

PETITIONER:
COMMISSIONER OF INCOME TAX, GUJARAT

Vs.

RESPONDENT:
M/S. ELECTRIC CONTROL GEAR MFG.CO.

DATE OF JUDGMENT: 08/07/1997

BENCH:
S.C. AGARWAL, G.B. PATTANAİK.

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T
THE 8TH DAY OF JULY, 1997

Present:

Hon'ble Mr.Justice S.C.Agrawal
Hon'ble Mr.Justice G.B.Pattanaik

B.Krishana Prasad, Adv. for the appellant
P.H.Parekh, Mrs.Sunita Sharma and Ms.R.Deepamala, Advs. for
the Respondent

The following Judgment of the Court was delivered:

S.C. AGRAWAL, J. :

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 assessee 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 case, the Tribunal was right in holding that the principle of mutuality was not applicable?

2 Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the provisions of Section 41 (2) were applicable?

3 Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee has earned capital gains, which was liable to tax under the provisions of Section 45 of the Income Tax Act 1961?

4 Whether, on the facts and in the circumstances of the case, 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 case, the Tribunal 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 case, 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 circumstance of the case, 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?

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.

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. Artex Manufacturing Co.,*

JUDIS