IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and CHANDRA POOJARI, AM

I.T.A. No.59/Coch/2014
Assessment Year : 2007-08

M. Ahammedkutty, S/o Moideen, aged 73 years, residing at U.P. 3/75, Maliyekkal House, Vengara Post, Malappuram District, Managing Partner of dissolved firm, M/s. Maliyekkal Auditorium, Chelari, Thenhipalam, Malappuram. [PAN: AAJFM 8550C]	**Vs.**	The Income Tax Officer, Ward-3, Trirur.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri K.B. Mohammed Kutty, Sr. Counsel
Revenue by	Smt. Latha V. Kumar, Jr. DR

Date of hearing	14/08/2014
Date of pronouncement	19/09/2014

O R D E R

Per CHANDRA POOJARI, Accountant Member:

This appeal filed by the assessee is directed against the order dated 19-11-2013 passed by the Ld. CIT(A), Kozhikode for the assessment year 2007-08.

2. The first ground is with regard to treatment of income of Rs.18,565/- as business income though the assessee had declared the income as agricultural income.

3. Before us, the Ld. AR submitted that the above income was earned from agricultural activities and hence to be treated as agricultural income.

4. On the other hand, the Ld. DR pointed out that before the CIT(A), assessee had not pressed this ground, as such it was to be dismissed.

5. We have heard both the parties on this issue. Admittedly, as seen from the order of the CIT(A), the assessee has not pressed this ground before the CIT(A). Being so, the assessee cannot have grievance on this issue and accordingly, this ground is dismissed as not pressed.

6. The next ground is with regard to sustaining the addition of Rs.38,43,623/- as short term capital gain in the hands of the assessee.

7. The Ld. AR submitted that the main contention before the authorities was with regard to the assessment of the assessee firm on alleged capital gain in respect of the sale of immovable property owned by Shri Moosakutty P. and sold by him ten days prior to the dissolution of the firm. Section 45(4) of the Income Tax Act has no application in the matter, because the firm has not at any time owned the property, but only used it as a licensee for the purpose of its letting out the auditorium on daily rent basis. The ownership of the land as well as the building vested with the owner of the land, namely, Shri Moosakutty at all times both on facts and in law.

8. The Ld. AR submitted that the Assessing officer observed that the land and building under the ownership of Shri Moosakutty transferred to the firm on a consideration of Rs.6,00,000/- at the time of formation of the firm and the land is transferred back to Shri Moosakutty on a consideration of Rs.6,00,000/-. According to the Ld. AR, this was an admission of the fact there was building in the land when the firm began and the land was given for use. The Ld. AR submitted that according to the Assessing Authority, the transfer of property to the firm by Shri Moosakutty at the time of formation of the firm and transferred back to Shri Moosakutty by the firm at the time of dissolution were not recorded

on the basis of any document. The Ld. AR submitted that this finding clearly showed that the firm was allowed to use the land only as a licensee for which no registration was needed. On the other hand, if there was real transfer of immovable property, according to the Ld. AR, registration was an imperative legal requirement both under the Registration Act as well as under the Transfer of Property Act. So, the Ld. AR submitted that on the basis of this finding itself the provision u/s. 45(4) was not attracted.

9. The Ld. AR referred to the deposition of the managing partner of the firm Ahmedkutty before the Assessing officer which is as follows:

> "Answer No. 10 – Regarding the ownership of the building and from whom the building was purchased and the ownership prior to the sale, the assessee stated that Moosakutty was the owner of the land in which the said building was situated. Thereafter in 1977 there was a building at the time of starting the partnership business and they have made some developmental work for the auditorium. Therefore, it was clear that there was a building as well when the partnership firm started in 1977.

10. The Ld. AR submitted that the building tax receipts were remitted in the name of second partner Shri Maliyekkal Ahmedkutty Haji and during the partnership period the remittance of building tax was effected by the managing partner Shri Maliyekkal Ahamedkutty Haji and the issuance of building tax receipt was sometimes done in the name of the

person who remits the same. According to the Ld. AR, this was not conclusive proof for the ownership of the land.

