

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 6362/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Shri Anand B. Tawade, 106, Roop Rayon Mill Compound, Near Datt Mandir, Jijamata Nagar, Kalachowki, Mumbai - 400 033.	बनाम/ v.	ITO - 17(3)(1), Piramal Chambers, Lalbaug, Mumbai.
स्थायी लेखा सं./PAN : ACDPT 9937A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Satish R. Mody
Revenue by :	Shri Ganesh Bare (Sr.DR)

सुनवाई की तारीख / **Date of Hearing** : 18-01-2016

घोषणा की तारीख / **Date of Pronouncement** : 16-03-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 6362/Mum/2012, is directed against the order dated 02-08-2012 passed by learned Commissioner of Income Tax (Appeals) (hereinafter called "the CIT(A)"), for the assessment year 2008-09.

2. The grounds raised by the assessee in the memo of appeal filed with the Tribunal read as under:-

“1. The CIT(A) erred in confirming the order of the AO treating Rs.75,53,858/ -, being amount received towards share of capital on retirement of partnership firm as Long Term Capital Gains & taxed accordingly, on the ground that:

- If continuing partners agree to pay a lumpsum consideration of the retiring partner assigning or relinquishing his share & right in partnership and its assets in favour of continuing partners, the transaction would amount to transfer within the meaning of Sec. 2(47) of the Income Tax Act, 1961.
- Further, 'interest' in a firm is an asset as any other asset as recognized by the Act that defined a capital asset to include extinguishment of interest and the partners having surrendered/extinguished their rights in such asset on retirement from the firm, there was a transfer within the meaning of Section 2(47) giving rise to Capital Gains exigible to tax.
- The decision of Apex Court in the case of CIT Vs. Mohanbhai Pamabhai is distinguishable on facts, as in this case, there is no transfer of interest of the partner.
- In view of the above, the goodwill of Rs.75,53,858/- received by the assessee is treated as Long Term capital gains and taxed accordingly.

2. The CIT (A) erred in not considering the facts of the case represented by the assessee as under:

- Your assessee has received a sum of Rs. 75,53,858/-, being his share of capital on retirement from partnership firm M/ s. Gurukripa Realtors & there is no distribution of assets.
- The case of your assessee squarely falls within the ambit of the decision of Apex Court in the case of CIT Vs. Mohanbhai Pamabhai which is based on the same facts.

- Further, the judicial pronouncements referred by the learned AO were delivered prior to the decision of the Apex court referred supra.

3. The brief facts of the case are that the assessee is an individual and assessee's case was reopened u/s 147/148 of the Income Tax Act, 1961(hereinafter called "the Act") after duly recording the reasons for reopening by issue of Notice u/s 148 of the Act dated 21-12-2010 which was duly served on the assessee. It was observed by the learned assessing officer (Hereinafter called "the AO") that the assessee was a partner in M/s. Gurukripa Realtors and he retired from the said partnership firm vide deed of retirement dated 10.12.2007. The assessment was reopened based on the information received from the Addl.CIT, Range-25(2), Mumbai vide letter dated 16.12.2010 as under:

"During the course of assessment proceedings in the case of M/s Om Gurukripa Realtors for A.Y. 2008-09, it was noticed that this firm has paid an amount of Rs. 75,53,858/- to Shri Anant B Tawade as payment for goodwill on retirement. Information was obtained from Shri Anant B Tawade u/s. 133(6) of the I. T. Act, 1961. The copy of I.T. Acknowledgement, capital account, computation of income and copy of ledger account of M/s. Om Gurukripa Realtors submitted by Shri Anant B Tawade are enclosed. The copy of retirement deed is also enclosed. It is seen that the amount of goodwill payment received by Shri Tawade has not been included in his income. The taxability of this amount in his hands as capital gains requires to be seen. This information is being sent to you for necessary action at your end."

