<u>आयकर अपीलीय अधिकरण 'ए" न्यायपीठ चेन्नई में।</u>
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकरअपील सं./ ITA No.325/Chny/2024
(निर्धारणवर्ष / Assessment Year: 2010-2011)

The Assistant Commissioner of Income Tax, Corporate Circle 1(2) Chennai.	**Vs.**	M/s. Buhari Holdings Pvt. Ltd, No.4, Buhari Towers, Moores Road, Chennai 600 006. [PAN AAACB 2679M]
(**अपीलार्थी**/Appellant)		(**प्रत्यर्थी**/Respondent)
अपीलार्थी की ओर से/ Appellant by	**:**	Shri. G. Baskar, Advocate
प्रत्यर्थी की ओर से /Respondent by	**:**	Shri ARV Srinivasan, IRS, Addl CIT.
सुनवाई की तारीख/Date of Hearing	**:**	20.06.2024
घोषणा की तारीख /Date of Pronouncement	**:**	29.08.2024

<u>आदेश / O R D E R</u>

<u>PER MANU KUMAR GIRI (Judicial Member)</u>

This appeal by the Department is arising out of the order of the Commissioner of Income Tax (Appeals)-18, Chennai in order No.ITBA/APL/S/250/2023-24/1058556563 (1) dated 07.12.2023. The assessment was framed by the DCIT, Corporate Circle-I(2), Chennai for the assessment year 2009-10 u/s.143(3) r.w.s 147 of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 16.03.2016.

02. The assessee has raised following grounds of appeal:-

> *''1.The order of the ld. Commissioner of LT. (Appeals) is opposed to law and facts of the case*
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> *2 The id. CITIA) erred in deleting the addition of Rs. 1,75,27,500/- made u/s 28(iv) of the Income Tax Act, 1961, which represented the amount credited to Capital Reserves on account of allotment of shares allotted by the amalgamated company. M/s Kemcos Land Developers Pvt Ltd, with respect to the shares held in the amalgamating company, M/s Transcar India Pvt Ltd, by the assesse*
>
> *3 The ld. CITIA) erred in holding that the allotment of shares to the assessee is not a voluntary transaction without appreciating that one of the business activities of the assessee is investment trading and the provisions of section 28țiv) in clearly attracted in the assesser's case*
>
> *4 For these grounds and any other ground including amendment of grounds that may be caused during the course of the appeal proceedings, the order of ld. CIT(A) thus sue may be set aside and the addition made by the Assessing Officer be restored''.*

03. Brief case of the case are that the assessee Company filed its Return of Income on 14.10.2010 for the A.Y.2010-11 disclosing an income of Rs.99,73,917/-. The assessment u/s 143(3) of the Act was completed on 11.2.2013. The assessment for A.Y.2010-11 was reopened u/s 147 of the Act as there was a reason to believe that income to the extent of Rs.1,75,00,000/- had escaped assessment. After issuing the statutory notices the assessment was completed by making the additions on two counts (i) Rs.1,75,27,500 u/s 28(iv) and (ii) disallowance u/s 14A of Rs.48,26,216/-. The AO while making the disallowances made the following observations:

> *"It is seen from the schedule 19 notes on accounts forming part of accounts, vide sl.no.6(B) it is stated that due to amalgamation of M/S. Transcar India Private Limited with M/s.Kemcos Developers Private Limited, 1,75,275 equity shares of Rs.100/- each amounted to Rs. 1,75,27,500/- was credited to capital of the assessee company. This credit is due to additional allotment of shares worth of Rs. 1,75,27,500/-.*

Due to the above reason, the ld. Assessing Officer made an addition of Rs.1,75,27,500/-. Aggrieved, assessee preferred an appeal before the ld. CIT(A).

