where the purchaser may be willing and may

> intend to sell the property purchased at profit, but he would also intend and be willing to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention is no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. We thus come back to the same position and that is that the decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule, principle or test and must in every case depend upon all the relevant facts and circumstances."

10) Reference may also be made to Raja Bahadur Kamakhya Narain Singh v. Commissioner of Income-Tax, Bihar & Orissa (1970) 77 ITR 253. The transactions which were the subject-matter of dispute at the hands of the Supreme Court in the instant case were of two kinds, firstly- purchase and subsequent sale of gold and secondly in respect of share transactions. On the issue pertaining to purchase and sale of gold, the Apex Court held as under:-

"The question, therefore, the Tribunal had before it was, whether when the assessee purchased the gold he did so with the intention to deal in it. The Tribunal held, and the High Court concurred with it, that the assessee's transactions showed that they were in the nature of trading transactions. Two facts, however, throw considerable doubt on the validity of that conclusion and neither the Tribunal nor the High Court seems to have weighed them with the consideration which they demand. The first fact is that in 1940 he converted his entire shareholding into gold, a fact consistent with his case that he did so because of the nervousness engendered by the breaking out of the Second World War, the initial German victories and the fall of France. The Tribunal did not countenance this case for it thought that if that was so, the assessee would have invested the other cash lying with him also in gold, and, secondly, because according to it the war panic started in 1942 and not in 1940. We do not think that this was an accurate approach. The fact that the assessee did not invest all his cash cannot mean, as the Tribunal thought, that his case about the purchases of gold was not correct. The war had commenced in 1939, and it is a notorious fact that in 1940 the fortunes of the Allies were none too bright. The fact was that the assessee sold his entire shareholding and applied their sale proceeds and also a further amount of Rs. 13 lakhs and odd obtained from his lessees, M/s. Anderson Wright & Co., into gold. The second fact, whose significance does not also seem to have

been adequately apprehended, was that the assessee, who started with the plan of getting at least net 7% yield, put a very large part of his funds into gold, an altogether sterile security, and retained that gold in his family vaults for nearly 4 years. The Tribunal had before it the gold prices current during the years 1940 to 1944. These indicate that the gold price remained steady at Rs. 42 per tola all throughout 1940. There was, however, an upward trend noticeable from about the end of 1941, which went up to Rs. 65 towards the end of 1942. By the middle of 1943 the gold price had risen to Rs. 90 and even more. In October, 1944, when the assessee sold a large bulk of his gold holding, the price was at Rs. 68 per tola. If the idea of the assessee in purchasing the gold was to trade in it, he would not have waited for 4 years without disposing of a particle of it. The price was on the upward trend in 1941 and reached the climax in 1943, when he could have sold the gold and made considerable gain. The fact that he did not do so and waited until October, 1944, appears to give credence to his case that by about the end of 1944, the war fortunes were turning in favour of the Allies, that confidence had gradually been regained by trading circles and that that was why he thought that it was no longer necessary for him to retain the gold any further and could safely invest his money in income-bearing securities. The further fact that he sold practically the whole of his stock of gold in October, 1944, instead of selling it bit by bit when the price was rising since about the end of 1942 is

inconsistent with the hypothesis that the object with which the gold was purchased was to trade in it."

In respect of share transactions, i.e. the second issue before the Apex Court, the Supreme Court concluded as under:-

"Regarding share transactions, we think that the Tribunal placed undue emphasis on the fact that when he opened the bank account in March, 1939, with the sale proceeds of Government securities, he did so, firstly, in the name of his wife, and, secondly, called that account as one of "Rs.48 lakhs floating in the share market". The first had no particular significance and the second properly viewed only meant that he wanted to set apart this fund for transactions in shares and securities and not mix up his other capital and the income arising from his estate. The name he gave to this account cannot for that reason only render his dealings with that account into trading transactions, if otherwise they were not."

As regards the Karanpura shares, the correspondence between him and the company and the advice he had from his brokers referred to in the statement of case show that the assessee did at one time entertain the idea of obtaining control over the company's management by procuring 51% of its total shares. He could do so by purchasing shares in the open market and also by other means. He purchased 7,025 shares in the market but that was clearly not enough. There was at that time litigation going on between him and the company and he seems to have hit upon the idea that he

would compromise his suit if the managing agents of the company were to sell him shares representing its unissued capital at prices offered by him. The object of his offer was that he would not have to pay the market price of the shares which was 3 times more than the one offered by him. The company did not agree and his move for compromise failed. According to him, there was, therefore, no useful purpose for retaining those shares and he sold 6,950 shares leaving only 75 shares with him. On these facts the Tribunal was not right in concluding that the shares which the assessee purchased from the market were not for the purpose of acquiring the major shareholding in the company and that the control over the company was to be obtained only by purchasing shares representing the unissued capital. Both the purchase of shares and the move to obtain shares representing the unissued capital were part of the same design, and if the latter failed, his purchase of 7,025 shares would obviously not bring him nearer his object. Furthermore, the bulk of the sale proceeds of gold went into the purchase of Bokaro Ramgur shares which remained with him till the assessment years in question. The profits made on the sale of shares, acquired with the intention of obtaining control over the company's management and not for dealing in them, would be on the capital and not revenue account (see *Kishan Prasad & Co. Ltd.* v. *CIT*[4] and *CIT* v. *National Finance Ltd.*[5]). The statement of case itself set out facts which were consistent

with the assssee's case."

On the aforesaid conclusions, the Supreme Court held that transaction in the sale and purchase of gold, as well as, transactions in respect of shares, could not be treated as falling under head "Profit and gain from business and profession".

11) In order to arrive at a definite conclusion in so far as the present controversy is concerned, it is imperative for us to apply the ratio laid down by the Supreme Court in G.Venkataswami Naidu & Co.'s case (supra) as well as in Raja Bahadur Kamakhya Narain Singh's case (supra). Having given our thoughtful consideration, and in view of the factual position explained in paragraph 8, we are satisfied that it is not possible for us to accept the contention of the learned counsel for the appellant-revenue so as to treat the sale of agricultural land at the hands of the respondent-assessee as falling under the head "Profit and gain from business and profession". We, therefore, uphold the determination rendered by the CIT vide an order dated 24.10.2007, as also order dated 26.6.2008 passed by the ITAT, to the effect that the earnings of the respondent-assessee from sale transaction of agricultural land is liable to be treated as a "Capital gain".

12) For the reasons recorded here-in-above, we find no merit in the instant appeal, and the same is accordingly, dismissed.

(J.S.Khehar)
Judge

(Nawab Singh)
Judge

4.3.2009
AS