& 366 Of 2009 [M/S. National Company vs . The

Author: V.K

Bench: Vineet Kothari, C.V.Karthikeyan

1 Judgement dated 0 .0 .2019 in T.C
& 366 of 2009 [M/s. National Comp
Assistant Commissioner of Income

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.03.2019

DATED: 08.04.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal Nos. 365 & 366 of 2009

T.C.A.No. 365 of 2009:

M/s. National Company
[PAN: AAAFN1642F]
A Partnership Firm represented
by its Managing Partner
Dr.C.V.Ananthasayanam
9, Kandaswamy Street,
Mylapore, Chennai – 600 004. Petitioner/Responde

Vs.

The Assistant Commissioner of Income Tax
Business Circle – I [I/c]
Chennai. Respondent/Appellant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, Chennai, dated 12.12.2008 made No.1477/Mds/2007.

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Mylapore, Chennai – 600 004.
Appellant/Petitioner/Respondent

Vs.

The Assistant Commissioner of Income Tax
Business Circle – I [I/c]
Chennai.
Respondent/Respondent/Appellant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, Chennai, dated 12.12.2008 in Cross Objections No. 111/Mds/2007 made in ITA No.1477/Mds/2007.

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For Appellant in
both T.C.As. : Mr. P.H.Arvind Pandian,
Senior Advocate
Assisted by Ms. R.Maheswari

For Respondent in
both T.C.As : Mr. T.R.Ravikumar
Senior Standing Counsel

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COMMON JUDGMENT

(Delivered by C.V.KARTHIKEYAN, J.) The Assessee has filed T.C.A.No. 365 of 2009 under Section 260-A of the Act challenging the order of the Income Tax Appellate Tribunal dated 12.12.2008 whereby the Tribunal had allowed the Appeal of the Revenue which had been filed challenging the order of the Commissioner of Income Tax (Appeals) – VI, Chennai, dated 16.03.2007 relevant to the Assessment Year 2004-2005.

2. The Assessee has also filed T.C.A.No. 366 of 2009 under Section 260-A of the Act challenging the order of the Income Tax Appellate Tribunal dated 12.12.2008 whereby the Tribunal had dismissed the cross objections filed by the Assessee relating to the same order of the Commissioner of Income Tax (Appeals) – VI, Chennai dated 16.03.2007 relevant to the Assessment Year 2004- 2005.

3. Both the appeals have been admitted on the following substantial questions of law:-

> http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] “1. Whether the Appellate Tribunal was right in holding that Section 45(4) of the Income Tax Act, 1961 applies to retirement of partner from partnership business?;
>
> 2. Whether the Appellate Tribunal was right in the manner and application of the rule of ejusdem generis to Section 45(4) of the Income Tax Act, 1961?;
>
> 3. Whether the word 'otherwise' in Section 45(4) of the Income Tax Act, 1961 takes into its sweep not only cases akin to dissolution of the firm but also cases of reconstitution of firm?; and
>
> 4. Whether the Appellate Tribunal erred in not appreciating that unless there is a 'transfer' within the meaning of Section 2(47), capital gains under Section 45(4) is not attracted?”.

4. The Assessee, M/s. National Company, Chennai, is engaged in the business of construction. It also owns, manages and maintains a commercial complex, two theatres and two kalyana mandapams. N.Munuswamy Mudaliar originally started a sole http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] proprietorship concern under the name of “National Company” in the year 1950. He then converted it as a partnership firm in the year 1974 and admitted his son, two daughters and one son-in-law, into the partnership. Since the son passed away in the year 1994, the partnership firm was reconstituted and the other son-in-law was also admitted as a partner. N.Munuswamy Mudaliar passed away on 08.06.2001. Thereafter the partnership firm was reconstituted and the partners were his two daughters, Dr.Chandra Ananthasayanam and Dr.Shanthi Shanmugasundaram and his two sons-in-laws, Dr.C.V.Ananthasayanam and Dr.V.Shanmugasundaram.