4. Brief facts are that the appellant was holding 29,21,250 shares of Rs.10 each in Transcar India P. Ltd., before the amalgamation of Transcar India P. Ltd. with Kemcos Land Developers P. Ltd. On post amalgamation, the appellant was entitled to 46,74,000 shares of Rs.10 each in Kemcos Land Developers P. Ltd. and the basis of allotment of shares in the transferee company (Kemcos Land Developers P. Ltd.) was due to holding of original investment in shares by the appellant company with the transferor company (Transcar India P. Ltd.) before the said amalgamation of the two companies. The appellant obtained 16 equity shares of Kemcos Land Developers P. Ltd. for every 10 shares in Transcar India P. Ltd. as per the scheme of amalgamation approved by the Hon'ble High Court of Madras vide order dt. 22.7.2010. The assessee passed journal entry in the books of account to give effect to the value of shares allotted to the assessee as below:

Particulars of Account	*Debit (Rs.)*	*Credit (Rs.)*
Investment shares in Kemcos Land Developers P. Ltd.	*4,67,40,000*	
To investment in shares Transcar India P. Ltd.		*2,92,12,500*
Capital Reserve		*1,75,27,500*
Total	*4,67,40,000*	*4,67,40,000*

The AO added the above capital reserve of Rs.1,75,27,500 u/s 28 (iv) of the Act as benefit accruing to the assessee and the same is disputed before the ld. CIT(A). Before the ld. CIT(A), the assessee contended that sec.28(iv) is not applicable as only the existing shares in the amalgamating company was converted into shares in the amalgamated company and the increase in value of shares is only notional which does not represent any income. The assessee further submitted that there was no transfer of shares by the assessee in the scheme of amalgamation and therefore, there is no accrual of income. The assessee also relied on the decision on the Kolkata ITAT in the case of *Kyal Developers P Ltd., in ITA No.627/2012 dated 13.3.2017 for AY 2008-09*, in which an identical issue was considered and held that as per the scheme of amalgamation, there is no material to indicate that the benefit, even if accruing to the assessee, on account of amalgamation by way of merger, as not in nature of revenue and there is no occasion to invoke sec.28(iv) and the transaction was in the capital field and therefore, no addition could be made. As per the ld. CIT(A) the increase in the capital reserve is only on capital field and sec.28(iv) is not applicable. Only the existing shares in the amalgamating company are converted into the shares of amalgamated company based on the swap ratio of 10:16 approved by the Hon'ble Madras High Court. In the process, the assessee did not gain anything and it is not the voluntary transaction undertaken by the assessee to earn any income. The assessee has not received shares in the amalgamated company without consideration or for a consideration which is less than the fair market value and thereby Sec.56(2)(viia) is also not applicable. But, at the same time, whenever the

shares are sold by the assessee, the AO should allow the actual cost of shares incurred by the assessee at the time of purchase of shares of amalgamating company and should not be carried away by the value of shares of the amalgamated company shown in the balance sheet which included the capital reserve of Rs.1,75,27,500/- while calculating the capital gains on the sale of shares in the year of sale. Hence, the ld. CIT(A) deleted the addition of Rs. 1,75,27,500/- made u/s 28(iv) of the Act. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before the Tribunal.

5. We have heard the rival submissions and orders of the lower authorities. The decision in the case of M/s Kyal Developers Pvt. Ltd. Vs ITO Wd-7(3), Kol (ITA No.627/Kol2012 A.Y 2008-09 has held as under:

> *''5. We have heard rival contentions and gone through facts and circumstances of the case. The admitted facts are that the assessee being a Public Limited Company has amalgamated with the abovementioned nine companies. The purpose of amalgamation was to bolster the capability of the assessee to conduct business in dynamic way and more to earn profits. The block of asset received from the amalgamating companies enhanced the image and goodwill of the assessee-company by increasing reserves and surplus. Whether the reserve and surplus of the amalgamated company can be treated as benefits accruing from business of the assessee in term of provisions of Section 28(iv) of the Act or not?*
>
> *6. Now, we have to go through the clause (iv) of Section 28 which lays down as under:*
>
> *"Section 28 sets out the incomes which are chargeable to income-tax under the head 'Profit and Gains of Business and Profession', and clause (iv) thereto refers to "the value of any benefit or perquisite, whether convertible into money or not, arising from the business or exercise of a profession".*
>
> *It is clear from the above provision that besides the profits and gains from business and profession carried on by the assessee at any time during the previous year or any other benefit or perquisite, whether convertible into money or not, is also chargeable to tax under this head of income. A plain reading of this provision shows two conditions precedents for such taxability*

