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IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.30 OF 2013

M/s. Afonso Real Estate Developers,
No.14/4, Garden View Bldg.,
Near Collectorate office,
Margao, Goa. .... Appellant

Versus

1. The Commissioner of Income Tax,
having office at Aayakar Bhavan
Patto Plaza, Panaji, Goa.

2. The Income Tax Officer,
Ward-2, Margao, Goa. .... Respondents

Mr. S. R. Rivonkar, Senior Advocate along with Ms. N. Rivonkar, Advocate for the Appellant.
Ms. Amira Razaq, Standing Counsel for the Respondent.

Coram:- M.S. SONAK &
NUTAN D. SARDESSAI, JJ.

Date:- 21st February, 2020

ORAL JUDGMENT (Per M. S. Sonak, J.)

Heard Mr. S. R. Rivonkar, learned Senior Advocate along with Ms. N. Rivonkar for the Appellant and Ms. Amira Razaq, learned Standing Counsel for the Income Tax Department - Respondent.

2. On 10.12.2013, this appeal was admitted on the following substantial questions of law:

> *i. Whether the learned Tribunal was right in holding that transaction is a business transaction when there was only one transaction and not series of transactions?*
> *ii. Whether the learned Tribunal has correctly interpreted the provisions of Section 2(14) of the Income Tax Act?*

3. Mr. S. R. Rivonkar, learned Senior Advocate for the appellant submits that in fact, only the substantial question of law at (i) above arises for determination and should the same be answered in favour of the appellant, then, the impugned judgment and order dated 23.08.2013 made by the Income Tax Appellate Tribunal (ITAT) will have to be set aside and the order of the CIT (Appeals) dated 26.03.2013 will have to be restored.

4. Ms. Amira Razaq, learned Standing Counsel for the respondent also accepts that the aforesaid position stated by Mr. Rivonkar is correct. Hence, we proceed to decide only the first substantial question of law which arises in the present appeal.

5. The appellant-assessee is a partnership firm constituted vide Partnership Deed dated 29.07.1989. This firm was however registered only on 04.04.2006, about which there is no serious dispute. The

record indicates that the firm had acquired agricultural land at Cavelossim admeasuring 28,200 sq.mtrs. vide a Deed of Exchange dated 15.08.1990. This land along with another property admeasuring 2,525 sq.mtrs., was sold by the appellant-assessee vide Sale Deed dated 13.07.2006 to Headway Resorts Line Pvt. Ltd. Company for total consideration of ₹1,69,20,000/-.

6. The appellant-assessee filed return of income on 30.01.2008 for the Assessment Year 2007-08 declaring a total income of ₹1,57,069/-, claiming deduction to the extent of ₹1,69,20,000/- inter alia on the ground that the amount received towards the sale of the properties were assessable as long term capital gains which were entitled to be deducted in terms of Section 54E and 54EC of the Income Tax Act, 1961 (I.T. Act).

7. The Assessing Officer (AO) did not agree with the contention of the appellant-assessee *inter alia* on the ground that the Cavelossim property fell within a distance of 8 kms. from the limits of the Margao Municipal Council. The appellant-assessee appealed to CIT (Appeals) vide ITA No.163/MRG/10 (AY 2007-08).

8. Soon thereafter, the respondent no.2 issued notices under Sections 147 and 148 of the I.T. Act to the appellant-assessee seeking

to reopen the assessment for Assessment Year 2007-08. After hearing the assessee, revised assessment order was made on 21.02.2011 computing the entire income of the appellant-assessee as "*business income*"and bringing the same to tax. The appellant-assessee therefore, preferred yet another appeal being ITA No.348/MRG/10-11 to the CIT (Appeals).

9. The CIT (Appeals), disposed of both the appeals by common judgment and order dated 26.03.2013. Both the appeals were allowed and the orders of the AO were set aside.

10. The Revenue instituted appeal being ITA No.98/PNJ/2013 before the ITAT to question the common judgment and order dated 26.03.2013 made by CIT (Appeals). The appellant-assessee filed cross-objections which were numbered as 26/PNJ/2013. The ITAT vide common order dated 23.08.2013 allowed the Revenue's appeal and dismissed the cross-objections of the appellant-assessee, thereby, restoring the orders made by the AO that the income derived by the appellant-assessee from the sale of the properties was "*business income*". Hence the present appeal on the aforesaid substantial question of law.