5. It is seen from the records that serious disputes arose among the partners. An Arbitrator Mr.M.S.Raghavan was appointed to settle the disputes. Dr.Shanthi Shanmugasundaram and Dr.V.Shanmugasundaram agreed to retire from the partnership business with effect from 30.11.2003 and a Deed of Retirement was also executed. The Firm continued with the remaining partners Dr.Chandra Ananthasayanam and Dr.C.V.Ananthasayanam, who also admitted their son Arjun A. Raja as another partner. http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

6. At the time of retirement of the two partners, valuation of the assets and liabilities of the firm and allottment of assets among the retiring and continuing partners took place.

7. For the Assessment Year 2004-2005, the partnership Firm declared an income of Rs.1,23,93,699/-. A random scrutiny was undertaken and the Joint Commissioner of Income Tax, the Assessing Officer passed an Assessment Order dated 26.12.2006 for a total income of Rs.9,77,05,330/-. An addition of Rs.8,53,11,630/- was made alleging long term capital gains arising out of transfer of immovable properties by the partnership firm to the retiring partners.

8. The Assessee/partnership firm preferred an appeal before the CIT(A). This was allowed by order dated 16.03.2007 and it was held that the properties obtained by the retiring partners through a family arrangement was not “transfer” for the purpose of capital gain. It was held that reconstitution of the partnership firm would not attract the provisions of Section 45(4) of the Act 1961. The addition of Rs.8,53,11,630/- was set aside.

http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

9. The Revenue then filed an appeal before the Tribunal. The Assessee filed cross objections affirming the order of the CIT (Appeals). The Tribunal passed an order dated 12.12.2008 allowing the appeal of the Revenue and dismissing the cross objections. The Tribunal held that Section 45(4) of the Act applied to the Assessee and further held that there was “transfer” of assets within the meaning of Section 2(47)(vi) of the Act.

10. The Assessee is in appeal before us against the said order. Heard arguments advanced by Mr.P.H.Arvind Pandian, learned Additional Advocate General, instructed by Ms.R.Maheswari, for the appellant and Mr.T.R.Ravikumar, learned Senior Standing Counsel for the Revenue.

11. Mr.P.H.Arvind Pandian, learned Senior Advocate pointed out that Section 45(4) of the Income Tax Act would apply only in a case where there is “dissolution” of the partnership firm. In the present case, there was retirement of two partners and the firm had not been dissolved. On the other hand, it continued its business operations by inducting another partner. The retiring partners did not receive any consideration for the transfer of their interests in the http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] firm. They had been allotted properties to the extent of the credit balance in the capital account.

12. The learned counsel for appellant - Assessee argued that this cannot be termed as “transfer” of assets and urged that Section 45(4) of the Income Tax Act would not apply to the facts of the present case. He also submitted that the Tribunal had relied on the Judgement of the Bombay High Court in CIT Vs. A.N.Naik Associates [2004] 265 ITR 346 (Bom). However a later Bench of the Bombay High Court in Prashant S. Joshi Vs. The Income Tax Office and Ors., reported in 2010 324 ITR 154 (Bom) had dealt with a similar fact situation and had held that on retirement of partners, when there is transfer of assets, it would not attract the provisions of Section 45(4) of the Act. The learned Senior Counsel also very fairly stated that the Judgement of A.N.Naik Associates was not cited in Prashant S. Joshi. He also relied on the observations made in B.T.Patil & Sons Vs. Commissioner of Gift Tax reported in (2000) 163 CTR SC 363 wherein the Hon'ble Supreme Court had held that when a partners retires and obtains in lieu of his interest in the firm an asset of the firm, no transfer is involved. He therefore urged that this Court should set aside the order of the Tribunal and restore the order of the CIT (Appeals). http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

13. On the other hand Mr.T.R.Ravikumar, learned Senior Standing Counsel for the Revenue argued that the Judgement in A.N.Naik Associates laid down the correct proposition and stated that when there is dissolution or otherwise of a partnership firm and when on such event there is transfer of assets to a partner then Section 45(4) of the Act would apply. The learned Senior Standing Counsel insisted that the order of the Tribunal requires no interference.