As the assessee has not offered the receipt of said goodwill amount of Rs.75,53,858/- on retirement from the partnership firm for taxation, the assessee was show caused by the AO that as to why the said receipt of Goodwill should not be treated as Income for the year under consideration. The assessee submitted that he has received as share of capital on retirement from M/s Gurukripa Realtors a sum of Rs. 75,53,858/-. The assessee submitted that the same must not be treated as income in his hands and should not be taxed in his hands as it is not a receipt liable to tax as there is

no element of transfer involved in the same. In the transaction of retirement of a partner, just as in the case of dissolution of partnership, there is no element of transfer of a capital asset, which attracts the provisions of Sec.45 and 47(ii) of the Act is involved, no capital gains is chargeable on the profit, if any, arising to the retiring partner from receipt of such money. It was submitted that there was no distribution of assets, but only payment of money. The assessee relied on the decision of Hon'ble Supreme Court in the case of CIT v. Mohanbhai Pamabhai (1987) 165 ITR 166 (SC), CIT v. Lengmally Raghukumar (2001) 247 ITR 801 (SC). The assessee also relied upon the following judicial decisions:-

- 1) Addl. CIT v. Snt Mahenderpal Bhasin (1979) 117 ITR 26 (All).
- 2) CIT v. Bhupinder Singh Atwal (1981) 128 ITR 67 (Cal).
- 3) CIT v. Madanlal Bharqava (1980) 122 ITR 545 (All).
- 4) CIT v. Pate P H (1988) 171 ITR 128 (AP).
- 5) CIT v. Raghukumar (1983) 141 ITR 674 (AP)
- 6) Prashant S Joshi v. ITO (2010) 189 Taxman 1 (Bom)

The A.O. observed that the assessee has received goodwill of Rs.75,53,858/- it was claimed as share of capital on retirement of partnership firm M/s Gurukripa Realtors. The AO issued notice u/s 133(6) of the Act to M/s Gurukripa Realtors and the said firm confirmed that firm has paid to the assessee his share of goodwill of Rs.75,53,858/-. The A.O. also observed that if continuing partners agrees to pay a lump-sum consideration to the retiring partner assigning or relinquishing his share and right in partnership and its assets in favour of continuing partners, the transaction would amount to transfer within the meaning of Sec.2(47) of the Act. The AO referred to clause (2) of the deed of retirement dated 10.12.2007 which clearly stated that the assessee being a retiring partner relinquished his share and right in favour of continuing partners. It was also held by the A.O. that interest in a firm is an

asset as any other asset as recognized by the Act that defined a capital asset to include extinguishment of interest and the partners having surrendered/extinguished their rights in such asset on retirement from the firm, there was a transfer within the meaning of Section 2(47) of the Act giving rise to Capital Gain exigible to tax as long term capital gain in the hands of the assessee. The A.O. also observed that the position of a retiring partner, for capital gains tax purposes, could not be equated with that of a partner upon general dissolution since a clear distinction existed between the two concepts in as much as consequences following from each were entirely different. In the case of retirement of partners, it is only that partner who goes out of the firm and remaining partners continue to carry on the business of a partnership, whereas in the case of dissolution, the firm as such no more exists and the dissolution is between all the partners of the firm. Hence, the assessee's position being a retiring partner cannot be equated with dissolution of partnership. The A.O. also distinguished the decision of Hon'ble Apex Court in the case of Mohanbhai Pamabhai (supra) wherein it was held that there is no transfer of interest of the partner, but whereas in the present case, the retiring partner i.e. the assessee has relinquished his share and right in favour of continuing partners vide deed of retirement dated 10-12-2007. The A.O. also distinguished the case relied upon by the assessee in the case of Lengmallu Raghukumar (supra) as in this case there is general dissolution and whereas in the present case there is retirement of a partner and the same could not be equated with that of general dissolution. The A.O. also observed that the pronouncements relied upon by the assessee are not applicable in the present case as the assessee relinquished his share and right in favour of the continuing partners and moreover in all these cases pertain to the period when provisions of section contained in clause (ii) of section 47 of the Act existed in the statute which was omitted w.e.f. 1.4.1988. Thus the A.O. observed that there was a transfer within the meaning of

section 2(47) of the Act giving rise to capital gain exigible to tax. The AO relied upon following judgments :-

1. CIT v. Tribhuvandas G Patel (1978) 115 ITR 95(Bom.)
2. CIT v. H R Aslot (1978) 115 ITR 255(Bom.)
3. N A Mody v. CIT (1986) 162 ITR 420(Bom.)
4. Shevantibhai C. Mehta v. ITO, Pune-Tibunal.