11. The Ld. AR drew our attention to the following comments of the CIT(A) in this regard:

> "The auditorium building now renamed Liberty Hall has been given a fresh cost of paint and has not undergone any structural change after transfer. This shows that the there was a building at the time of entering into partnership. When it was stated that there was no structural change after transfer, it was an admission of the fact that there was a structure already in existence."

12. The Ld. AR also submitted that the following observation of the CIT(A) was contrary to the principles of law governing ownership of land:

> "No proof was submitted to me during hearing that auditorium was existing on land when Moosakutty transferred the property to the firm for Rs.60,00,000/-. This implies that the auditorium was built by the firm and Moosakutty cannot claim ownership of the land because it has submerged with the auditorium which belonged to the firm."

13. According to the Ld. AR the first part of the above observation was contrary to the facts as explained above as it was not known on what principles of law the appellate authority came to the conclusion that the ownership of the land cannot be claimed by Shri Moosakutty because the land has submerged with the auditorium which belonged to

the firm. According to the Ld. AR, looked up from any angle, this view was incorrect.

14. The Ld. AR relied on the following decisions:

i) Ratna Trayi Reality Service P. Ltd. vs. ITO (2013) 356 ITR 493(Guj.)
ii) Sandeep Sharma and Others vs. Sai Chhaya Autolink (P) Ltd. (2012 KHC 2533) (M.P.)

15. The CIT(A) stated that the dissolution u/s. 40 of the Indian Partnership Act, though can be with the consent of the partners or in accordance with the contract between the partners 'the term orally is not used'. However, the ld. AR submitted that it is a well known proposition that by virtue of sec. 40 of the Act that a partnership or its dissolution need not be a registered one under the General Law.

16. According to the Ld. AR, with regard to the non-disclosure of the report of the village officer dated 15-12-2010 and the report of the sub-registrar dated 08-12-2010, the CIT(A) took the stand that there was no written request seeking for copies of the same which view was not correct. Further, the CIT(A) observed that the assessee was served with notice u/s. 148 to furnish return and then sought to know the reasons which necessitated the issue of notice. According to the Ld. AR, the Assessing officer has stated that assessee had requested by letter dated

23-04-2010 to treat the return already filed as one in response to notice u/s. 148 of the Act. The Ld. AR submitted that at any rate in the notice, there was no reference to the reports of the Village Officer or Sub Registrar and the assessee is entitled to know all matters gathered by way of enquiry in the process of assessment as the same was used against him. The Ld. AR further submitted that without any request, materials gathered from other sources should have been disclosed as the failure to do so vitiates the assessment proceedings in the light of the decision of the Hon'ble Supreme Court in the case of Gulzar Singh vs. Sub-Divisional Magistrate (1999 KHC 1719) (SC). The Ld. AR also submitted that since the assessee came to know about the reliance of such reports only from the assessment order, it was not possible for the assessee to make a request of copies thereof.

17. According to the Ld. AR the Assessing officer noticed that the assessee disclosed rental income from auditorium as business income which comes to Rs.2,17,000/-. However, according to the Ld. AR, the Assessing officer treated the income as income from house property. Further, it was submitted that in all the previous years, the assessee returned the income from auditorium as business income, but the Assessing officer had not raised any objection. According to the Ld. AR, the auditorium was rented out on daily basis to different customers and

there was no lease agreement to treat the income as income from house property. However, this contention of the assessee was rejected by the Assessing officer According to the Assessing officer, the decisions relied are not applicable to the facts of the present case, where the auditorium was rented out on daily basis with furniture and other equipments.

18. On the other hand, the Ld. DR submitted that the prime object of the assessee firm was to let out property. Therefore the objection of the assessee in this regard was without merit. The Ld. DR relied on the following decisions:

i) Shambu Investments (P) Ltd. vs. CIT (263 ITR 143) (SC).
ii) CIT vs. Chennai Properties and Investment Ltd. (266 ITR 685)(Mad.)