14. The substantial questions of law framed in the light of the above facts and the orders of the authorities revolve around the issue whether Section 45(4) of the Act applies on retirement of a partner from the partnership business and whether the word “otherwise”, it would take into its sweep not only cases of dissolution of partnership firm but also cases of reconstitution of a partnership firm on retirement of a partner.

15. Chapter IV of the Act deals with computation of total income. Section 45 deals with computation of income from capital gains. Section 45 is as follows:-

> http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] “45. Capital Gains.-
>
> (1) .....
>
> (2) ....
>
> (3) ...
>
> (4) The profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and for the purposes of

> section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer.

.....

..... ”

16. It is clear that two primary requirements are essential for the application of Section 45(4) of the Act, namely, http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

(i) there should be a transfer of a capital assets; and

(ii) there should be distribution of capital assets on the dissolution of a firm or otherwise.

17. To examine this, it would be advantagous to refer to the definition of the word “transfer” as defined under Section 2(47)(vi) of the Act.

“Section 2. In this Act, unless the context otherwise requires.-

(47) “transfer”, in relation to a capital asset, includes:-

> (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.” http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

18. In the background of the above provisions it has to be determined whether there would be a transfer of capital asset on retirement of a partner. Section 4 of the Partnership Act is as follows:-

“Section 4. Nature of partnership 'partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm' and the name under which their business is carried on is called the 'firm name.'”

19. It is seen that three ingredients are required, namely, http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

(i) there must be an agreement entered into by the partners;

(ii) the agreement must be to share the profits of a business; and

(iii) the business must be carried out by all or any of the persons concerned, acting for all.

20. It is also to be noted that on the retirement of a partner from the firm, there will be allotment of his interests in the firm. The interest of a partner in a partnership firm is a right to obtain share of profits from time to time during the subsistance of the partnership and further, on dissolution of the partnership, or on his retirement from the partnership, to get the value of his share in the net partnership assets which remain after deducting the debts and liabilities of the partnership. This could be in the form of immovable assets or in the form of cash in lieu of the immovable assets. Therefore, when a partner retires from a partnership and his share in the net partnership assets is determined and allotted to him, what he receives is his share in the partnership and not any consideration for transfer of his interest in the partnership to the continuing partners. http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] His share in the partnership is worked out by taking accounts in the manner prescribed by the relevant provisions of the partnership law and it is this, namely, his share in the partnership which he receives in terms of money or as an asset. There is in this transaction no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners.

21. The transfer of a capital assets in order to attract capital gains tax must be one as a result of which consideration is received by the assessee or accrues to the assessee. When a partner retires from a partnership he receives his share in the partnership and this does not represent consideration received by him in lieu of relinquishment of his interest in the partnership asset.

22. In Commissioner of Income Tax Vs. A.N.Naik Associates and Others reported in 2004 265 ITR 346 (Bom), the facts were that the respondents were parties to a family settlement dated 30.01.1997. Pursuant to the family settlement, there was a deed of reconstitution of various partnerships. One of the questions of law which had been formulated for consideration was whether the deed of reconstitution of partnership by the Assessee firm was a device to avoid tax. A further examination of the facts in that case http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] reveal that it had been agreed between the parties that businesses of six firm would be distributed in terms of the family settlement, as the parties desired that various matters concerning the business and the assets thereto be divided separately and partitioned. In the settlement, the manner in which the assets were proposed to be divided were set out. It was also provided that all such documents, deeds, declarations, affidavits as are reasonably required for effecting such transfer would be executed. The Assessment was based on the family settlement and the subsequent deeds of retirement of partnership. It is thus seen that there was a conscious decision taken prior to reconstitution of the firms to transfer assets and the liabilities by way of a family settlement. It was also consciously decided to execute all necessary deeds and documents to effect such transfer. A transfer of assets in such circumstances, though held was not a device to avoid tax was still held to be 'transfer' within the meaning of Section 2(47) of the Act.