Thus, the goodwill amount of Rs. 75,53,858/- received by the assessee is treated as long term capital gain and charged to tax by the A.O., vide assessment order dated 29-12-2011 passed by the AO u/s 147 r.w.s. 143(3) of the Act.

4. Aggrieved by the assessment order dated 29-12-2011 passed by the A.O. u/s 147 r.w.s. 143(3) of the Act , the assessee preferred first appeal before the CIT(A).
5. Before the CIT(A), the assessee filed written submission and relied upon the following decisions:-
 1. CIT v. Mohanbhai Pannabhai, 165 ITR 166 (SC)
 2. Lingamalli Raghukumar, 247 ITR 801 (SC)
 3. Mahinderpal Bhasin, 117 ITR 26 (Allh.)
 4. Bhupindersingh Bhatwal, 128 ITR 67 (Cal)

It was contended by the assessee that payment to retiring partner does not lead to levy of capital gain as there is no transfer of asset.

The CIT(A) held that the relinquishment of rights on retirement from a partnership is not listed as one of the situations which will not be regarded as a transfer. The CIT(A) relied upon the decision of Mumbai bench of the Tribunal in the case of Sudhakar M. Shetty, 130 ITD 197, which is similar to

the assessee's case wherein it was stated that a lump-sum consideration paid in consideration of the retiring partner assigning or relinquishing his share or right in the partnership and its assets in favour of the continuing partner will lead to levy of capital gain. To decide the case, the Tribunal has relied upon the decision of Hon'ble Bombay High Court in the case of Tribhuwandas G. Patel, 115 ITR 95 (Bom), HR Aslot, 115 ITR 255 (Bom) and N.A. Modi, 52 CTR (Bom) 149. The case of CIT v. Mohanbhai Pannabhai, 165 ITR 166 (SC) was also considered by the Tribunal to arrive at the decision in the case of Sudhakar M Shetty (supra). Thus, the CIT(A), in nutshell held that there is a transfer of interest from the retiring partner to the continuing partners as per the retirement deed within the meaning of section 2(47) of the Act and consequently compensation to the retiring partner has been paid for the transfer of the interest of the retiring partner and hence, the capital gain has to be levied, the CIT(A) upheld the orders of the A.O., vide orders dated 02-08-2012.

6. Aggrieved by the orders dated 02-08-2012 passed by the CIT(A), the assessee is in appeal before the Tribunal.

7. The ld. Counsel for the assessee submitted that the assessee has received Rs. 1 crore from M/s Gurukripa Realtors, out of which an amount of Rs. 23,96,142/- was towards his share in profit and the balance of Rs. 75,53,858/- was paid towards his share in goodwill on his retirement as partner from the partnership firm. The ld. Counsel for the assessee relied upon the decision of Hon'ble jurisdictional Bombay High Court in the case of Prashant S. Joshi v. ITO & Anr., (2010) 324 ITR 154 and submitted that the amount received by the assessee on retirement from the partnership firm being the goodwill amount cannot be brought to tax. The ld. Counsel for the assessee relied upon section 45(4) of the Act and submitted that the said amount is exigible to tax in the hands of the firm and not in the hands of the

assessee. He also relied upon the decision of Hon'ble Bombay High Court in the case of The CIT v. Shri Rajnish Maniklal Bhandari in Income Tax Appeal (LOD) No. 2058 of 2012 , dated 8th March, 2013 and CIT v. Riyaz A.Sheikh in ITA No 1969 of 2011, dated 26th February 2013.