11. Mr. Rivonkar, the learned Senior Advocate for the appellant

submits that the business of the appellant-assessee was to develop properties into plots or by constructing buildings and thereafter engage in the real estate business. He submits that the fact that the agricultural land was purchased in the year 1990 and the same was not even converted suggests that the appellant-assessee was not carrying on any business in relation to such property. He submits that on the basis of a single transaction of this nature, it could not have been held that the appellant-assessee was carrying on business in selling and purchasing properties. He submits that there is absolutely no material on record to establish that the appellant-assessee was engaged in the business of selling and purchasing agricultural properties and therefore, the ITAT, was not at all right in recording a finding that the proceeds from sale constitute income from business. He relied upon decision of the Supreme Court in ***Narain Swadeshi Weaving Mills vs. Commissioner of Excess Profits Tax – AIR 1955 SC 176***.

12. On the other hand, Ms. Razaq defends the impugned judgment and order made by the ITAT on the basis of the reasoning reflected therein. She submits that the finding recorded by the ITAT is borne out by the material on record and therefore warrants no interference in this appeal.

13. The rival contentions now fall for our determination.

14. The main issue involved in this appeal is whether the proceeds from sale of the properties vide sale deed dated 13.07.2006 can be regarded as income from business or not.

15. The appellant-assessee was constituted vide Deed of Partnership dated 29.07.1989. The business of the partnership is that of real estate developers. Clause 2 of the Partnership Deed is most relevant and the same reads as follows:

> *"2. The business of the partnership firm shall be that of buying and developing the properties into plots including construction works and/or any other business as the parties hereto may mutually agree upon from time to time.* ***The business shall include buying or selling of properties situated at various places in Goa either wholly or in plots****."*

16. From the aforesaid, it is quite clear that the business of the appellant-assessee is buying and selling properties situated in various places in Goa either wholly or in plots. Mr. Rivonkar's contention that the business of the appellant-assessee is only to purchase properties, develop them into plots or construct buildings upon them and thereafter to sell them cannot be accepted, looking to the aforesaid provisions in the Deed of Partnership by which the appellant-assessee came to be constituted. The business of the appellant-assessee very specifically includes buying and selling properties situated in various places in Goa either wholly or in plots. Considering the wide

phraseology employed, it is obvious that the business of the appellant-assessee includes buying and selling even agricultural properties. Accordingly, we are unable to accept that the sale of the properties by the appellant-assessee vide sale deed dated 13.07.2006 has no nexus with the business of the appellant-assessee.

17. Besides, we find that both the Assessing Officer as well as the CIT (Appeals) have noted that by sale deed dated 13.07.2006, the appellant-assessee sold not merely the agricultural property but also another property admeasuring 2,525 sq.mtrs. to Headway Resort Line Pvt. Ltd. Therefore, this is not a case of sale of a solitary property, by way of a one off transaction. The appellant-assessee, in terms of Clause 2 of the Partnership Deed is clearly involved in buying and selling properties situated in various places in Goa either wholly or in plots. By sale deed dated 13.07.2006, the appellant-assessee has indeed sold the properties purchased by it for a considerable profit. This material, according to us, is more than sufficient to sustain the findings recorded by the AO and the ITAT. The finding of fact cannot be regarded as perverse, so as to give rise to any substantial question of law or so as to warrant interference.

18. The decision in *Narain Swadeshi Weaving Mills (supra)*, is entirely distinguishable, since, it turns on its own peculiar facts. There,

the assessee firm had virtually stopped its business mainly because no raw material was available due to the war. The factory premises were then leased and the issue was whether the lease rent could be treated as business profits liable to excess profits tax. In this fact situation, the Hon'ble Apex Court held that such lease could not be described as the business of the assessee firm and lease rent would therefore not qualify as business income. These facts, offer no parallel whatsoever to the fact situation in the present case.

19. We therefore answer the substantial question of law against the appellant-assessee and in favour of the respondent Revenue.

20. The appeal is accordingly liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

NUTAN D. SARDESSAI, J. ***M. S. SONAK, J.***

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