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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 30th November, 2012

+ ITA 667/2012

COMMISSIONER OF INCOME TAX -XI

..... Appellant

Through: Mr. Sanjeev Rajpal, sr. standing counsel

versus

SANGEETA WIG

..... Respondent

Through: None.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

S. RAVINDRA BHAT, J: (OPEN COURT)

The Revenue claims to be aggrieved by order dated 25.5.2012 of the Income Tax Appellate Tribunal (Tribunal, for short) in ITA No.4274/(Del)/2011 relating to assessment year 2008-09. The question of law concerns the correctness of the Tribunal's opinion that the amount of ₹1,20,00,000/- received by assessee, towards consideration pursuant to the memorandum of understanding signed by her with the newly inducted shareholder, was capital gain.

2. The assessee as an individual had been the owner of the proprietary concern which used to provide civil engineering consultancy styled as SD Engineering Consultants. The concern was taken over by ICT-SD Engineering Consultants Pvt. Ltd. w.e.f. 31.10.2007. The assessee received ₹1,20,00,000/- in terms of the memorandum of understanding dated 30.10.2007 and subsequent agreement dated 4.12.2007 as consideration. The two other individuals i.e. Mr. K K Kapila and his brother Mr. S D Kapila were entitled to shareholding aggregating to 55% shares in the



said company; 45% was held by the assessee. In the return filed the assessee claimed that the amount received by her was on capital account and gave rise to capital gains. The Assessing Officer rejected the claim holding that it was not a capital receipt but business receipt and represented compensation for not carrying out any activity in relation to the business or profession, assessable under section 28(va) of the Act. The Commissioner of Income Tax (Appeals) reversed the findings of the Assessing Officer. The Revenue carried the matter in appeal to the Tribunal which by analyzing the fact of the agreements and also appreciating the judgments cited before it held as follows :

“11. We have heard both the parties and have perused the material on record. The assessee is a specialist in designing of structures, public health and fire protection services, having designed over 500 projects in India and abroad, including Public Health Engineering services for the Metro Corridor, Railway Coach Factory, Hospitals, Schools, Fire Stations, Police Stations and commercial and residential projects for PWD, CPWD, DLF, Ansals, Jaypee and JMD, etc., was the proprietor of SD-Engg.Consultants. She formed a Company with one Sh.K.K. Kapila, who was engaged in Project Management Consultancy for various projects in India and abroad. The Company is known as ICT-SD Engineering Consultants Pvt. Ltd. Vide a Memorandum of Understanding dated 30.10.2007, (copy placed at pages 35-36 of the APB), followed by an Agreement dated 4.12.2007 (copy at pages 30 to 34 of the APB), it was agreed that the newly formed Company had taken over the assets and liabilities of the business of S.D. Engg. Consultants as a going concern on the close of business as on 31.10.2007, for a total consideration of ₹1,20,00,000/-, inclusive of good-will, empanelments, receivables, work in progress and all other rights and entitlements. Out of the said consideration of ₹1,20,00,000/-, a sum of ₹54,00,000/- was to be paid by ₹54,000/- fully paid up the equity shares of ICT-SD Engineering Consultants Pvt. Limited. At this juncture, it would be appropriate to reproduce here-under, the relevant clauses of the said Agreement:-

"1. That M/s. ICT-SD Engineering Consultants Pvt. Ltd. have taken over the assets and liabilities of the business of the party of the second part, i.e., Mrs. Sangeeta Wij under the name and style



M/s. S.D. Engineering Consultants Pvt. Ltd. as a going concern as on the close of business as on 31.10.2007, such assets being described in detail in the Schedule attached to this Agreement.

2. That the total Enterprise value of the proprietary business of M/s. S.D. Engineering Consultants Pvt. Ltd. including good-will, empanelments, receivables, work in progress and all other rights and entitlements as per Schedule attached herewith has been decided and determined at ₹1,20,00,000/- (rupees one hundred and twenty lakhs only).