8. The ld. D.R., on the other hand, relied upon the orders of authorities below and submitted that the authorities below have rightly brought to tax as long term capital gain the said amount to tax received by the assessee on retirement from the partnership firm. The Ld. DR relied upon the decision of Mumbai Bench of the Tribunal in the case of Sudhakar M. Shetty v. ACIT, [2011] 130 ITD 197 (Mum.-Trib) and the decision of Hyderabad Bench of the Tribunal in the case of Smt. Girija Reddy v. ITO in ITA No. 297 (Hyd.) of 2012 dated May, 25, 2012.

9. In the rejoinder, the ld. Counsel submitted that the Hon'ble Bombay High Court in the case of Riyaz A. Sheikh in I.T. Appeal No. 1969 of 2011 order dated 26th February, 2013 has reversed the decision in the case of Sudhakar M. Shetty. The ld. AR relied upon decision of in the case of CIT v. R Lingermallu Raghukumar (2001) 247 ITR 801(SC), Tribhuvandas G Patel 236 ITR 515(SC) . The ld. Counsel submitted that the in view of provisions of Section 45(4) of the Act , the said amount received by the assessee can be taxed in the hands of the partnership firm but not in the hands of the assessee,

10. We have considered the rival submission and also perused the material available on record including the case laws relied upon by both the sides. We have observed that the assessee was a partner in a partnership firm M/s Gurukripa Realtors. The assessee retired from the said firm vide deed of retirement dated 10.12.2007 and he received share of profit as well as goodwill amount from the firm, totaling Rs.1,00,00,000.00 for extinguishment

of his rights in the partnership firm Gurukripa Realtors in favour of the continuing partners . We have observed that the issue with respect to taxability of the amount received by the partner on retirement from the partnership firm for extinguishment of his rights in the partnership firm in favour of the continuing partners has been decided by the Hon'ble Bombay High Court in the case of CIT v. Shri Rajnish Maniklal Bhandari, IT Appeal No. 2058 of 2012, vide judgment dated 9th March, 2013 and in the case of CIT v. Mr. Riyaz A. Sheikh in I.T. Appeal No. 1969 of 2011 vide judgment dated 26th February, 2013, whereby the Hon'ble Bombay High Court has held that the said amount received by partner on retirement from the partnership firm is not taxable in the hands of the partner. The Hon'ble Bombay High Court in the case of Riyaz A Sheikh reported in (2014) 41 taxmann.com 455(Bom.) held as under :

“2. We find that by the impugned order, the Tribunal while holding that amounts received by a partner on his retirement from partnership firm are exempt from capital gains tax relied upon the decision of this Court in the matter of Prashant S. Joshi v. ITO [2010] 324 ITR 154/189 Taxman 1 (Bom). Counsel for the revenue is unable to point out as to how the decision in the matter of Prashant S. Joshi (supra) inter alia holding that no capital gains are payable by an erstwhile partner on amounts received on retirement would not be applicable to the present case. The only submission on behalf of the revenue is that there was an earlier decision of this Court in the matter of N.A. Modi v. CIT [1986] 162 ITR 420/24 Taxman 219 (Bom.) and it has not been considered in the decision rendered in the matter of Prashant S. Johsi (supra).

3. In the impugned order, the Tribunal does refer to the this Court in the matter of N.A. Modi (supra) and states that it follows the decision of this Court in the matter of CIT v. Tribhuvandas G. Patel [1978] 115 ITR 95

(Bom.) and the same has been reversed by the Apex Court in Tribhuvandas G. Patel v. CIT [1999] 236 ITR 515. This Court in the matter of Prashant S. Joshi (supra) has also referred to the decision of Tribhuvandas G. Patel (supra) rendered by this Court and its reversal by the Apex Court. Moreover, the decision of this Court in the case of Prashant S. Joshi (supra) placed reliance upon the decision of the Supreme Court in the case of CIT v. R. Lingamallu Rajkumar [2001] 247 ITR 801/[2002] 124 Taxman 127 wherein it has been held that amounts received on retirement by a partner is not subject to capital gains tax. In the above circumstances, we see no reason to entertain the proposed question of law.”