20. The Ld. DR submitted that in Ground No. 3, the assessee had objected to the assessment of short term capital gains amounting to Rs. 38,43,623/- on dissolution of the firm, since according to the assessee the auditorium owned by one of the partners Shri Moosakutty Haji was sold by him as his own property ten days before the dissolution of the partnership. However, according to the ld. DR, this argument of the assessee was not correct since as per page 3, Sl. No. 5, of the partnership deed dated 17/2/1997 executed by Shri P. Moosakutty, S/o Muhammed Haji, Parangodath Kappil House, Vengara P.O., Malappuram District, Shri M. Ahmmedkutty Haji (the Managing Partner) and four

others, the land required for the Auditorium will be contributed by the partner Shri Moosakutty. According to the Ld. DR there was no mention about the Auditorium building in the partnership deed and the firm dissolved without any document of dissolution during the F.Y. 2006-07. The land with building No. MP-2/2A, was sold vide document No. 2096 of 2006 dated 20-12-2006. It was claimed that the building and land were owned by Shri Moosakutty. According to the Ld. DR, the Assessing officer and the CIT(A) did not accept this claim and assessed the profit on sale of land and building in the hands of the assessee firm. In the remand report, it was stated that the building tax records of Mooniyoor Panchayath shows that the building tax receipts were remitted in the name of 2nd Partner Shri Maliyekkal Ahmedkutty Haji. As per the records of Mooniyoor Grama Panchayath wherein the property is situated, the building No. MP-2/2A was in the ownership of Maliyekkal Mohammedkutty, S/of Ahammedkutty Haji from 17/08/2001 to 20/03/2007.

21. From the above details, the Ld. DR submitted that it was clear that the land owned by Shri Moosakutty was brought into the firm as his capital contribution and that the building "Maliyekkal Auditorium" which was sold vide document No. 2096 of 2006 dated 20/12/2006 was not owned by Shri Moosakutty. The Ld. DR further submitted that the land

and building together was the property of the firm, and hence short term capital gains has been rightly assessed in the hands of the firm. For this reason, he submitted that this ground of the assessee is devoid of any merit.

22. Regarding Ground Nos. 5 & 6, wherein it was stated that the refusal to supply copies of the documents was a clear violation of principles of natural justice and the market value of the property reported by the Income Tax Inspector as arbitrary and the basis thereof not known to the assessee, the Ld. DR submitted the above arguments were not correct since the assessee failed to furnish any records regarding the transfer of assets at the time of dissolution of the firm, the value of land was adopted on the basis of reports from the village officer and the Sub Registrar. However, the Ld. DR submitted that since the fair value of the Auditorium building was not a subject matter coming within the purview of the village officer, the value of the building was adopted on the basis of Inspector's report, since the assessee did not furnish any details thereof. In view of the above facts, the Ld. DR submitted that the orders of the Assessing officer and the CIT(A) may be upheld.

23. We have heard both the parties and perused the record. In this case, as seen from the record, originally the land was owned by one of the partners Shri Moosakutty Haji and was used by the firm as his capital. Later the firm has constructed the building which is evident from the appearing of the building as an asset in the balance sheet, a copy of which was filed by the Ld. DR which is kept on record and on the said building, the assessee claimed depreciation. The main contention of the assessee is that land and building belonged to Shri Moosakutty and being so, there is no question of transfer of land and building back to the partner, Shri Moosakutty and he is the owner of land and building. However the argument of the assessee's Counsel is contrary to the facts brought on record.