i.e. (i) that there should be benefits or perquisites and, (ii) that such benefits or perquisites should arise from the business or exercise of the profession. The expression 'arising from the business' essentially implies that the benefit or perquisite must be in the nature of a business receipt or revenue receipt. No matter how wide be the scope of Section 28(iv) of the Act, the difference between a capital receipt and revenue receipt cannot be overlooked. In the case of Mahindra & Mahindra Limited Vs. CIT (261 ITR 501), Hon'ble Bombay High Court has, in the context of this significant distinction between revenue and capital receipts, held that waiver of principal amount in respect of imports of plant and machinery could, by no stretch of logic, be treated as 'business income', and, therefore, as an income taxable under section 28(iv) of the Act. One must bear in mind the fact that section 28 of the Act only refers to the term "income" which can be charged to income tax under the head "profits and gains from business or profession", and, therefore, when a particular advantage, perquisite or receipt is not in the nature of income, there cannot be any occasion to bring the same to tax under section 28(iv) of the Act.

7. Hon'ble Supreme Court, in the case of Padmaraje R Kadambande vs CIT (195 ITR 877) observed that, "... we hold that the amounts received by the assessee during the financial year in question have to be regarded as capital receipts, and, therefore, are not income within meaning of section 2(24) of the Income Tax Act."(Emphasis by underlining supplied by us). This clearly shows, as is the settled law that a capital receipt, in principle, is outside the scope of income chargeable to tax. Of course, there are specific provisions under the Income Tax Act which provide hat certain capital receipts can also be considered as income, such as under section 2 (24)(vi) of the Act which covers "any capital gains chargeable under section 45", but right now we are confined to normal connotations of the expression 'income'. Howsoever liberal or narrow be the interpretation of expression 'income', it cannot alter character of a receipt, i.e. convert a capital receipt into revenue receipt or vice versa. The crucial distinction between capital and revenue cannot be blurred or nullified by even the most liberal interpretation of expression 'income'. It is also important to bear in mind that, as held by Hon'ble Supreme Court in the case of Dr K George Thomas Vs CIT (156 ITR 412), "the burden is on the revenue to establish that the receipt is of a revenue nature" though "once a receipt is found to be of revenue character, whether it comes under exemption or not, it is for the revenue to establish". It is thus clear that capital receipts are inherently outside the scope of an income which can be taxed under section 28(iv), and Hon'ble Bombay High Court, in the case of Mahindra & Mahindra (supra) also holds so. As to what constitutes capital receipt, we find guidance from Hon'ble Madras High Court's judgment in the case of CIT Vs Seshasayee Brothers Pvt Ltd. (222 ITR 818) wherein Their Lordships, after elaborately surveying the legal precedents on this issue, concluded that, "Thus, a combined reading of the above said judicial pronouncements would go to show that when a receipt is referable to fixed capital, it is not taxable,, and it is taxable as a revenue receipt when it is referable to circulating capital or stock in trade".

8. To sum up, unless it is a revenue receipt, it cannot be in the nature of income [except in a situations in which capital receipts are specifically

included in the definition of income such as under section 2(24)(vi)], and unless it is in nature of income, it cannot be considered for taxation under section 28(iv). The reference to benefit which can be brought to tax under section 28(iv) for benefits 'arising from the business' also indicates that such benefit must be a business or revenue receipt in nature. To find out whether or not the benefit, even if that be so, is on capital account or revenue account, it is necessary to understand the nature of transaction which has resulted in, what the Assessing Officer, perceives as 'benefit to the assessee'. This was a case of amalgamation in the nature of merger, and an amalgamation in the nature of merger, in corporate parlance, is the process of blending of two or more companies into one of these blending companies, the shareholders of each blending company becoming substantially the shareholder of the company which holds the blended undertaking. The expression 'amalgamating company' is used for the 'blending company' which loses its existence into the other company and the expression 'amalgamated company' is used for blended undertaking, which holds existence of those two or more companies. In essence thus, the whole exercise of amalgamation in the nature of merger is an exercise in that of pooling of resources, as also pooling of assets, into the company in which two or more companies are blended. It is a process of corporate reconstruction and it is only with the approval of Hon'ble jurisdictional High Court that this exercise is carried out. In the present case also, as stating paragraph 4 of Part I of Schedule A (i.e. scheme of amalgamation) to Hon'ble Calcutta High Court's order dated 9th April 2008, "for the purpose of better, efficient and economical management, control and running of the business and to withstand the recessionary tend in the economy of the business undertaking concerned and for administrative convenience and to obtain advantage of economies of large scale, the present scheme is proposed to amalgamate the transferor company (i.e VVPL) with the transferee company (i.e. the assessee). As a result of amalgamation, the assessee, being the transferee company, will increase its assets and liabilities, and, even if there be a benefit in the process, such a benefit can only be in the capital field because it is relatable to the non trading assets and capital. What it affects is the capital structure of the assessee company and the manner in which business is consolidated. As the Assessing Officer himself observes, "..... this exercise of amalgamation is also aimed at bolstering the capability of the assessee to conduct business more dynamically and earn more profit. So, the enhancement of its capital reserve, as a result of this amalgamation can only be construed as a benefit accrued to the assessee ...", but then it is not even the case of the Assessing Officer that the benefit is in the revenue field, and unless the Assessing Officer is to discharge the onus of demonstrating that the benefit is in the revenue field, there cannot be any occasion to invoke Section 28(iv). Applying the test laid down by Hon'ble Madras High Court, in the case of Seshasayee Brothers (supra), also, we find that the benefit is referable to the capital, and is thus not of an income nature. Even if, as the Assessing Officer observes, "is benefited in a myriad ways by way of amalgamation", it does not lead to the conclusion that the benefit is in revenue field which alone can be treated as income and thus be considered for taxability under section 28(iv) of the Act. The onus is on the Assessing Officer to demonstrate that the receipt is of the revenue nature.

