Commissioner of Income Tax, Gujarat

Vs

Electric Control Gear Mfg. Co.

(S.C.Agarawal, G.B.Pattanaik JJ)

08.07.1997

JUDGMENT

S.C.AGRAWAL, J.

1. This appeal by certificate is directed against the judgment of the Gujarat High Court dated August 29, 1980. The matter relates to the assessment year 1967-68. The assessee is a partnership concern consisting of 13 partners. On March 31, 1966 it entered into an agreement whereby it transferred the entire assets of business together with liabilities as a going concern to a limited company, styled M/s Electric Control Gear Pvt. Ltd. for a consideration of Rs.8 lakhs. The erstwhile partners of the assessee firm were allotted the shares of the same value in their profit sharing proportion. The Income Tax Officer held that depreciation allowed to the assessee firm amounting to Rs.3,32,863/- in respect of the assets transferred by the firm to the said company was chargeable to tax under the provisions of Section 41(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). He also brought to tax capital gains of Rs. 8 lakhs, being purchase consideration received by the assessee and after excluding the sum of Rs.5,000/- as basic exemption, included the sum of Rs.7,95,000/- in the computation of the total income of the assessee under the head 'Capital Gains'. The Appellate Assistant Commissioner held that the impugned profits were taxable under the provisions of Section 41(2) of the Act. As regards capital gains, the Appellate Assistant Commissioner, however, held that the capital gains could not be taxed in the hands of the registered firm under the provisions of section 114 of the Act. Appeals were filed by the assessee as well as the Revenue against the said judgment of the Appellate Assistant Commissioner. The assesse challenged the liability to tax under Section 41(2) of the Act as well as the liability to capital gains while the Revenue challenged the decision of the Appellate Assistant Commissioner about recomputation of profits under Section 41(2) as well as non-levy of capital gains in the hands of the registered firm under the provisions of Section 114 of the Act. The income Tax Appellate Tribunal remitted the matter to the Income Tax Officer for recomputation of the aggregate amount chargeable as profits under Section 41(2) and as capital gains. The Tribunal held that the correct status of the assessee should be 'registered firm' and not 'association of persons'. The Tribunal referred the following questions for the opinion of the High Court:

> 1.Whether, on the facts and in the circumstances of the cases, the Tribunal was right in holding that the principle of mutuality was not applicable?
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> 2.Whether, on the facts and in the circumstances of the cases, the Tribunal was right in holding that the provisions of Section 41(2) were applicable?
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> 3.Whether, on the facts and in the circumstances of the cases, the Tribunal was right

in holding that the assessee has earned capital gains, which was liable to tax under the provisions of Sections 45 of the Income Tax Act 1961?

4. Whether, on the facts and in the circumstances of the cases, the Tribunal was right in holding that the status of the assessee was a registered firm and not that of an association of persons?

5.Whether, on the facts and in the circumstances of the cases, the Tribunal was rightly rejected the claim of the assessee that surplus realised by it on sale to the limited company was not chargeable to tax, being realisation sale?

6. Whether, on the facts and in the circumstances of the cases, the Tribunal was right in holding that Section 34(2) will apply and, therefore, the assessee is not entitled to depreciation?

7. Whether, on the facts and in the circumstances of the cases, the Tribunal was right in holding that the registered firm can be liable to capital gains under s.114 of the Income Tax Act, 1961?

8. Whether, the Tribunal was right in holding that the assessee was not entitled to any relief on the basis of the two circulars relied on by it?

2. Questions Nos. 1, 3 and 5 were answered by the High Court in affirmative, i.e., in favour of the Revenue and against the assessee, questions Nos. 2, 4 and 8 were answered in the negative, i.e., against the Revenue and in favour of the assessee, question No.6 was not pressed by the learned counsel for the assessee and question No.7 was not answered since it did not survive in view of answer to question No.4. The present appeal relates to questions Nos. 2, 4 and 5 which have been answered against the Revenue.

3. The High Court has placed reliance on its judgment in Artex Manufacturing Co. Vs. Commissioner of Income Tax, Gujarat-II, [1981] 131 ITR 559. The said judgment of the High Court has been considered by us in our judgment pronounced today in C.A.No.2276[NT] of 1981, the Commissioner of Income Tax Vs. M/s. Artex Manufacturing Co.. In that case, we have held that Section 41(2) was applicable since price attributable to the Plant, machinery and dead-stock which were transferred had been disclosed by the assessee during the course of assessment proceedings before the Income Tax Officer and that the said price was as per the value assessed by the valuers at the time of execution of the agreement. In the present case there is nothing to indicate the price attributable to the assests like the machinery, plant or building out of the consideration amount of Rs. 8 lakhs. Merely because a sum of Rs.3,32,863/- had been allowed as depreciation to the assessee firm, it could not be said that was the excess amount between the price and the written down value. Question No.2 was, therefore, rightly answered against the Revenue by the High Court. On question No.4 the High Court has taken the same view as was taken by it while answering question No.4 in M/s Artex Manufacturing Co. [supra]. The said view has been affirmed by us in our judgment in that case. Question No.8 is similar to question No. 5 in M/s Artex Manufacturing Co. [supra]. The view of the High Court with regard to that question has been reversed by us in our judgment in the case and for the same reasons question No. 8 must be answered in the affirmative, i.e., in favour of the Revenue and against the assessee.

4. In result the appeal is partly allowed to the extent that the answer given by the High Court to

question No. 8 is set aside and the said question is answered in the affirmative, i.e., in favour of the Revenue and against the assessee. The answers given by the High Court to questions Nos. 2 and 4 are affirmed. No order as to costs.