

- 3) *That there being no transfer u/s 2(47) of IT Act 1961, the assumption u/s 45(4) that there was a transfer is incorrect.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in recording a finding that the provisions of sec 45(4) is applicable on transfer of assets as this provision covers transfer arising on dissolution of the firm or otherwise and the term "otherwise" used in the section does not include retirement.*
4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in applying provisions of sec 45(4) to confirm the assessment of capital gains even though the Assessing Officer had invoked the provision of sec 50B and 45(2) of the Income Tax Act.*
5. *Without prejudice to the above, the Ld. CIT(A) failed to appreciate that even if there was any transfer of asset such transfer pertained to only half of the property relating to the share of the outgoing partners as per Consent Terms and Deed of Retirement."*

2. Before us the assessee have moved an application vide letter dated 02.05.2013 which was filed on 06.05.2013 requesting for admission of the additional evidence which has come into existence subsequent to the filing of the appeal by the assessee before the Tribunal. This evidence consists of the following: -

- i) Copy of public notice for the auction of property- M/s. B.V. Jewels on 19.03.2013
- ii) Copy of Form of notice of Public Premises dated 15.04.2013
- iii) Copy of Cancellation of sub-lease agreement dated 18.03.2013
- iv) Copy of Sub-lease Agreement dated 14.09.1993

We noted that the issue involved in this appeal relates to the levy of capital gain on the assessee which was held as leased out property and was taken as transfer being made by the assessee situated at Seepz. The AO levied capital gain on the assessee firm by invoking provisions of Section 45(4) taking the fair market value of the said property at ₹8,59,06,527/-. We noted that the assessee is a partnership firm engaged in the business of manufacturing jewellery. During the impugned assessment year assessee filed its return declaring total loss of ₹61,257/- on 31.03.2009 in response to the notice issued under section 148. There were two groups, Shah

Group and Mehta Group carrying on the business of manufacturing jewellery in the name and style of M/s. B.V. Jewels and M/s. B.V. Star at Seepz, Mumbai. The jewellery business was carried on mainly through M/s. B.V. Jewels and family members of Mehta Group were actively involved in the day to day functioning of both the firms. Mehta Group used to manage the business and maintained the accounts of both the firms on behalf of Shah Group but in due course serious differences, disputes have arisen between the two firms in respect of the business of M/s. BV. Star and M/s. B.V. Jewels. Therefore both the groups filed cases against each other in the court of law. Due to the presence of arbitration clause in the partnership deed the court directed the parties to resolve the issue through arbitration. Accordingly, both the groups referred the differences' and disputed to Justice D.R. Dhanuka (Retd.), Justice S.M. Jhunjhunwala (Retd.) and Shri Arun R. Mehta in arbitration proceedings which concluded ultimately and parties agreed by way of consent terms dated 08.04.2004. Further, consent terms dated 12.05.2004 and a common consent award was ultimately passed on 19.04.2004. As per the consent award it was decided as under: -

- I. Shah Group will retire from the firm B.V. Jewels and Mehta Group will retire from the firm B.V. Star, w.e.f. from close of business on 31st March, 2004. Separate Deed of Retirement of M/s. B. V. Jewels and M/s. B. V. Stars to be drafted with effect from 1st April, 2004.
- II. B.V. Jewels to be retained by Mehta Group with all assets including stock, recoveries and bank balances.
- III. B. V. Stars to be retained by Shah Group:
 - a. Building in Seepz to be jointly owned by Mehta Group.
 - b. Stock, recoveries and bank balances to be allotted to Mehta Group.
 - c. Machineries and other moveable to be divided between two groups equally.
 - d. Liabilities of B.V. Jewels towards Vysya Bank up to 4 crore is of Mehta Group and excess over Rs. 4 crore to be divided in equal proportion.
 - e. All cars allotted to Mehta group.
 - f. Right in the Bharat Diamond Bourse allotted to Shah Group.
 - g. Four flats of Shanti Nagar allotted to Shah Group.

- h. Workman & retrenchment compensation liabilities to be borne by Mehta Group.

On separation as per arbitration award M/s. Mehta Group, who had been managing the affairs of the firm and as well maintaining the accounts, declined to hand over the accounting records along with the Balance Sheet and Profit & Loss Account of the assessee firm in order to enable it to maintain accounts thereafter as the firm retained by Shah Group The learned A.R. further contended that due to this assessee was not in a position to prepare Balance Sheet, Profit & Loss Account and other books of account for assessment years 2004-05, 2005-06 and 2006-07 as required by the AO during the course of assessment proceedings. The AO, therefore, completed the assessment ex-parte under section 144. The assessee also could not get the documents in respect of the income which has been assessed by the AO.

3. The assessee went in appeal before the CIT(A) and the Tribunal. The appeal before the Tribunal was filed on 22.05.2012. The impugned property in respect of which capital gains been assessed by the AO was lease hold property and the assessee got the notice for auction of the said property on 19.03.2013 as the lease of the property was cancelled. Thus, it was contended that these documents which are being filed now have vital bearing on determination of capital gain in the hands of the assessee. The assessee could not file these documents before the AO or CIT(A) as the documents have come to the assessee only subsequent to the orders of the AO and CIT(A).

4. The learned D.R., on the other hand, agitated that these documents should have been filed before hand.

5. We are convinced with the submissions of the learned A.R. and we noted that all these documents are being filed now will have bearing on determination of capital gain. We, therefore, admit the additional evidences. Since these evidences were not before the AO, we set aside the assessment order and direct the AO to frame a fresh assessment on the assessee after considering all these evidences in accordance with law. The

assessee is also directed to produce all these evidences before the AO and cooperate with the AO while making the assessment.

6. In the result, the appeal filed by the assessee is statistically allowed.

Order pronounced in the open court on 11th October, 2017.

Sd/-
(R.L. Negi)
Judicial Member

Sd/-
(P.K. Bansal)
Vice President

Mumbai, Dated: 11th October, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -39, Mumbai*
4. *The CIT, Central - II, Mumbai*
5. *The DR, "D" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.