IN THE HIGH COURT OF MADRAS

T.C.(A).No.982 of 2004

S M SUNDARAM

Vs

THE COMMISSIONER OF INCOME TAX, CHENNAI

P Jyothimani and P P S Janarathana Raja, JJ

Dated : November 17, 2011

Appellant Rep by: Mr. T N Seetharaman
Respondent Rep by: Mr. Patty B Jegannathan Senior Standing Counsel

Assessee's appeal dismissed

JUDGEMENT

Per: P Jyothimani:

The assessee has filed the present appeal challenging the order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 13.12.2000 made in ITA No.209/Mds/1995 for the assessment year 1992-1993 and the same was admitted on the following question of law:

"Whether on the facts and circumstances of the case and having regard to the provisions of Section 67(2), the Appellate Tribunal was right in law in holding that the appellant is not entitled to the deduction under Section 48(2) of the Income Tax Act, 1961 on the share of capital gains allocated to him on the basis of the computation in the assessment of a firm of which the appellant is a partner?"

2.1. The assessee is a partner of a firm - The Foundry and Engineering Services. In respect of the assessment year 1992-1993, he admitted share income from the firm comprised of loss of Rs.1,75,537/- under the head "business", long term capital gains of Rs.3,97,680/-, and short term capital gains of Rs.30,179/-. From the long term capital gains, the assessee claimed deduction under Section 48(2) of the Income Tax Act, 1961 (for brevity, "the Act"). The Assessing Officer has completed the assessment without considering the plea for deduction on long term capital gains.

2.2. On appeal, the Commissioner of Income Tax (Appeals) held that the assessee was not entitled to deduction under Section 48(2) of the Act in respect of the capital gains received from the firm, on the basis that in the hands of the firm the deduction has already been allowed under Section 48(2) of the Act while assessing the capital gains of the firm.

2.3. It was against the order of the Commissioner of Income Tax (Appeals), a further appeal was filed by the assessee before the Tribunal. The Tribunal, by the impugned

order, has dismissed the appeal holding that the long term capital gains having been assessed already in the hands of the partnership firm, the assessee cannot be once again granted deduction, while rejecting the contention of the assessee that under Section 67(2) of the Act for the assessment in the hands of the partner of a firm the income is apportioned under various heads in the same manner as it was in the firm's name. It is as against the impugned order of the Tribunal, the assessee has filed the present appeal on the above said substantial question of law.

3.1. Mr.T.N.Seetharaman, learned counsel for the appellant would submit that under Section 48(2) of the Act, which came into effect from 1.4.1988, the long term capital gain after deduction when it comes to the hands of the partner as his share, it retains the character of capital gain in the hands of the shareholder and, therefore, the shareholder is entitled to deduction under the above said sub-section. To substantiate his claim, he would rely upon Section 67(2) of the Act, which, while speaking about the method of computing a partner's share in the income of the firm, permits the apportionment under various heads of income in the same manner in which the income or loss of the firm has been determined under each head of income.

3.2. He would compare the deduction in respect of long term capital gains in the case of assessees other than companies as provided under Section 80T of the Act and would submit that a combined reading with Section 80A(3) of the Act negatives any deductions in the hands of a partner while computing the total income from the firm and, therefore, according to him, impliedly it means that even if the partnership firm has been given deduction on the long term capital gain, that will not effect the right of a partner after receiving his share from the capital gain from the firm to claim such deductions. He would rely upon the judgment in *Commissioner of Income Tax (Central), Madras v. Express Newspapers Ltd., (1980) 124 ITR 117* to substantiate his contention.

4.1. On the other hand, it is the contention of Mr.Patty B.Jegannathan, learned Senior Standing Counsel for the respondent that when once in the hands of the partnership firm the long term capital gain has been granted deduction, the remaining amount which comes to the hands of each partner will not retain the character of capital gain and allowing of deduction once again in the hands of the partner will amount to granting double benefit, which cannot be the intent of the lawmakers.

4.2. It is also his submission that the assessee cannot rely upon Section 80T of the Act. In any event, it is submitted that the said section which has been relied upon by the learned counsel for the appellant has been repealed with effect from 1.4.1989.

5. We have heard the learned counsel for the assessee as well as the Department and considered the entire factual matrix.

6. Chapter VI-A of the Act allows deductions to be made in computing total income. Section 48 of the Act which stood during the relevant point of time is as follows:

"Section 48. Mode of computation and deductions.

