IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 19.08.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.8368 of 2010
and
M.P.No.1 of 2010

M/s.National Company,
A registered Partnership Firm
Having Office at
Chandra Apartments,
No.9, Kandasamy Street,
Mylapore, Chennai - 600004.
Rep. by its Managing Partner
Dr.C.V.Ananthasayanam ...Petitioner

Vs

The Chief Commissioner of Income-Tax,
Chennai II,
No.121, Nungambakkam High Road,
Chennai - 600034. ...Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorari, calling for the records on the file of the respondent pertaining to the order dated 03.03.2010 in proceedings No.CC-II/B(11)2008-09, and quash the same.

For Petitioner : Mrs.R.Maheswari

For Respondent : Mr.D.Prabhu Mukunth Arun Kumar, JSC

O R D E R

When the petitioner herein had filed their returns for the assessment year 2004-05 declaring a total income of Rs.1,29,93,699/-, the Assessing Officer had assessed the income under Section 143(3) of the Income Tax Act, assessing total income at Rs.9,77,05,329/- under Section 45(4) of the Income Tax Act, by taking into account the Long Term Capital Gains arising out of the transfer of immovable properties by the petitioner to its retiring partners. Subsequently, the Department had notionally worked out the advance tax on the disputed tax liability and had also imposed interest under Section 234B and 234C of the Income Tax Act.

2. It is seen that when the assessee had filed two tax appeals against the order of the Income Tax Appellate Tribunal challenging the order of the Commissioner of Income Tax dated 16.03.2007 for the assessment year 2004-05 and against the dismissal of the cross objections filed by the assessee before the Tribunal against the same order of the Commissioner of Income Tax, the substantial questions of law framed in the Tax Case Appeal are as follows:-

> *"1. Whether the Appellate Tribunal was right in holding that Section 45(4) of the Income Tax Act, 1961 applies to retirement of partner from partnership business?;*
>
> *2. Whether the Appellate Tribunal was right in the manner and application of the rule of ejusdem generis to Section 45(4) of the Income Tax Act, 1961?;*
>
> *3. Whether the word 'otherwise' in Section 45(4) of the Income Tax Act, 1961 takes into its sweep not only cases akin to dissolution of the firm but also cases of reconstitution of firm?; and*
>
> *4. Whether the Appellate Tribunal erred in not appreciating that unless there is a 'transfer' within the meaning of Section 2(47), capital gains under Section 45(4) is not attracted?".*

3. While dealing with the aforesaid substantial questions of law, the Division Bench of this Court had passed orders on 08.04.2019 in the Tax Case Appeal Nos.365 and 366 of 2009 by observing as follows:-

> *30. It is thus seen that the Hon'ble Supreme Court had also held that on retirement, the settlement to a partner of his share in the assets of the partnership after deduction of liabilities is not assessable to capital gains.*

31. In CIT Vs. Surendra Kumar Gupta reported in [2004] 270 ITR 325, the assets of the firm were taken over by one of the two partners on dissolution of the firm, on payment of an agreed amount to the other partner; it was held that the aforesaid transaction did not result in any transfer of asset as understood in common law.

32. In CIT Vs. Kunnamkulam Mill Board reported in [2002] 257 ITR 544 (Ker), it was held that on retirement of the partner of the firm, there is no transfer of the assets of the firm in favour of the continuing partners within the meaning of Section 45 (4) of the Act.

33. In the present case, very significantly, there was only a reconstitution of the partnership firm by retirement of two partners and admission of another partner. The partnership firm continued. It must also be further noted that the assets of the firm originally belonged to the father of the retiring / continuing partners and there was only a division of the assets on retirement in accordance with their entitlement on the shares in the partnership. As pointed out earlier, the National Company was originally a sole proprietorship concern started by N.Munuswamy Mudaliar. It was in the business of

construction and assets had been acquired even at that particular point of time. The two daughters and two sons-in-laws of N.Munuswamy Mudaliar were subsequently admitted as partners and on division of the assets, it can also be arguably pointed out that one daughter and one son-in-law were allotted a share which they were otherwise legally entitled to out of the holdings N.Munuswamy Mudaliar.

34. In view of the peculiar facts of the case in hand, we hold that the provisions of Section 45(4) would not be attracted on the retirement of the two partners and consequential allotment of their share in the assets in the Assessee Firm. We therefore answer the substantial question of law in favour of the Assessee and against the Revenue.

4. Thus, the view taken by the Division Bench is to the effect that the provisions of Section 45(4) would not be attracted on the retirement of the two partners and the consequential allotment of their share in the assets. The issue for consideration in the present writ petition is also on the same aspect and in view of the findings of the Division Bench in the aforesaid Tax Case Appeals, the petitioner herein would be entitled to succeed.

5. In the light of the above observations, the impugned proceedings dated 03.03.2010 is quashed. Consequently, all further proceedings initiated pursuant to the order dated 03.03.2010, shall stand abated.

6. Accordingly, the Writ Petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Chief Commissioner of Income-Tax,
Chennai II,
No.121, Nungambakkam High Road,
Chennai - 600034.

+2 cc to Mr.R.Maheswari, Advocate Sr.No.70387
& 70400 (27.09.2019)
+1 cc to M/s.Hema Murali Krishnan, Advocate Sr.no.70775

AKM/25.09.19/4P-5C /

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