The issue of taxability of amount received by the partner on retirement from the partnership firm for extinguishment of his rights in the partnership firm in favour of the continuing partners was also discussed by the Hon'ble Bombay High Court in the case of Prashant S Joshi v. ITO reported in (2010) 324 ITR 154(Bom.) after considering the omission of Section 47(ii) from the statute w.e.f 01-04-1988 as reproduced here-under:

“12. *The only reason that has been recorded by the Assessing Officer is that the Commissioner of Income-tax (Appeals) by his order dated 17-9-2008, in the case of the partnership firm for assessment year 2005-06 allowed a claim for treating the payment of Rs. 1 crore to the two retiring partners as revenue expenditure. Since the assessee claimed the payment to be exempt by treating it as a capital receipt, it is stated that there was reason to believe that the receipts under the deed of retirement had escaped assessment within the meaning of section 147.*

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 learned Judge then was) speaking for a Division Bench of the Gujarat High Court in CIT v. Mohanbhai Pamabhai [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 CIT v. Bankey Lal 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 worked 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 judgment of the Gujarat High Court :—

"...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 judgment of the Gujarat High Court was dismissed by a Bench of three learned Judges of the Supreme Court in Addl. CIT v. Mohanbhai Pamabhai [1987] 165 ITR 166 . The Supreme Court relied upon its judgment in Sunil Siddharthbhai v. CIT [1985] 156 ITR 509. The Supreme Court reiterated the same principle by relying upon the judgment in Addanki Narayanappa v. Bhaskara Krishnappa AIR 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 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 judgment of the Gujarat High Court in Mohanbhai Pamabhai's case (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 CIT v. R. Lingmallu Raghukumar [2001] 247 ITR 801 , the Supreme Court held, while affirming the principle laid down in Mohanbhai Pamabhai 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 by the retired partner to the continuing partners.

15. *At this stage, it may be noted that in CIT v. Tribhuvandas G. Patel [1978] 115 ITR 95 (Bom.), which was decided by a Division Bench of this Court, under a deed of partnership, the assessee retired from the partnership firm and was inter alia paid an amount of Rs. 4,77,941 as his share in the remaining assets of the firm. The Division Bench of this Court had held that the transaction would have to be regarded as amounting to a transfer within the meaning of section 2(47) inasmuch as the assessee had assigned, released and relinquished his share in the partnership and its assets in favour of the continuing partners. This part of the judgment was reversed in appeal by the Supreme Court in Tribhuvandas G. Patel v. CIT [1999] 236 ITR 515. Following the judgment of the Supreme Court in Sunil Siddharthbhai's case (supra), the Supreme Court held that even when a partner retires and some amount is paid to him towards his share in the assets, it should be treated as falling under clause (ii) of section 47. Therefore, the question was answered in favour of the assessee and against the revenue. Section 47(ii) which held the field at the material time provided that nothing contained in section 45 was applicable to certain transactions specified therein and one of the transactions specified in clause (ii) was distribution of the capital assets on a dissolution of a firm. Section 47(ii) was subsequently omitted by the Finance Act of 1987 with effect from 1-4-1988. Simultaneously, sub-section (4) of section 45 came to be inserted by the same Finance Act. Sub-section (4) of section 45 provides that 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. The fair market value of the assets 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 for the purpose of section 48. Ex facie sub-section (4) of section 45 deals with a situation where there is a transfer of a capital asset by way of a distribution of capital assets on the dissolution of a firm or otherwise. Evidently, on the admitted position before the Court, there is no transfer of a capital asset by way of a distribution of the capital assets, on a dissolution of the firm or otherwise in the facts of this case. What is to be noted is that even in a situation where sub-section (4) of section 45 applies, profits or gains arising from the transfer are chargeable to tax as income of the firm.”

