IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1620 OF 2016

Pr. Commissioner of Income Tax-31 .. Appellant

v/s.

M/s. S.C. Brothers .. Respondent

Mr. Arvind Pinto for the appellant
None for the respondent

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 23rd JANUARY, 2019

P.C.

1. The Revenue is in appeal against the order of the Income Tax Appellate Tribunal ("the Tribunal" for short), raising following question for our consideration :-

> *"Whether in law and on the facts of the instant case, was the Tribunal correct in holding that income from the transfer of property by way of distribution of assets on retirement of the two partners to be long term capital gains ass per Section 45(4) of the I.T. Act instead of short term capital gain as held by the AO?*

2. The issue arises in following background.

3. The respondent assessee is a partnership firm. In the return of income filed for Assessment Year 2007-08, the assessee had offered

certain receipts to tax as long term capital gain. The Assessing Officer, however, was of the opinion that the gain would give rise to short term capital gain.

4. The assessee had acquired a plot of land at Jogeshwari in the year 1960 for a consideration of Rs.70,000/-. During the period relevant to the Assessment Year 2006-07, the assessee entered into a development agreement on 28.11.2005 with one M/s K. Reheja Universal Pvt. Ltd. ("M/s. K. Raheja" for short) for development of such land. As per the terms of the development agreement, the assessee would receive 50% of the developed property and cash of Rs.4.80 crores (rounded of). The development agreement was registered with Registering Authorities, which was valued at Rs.10.62 crores (rounded of) for the purposes of stamp duty. The assessee firm also offered capital gain tax on such valuation of Rs.10.62 crores after claiming indexed cost of 50% of the land. According to the assessee, after transfer of land pursuant to said development agreement, the assessee would remain owner of the 50% of the land with FSI available on such land and would have a right to claim 50% of the developed property from M/s. K. Raheja.

5. On 31.12.2006, two partners of the firm Shri. Yogendra Sanghavi and Shri. Somin Sanghavi having 34% and 16% share in the property of the firm retired. These partners were also entitled to receive share in the property of the firm in the ratio of share of profit in the partnership firm. Accordingly, the assessee firm distributed 50% of the land and the FSI and right to develop the property to the retiring partners. In terms of the provisions contained in Section 45 of the Income Tax Act, 1961, the assessee offered long term capital gain on account of distribution of the assets of the firm to the retiring partners, considering 50% of the capital asset having been distributed.

6. The Assessing Officer raised several disputes with this computation and the treatment to tax offered by the assessee firm. However, in the present appeal, the Revenue has pressed only one such objection namely that the assessee was incorrectly treating the capital gain as long term instead of offering to short term capital gain tax.

7. The assessee carried the matter in appeal. The Commissioner of Income Tax [CIT(A)] allowed the assessee's appeal accepting the assessee's contention that there was no conversion of the land with FSI available thereon vide development agreement dated 28.11.2005. The

CIT(A) held that the transfer by way of distribution on retirement of the partners was 50% of the assets of the firm. The same was, therefore, transfer of long term capital asset.

8. The Tribunal, in appeal filed by the Revenue, confirmed the view of the CIT(A) observing that at the time of execution of the development agreement, the assessee had offered the full value of consideration of Rs.10.62 crores to long term capital gain. The assessee had retained the remaining 50% of the land with available FSI and, therefore, the assessee was correct in considering the distribution of such retained asset, upon retirement of the partners as giving rise to long term capital gain.

9. We are in agreement of the view taken by the CIT(A) and the Tribunal. The Revenue is not justified in holding a belief that the capital asset in question can be said to have been acquired by the partnership firm only on 28.11.2005, which was the date on which the development agreement was executed. As noted, what happened under the development agreement between the assessee and M/s. K. Raheja was transfer of certain rights in the property, namely 50% of the land with development of available FSI thereon on certain terms and

conditions. Under the said agreement, the assessee would receive a portion of the developed property as well as cash amount of Rs.4.80 crores to be paid. The assessee on assessed total consideration arising out of the development agreement at Rs.10.62 crores for the purposes of stamp duty valuation and offered the entire amount to capital gain tax, after claiming indexation of only 50% of the land. This formula is obviously accepted by the Revenue.

10. In any case, in view of the development agreement, the assessee retained remaining 50% of the land with use of FSI available on such land. Under the development agreement, therefore, the assessee can be seen to have divested itself of a portion of the land with the rights attached to such land and having retained the remaining portion. This development agreement under no circumstances, can be seen to have given rise to acquisition of the land or rights therein by the assessee on the date of agreement. Consequently, therefore, when two partners representing 50% share in the profit as well as the assets of the firm retired, the assessee distributed 50% of the rights in land which remained with the assessee upon execution of the development agreement and offered the notional value to long term capital gain, which the Tribunal correctly approved. No question of law, therefore

arises.

11. The appeal is dismissed.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**