

आयकर अपीलीय अधिकरण “बी” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VP AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं. ITA No.3268/Chny/2019
(निर्धारण वर्ष / Assessment Year: 2011-12)

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| DCIT Corporate Circle-3(1), Chennai. | बनम / Vs. | M/s. Thulasi Mohan Constructions Pvt. Ltd. 32, (Old No.43), K. Bharathidasan Salai, Alwarpet, Chennai-600 018. |
| स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AADCT-5592-Q | | |
| (पीलार्थी/ Appellant) | : | (प्रत्यर्थी / Respondent) |

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| अपीलार्थी की ओर से/ Appellant by | : | Shri D. Hema Bhupal (JCIT)- Ld. DR |
| प्रत्यर्थी की ओर से/ Respondent by | : | Shri S. Sridhar (Advocate)-Ld.AR |

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| सुनवाई की तारीख/ Date of Hearing | : | 21-06-2023 |
| घोषणा की तारीख / Date of Pronouncement | : | 08-09-2023 |

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year (AY) 2011-12 arise out of order of learned Commissioner of Income Tax (Appeals)-11, Chennai [CIT(A)] dated 13-09-2019 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143(3) r.w.s. on 30-12-2018. The grounds raised by the revenue read as under: -

1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case.
2. The Id.CIT(A) has erred in allowing the assessee's appeal without proper appreciation of the facts?
3. The Id.CIT(A) erred in overlooking the fact that the Firm was not in existence after the takeover by the assessee company on 01/ 11/2010 and hence the Assessing

Officer has rightly invoked the provisions of section 170 and made the addition in the hands of the successor i.e. M/s.Thulasi Mohan Constructions Pvt. Ltd.

4. The Id.CIT(A) having co-terminous powers as that of the Assessing Officer ought to have verified the reopened assessment details of the firm and its partners before arriving at the decision that the Firm was in existence and the Short Term Capital Gains should not be brought to tax in the hands of the transferee company, even while the assessee company was not forthcoming with details of reopened assessment details of the firm and its partners before the Id.CIT(A).

5.The Id.CIT(A) erred in holding that this is not a case of succession of the firm by a company u/s.47(xiii) even while there was no successor entity to the erstwhile partnership firm, after the date of succession, the company which acquired the partnership "lock stock and barrel" "as where is" along with all the liabilities of the partnership firm which includes the income tax liability of the erstwhile partnership firm on account of the transfer and therefore the resulting capital gains is assessable in the hands of the assessee company.

2. The Ld. Sr. DR advanced arguments supporting the case of the revenue and cited various judicial decisions to support the assessment framed by Ld. AO. The Ld. AR controverted the same and referred to the findings rendered in the impugned order. Having heard rival submissions and upon perusal of case records, our adjudication would be as follows.

Assessment Proceedings

3.1 The assessee being resident corporate assessee was assessed u/s 143(3) on 19-03-2014 accepting returned income of Rs.147.67 Lacs. However, the case was reopened and a notice u/s 148 was issued on 31-03-2018. The assessee offered original return of income and demanded reasons for reopening which were supplied. The assessee objected to the same which were disposed-off vide order dated 16-12-2018.

3.2 The Ld. AO noted that the assessee took over a partnership firm namely M/s M. Thulasi & ors. The net asset value was Rs.2396.88 Lacs whereas the consideration paid to the firm was Rs.2995.60 Lacs leaving gap of Rs.568.71 Lacs. Since the consideration was partly in the form of equity share capital and partly in the form of unsecured loans, the

transaction would not fall under the purview of Sec. 47(xiii) and clause (c) thereof would apply which provide that the partners of the firm do not receive any consideration or benefit other than by way of allotment of shares. However, the net consideration was paid in the form of equity share capital for Rs.16.50 Lacs and balance Rs.2979.10 Lacs was in the form of unsecured loans. The clause (c) to Sec.47(xiii) stipulate that the partners of the firm should not received any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company. The erstwhile firm would get the benefit of interest on loans. Since the assessee company has taken over the firm as 'Lock stock and Barrel', there is no firm in existence on the date of issue of notice u/s 148 and the assessee company has taken over all the assets and liabilities and therefore, the capital gains arising from the above transaction was to be taxed in the hands of the assessee company u/s 170.