9. In the present case there is o material whatsoever before us to indicate that the benefit, even if accruing to the assessee, on account of amalgamation by way of merger as not in revenue field, and not of an income nature. Accordingly, there was no occasion to invoke Section 28(iv) of the Act. According to us, CIT(A) was quite justified in his observations that "the amalgamation is not an adventure in the nature of trade" and that "this transaction is clearly a capital account transaction" and he was justified in deleting the addition. We uphold his order and dismiss the appeal of revenue.

6. The ITAT, Mumbai bench in the case of Rupee Finance & Management (P) Ltd., vs. ACIT (2009) 120 ITD 539 explained the scope of Section 28(iv) of the Income Tax Act in para 8.5 of the Order which reads as under :

"8.5. Applying these propositions to the case on hand, the purchase of shares at a particular price which is below the market price as an investment is not income by any stretch of imagination. It cannot also be deemed as income under s. 28(iv) as it is neither benefit nor perquisite that has arisen to the assessee from the business or in the exercise of a profession. The Hon'ble Gujarat High Court in the case of CIT vs. Bhavnagar Bone & Fertiliser Co. Ltd. (1987) 59 CTR (Guj) 116 : (1987) 166 ITR 316 (Guj) has upheld the Tribunal's finding that there must be a nexus between the business of the assessee and the benefit which the assessee has derived for the purpose of attracting provisions of s. 28(iv). At p. 320 it has observed as follows: "After referring to various decisions, the Tribunal observed, these decisions make it abundantly clear that the benefit received or receivable by a person must be one which has intimate connection with business and even if such benefit is derived by way of bounty, nevertheless it would be taxable, if accrues to it or if received by it in the course of business or employment of office." In this case the Revenue has not demonstrated what is the business connection or the business done between the seller and the purchaser of the shares. No case has been made out that privilege or benefit or concession has been passed on by the seller to the buyer as part and parcel of a business transaction. A benefit has been assessed by the CIT(A). Mere purchase of shares by way of investment cannot be considered as business of the company though the objects of the company enable it to invest as well as deal in shares. As already stated there is no event which can be said to have resulted in accrual of income to the assessee. Thus on this factual matrix, mere purchase of shares, as an investment, with the lock-in-period of holding, for a consideration which is less than the market value, cannot be brought to tax, as a benefit or perquisite under s. 28(iv) of the Act. The assessee has not in this case, secured any benefit or perquisite in consideration of a business transaction undertaken with the sellers of the shares. Thus, this issue is decided in favour of the Revenue and against the assessee."

