

OD - 17 & 18

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

IA NO.GA/1/2021
ITAT/108/2021

PRINCIPAL COMMISSIONER OF INCOME TAX - 1, KOLKATA
VS.
M/S. ORCHID GRIHA NIRMAN PVT. LTD.

IA NO.GA/2/2021
ITAT/108/2021

PRINCIPAL COMMISSIONER OF INCOME TAX - 1, KOLKATA
VS.
M/S. ORCHID GRIHA NIRMAN PVT. LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATED JANUARY 31, 2022.

[Via Video Conference]

Appearance :
Mr. P.K. Bhowmick, Adv.
Mr. Asok Bhowmick, Adv.
... for the appellant

Mr. J.P. Khaitan, Sr. Adv.
Ms. Swapna Das, Adv.
Mr. Siddharth Das, Adv.
..for the respondent

The Court :- We have heard Mr. P.K. Bhowmick, learned
standing counsel for the appellant/revenue duly assisted by Mr. Asok

Bhowmick and Mr. J.P. Khaitan, learned senior counsel for respondent/assessee duly assisted by Ms. Swapna Das and Mr. Siddharth Das.

There is a delay of 874 days in filing this appeal. We have perused the affidavit filed in support of the petition and we find there is absolutely no reason given for the inordinate delay in filing the appeal. However, considering the facts that identical issues were considered in the assessee's own case for the subsequent assessment year 2008-2009 along with other connected matters and decision was rendered in ITAT/164/2017 dated 18th January 2022, we exercise discretion and condone the delay. Accordingly, the delay is condoned.

The petition for condonation of delay is disposed of.

ITAT/108/2021

This appeal filed by the revenue under Section 263A of the Income Tax Act, (the Act) is directed against the order of the Income Tax Appellate Tribunal "C" Bench Kolkata (Tribunal) dated 26th September, 2018 in ITAT/569/Kol/2015 for the assessment year 2006-07.

The revenue has raised the following substantial questions of law for consideration.

1. Whether on the facts and circumstances and points of law, the Learned Income Tax Appellate Tribunal was

committed substantial error of law and justified by ignoring the detailed factual discussions in the assessment order wherein the Assessing Officer made observations about the adoption of colourable devices to avoid paying taxes, in the light of the Judgment of the Hon'ble Supreme Court of India in *McDowell & Co Ltd - vs- CTO* (1985) 154 ITR 148/22 Taxman 11 (SC) ?

2. Whether on the facts and circumstances of the case Learned Income Tax Appellate Tribunal committed substantial error of law by granting relief to the assessee on the ground that Land in question in the instant case is not a capital asset, where the said piece of land was acquired with intent to transfer it as Capital contribution in the Partnership firm and is beyond the scope of Section 45(3) of the Income Tax Act 1961?
3. Whether on the facts and circumstances of the case, the Learned Tribunal failed to appreciate the facts and overlooked the merits of the case as found by the Assessing Officer and as such the conclusion arrived by the Learned Tribunal as perverse and as such the said order of the learned Tribunal is not sustainable in law?

We have heard Mr. Bhowmick, and Mr. J. P. Khaitan, Senior Advocate for the respondent/assessee.

It is not disputed before us that the substantial questions of law which have been raised in this appeal by the revenue have been held to be not substantial questions of law in the assessee's own case for subsequent assessment year in ITAT/250/2017 which was heard and disposed of along with ITAT/164/2017 and ITAT /239/2017 by judgment dated 18th January, 2022. The operative portions of the judgment are reproduced below.

“15. The CIT (A) accepted the contention raised by the assessee. After examining the factual issues it specifically held that revaluation of an asset is not a business transaction resulting in any pecuniary gain which can form subject matter of taxation. Ultimately by a well reasoned order, the CIT(A) allowed the appeal filed by the assessee. Aggrieved by the same, the revenue preferred the appeal before the tribunal. The tribunal firstly considered the validity of the reopening of the assessment under section 147 of the Act. After elaborately considering the facts the tribunal held that, if at all any income accrues or arises owing to such revaluation, it is an issue which had to be dealt with in the assessment of the firm M/S. Salapuria Soft Zone which is the separate taxable entity. After noting the facts the tribunal held that in terms of the Section 10 (2A) of the Act partners' share in the total income of the firm is not to be included in the total income of the partner. Therefore, it was held that there was no reason for initiating proceedings under section 147 of the Act. With regard to the applicability of Section 45(3) of the Act, the tribunal after considering the books of accounts of the firm recorded the following factual findings:-

The books of account of the said firm for the financial year ended March 31, 2006 clearly reflected the receipt of the said land by it by way of capital contribution from three of its partners as also the value thereof with corresponding credit to the partners'

capital accounts. The land upon purchase was shown by the said three companies as part of their current assets. The said firm upon receipt of the said land during the financial year ended March 31, 2006 also accounted for it as a current asset. The partners transferred the said land at cost. As such, there was no profit in the hands of the partners upon transfer of the said land to the said firm. Section 45(3) of the Act is applicable only in respect of a capital asset. The said provision has no application in the instant case since what was transferred by the partners was a current asset and not a capital asset. Section 45(3) of the Act did not come into operation for the assessment year 2008-09 by reason of conversion of the developed land and building into fixed assets by the said firm or due to revaluation by the said firm of the asset so converted during the previous year ended March 31, 2008. Section 45(3) of the Act is applicable in the year of transfer by the partner of his capital asset to the partnership firm by way of capital contribution. In the instant case, the year of transfer was the financial year ended March 31, 2006. The ITO was wholly unjustified in invoking Section 45(3) which had no application in the assessment year 2008-09 or for that matter in the assessment year 2006-07. Even otherwise, Section 45(3) seeks to determine the capital gains with reference to the value of the asset recorded in the books of account of the firm. The value so recorded is statutorily deemed to be the full value of consideration received or accruing to the partner as a result of the transfer of the capital asset to the firm. Thus, Section 45(3) does not seek to substitute by any other figure the value agreed between the partners at which the asset is transferred by a partner to the firm.

16. With regard to the revaluation, tribunal re-appreciated the facts which were considered by the CITA. With regard to the development of the area in question, as to how there was steep rise in

the value of the properties and the state government revised the guideline value for the purpose of stamp duty several times between 2004-07 and after noting the price rise the tribunal held notwithstanding the said fact in accordance with the accounting principles the land held as inventory was shown at its cost and therefore it cannot be said that under valuation was done by the assessee as alleged by the Assessing Officer.

17. Further more on facts the tribunal agreed with CIT(A) that after conversion of inventory into fixed asset the firm revalued the developed land including construction thereon in order to bring it in line with the current market value to justify the business assistance secured by the firm from the banks to extent of nearly Rs. 250 crores. Therefore, on facts the tribunal concluded that the revaluation was not a colourable device.

18. Further more on facts it was held that there was no withdrawal by the partners from capital accounts and therefore there cannot be any income liable to tax in their hands.”

Thus following the above decision, the appeal filed by the revenue stands dismissed on the ground that there is no question of law, much less substantial questions law arising for consideration.

Stay petition consequently, stands dismissed.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)