(1) The income chargeable under the head 'Capital gains' shall be computed,-

(a) by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto:

Provided that in the case of an assessee, who is a non-resident Indian, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency so however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every re-investment thereafter in, and sale of, shares in, or debentures of, an Indian company.

Explanation: For the purposes of this clause,-

(i) "non-resident Indian" shall have the same meaning as in clause (e) of section 115C;

(ii) 'foreign currency' and 'Indian currency' shall have the meanings respectively assigned to them in section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973);

(iii) the conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;

(b) Where the capital gain arises from the transfer of a long-term capital asset (hereinafter in this section referred to, respectively, as long-term capital gain and long term capital asset) by making the further deductions specified in sub-section (2).

(2) The deductions referred to in clause (b) of sub-section (1) are the following, namely :-

(a) where the amount of long-term capital gain arrived at after making the deductions under clause (a) of sub-section (1) does not exceed fifteen thousand rupees, the whole of such amount;

(b) in any other case, fifteen thousand rupees as increased by a sum equal to,-

(i) in respect of long-term capital gain so arrived at relating to capital assets, being buildings or lands or any rights in buildings or lands or gold, bullion or jewellery,-

(A) in the case of a company, ten per cent of the amount of such gain in excess of fifteen thousand rupees;

(B) in the case of any other assessee, fifty per cent of the amount of such gain in excess of fifteen thousand rupees;

(ia) in respect of long-term capital gain so arrived at relating to equity shares of venture capital undertakings,-

(A) in the case of a company, other than venture capital company, thirty per cent of the amount of such gain in excess of fifteen thousand rupees;

(B) in the case of venture capital company, sixty per cent of the amount of such gain in excess of fifteen thousand rupees;

(C) in any other case, sixty per cent of the amount of such gain in excess of fifteen thousand rupees;

(ii) in respect of long-term capital gain so arrived at relating to capital assets other than capital assets referred to in sub-clauses (i) and (ia),-

(A) in the case of a company, thirty per cent of the amount of such gain in excess of fifteen thousand rupees;

(B) in any other case, sixty per cent of the amount of such gain in excess of fifteen thousand rupees:

Provided that where the long-term capital gain relates to both categories of capital assets referred to in sub-clauses (i) and (ii), the deduction of fifteen thousand rupees shall be allowed in the following order, namely:-

(1) the deduction shall first be allowed against long-term capital gain relating to the assets mentioned in sub-clause (i);

(2) thereafter, the balance, if any, of the said fifteen thousand rupees shall be allowed as deduction against long-term capital gain relating to the assets mentioned in sub-clause (ii), and the provisions of sub-clause (ii) shall apply as if references to fifteen thousand rupees therein were references to the amount of deduction allowed in accordance with clauses (1) and (2) of this proviso:

Provided further that, in relation to the amount referred to in clause (b) of sub-section (5) of section 45, the initial deduction of fifteen thousand rupees under clause (a) of this sub-section shall be reduced by the deduction already allowed under clause (a) of section 80T in the assessment for the assessment year commencing on the 1st day of April, 1987, or any earlier assessment year or, as the case may be, by the deduction allowed under clause (a) of this sub-section in relation to the amount of compensation or consideration referred to in clause (a) of sub-section (5) of section 45 and references to fifteen thousand rupees in clauses (a) and (b) of this sub-section shall be construed as references to such reduced amount, if any.

Explanation : For the purposes of this section,-

(a) 'venture capital company' means such company as is engaged in providing finance to venture capital undertakings mainly by way of acquiring equity shares of such undertakings or, if the circumstances so require, by way of advancing loans to such undertakings, and is approved by the Central Government in this behalf;

(b) 'venture capital undertaking' means such company as the prescribed authority may, having regard to the following factors, approve for the purposes of sub-clause (ia) of clause (b) of sub-section (2), namely :-

(1) the total investment in the company does not exceed ten crore rupees or such other higher amount as may be prescribed;

(2) the company does not have adequate financial resources to undertake projects for which it is otherwise professionally or technically equipped; and

(3) the company seeks to employ any technology which will result in significant improvement over the existing technology in India in any field and the investment in such technology involves high risk.

(3) The deductions specified in sub-section (2) shall be made also for the purposes of computing any loss under the head 'Capital gains' in so far as it pertains to any long-term capital asset and, for the this purpose, any reference in that sub-section to the amount of long-term capital gain arrived at after making the deductions under clause (a) of sub-section (1) shall be construed as reference to the amount of loss arrived at after making the said deductions."