24. The Ld. Counsel of the assessee has gone through the order of the lower authorities to suggest that the Department had accepted the building as owned by the partner Shri Moosakutty. This argument of the assessee's Counsel is totally contrary to the facts. The lower authorities categorically mentioned that the assessee has not placed any evidence to suggest that the building was constructed by Shri Moosakutty and not by the firm. Further, it is also brought on record by the lower authorities that the building tax was paid by one of the partners, Shri Maliyekkal Ahmedkutty Haji. It is also evident from the Remand Report

furnished by the Assessing officer to the CIT(A) that the building No. MP-2/2A which is situated in Moonniyur Grama Panchayath, was in the ownership of Maliyekkal Mohammedkutty, S/o Ahamedkutty Haji, from 17/08/2001 to 20/03/2007. Before us also, the assessee failed to substantiate the fact that the building does not belong to the assessee firm. We find that there is no iota of evidence to suggest that the building was owned by Shri Moosakutty. Being so, we are not in a position to hold that the building belonged to Shri Moosakutty.

25. The other argument of the assessee is that the provisions of section 45(4) cannot be invoked.

26. We have heard the rival submissions. To appreciate the rival contentions we have to refer to certain provisions of the IT Act, 1961. Sec. 45(1) of the Act brings to tax any capital gain that accrues or arises on transfer of a capital asset. The capital gain is charged to tax in the previous year in which the transfer takes place. Sec. 2(47) defines what is transfer and it reads as follows :

'(47) "transfer", in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment;

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in s. 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of or acquiring shares in, a cooperative society, company or other AOP or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.'

Explanation : For the purposes of sub-cls. (v) and (vi), "immovable property" shall have the same meaning as in cl. (d) of s.269UA.'

27. Capital asset has been defined in s. 2(14) of the Act, as meaning "property" of any kind held by the assessee, whether or not connected with his business or profession. The above exhaustive definition is subject to the following exclusions like stock-in-trade, consumable stores or raw material held for the purpose of business or profession, personal effects, agricultural land in India, certain gold bonds, special bearer bonds and gold deposit bonds.

28. The share or interest of a partner in the partnership and its assets would be property and, therefore, a capital asset within the meaning of the aforesaid definition. To this extent, there can be no doubt. The next

question is as to whether it can be said that there was a transfer of capital asset on dissolution of the firm in favour of the partner so as to attract a charge under s. 45 of the Act.

29. A look at how formation and dissolution of partnership was used as a device to evade tax on capital gains to convert an asset held individually into an asset of the firm in which the individual is a partner and conversion of capital assets into individual assets on dissolution or otherwise, is necessary.

30. Partnership as a form of carrying on business evolved so that two or more persons can to join together by pooling resources in the form of capital and expertise. One of the devices used by assessee to evade tax on capital gain was to convert in asset held individually into asset of the firm in which the individual is a partner. Similarly, partnership assets were converted into individual assets on dissolution or otherwise.

31. Such introduction of capital asset as capital contribution by a partner up to 1st April, 1988 did not result in incidence of capital gain. It was so held by the Hon'ble Supreme Court in the case of Sunil Siddharthbhai vs. CIT (1985) 49 CTR (SC) 172 : (1985) 156 ITR 509 (SC). The Hon'ble Supreme Court held that under the IT Act, 1961,

where a partner of a firm makes over capital assets which are held by him to a firm as his contribution towards capital, there is a transfer of a capital asset within the terms of s. 45 of the Act, because an exclusive interest of the partner in personal assets is reduced, on their entry into the firm, into a share interest. On such introduction of capital the partner's capital account is credited with the market value of the property. Such entry does not represent the true value of consideration. It is a notional value only, intended to be taken into account at the time of determining the value of the partner's share in the net partnership assets on the date of dissolution or on his retirement, a share which will depend upon deduction of the liabilities and prior charges existing on the date of dissolution or retirement. It is not possible to predicate before hand what will be the position in terms of monetary value of a partner's share on that date. At that time when the partner transfers his personal asset to the partnership firm, there can be no reckoning of the liabilities and losses which the firm may suffer in the years to come. All that lies within the womb of the future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset into the partnership firm when neither can the date of dissolution or retirement be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet. Therefore, the consideration which a partner acquires on

making over his personal asset to the firm as his contribution to its capital cannot fall within the terms of s. 48 of the Act. And as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in s. 45, such a case must be regarded as falling outside the scope of capital gains taxation altogether. In coming to the above conclusion the Hon'ble Court relied on the decision of the Hon'ble Supreme Court in Addanki Narayanappa vs. Bhaskara Krishnappa AIR 1966 SC 1300. The Hon'ble Supreme Court in the said decision explained the nature of partnership and the right of the partners over the assets of the partnership as follows (p. 1303 of AIR) :