23. In the light of the above facts, it was held in A.N.Naik Associates as follows:-

> "21. The expression "otherwise" in our opinion, has not to be read ejusdem http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] generis with the expression, "dissolution of a firm or body or association of persons". The expression "otherwise" has to be read with the words "transfer of capital assets" by way of distribution of capital assets. If so read, it becomes clear that even when a firm is in existence and there is a transfer of capital assets it comes within the expression, "otherwise" as the object of the amending Act was to remove the loophole which existed whereby capital gain tax was not chargeable. In our opinion, therefore, when the asset of the partnership is transferred to a retiring partner the partnership which is assessable to tax ceases to have a right or its right in the property stands extinguished in favour of the partner to whom it is transferred. If so read it will further the object and the purpose and intent of the amendment of Section 45. Once, that be the case, we will have to hold that the transfer of assets of the partnership to the retiring partners would amount to the transfer of the capital assets in the nature of capital gains and business profits which is chargeable to tax under Section 45(4) of the Income Tax Act. We will, therefore, have to answer question http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] No.3, by holding that the word "otherwise" takes into its sweep not only cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner."

24. The above judgement was also referred in T.C.A.No. 1458 of 2005 decided on 31.10.2012, Commissioner of Income Tax, Trichy Vs. M/s. Nathan and Company, Trichy, by a Co- ordinate Bench of this Court. In that case, the Assessee was a firm constituted by six partners and running a printing press at Trichy and another at Chennai. They entered into an agreement on 28.04.1989 whereby two partners, were permitted to carry on the business under the same name at Chennai and four partners were permitted to carry on the business at Trichy in the same name. It is seen that in that case, there was definitely an element of transfer of assets since two of the partners gave up their interests in the business at Trichy and four of the partners gave up their interest in the business at Chennai. The facts are certainly distinguishable to the facts of the present case.

25. However a directly contrary view to the view taken in A.N.NaiK Associates have been expressed in Prashant S. Joshi Vs. The Income Tax Officer and Others reported in 2010 324 http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] ITR 154 (Bom) wherein a Division Bench of the Bombay High Court, again dealing with a fact situation in respect of a partnership firm dealing with development of real estate, when a partner retired and agreed to receive sum of Rs.50 lakhs, in addition to the balance lying to his credit in the capital as reflected in the books of accounts as final settlement of his dues on account of retirement, held that the same was not a transfer and taxable under Section 45(4) of the Act. The reasoning of the Bombay High Court, is given below for better appreciation:-

> "13. During the subsistence of a partnership, a partner does not possess an interest in specie in any particular asset of the partnership. During the subsistence of a

partnership, a partner has a right to obtain a share in profits. On a dissolution of a partnership or upon retirement, a partner is entitled to a valuation of his share in the net assets of the partnership which remain after meeting the debts and liabilities. An amount paid to a partner upon retirement, after taking accounts and upon deduction of liabilities does not involve an element of transfer within the meaning of Section 2(47). Chief Justice P.N.Bhagwati (as the http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] learned Judge then was) speaking for a Division Bench of the Gujarat High Court in Commissioner of Income Tax, Gujarat V. Mohanbhai Pamabhai MANU/GJ/0015/1971 :

(1973) 91 ITR 393 dealt with the issue in the following observations:

... when, therefore, a partner retires from a partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts on the footing of notional sale of the partnership assets and given to him, what he receives is his share in the partnership and not any consideration for transfer of his interest in the partnership to the continuing partners. His share in the partnership is worked out by taking accounts in the manner prescribed by the relevant provisions of the partnership law and it is this and this only, namely, his share in the partnership which he receives in terms of money. There is in this transaction no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners: vide also the recent decision of the Supreme Court in Commissioner of Income Tax v. Bankey Lal http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] Vaidya. It is true that Section 2(47) defines “transfer” in relation to a capital asset and this definition gives an artificially extended meaning to the term “transfer” by including within its scope and ambit two kinds of transactions which would not ordinarily constitute “transfer” in the accepted connotation of that word, namely, relinquishment of the capital asset and extinguishment of any rights in it. But even in this artificially extended sense, there is no transfer of interest in the partnership assets involved when a partner retires from the partnership.