We have also observed that in a recent judgment delivered by the Mumbai-Tribunal in the case of Smt. Hemalata S. Shetty v. ACIT in ITA No. 1514/Mum/2010 for the assessment year 2006-07 vide orders dated 1st December, 2015 . the Mumbai-Tribunal held that the said amount received by the partner on retirement from the partnership is not taxable in the hands of the retiring partner. Similar view has been taken by the Chennai-Tribunal in the case of Vikas Academy v. ITO [2015] 154 ITD 693 (Chennai-Trib.) . The Revenue has relied upon decision of Sudhakar M Shetty(supra) and the Mumbai-Tribunal in the case of Mrs. Hemlata S. Shetty (supra), wife of Mr. Sudhakar M Shetty(supra) vide orders dated 01.12.2015 with respect to receipt by the partner on retirement from the partnership firm after considering the decision of Mr Sudhakar M Shetty(supra) which was delivered on 09-09-2010 and the decision of the Courts subsequent to the decision of

Sudhakar M Shetty(supra) has held that the receipt on retirement from partnership firm is not taxable in the hands of the retiring partner. The decision of the Mumbai-Tribunal in the case of Mrs Hemlata S Shetty(supra) in ITA no. 1514/Mum/2010 delivered on 01.12.2015 is reproduced below :

“These appeals are filed by the assessee against the order of the CIT(A) for A.Y. 2006-07. In ITA No. 1514/Mum/2010 assessee raised the following grounds: -

“1. The CIT(A) erred in law and on facts in upholding the action of the AO that the amount received by the Appellant on retirement from partnership firm M/s. D.S. Corporation is taxable under the head “Capital Gains” on the mistaken belief that “retirement from partnership” amounts to “transfer” within the meaning of section 2(47) of the I.T. Act.

2. The CIT(A) failed to appreciate the facts of the case and the relevant law on the subject.

3. The CIT(A) erred in not following the judgement of the Supreme Court and of the Jurisdictional Court.

4. The CIT(A) erred in construing the deed of retirement, under which no transfer had taken place, and without transfer there can be no Capital gains tax liability.”

2. Assessee is an individual and she joined on 16.09.2005 a partnership firm M/s. D.S. Corporation as a partner having 20% profit sharing ratio therein. She retired from the said partnership firm M/s. D.S. Corporation on 27.03.2006. At the time of retirement she received a sum of

Rs.30,87,98,088/- from the said firm M/s. D.S. Corporation. However, as observed by the learned Assessing Officer, the assessee did not disclose the aforesaid receipt of Rs.30,87,98,088/- as her income in the relevant assessment year 2006-07. Search & Seizure action u/s. 132 of the Act were carried out in assessee's premises on 18.01.2007. Notices u/s. 153A, under section 143(2) and 142(1) of the Act were issued and duly served upon the assessee. Assessee was confronted and requested to explain as to why the amount received in excess of principal capital contribution amounting to Rs.30,87,98,088/- from the said firm M/s. D.S. Corporation should not be treated as short term capital gain and brought to tax. The concerned Assessing Officer has considered the submission on behalf of assessee but did not accept the plea of the assessee for the reasons given in the assessment order, which is reproduced hereunder.

“The explanation of Smt. Hemlata Shetty is not acceptable. The scheme of things is detailed hereinafter

- I. A partnership firm was formed between 2 persons Shri Sudhakar Shetty - 40% and Shri Rakesh Kumar Wadhawan - 60% on 01.08.2005.*
- II. The original capital contributions being Rs.3,20,50,000/-.*
- III. Thereafter, the land being Unity Compound was purchased in the year 2006, on a total consideration of Rs.6.50 crores.*
- IV. Smt. Hemlata Shetty becomes a partner in M/s. D.S. Corporation on 16.09.2005. The profit sharing ratio is divided into Shri Rakesh Kumar Wadhwan - 60%, Shri Sudhakar Shetty - 20% and Smt..*

Hemlata Shetty - 20%. The capital contribution Rs.1,24,50,000/- and Rs.52,50,000/- respectively.

- V. *3 new members were introduced on 23.09.2005 and the profit sharing ratios were revised as follows*

Mr. Rakesh Kumar Wadhawan - 35%, Mr. Sudhakar Shetty - 20%, Mrs. Hemlata Shetty - 20%, Prithvi Realtors & Capital Pvt. Ltd. - 20% (new), Mr. Sarang Rakesh Kumar Wadhawan - 5% (new). All the new members were related to/connected/controlled by Shri Rakesh Kumar Wadhawan.