> ".....whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in, all the partners, and in that sense every partner was an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to L share in the assets of the firm which remain after satisfying the liabilities set out in cl. (a) and sub cls. (i), (ii) and (iii) of cl. (b) of s. 48."

The position was later explained in the same judgment as follows:

(p. 1304) :

"The whole concept of partnership is to entry upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the, of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges."

32. Parliament with the avowed object of blocking this escape route for avoiding capital gains tax by the Finance Act, 1987, introduced sub-s. (3) to s. 45 w.e.f. 1st April, 1988. The effect of this was that the profits and gains arising from the transfer of a capital asset by a partner to a firm are chargeable as the partner's income of the previous year in which the transfer took place and the amount recorded in the books of account of the firm, shall be deemed to be the full value of consideration received or accruing as a result of transfer of the capital asset.

33. In the case of dissolution where partners are allotted capital assets of the firm, it was held that there was no transfer. In Malabar Fisheries Co. vs. CIT (1979) 12 CTR (SC) 415 : (1979) 120 ITR 49 (SC), the Hon'ble Supreme Court has explained the nature of distribution of assets

of a partnership on dissolution amongst its partners and as to whether such distribution of assets would constitute transfer within the meaning of s. 2(47) of the IT Act as follows :

> "A partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly by or in common the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of s. 2(47) of the Act. Further, it is necessary that the sale or transfer of assets must be by the assessee to a person. Now every dissolution must in point of time be anterior to the actual distribution, division or allotment of the assets that takes place after making up accounts and discharging the debts and liabilities due by the firm. Upon dissolution the firm ceases to exist, then follows the making up of accounts, then the discharge of debts and liabilities and thereupon distribution, division or allotment of assets takes place inter se between the erstwhile partners by way of mutual adjustment of rights between them. The distribution, division or allotment of assets to the erstwhile partners, is not done by the dissolved firm. In this sense there is no transfer of assets by the assessee (dissolved firm) to any person."

34. To plug this loophole the Finance Act, 1987, brought on the statute book a new sub-s. (4) in s. 45 of the Act, w.e.f. 1st April, 1988, which reads as follows :

> "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 AOP or BOI (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 s. 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."

35. Before the introduction of sub-s. (4) to s. 45, there was cl. (ii) of s. 47 which read as under :

> "Any distribution of capital assets on the dissolution of a firm, body of individuals or other association of persons."

Sec. 47 of the Act lays down which are the transactions not regarded as transfer for the purpose of s. 45 of the Act.

36. The Finance Act, 1987, w.e.f. 1st April, 1988, omitted this clause, the effect of which was that distribution of capital assets on the dissolution of a firm would w.e.f. 1st April, 1988 be regarded as "transfer". Therefore, instead of amending s. 2(47), the amendment was carried out by the Finance Act, 1987, by omitting s. 47(ii), the result of which was that distribution of capital assets on the dissolution of a firm was regarded as "transfer". The effect was that the profits or gains arising from the transfer of a capital asset by a firm to a partner on dissolution or otherwise would be chargeable as the firm's income in the previous year in which the transfer took place and for the purposes of

computation of capital gains, the fair market value of the asset on the date of transfer was deemed to be the full value of the consideration received or accruing as a result of the transfer.

37. Thus Parliament brought into the tax net transactions whereby assets were brought into a firm or taken out of the firm.
Thus s. 45(4) covers cases where there is dissolution of the firm and distribution of assets of the firm by the firm to its partners.