3.3 It was further held by Ld. AO that the majority of sale consideration comprises of inventories which is business assets and theretofore, the gains are to be assessed as Short-Term Capital Gains (STCG). Since the firm was not in existence and the assessee took over all the assets and liabilities including Income Tax liability, the capital gains was to be taxed in the hands of the assessee company as a successor in terms of Sec.170 of the Act.

3.4 The assessee submitted a copy of notice issued u/s 148 in the name of erstwhile firm by Ld. DCIT, non-corporate Circle 8(1), Chennai to support the submissions that the firm was in existence and therefore, the provisions of Sec.170 would not apply. However, in the absence of information regarding assessment in the hands of the firm, the capital

gains were assessed in the hands of Assessee Company as STCG for Rs.568.71 Lacs.

First Appellate proceedings

4.1 The assessee objected to reopening and also assailed applicability of Sec. 170(2) on the ground that the payee firm was very much in existence. The assessee filed various submissions during the course of appellate proceedings to support its case on legal ground as well as on merits.

4.2 The aforesaid submissions found favor with Id. CIT(A) and Ld. CIT(A) deleted the impugned additions by observing as under: -

7. The facts of the case are examined. The assessee has objected to the assumption of jurisdiction. It has also alleged that the 148 notice was served on it only on 04.04.2018. The assessee has also objected to initiation or reassessment proceedings without any valid basis when an assessment u/s.143(3) had been completed in the case of the assessee. The assessee has also filed detailed objections on merits of the case. The merits are examined and adjudicated as under.

8. As per the agreement dated 01.11.2010 the entire real estate and construction business of the firm M/s. Thulasi and others had been taken over by the company M/s. Tulasi Mohan Constructions Pvt. Ltd. However the firm continued to be in existence and has filed its return of income for AY 2011-12. The firm has not filed any returns of income for the subsequent period. In the assessment order, the Assessing Officer has noted that a notice u/s 148 had been issued in the name of the firm by DCIT, NCR- 8(1) Chennai. The whereabouts of this assessment in the hands of the firm for the AY 2011-12 are not known. The firm had transferred its real estate and construction business. However, the firm continued to be in existence. This is not a case of succession of the firm by a company as attracted u/s 47(xiii) of the Income tax Act. This is a simple case of the business of the firm transferred to the company on a slump sale basis 'lock stock and barrel' to the company. The company is the transferee and there cannot be any capital gains in the hands of the transferee when transferor was very much in existence. There cannot be any rectification of capital gain in the hands of the company on account of taking over the business of the firm. Merely because the Assessing Officer could not readily locate the assessment particulars of the firm, he is not entitled to bring the transaction for taxation as capital gains in the hands of the company being the transferee. The assessment framed and the STCG brought to taxation cannot be seconded. The grounds of appeal are accepted. The Assessing Officer is directed to delete the STCG brought to taxation."

Aggrieved as aforesaid, the revenue is in further appeal before us.

Our findings and Adjudication

5. From the findings rendered in the impugned order, it could very well be seen that the case for the firm was also reopened by issuance of notice u/s 148 and the firm was in existence which is further substantiated by the fact that the firm has filed return of income for AY 2011-12 also. The firm has merely transferred its real estate and construction business and this is not a case of succession of the firm by a company rather a simple case of transfer of a certain line of business on slump sale basis. The assessee is a transferee and paid the sale consideration and hence, it could not be subjected to any capital gains. Therefore, no fault could be found in the impugned order.

6. The appeal stands dismissed.

Order pronounced on 8th September, 2023

Sd/-
(MAHAVIR SINGH)
उपाध्यक्ष / **VICE PRESIDENT**

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य / **ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated :08-09-2023
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

- 1.अपीलार्थी/Appellant
- 2.प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
- 4.विभागीय प्रतिनिधि/DR
- 5.गार्ड फाईल/GF