- VI. *This land was valued in the balance sheet of M/s. D.S. Corporation on 2006 and the land was revalued at Rs. 194.78 crores.*

- VII. *The sum of Rs.194.78 crores was received by M/s. D.S. Corporation from M/s.HDILL.*

VIII. A sum of Rs.30.88 crores gave to Shri Sudhakar Shetty and Rs.30.88 crores to Ms. Hemlata Shetty, upon their receipt from the firm M/s. D.S. Corporation.

- VIII. *The revaluation of land resulted in a notional profit of Rs.154.40 crores, resulting in 20% share each of Shri Sudhakar Shetty and his wife, at Rs.30.88 crores each respectively. These amounts were received by the Shetty's and were duly credited in their bank accounts.*

IX. No tax was paid on these revalued profits on the plea that these were amounts exempt as per provisions of Section 10(2A) of the I.T. Act, 1961."

3. The matter was carried before the first appellate authority wherein various contentions were raised on behalf of the assessee and having considered the same CIT(A) confirmed the order of Assessing Officer. Same has been opposed before us, inter alia, submitting that CIT(A) should have allowed the appeal of assessee. For the same assessee raised various legal and factual submissions and requested to allow the claim of assessee prayed. On the other hand the learned D.R. supported the order of Assessing Officer and submitted that the order of ITAT in the case of Shri Sudhakar Shetty should be followed because it is based on the similar facts.

4. After going through rival submissions and material on record we find that the Tribunal in the case of husband Shri Sudhakar Shetty has decided the issue against the assessee by observing as under: -

"2.5 In the light of the above, more specifically, when the issue has been settled by the Hon'ble jurisdictional High Court, we find merit in the appeal of the assessee. The Hon'ble Apex Court as discussed by the Hon'ble jurisdictional High Court in the aforesaid case also, in CIT vs. R. Lingamallu Rajkumar (2001) 247 ITR 801 held that amounts received on retirement by a partner is not subject to capital gains tax. Our view is also fortified by the decision by the Coordinate Bench in ACIT vs. Shri N. Prasad, Executive Chairman Secunderabad (ITA No. 1200/Hyd/2010) order dated 27/10/2014."

5. In this regard the learned Authorized Representative for the assessee requested that after the decision was taken in the case of Shri Sudhakar Shetty, the Department, following decision in case of Shri Sudhakar Shetty's case reopened the case of the firm, M/s. D.S. Corporation wherein Shri Sudhakar Shetty and Mrs. Hemlata Shetty, assessee were partners. The Department under provisions of section 45(4) of the Income Tax Act has assessed the same income in the hands of the firm. Thus, according to the learned Authorized Representative for the assessee the Department has realized the mistake that it cannot assess the partners on account of income received on retirement under section 45(4) of the Act. This fact was not before the ITAT at the relevant point of time when the case of Shri Sudhakar Shetty was decided. So the decision of ITAT in the case of Shri Sudhakar Shetty should not be followed because it was decided in different facts and circumstances which have changed because of subsequent developments as discussed above.

6. The doctrine of judicial precedents; judicial discipline and *res judicata* have been evolved to ensure stability and certainty in law otherwise any judge could take any view on the interpretation of the law resulting in chaos. The judgement of the High Court in the state is binding as a judicial precedent in that state is 'ratio decidendi'. The expression *ratio decidendi* means the underlying principle, viz., the general reasons upon the decision has been rendered. It has to be ascertained by analysis of the facts of the case and the process of reasoning involving major premise consisting of rule of law, either statutory or judge made and a major premise consisting of material facts of the case under consideration. There cannot be a judicial precedent on a question of fact. It is only the legal principle laid down on the basis of fact and the law that becomes judicial precedent. The precedent may not be binding when

the judgement is per incurium i.e. in ignorance of the law or contrary to the law or its own earlier decisions of own or by inadvertence.