The contention of the Ld. D.R, thus, cannot be accepted that for applicability of provisions of Section 28(iv), it is not necessary that the benefit or perquisite must arise from the business or the exercise of profession carried on by the

recipient. The ITAT, Kolkata Bench in the case of ITO vs Shreyans Investments Private Limited 141 ITD 672 (Kolkata-Tribunal) relying on the decision of the Honorable Bombay High Court in the case of Mahindra and Mahindra 261 ITR 501 (Bom.) had taken a view that reserve arising out of amalgamation cannot be treated as income under section 28(iv) of the Income-Tax Act, 1961. The decision of the Honourable Bombay High Court in the case of Mahindra and Mahindra (supra), has been upheld by the Honorable Supreme Court reported in 404 ITR 1. Learned Counsel for the Assessee also relied upon decision of the Chennai Bench of the Tribunal in the case of Spencers and Company Limited vs., ACIT 137 ITD 141 (T.M.) (Madras-Tribunal). In this case, the surplus arising out of the amalgamation was transferred to a general reserve which were treated by the Assessing officer as an income chargeable to tax under section 28(iv) of the Income Tax Act, 1961. When the matter went to Third Member, the Third Member agreed with the view of the Accountant Member that "there were no benefit arising in the course of business and, therefore, no such amount can be charged to tax under section 28(iv) of the Income Tax Act, 1961. The Tribunal while holding so also distinguished the decision of the Honourable Madras High Court in the case of Arise Advertising Private Limited 265 ITR 510 mentioning that the said decision pertains to the remission of unclaimed balance of trading liability." It is well settled Law that decision of the Third Member is as good as the decision of the Special Bench as is held by the Special Bench of the Tribunal in the case of DCIT vs., Oman International Bank (2006) 286 ITR (AT) 8 (SB). Similar view has been taken by the ITAT, Kolkata Bench in the case of ITO vs., Kyal Developers Private Limited 63 SOT 93 (URO).

Reliance is also placed upon the decision of Calcutta High Court in the case of Shaw Wallace & Company Ltd. v. CIT (119 ITR 399, 411). This is also a case of amalgamation where there was transfer of asset from amalgamating company to the amalgamated company. The Hon'ble High Court has observed that there was no transfer involved to another person or any consideration passing on as a result thereof. It was held that the dissolution of the amalgamating company took place by operation of the scheme sanctioned by law and as a result the rights in the shares of the amalgamating companies came to an end. Secondly, it was held that the amalgamated company was owner of all the assets of the amalgamating company as it was a 100% holding company. Once, all the assets are transferred to the amalgamated company, there was no element of gain or loss when the assessee re-arranged its capital base. In his concurring judgment, Justice C. K. Banerji observed as under:

"The shares held by the assessee in the transferor-companies represented the capital invested by the assessee in the said companies and by the said amalgamations the assessee became the sole owner of the entire capital of the transferor-companies. By virtue of the said amalgamations the assessee as the transferee-company became the sole repository of all the rights which flowed from or were imbedded in the shares held by the assessee in the transferor-companies."

7. In the case of CIT Vs. NALWA INVESTMENTS LTD (Delhi High Court) [2020] 118 taxmann.com 278 (Delhi) / (2020) 427 ITR 229 (Del), the Hon'ble Court in sum & substance opined that:

> *''Receipt of shares of amalgamated company by the shareholders of amalgamating company in lieu of their shareholding in amalgamating company is transfer within the meaning of section 2(47) and 45 of Income Tax Act,1961. If on the date of amalgamation, the shareholders of amalgamating company held those shares as capital asset, such transfer would be exempt from capital gains tax under section 47(vii). If on the other hand such shares were held as* ***stock-in-trade****, such transaction would be taxable as normal business income under section 28''.*

In the present case, Nalwa case is not applicable as in that case shares were held as stock-in-trade and nature was investment. In this case it is capital reserve.

8. Therefore, in the entire conspectus of matter, we upheld the order of the ld.CIT(A) that the capital reserve of Rs.1,75,27,500/- could not be considered as benefit accrued to the assessee as per section 28(iv) of the Act.

9. In result, appeal of the assessee is allowed.

Pronounced in open court on 29th day August, 2024 at Chennai.

Sd/-	**Sd/-**
(मनोज कुमार अग्रवाल)	**(मनु कुमार गिरि)**
(MANOJ KUMAR AGGARWAL)	**(MANU KUMAR GIRI)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

चेन्नई Chennai:
दिनांक Dated :29-08-2024
KV

आदेश की प्रतिलिपि अग्रेषित /Copy to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai/Coimbatore/Madurai/Salem.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF