

**THE ASST COMMRR OF INCOME TAX
25(2), MUMBAI**

Vs

**M/s KALCHURI CORPN
C/o AJAY CHOWDHAR, 1ST FLOOR
CHAWDHARY HOUSE, S V ROAD, DAULAT NAGAR
BORIVALI (W), MUMBAI 66**

R K Gupta, JM and Rajendra Singh, AM

Dated : April 15, 2009

Appellant Rep by : Shri Vipul Joshi/Sameer Dalal

Respondent Rep by : Shri J V D Langsteih

ORDER

Per : R K Gupta:

This is an appeal by the department against the order of the CIT(A) relating to assessment year 2002-03.

2. The only issue in appeal of the department is against directing the AO to treat the income arising from sale of land by way of capital gains instead of business income.

2.1 During the assessment proceedings, the AO noticed that the assessee had shown income from sale of plot of land as capital gains in its return of income. It was seen that the assessee had sold the plot of land at Rs.17 lacs and after deducting the indexed cost of acquisition shown, the income was shown as capital gains. The assessee was asked to explain as to why such income should not be treated as business income as against capital gains. It was submitted that the assessee had purchased the plot of the land on 29.3.1989 as an investment and the assessee had not carried out any development on such plot of land since then. Reliance was placed on the decision of the Hon'ble Madras High Court in the case of *Mahingam Chattiar in 107 ITR 236*. However, the AO was not satisfied with the explanation of the assessee.

2.2 According to the AO, the transaction would take the colour from the intention of the assessee and even an isolated transaction could also be regarded as adventure in nature of trade, if the intent of such transaction at the time of entering into such transactions could be found to be so. Reliance was placed by the AO on the decision of the case of *V V Trivedi in 172 ITR 95*. The AO observed that the assessee's partnership deed revealed that the partnership was formed to carry out *inter-alia* the business of building construction, development of land, houses, buildings and flats on lease, purchase and sale piece of land with or without the structure. Accordingly, the AO treated the transactions as adventure in nature and held as business transaction. Accordingly, the amount so received was treated as business receipt.

2.3 Contentions raised before the AO were reiterated before the CIT(A). It was submitted that the assessee firm had purchased plot of land in 1989 and the same was sold after the period of 12 years without carrying out any development activity on such plot of land. According to the assessee, the fact that the assessee had not carried out any development activity itself makes it abundantly clear that the assessee had treated the plot as investment as against stock-in-trade as claimed by the AO. It was submitted that mere fact

that the object of the firm *inter-alia* included development activities did not automatically justifies the AO's claim that the assessee could not invest in plot as long term assets. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of DLF Housing and Construction P. Ltd. It was also explained that the assessee firm had not carried out any activity nor even had opened the bank account of its own till the plot of land was sold and that initial investment was made by the partners from their sources.

2.4 After considering the submissions and perusing the material of record, the CIT(A) found that the explanation of the assessee is correct. It was noted by the CIT(A) that plot in question was shown as investment. No activity of development on the plot was done by the assessee firm. It was observed by the CIT(A) that even no bank account was opened during the intervening period which clearly reveals that the assessee was holding the assets as investment. It was found that no borrowed money was used for purchase of plot of land as the partners invested their own money for purchase of plot of land and thereafter, the same was transferred to the firm as their contribution of capital. Accordingly, it was held by the CIT(A) that the transaction is capital in nature and capital gain is only chargeable. Accordingly, the ground of the assessee was allowed. Now, department is in appeal here before the Tribunal.

3. The Id DR placed reliance on the order of the AO and on the other hand, the Id counsel of the assessee placed reliance on the order of the CIT(A). Further reliance was placed in *172 ITR 95, 141 ITR 806 and 165 Taxman 465 (Del)*.

4. After considering the orders of the authorities below and various case laws relied upon by the Id counsel of the assessee, we do not find any infirmity in the findings of the Id. CIT(A). Undisputed facts are that the partnership firm was established on 30.12.1988 consisting of two lady partners. None of them were in the business of real estate. The plot of land was originally purchased by the partners out of their own funds in their individual capacity. Later on, they brought the same into the firm by way of their capital contribution. It is seen that the investment in plot was for the purpose of investment only as no activity was carried out by the partners or the firm before selling. Neither any borrowed funds were used to purchase the plot. The plot of land was sold nearly after 12 years. Even bank account was not opened by the firm. No income tax return was filed as there was no income. Keeping in view of these facts and circumstances, we are of the considered view that the investment in plot in question was for investment purpose and the assessee has rightly computed the capital gain on the same. Therefore, for this reason and for the reasons recorded by the CIT(A), we confirm his order.

5. In the result, the appeal filed by the department is dismissed.

Order pronounced on 15.4.2009.