The Gujarat High Court held that there is, in such a situation, no transfer of interest in the assets of the partnership within the meaning of Section 2(47). When a partner retires from a partnership, what the partner receives is his share in the partnership which is working out by taking accounts and this does not amount to a consideration for the transfer of his interest to the continuing partners. The rationale for this is explained as follows in the judgement of the Gujarat High Court:

http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] .... what the retiring partner is entitled to get is not merely a share in the partnership assets; he has also to bear his share of the debts and

liabilities and it is only his share in the net partnership assets after satisfying the debts and liabilities that he is entitled to get on retirement. The debts and liabilities have to be deducted from the value of the partnership assets and it is only in the surplus that the retiring partner is entitled to claim a share. It is, therefore, not possible to predicate that a particular amount is received by the retiring partner in respect of his share in a particular partnership asset or that a particular amount represents consideration received by the retiring partner for extinguishment of his interest in a particular asset.

14. The appeal against the judgement of the Gujarat High Court was dismissed by a Bench of three learned Judges of the Supreme Court in Addl. Commissioner of Income Tax, Gujarat v. Mohanbhai Pamabhai : 165 ITR 166. The Supreme Court relied upon its judgement in Sunil Siddharthbhai v. Commissioner of Income Tax MANU/SC/0164/1985 : (1985) 156 http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] ITR 509 (S.C.). The Supreme Court reiterated the same principle by relying upon the judgement in Addanki Narayanappa and Anr. Vs. Bhaskara Krishnappa and Ors.

MANU/SC/0281/1966: (1966) SC 1300.

The Supreme Court held that what is envisaged on the retirement of a partner is merely his right to realise his interest and to receive its value. What is realised is the interest which the partner enjoys in the assets during the subsistence of the partnership by virtue of his status as a partner and in terms of the partnership agreement. Consequently, what the partner gets upon dissolution or upon retirement is the realisation of a pre- existing right or interest. The Supreme Court held that there was nothing strange in existing right or interest. The Supreme Court held that there was nothing strange in the law that a right or interest should exist in praesenti but its realisation or exercise should be postponed. The Supreme Court inter alia cited with approval the judgement of the Gujaraj High Court in Mohanbhai Pamabhai (supra) and held that there is no transfer upon the retirement of a partner upon the distribution of his share in the net assets of the firm. In Commissioner of Income Tax http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] V. R.Lingmallu Raghukumar MANU/SC/0810/2001: (2001) 247 ITR 801, the Supreme Court held, while affirming the principle laid down in Mohanbhai Pamabhal that when a partner retires from a partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts, there is no element of transfer of interest in the partnership assets b y the retired partner to the continuing partners.

26. It is seen that Bombay High Court held in the above case that when a partner retires and there is transfer of his interests in the partnership assets to him towards his share in the assets, the same cannot be brought to tax as capital gain by transfer of capital asset.

27. In Sampath Iyengar's “Law of Income Tax” revised by S.Rajaratnam, 12th edition, it had been observed as follows:-

"134. Or otherwise.- There should ordinarily be no presumption of transfer in dissolution except to the extent directed under Section 45(4).