38. Dissolution and retirement are two different concepts. In the case of retirement, the retiring partner goes out of the firm but the remaining partners continue to carry on the business of the partnership as a firm. In the case of dissolution, the firm no longer exists and the dissolution is between all the partners of the firm.

39. In the case of retirement of a partner there could be two situations. In the first situation there can be a retirement of a partner from the firm and the firm might continue its existence and the retiring partner might be given assets in lieu of amounts payable to him on retirement. This could be done either on the basis of settling amounts standing to the credit of his capital account or on a lump sum basis. There could be a second situation where the retiring partner is paid

consideration in cash and he gives up his rights as partner including his rights over the assets of the partnership. This again can be done either on the basis of settling amounts standing to the credit of his capital account or on a lump sum basis.

40. In the first situation i.e., retirement of a partner from the firm and the firm continuing its existence and the retiring partner is given assets in lieu of amounts payable to him on retirement, it has been held by the Hon'ble Bombay High Court to be covered by the provisions of s. 45(4) of the Act viz., a transfer giving rise to a capital gain. The Hon'ble Bombay High Court, in the case of CIT vs. A.N. Naik Associates (2004) 187 CTR (Bom) 162 : (2004) 265 ITR 346 (Bom) was dealing with a case of reconstitution of firm and allotment of assets to retiring partners. The reconstitution had taken place pursuant to a family arrangement. The chargeability to capital gain tax in such circumstances was in issue before the Hon'ble Court. The Court dealt with the issue as to what would be the effect of partners of a subsisting partnership distributing assets to partners who retire from the partnership. Does the asset of the partnership, on being allotted to the retired partner/partners fall within the expression "otherwise" ? The Court held that the purpose and object of the Act of 1987 was to bring to charge of tax arising on distribution of capital assets of firms which otherwise was not subject to taxation. If

the language of sub-s. (4) is construed to mean that the expression "otherwise" has to partake of the nature of dissolution or deemed dissolution, then the very object of the amendment could be defeated by the partners by distributing the assets to some partners who may retire. The firm then would not be liable to be taxed thus defeating the very purpose of the amending Act. The Court noticed that the position prior to the amendment by introduction of s. 45(4) by the Finance Act, 1987, was that there was no transfer of assets by the firm to the partners on dissolution or transfer of assets to the retiring partner on retirement. The effect was that the profits or gains arising from the transfer of a capital asset by a firm to a partner on dissolution or otherwise would be chargeable as the firm's income in the previous year in which the transfer took place and for the purposes of computation of capital gains, the fair market value of the asset on the date of transfer would be deemed to be the full value of the consideration received or accrued as a result of the transfer. Therefore, if the object of the Act is seen and the mischief it seeks to avoid, it would be clear that the intention of Parliament was to bring into the tax net transactions whereby assets were brought into a firm or taken out of the firm.

41. Prior to the aforesaid decision, cases where on retirement, property was allotted to a partner by the firm in lieu of amounts payable to him

were not subjected to capital gains tax. In that scenario the assessees took a stand that retirement is also one form of dissolution of the firm because distribution of assets on retirement was not regarded as a transfer under s. 47(ii) of the Act. This was not accepted by Hon'ble Bombay High Court and they held in the case of N.A. Mody (supra)] that a clear distinction exists between retirement of a partner from a firm and dissolution of the firm. In the case of retirement of a partner from the firm it is only that partner who goes out of the firm and the remaining partners continue to carry on the business of the partnership as a firm, while in the case of dissolution of the firm the firm as such no more exists and the dissolution is between all the partners of the firm. The above decision in the case of A.N. Naik Associates (supra) however, treats distribution of assets of the firm to partners on dissolution or on retirement as falling within the ambit of s. 45(4).