3. That the share of the party of the second part hereto in the enterprise value as described in para 2 above shall be paid by the party of the first part to the party of the second part in the following manner:-

a) ₹22,00,000/-(rupees twenty two lakhs) by account payee cheque No. 043706 dated 05.12.2007 drawn on Axis Bank, Green Park, New Delhi.

b) ₹44,00,000/- (rupees forty four lakhs) by account payee cheque No. 043707 dated 15.12.2007 drawn on Axis Bank, Green Park, New Delhi.

c) ₹54,00,000/-(rupees fifty four lakhs) by 54,000 fully paid up equity shares in the company for which share certificates will be executed and duly handed over as per procedure to the second party within fifteen days of the execution of this Agreement."

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13. As per section 2(42C) of the I.T. Act:

"Slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

14. The assessee having carried on business for 11 years, she computed long term capital gains qua the slump sale under section 50B of the I.T. Act and under the said section, she furnished the Report of a Chartered



Accountant in Form 3 CEA, determining the net worth at ₹4,73,725/-, taking the Written Down Value of depreciable assets and the book value of the other assets, in accordance with Explanation 2 to section 50B of the Act. The long term capital gain was thus calculated at ₹1,15,26,275/-. Seeking to avail exemption thereon u/s 54 F of the Act, the assessee invested ₹1,76,64,235/- by purchasing an apartment in Westend Heights, DLF City-V, Gurgaon, on 13.6.2008. The complete documentation regarding the sale of her business and purchase of the said house property were furnished before the AO. Along with the return of income filed at Rs. 16,78,570/-, the Tax Audit Report u/s 44AB, Balance Sheet and the aforesaid Report in Form 3 CEA were filed by the assessee. In the assessment proceedings, on query, all details regarding the slump sale, the capital gains and the investment in the house property were furnished by the assessee before the AO.

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20. It is, however, seen that herein, the sum received was not for carrying out any activity in relation to any business. Rather, it is patent on record, that the business itself was transferred by the assessee, for a lump-sum consideration, with effect from 31.10.2007, when the firm of the assessee ceased to operate consequent upon the slump sale of the business as a going concern. The intention of the assessee is eloquently clear from the Disclosure of the Accounting Policies (APB 27), filed before the AO. As per clause 1B thereof:-

"The firms ceases its operations w.e.f. 31.10.2007 consequent to the slump sale of the business."

3. The Tribunal, as is evident from the extracted portion of its order, considered the rival merits as well as case law. An examination of the balance sheets of M/s SD Engineering Consultants and the relative agreements dated 30.10.2007 and 4.12.2007 was undertaken. The clauses in the agreement which conferred certain powers and authorities on the assessee such as clause 7 of the agreement dated 4.12.2007 and also the extent of shareholding were carefully analysed by the Tribunal. In addition to these, it made detailed consideration of the law on the subject. In this regard the Tribunal took into account judgment of the Supreme Court in *CIT Vs. Motor &*



General Stores (P) Ltd. (1967) 66 ITR 692 (SC) to the effect that the real intention of the parties has to be gathered on the appreciation of a background in its entirety instead of focusing either on the nomenclature or concentrating on certain parts of it. Furthermore, the Tribunal took note of the CBDT Circular No.779 14.09.1999 in this regard.

4. After such consideration the Tribunal held as follows :

“50. The assessee's business, it may be reiterated, was itself transferred, as a going concern to ICT-SD.

51. Moreover, now, even the jurisdictional High Court in "CIT v. Media World Publications Pvt. Ltd."(supra), has held that the right to carry on any business has been recognized by the Legislature as a capital asset, taxable u/s 55 (2)(a) of the Act and not taxable u/s 28(va) thereof.

52. In view of the above, we do not find any error whatsoever in the order of the Id. CIT(A), which we hereby confirm. Finding no merit in the grievance sought to be raised by the Department, the same is rejected.”

5. This Court has carefully considered the submissions. An overall analysis of the two agreements sought to be relied upon by the Revenue does not anywhere manifest the intention of the parties that the assessee wants to continue to carry on the same business and received the consideration which she did (i.e. ₹1.20 crores) as a non-compete fee as is being contended by the Revenue in the present case. The transaction was, to put it plainly, one whereby she parted with her controlling interest in the concerned business which was taken over by ICT-SD Engineering Consultants Pvt. Ltd. As part of the consideration payable, she had received shares to the tune of 45% of the said company. Having regard to these this Court is of the opinion that there is no infirmity in the appellate order of the Tribunal. No substantial question of law therefore arises.



The appeal is therefore dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

NOVEMBER 30, 2012

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