Retirement is prima facie not covered by http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] the sub-section. But the Departmental view is that the words "or otherwise" immediately succeeding "dissolution" under Section 45(4) would cover even retirement. "Or Otherwise" can only mean "before or after dissolution" in contradistinction to "on". Further Section 45(4) when understood in conjunction with Section 45(3) can refer to formations and dissolutions. Since change in constitution is a concept recognised in Chapter XVI-C of the Act, there is no reason why the law should not have referred to change in constitution along with dissolution, if that were the intent instead of the expression "or otherwise".

28. It is seen that even the learned author has expressed the view with that Section 45(4) of the Act would not apply on retirement of a partner from a partnership firm and when there is transfer of assets.

29. It may also be appropriate to refer to Commissioner of Income Tax Vs. R.Lingmallu Raghukumar reported in 2001 247 ITR 801 SC. The entire Judgement is quoted below:-

> http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] "1. This appeal by the Revenue is directed against the Judgement of the Andhra Pradesh High Court dated July 21, 1982, (see (1983) 141 ITR
>
> 674), in Referred Case No. 28 of 1977, whereby the following question of law referred to the High Court was answered against the Revenue and in favour of the assessee (page 676):
>
> "Whether, on the facts and in the circumstances of the case, the excess amount of Rs.46,500 received by the assessee on retirement from the two partnership firms is assessable to capital gains?"
>
> 2. The High Court has held that there was no transfer of any assets as contemplated by the expression "transfer" as defined in Section 2(47) of the Income-tax Act. The High Court had placed reliance on the Judgement of the Gujarat High Court in CIT vs. Mohanbhai Pamabhai [1973] 91 ITR 393, wherein it has been held that where a partner retires from a http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts in the manner prescribed by the relevant provisions of the partnership law there is no element of transfer of interest in the partnership assets by the retired partner to the continuing partners.

The said Judgement of the Gujarat High Court has been affirmed by this Court in Addl.

CIT V. Mohanbhai Pamabhai [1987] 165 ITR 166. In view of the said Judgement we find no merit in this appeal and the same is, therefore, dismissed. No order as to costs."

30. It is thus seen that the Hon'ble Supreme Court had also held that on retirement, the settlement to a partner of his share in the assets of the partnership after deduction of liabilities is not assessable to capital gains.

http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax]

31. In CIT Vs. Surendra Kumar Gupta reported in [2004] 270 ITR 325, the assets of the firm were taken over by one of the two partners on dissolution of the firm, on payment of an agreed amount to the other partner; it was held that the aforesaid transaction did not result in any transfer of asset as understood in common law.

32. In CIT Vs. Kunnamkulam Mill Board reported in [2002] 257 ITR 544 (Ker), it was held that on retirement of the partner of the firm, there is no transfer of the assets of the firm in favour of the continuing partners within the meaning of Section 45(4) of the Act.

33. In the present case, very significantly, there was only a reconstitution of the partnership firm by retirement of two partners and admission of another partner. The partnership firm continued. It must also be further noted that the assets of the firm originally belonged to the father of the retiring / continuing partners and there was only a division of the assets on retirement in accordance with their entitlement on the shares in the partnership. As pointed out earlier, the National Company was originally a sole proprietorship concern started by N.Munuswamy Mudaliar. It was in the business of http://www.judis.nic.in & 366 of 2009 [M/s. National Company Vs. The Assistant Commissioner of Income Tax] construction and assets had been acquired even at that particular point of time. The two daughters and two sons-in-laws of N.Munuswamy Mudaliar were subsequently admitted as partners and on division of the assets, it can also be arguably pointed out that one daughter and one son-in-law were allotted a share which they were otherwise legally entitled to out of the holdings N.Munuswamy Mudaliar.

34. In view of the peculiar facts of the case in hand, we hold that the provisions of Section 45(4) would not be attracted on the retirement of the two partners and consequential allotment of their share in the assets in the Assessee Firm. We therefore answer the substantial question of law in favour of the Assessee and against the Revenue.

35. In the result, the Appeals of the Assessee are allowed. No costs.

(V.K., J.)

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DR.VINEET KOTHARI, J.

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