42. The situation in which, we are concerned in this appeal is a case where on dissolution, a partner Shri Moosakutty took over the capital asset of the assessee-firm and the firm was the owner of the building as held in the earlier para. It is pertinent to mention here that the legal ownership of the landed building was not transferred in the name of the assessee-firm but it is a settled position by now that such a transfer of legal title in the name of the assessee-firm is essentially to hold that the assessee-firm is the owner of those assets if such assets

are transferred by a partner of the firm. More so, the landed building has already appeared in the balance sheet of the assessee-firm and the assessee has been claming depreciation on that building.

43. As per the provisions of sec. 45(4), the profits and gains arising from the transfer of capital asset by way of distribution of capital assets on dissolution of the firm, and the assessee-firm being the owner of the capital asset and the building was taken over by one of the partners, Shri Moosakutty, this transaction is liable for capital gains tax and the lower authorities are justified in treating the transaction as liable for short term capital gains tax in the hands of the firm, M/s. Maliyekkal Auditorium. However, we are not in agreement with the quantification of the capital gains by the Assessing officer while invoking the provisions of sec. 45(4) r.w.s. 48 of the I.T. Act. Thus, when the capital gain is computed, 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 accrued as a result of the transaction. From the reading of the provisions of sec. 45(4), it is clear that in case of transfer of capital assets on dissolution of firm, income has to be worked out on the basis of the fair market value of the capital asset on the date of transfer.

44. In the light of such specific provision of sec. 45(4) of the I.T. Act, the Assessing officer is required to determine the fair market value of the building which was transferred to the partner, Shri Moosakutty. The Assessing officer in this case has considered the fair market value of Rs. 4.3 crores on the basis of the report of the Inspector of Income Tax who is not a technical person to determine the fair market value of the building. Accordingly, we remit this issue to the file of the Assessing officer with a direction to determine the fair market value of the building on the basis of the report of the DVO and decide accordingly.

45. Regarding the claim of the assessee that rental income from auditorium is to be assessed as business income instead of income from house property, we are of the opinion that when the assessee exploited the commercial building by letting out, then that income derived from letting out is to be assessed as income from house property only as held by the Supreme Court in the case of Shambhu Investments Pvt. Ltd., cited supra. Being so, we do not find any infirmity in the order of the CIT(A) and the same is confirmed.

46. Regarding claim of the assessee that the assessee has not got proper opportunity of hearing before the lower authorities, the

Assessing officer has given ample opportunity of hearing to the assessee. As seen from the order of the Assessing officer, the case was heard by him on 17-06-2010, 11/8/2010, 24/11/2010, 13/12/2010 and 17/12/2010 and the final order was passed on 20/12/2010. Similarly, the CIT(A) heard the appeal on 20-03-2012, 24-08-2012, 21-08-2013, 27-08-2013 and 19-11-2013 and the final order was passed on the same day. If the assessee had any grievance, it should have raised the issue before the lower authorities at the appropriate time. Further, even the CIT(A) called for remand report from the Assessing Officer and the copy of it was given to the assessee's Counsel on 21-08-2013 and the written comment was filed by the assessee on 27-08-2013. Having failed to raise the objection regarding denial of opportunity, at this stage, the assessee cannot plead before us. Being so, the plea of the assessee is without any merit. Accordingly, this ground of the assessee is dismissed.

47. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Pronounced accordingly on 19-09-2014.

sd/-	sd/-
(N.R.S.GANESAN)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 19th September, 2014
GJ
Copy to:
1. M. Ahammedkutty, S/o Moideen, aged 73 years, residing at U.P. 3/75, Maliyekkal House, Vengara Post, Malappuram District, Managing Partner of dissolved firm, M/s. Maliyekkal Auditorium, Chelari, Thenhipalam, Malappuram District.
2. The Income Tax Officer, Ward-3, Tirur.
3. The Commissioner of Income-tax(Appeals), Kozhikode.
4. The Commissioner of Income-tax, Kozhikode.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSSITANT REGISTRAR)
I.T.A.T., COCHIN