Sometimes, there are conflicting judgements of the same court and the question arises whether latter judgement or earlier judgement becomes a binding precedent. In such a situation, if the two decisions are delivered by a Bench of equal strength, latter judgement may be followed specially when the earlier judgement is referred while deciding the matter in latter judgement. The same has happened in assessee's case. After the judgement in the case of Shri Sudhakar Shetty decided on 9th September, 2010 by "E" Bench, the similar matter was decided by the "E" Bench in the case of R.F. Nanigrani, HUF vs. DCIT in ITA No. 6124/Mum/2012 on 10th December, 2014 wherein the decision in the case of Shri Sudhakar Shetty was also referred. In the said case the issue before the Tribunal was whether the amount of Rs.14,15,61,370/- received from partnership firm Landmark Developments on retirement is a capital gain chargeable to tax? This issue was very similar to the issue in the case before us. While deciding the same ITAT "E" Bench, Mumbai in R.F. Nanigrani, HUF (supra) reversed its own decision taken in the case of Shri Sudhakar Shetty and decided the matter in favour of the assessee. While deciding the matter ITAT observed as under: -

"2.5 In the light of the above, more specifically, when the issue has been settled by the Hon'ble jurisdictional High Court, we find merit in the appeal of the assessee. The Hon'ble Apex Court as discussed by the Hon'ble jurisdictional High Court in the aforesaid case also, in CIT vs. R. Lingamallu Rajkumar (2001) 247 ITR 801 held that amounts received on retirement by a partner is not subject to capital gains tax. Our view is also fortified by the decision by the Coordinate Bench in ACIT vs. Shri N. Prasad,

Executive Chairman Secunderabad (ITA No. 1200/Hyd/2010) order dated 27/10/2014.”

It was further brought to our knowledge by the learned Authorized Representative for the assessee that the Hon'ble Member who delivered the decision in the case of ACIT vs. N. Prasad, Executive Chairman, Secunderabad was the same Member who delivered the judgement in the case of Shri Sudhakar Shetty. While deciding the case of Shri N. Prasad (supra) the Member clearly mentioned that they are bound by the decision of the jurisdictional High Court. It is pertinent to mention that in the case of R.F. Nagrani, HUF the ITAT “E” Bench decided the matter on the basis of later judgement of the Hon'ble Bombay High Court in case of CIT vs. Riyaz A. Shaikh (2014) 41 Taxman.com 455 (Bom) was not available when the matter of Shri Sudhakar Shetty was decided.

7. We find that in Palitana Sugar Mills P. Ltd. vs. State of Gujarat (AIR 2007 SC 1701 it was observed as under: -

“It is well settled that the judgments of this Court are binding on all the authorities under Article 141 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and/or the judgment of this Court in the earlier proceedings had only collaterally or incidentally decided the issues raised in the show cause notices. Such an attempt to belittle the judgments and the orders of this Court to say the least is plainly perverse and amounts to gross contempt of this Court... Courts have held in a catena of decisions that where in violation of an order of this Court, something has been done in disobedience, it will be the duty of this Court as a policy to set the wrong right and not to allow the perpetuation of the

wrong doing. In our opinion, the inherent power will not be available under section 151, CPC as available to us in such a case but it is bound to be exercised in that manner in the interest of justice and public interest."

From the above decision of the Hon'ble Supreme Court the following proposition emerges: -

"(a) It is immaterial that in a previous litigation the particular petitioner before the Court was or was not a party, but if law on a particular point has been laid down by the High Court, it must be followed by all authorities and Tribunals in the State.

(b) The law laid down by the High Court must be followed by all authorities and Tribunals when it has been declared by the highest court in the State and they cannot ignore it either in initiating proceedings or decision on the rights involved in such a proceeding.

8. In this regard, we find that the Hon'ble Bombay High Court in the case of Siemens India Ltd. & Anr vs. K. Subramanian, Income tax Officer (1983) 34 CTR 23 observed in para 24 of their order as under:

"24. In East India Commercial Co. Ltd. vs. Collector of Customs, Calcutta, AIR 1962 SC 1893, the Supreme Court held that an administrative authority or Tribunal cannot ignore the law declared by the highest Court in the State. The Supreme Court pointed out that taking into consideration the provisions of Arts. 215, 226 and 227 of the Constitution it would be anomalous to suggest that a Tribunal over which the High Court had superintendence can ignore the law declared by that Court and