7. Under Section 48(1) of the Act, the deduction in respect of the full value of the consideration received or accrued regarding the expenditure incurred wholly, etc. and cost of acquisition of asset and the cost of improvement are granted. This deduction has admittedly been granted from the capital gain in the hands of the partnership firm. Section 48(1)(b) of the Act, extracted above, shows that the capital gain arising from the transfer of a long term capital asset is entitled to further deduction specified in sub-section (2).

8. Mr.T.N.Seetharaman, learned counsel for the appellant contends that Sections 48(1) and 48(2) of the Act have to be read separately and according to him, what is contemplated under Section 48(1)(b) of the Act regarding further deduction as enumerated under Section 48(2) of the Act is in addition to what has already been granted under Section 48(1) of the Act. His specific insistence is about the words "further deductions" that find place under Section 48(1)(b) of the Act.

9. On a careful reading of Section 48 of the Act, we are unable to agree with the contention of the learned counsel for the appellant. In our considered view, Sections 48(1) and 48(2) of the Act cannot be read separately. Unless an assessee gets benefit under Section 48(1) of the Act, he cannot independently claim the right of deduction under Section 48(2) of the Act. In other words, while Section 48(1) of the Act confers substantial right of deduction, what is done in Section 48(2) of the Act is granting further deduction. If the contention of the learned counsel for the appellant is accepted, then the partner after obtaining his share as a long term capital gain from the firm, in the hands of which deduction has already been granted, will be again entitled to claim the rights which are conferred under Section 48(1) of the Act, which is not even the case of the appellant and that cannot be the interpretation, for,

such construction would mean that the right of deduction which has already been enjoyed in the hands of the partnership firm in the long term capital gain will be again made to be available in the hands of the partner in respect of his share, which will certainly amount to granting double benefit and that can never be the intent of the lawmakers.

10. The reliance placed on Section 67(2) of the Act prescribing the method of computing a partner's share in the income of the firm, which is as follows:

"Section 67. Method of computing a partner's share in the income of the firm.

*(1) ****

(2) The share of a partner in the income or loss of the firm, as computed under sub-section (1) shall, for the purposes of assessment, be apportioned under the various heads of income in the same manner in which the income or loss of the firm has been determined under each head of income.",

is certainly not in relation to any independent right under Section 48(2) of the Act.

11. It is not in dispute that in the hands of the partner the amount of long term capital gain is entitled to apportionment under various heads. But, the question here is whether the deduction already claimed under Section 48(2) of the Act by the firm can be claimed by the partner once again in his hands in respect of his share of long term capital gains.

12. The analogy made by the learned counsel to Sections 80A(3) and 80T of the Act cannot be made applicable to the facts of the present case. The present assessment being of the year 1992-1993, after the Direct Tax Laws (Amendment) Act, 1989 came into effect from 1.4.1989 by which Section 80T of the Act came to be omitted, the taxing structure in respect of the firm and individual partner were different when compared to the legal position after the said date, namely 1.4.1989. Simply because by change of law nominal tax has been imposed on the firm and in the hands of the partner different tax amount has been imposed, there can be no comparison between the same. Therefore, we do not agree with the contention raised by the learned counsel for the appellant by relying upon the said provisions that the negative provision should be read in favour of the assessee.

13. The reliance placed on the judgment of this Court in Express Newspapers Ltd. case, supra, has no application to the facts of the present case. That was a case relating to the deduction of interest paid on equitable mortgage and whether the same can be claimed again under Section 24(1)(iii) of the Act as it stood at the relevant point of time. We are unable to compare the facts of the said case with the facts of the present case.

14. On the other hand, from a perusal of the orders of all the three authorities it is clear that in the hands of the firm, in respect of the capital gain, deduction under Section 48(2) of the Act has already been considered and the same amount simply because it has come to the hands of the partner it will not continue to be a long term capital gain so as to enable the partner to claim deduction once again. In fact, the Tribunal has elaborately discussed about the implications of Sections 80T and 80A(3)

of the Act as contended by the learned counsel for the appellant and distinguished the same holding that Section 48(2) of the Act allows deduction while computing the capital gains and not from the capital grains included in the gross total income, while Section 80T of the Act provides for deduction from the gross total income and observed that the Legislature has intentionally provided in Section 80A(3) of the Act that when once the deduction was allowable in the case of a firm, no such deduction would be allowed in the hands of the partner.

15. For the foregoing reasons, we do not see any reason to interfere with the impugned order of the Tribunal. Accordingly, the substantial question of law is answered against the assessee and the appeal stands dismissed. No costs.