IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

MONDAY, THE 1ST DAY OF JULY 2024 / 10TH ASHADHA, 1946

ITA NO. 203 OF 2019

AGAINST THE ORDER DATED 29.11.2018 IN ITA NO.428 OF 2015/COCH/2015 OF INCOME TAX APPELLATE TRIBUNAL,COCHIN BENCH

APPELLANT:

PVR TOURIST HOME
35/1087, PALARIVATTOM, KOCHI-6823 025, REP BY THE MANAGING PARTNER P.SHRINIVAS

BY ADV MOHAN PULIKKAL

RESPONDENT:

THE COMMISSIONER OF INCOME TAX
KOCHI-682 018

BY ADVS.
SRI.P.K.RAVINDRANATHA MENON (SR.)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON 01.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dr. A.K.Jayasankaran Nambiar, J.

The appellant is a partnership firm engaged in the business of running a hotel to which a restaurant and bar are also attached. In the appeal, it impugns the order dated 29.11.2018 of the Income Tax Appellate Tribunal, Cochin in ITA No.428/COCH/2015 pertaining to the assessment year 2012-2013. The following substantial questions of law have been raised by the appellant:

> (i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in allowing the additional ground raised by the Revenue before the second appellate forum, which were not raised either by the Assessing Officer or the Commissioner of Income Tax (appeals) nor considered by them?
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> (ii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the transfer of the depreciable capital assets attracted capital gains tax under Sec.45(4) of the Act, in the absence of distribution of any capital asset among the partners following a dissolution of the appellant firm?
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> (iii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in upsetting the conclusion reached by the CIT (Appeals)

that under Sec.50 of the Act, the transfer in question was not exigible to capital gains tax?

(iv) Are not the provisions of Sections 50A and 45(4) of the Act inapplicable to the facts and circumstances of the case and is not Sec.50 of the Act the correct provision of law applicable to the transfer of the depreciable asset in issue?

2. The brief facts necessary for the disposal of the appeal are as follows:

During the previous year relevant to the assessment year 2012-2013, there was a reconstitution of the appellant firm with effect from 07.07.2011, whereby one of the partners of the erstwhile firm retired from the partnership, and three other new partners were admitted into the partnership. Just prior to the reconstitution of the firm with effect from 07.07.2011, the partnership firm had on 03.05.2011 sold the land and building belonging to it to one Poonghat Shrinivas for a total value of Rs. 8.40 crores, of which Rs.7.40 crores was the value of the building and Rs.1 crore the value of the land. It is significant that the aforementioned Poonghat Shrinivas was one of the persons, who subsequently became a partner in the firm upon its reconstitution with effect from 07.07.2011. It is also on record that he brought back the building which he had purchased from the firm to the accounts of the

firm, at the same value at which he had purchased it from the erstwhile firm, namely, Rs.7.40 crores.

3. While submitting its returns for the assessment year 2012-2013, the appellant firm declared a taxable income of Rs.67,59,315/- in its return dated 31.10.2013. The Assessing Officer, pursuant to a scrutiny of the said return, completed the assessment under Section 143(3) of the Income Tax Act by making a substantial addition to the declared income to the tune of Rs.9,77,46,777/-. Of the said amount, an amount of Rs.6,50,77,334/- was attributed to the short-term capital gains alleged to have accrued to the appellant firm by computing the same in accordance with S.50A of the IT Act.

4. In an appeal carried by the appellant before the First Appellate Authority, the said Authority found that the Assessing Authority, while making this computation of short-term capital gains, had not factored in the addition of the building valued at Rs.7,40,00,000/-, that was brought into the firm by the incoming partner, namely, Poonghat Shrinivas, and hence the written down value as on 31.03.2012, at the end of the previous year, after allowing depreciation, would be Rs.41,94,640/-. He, therefore, found that the addition of Rs.6,50,77,334/- made by the Assessing Officer had to be deleted.

5. In a further appeal carried by the Department against the order of the First Appellate Authority, the Department raised an additional ground, which was accepted on record by the Appellate Tribunal, where under it contended that the capital gains had to be charged in accordance with Section 45(4) of the Income Tax Act, and that the computation methodology adopted by the Assessing Officer and the First Appellate Authority was not correct.

6. The Appellate Tribunal after hearing the rival contentions found force in the submission of the revenue and held that the charge of short-term capital gains had to be in accordance with the provisions of Section 45(4) of the Income Tax Act. The Appellate Tribunal did not, however, proceed to determine the tax effect, if any, that would follow pursuant to its finding as regards the charge of short-term capital gains. It is under these circumstances that the appellant is before us in this appeal raising the questions of law aforementioned.

7. We have heard Sri. Mohan Pulickkal, the learned counsel for the appellant and Sri.Jose Joseph, the learned Standing counsel for the Income Tax Department.

8. On a consideration of the rival submissions, we find that it is not seriously disputed by the appellant that the charging provisions for

short-term capital gains under the Income Tax Act, on the facts of the instant case, are as stipulated under Section 45(4) of the Income Tax Act. If that be so, then the only other question to be considered is regarding the manner in which the short-term capital gains that are chargeable under Section 45(4) of the Income Tax Act have to be computed. A reading of the provisions of Section 45(4) would indicate that the computation has to be in the manner prescribed under Section 48, as modified by Section 50(1) of the Act. The consequence of an application of the said provisions of the IT Act to the income assessed in respect of the appellant firm, has not been discussed by the Tribunal in the impugned order. We are of the view that the Tribunal ought to have considered the said aspect also while disposing the appeal preferred by the revenue, especially because the order of the First Appellate Authority, that was impugned by the revenue before it, was in favour of the appellant herein.

9. Thus, while we uphold the finding of the Tribunal that the charge of Short Term Capital Gains, in the instant case, has to be as mandated in Section 45(4) of the Income Tax Act, we remand the matter back to the Tribunal for computing the extent of short-term capital gains, if any, that would be brought to tax in relation to the appellant herein. The Appellate Tribunal would have to do the said exercise by taking into account the totality of transactions effected

during the previous year relevant to the assessment year in question.

10. Thus, this appeal is allowed by answering question Nos. 1 and 2 against the assessee and in favour of the revenue and by not answering question Nos. 3 and 4, in the light of the discussions in this judgment and the remand necessitated to the Tribunal for a specific finding on the extent of short term capital gains, if any, that would accrue to the appellant firm during the assessment year in question. The Appellate Tribunal shall examine the provisions of Section 48, as modified by Section 50(1) of the Income Tax Act, and determine whether or not any short-term gains had accrued to the appellant firm for the assessment year in question. Taking note of the time that has elapsed since the filing of this appeal before this Court, we direct that the above computation exercise be completed by the Appellate Tribunal within an outer time limit of six months from the date of receipt of a copy of this judgment, after hearing the appellant firm.

The IT Appeal is disposed as above.

Sd/-

DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
SYAM KUMAR V.M.
JUDGE

mns

APPENDIX OF ITA 203/2019

PETITIONER ANNEXURES

ANNEXURE-A	**TRUE COPY OF THE ASSESSMENT ORDER DATED 23.03.2015**
ANNEXURE-B	**TRUE COPY OF THE ORDER DATED 08.06.2015 OF THE COMMISSIONER OF INCOME TAX (APPEALS), KOCHI, IN ITA 62/NCR/VC-CP-1 / CIT(A)-II/2014-15**
ANNEXURE-C	**TRUE COPY OF THE ORDER DATED 29.11.2018 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BEANCH IN ITA NO.428/COCH/2015**