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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI PAWAN SINGH, JM

I.T.A. Nos. 6491 & 6963/Mum/2016
(Assessment Year: 2010-11 & 2008-09)

I.T.O-16(3)(3), Room NO. 448, 4th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	Ramal P. Advani 6, Renukar Building, Linking Road, Bandra (W), Mumbai-400 050
PAN/GIR No. ABZPA 0965 G		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Ram Tiwari
Respondent by	:	Shri Nilesh Zaveri

Date of Hearing	:	26.06.2018
Date of Pronouncement	:	27.08.2018

O R D E R

Per Shamim Yahya, A. M.:

These are appeals by the Revenue against the respective orders of the ld. Commissioner of Income Tax (Appeals) for the assessment years 2008-09 and 2010-11 in case of the same assessee.

2. The common grounds of appeal raised read as under:

1) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the A.O amounting to Rs.2,33,58,240/- on account of Long Term Capital Gain.
2) The Ld. CIT(A) has erred in ignoring the fact in the absence of a valid firm, there cannot be any dissolution and since the payment of Rs.2.95 Crs was made to the assessee on settlement of arbitration proceedings, it has been rightly taxed in the hands of the assessee as 'Capital Gain'.
3) The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing officer be restored.

3. The facts for both the years are same and identical. In assessment year 2010-11 the assessment was made on substantive basis and for assessment year 2008-09, it was made on protective basis. For assessment year 2008-09 the addition was made subsequent to the reopening. For assessment year 2008-09, the assessee has also challenged the reopening before the ld. Commissioner of Income Tax (Appeals). However, the ld. Commissioner of Income Tax (Appeals) has confirmed the validity of reopening.

4. In his order for assessment year 2008-09, on merits of the issue, the ld. Commissioner of Income Tax (Appeals) referred to his order for assessment year 2010-11 where on the same issue, on the substantive addition he had deleted the addition. Referring to the same, the ld. Commissioner of Income Tax (Appeals) deleted the protective addition for assessment year 2008-09 also. In this background, we refer to the facts in the present case which reads as under:

> The facts leading to the addition are that the appellant was a partner with Mrs. Vandana Suresh Punwani in a partnership firm known as M/s. Vinky Developers since 22.10.1988 with profit sharing ratio of 50:50. The partnership firm was not registered. The firm had acquired development right in a plot owned by St. Peter's Church, Hill Road, Bandra, Mumbai in the year 1989 for Rs. 20,00,000/-. Subsequently, there was dispute between two partners and matter was referred to sole arbitrator, Justice Dr. B.P. Saraf, retired Chief Justice of J & K. The arbitration consent was awarded on 09.08.2007. The assessee retired from the partnership firm and in lieu of his retirement, he got Rs. 3.33 crores in post-dated cheques. Since the cneques were not honoured, the appellant moved to the Hon'ble Bombay High Court. The Hon'ble Bombay High Court vide its order dated 07.08.2008 directed the other partner, Mrs. V. S. Punwani to pay Rs. 2.95 crores. Against the above background, the AO asked the assessee as to why the said amount of Rs. 2.95 crores should not be taxed under the head capital gain. In response thereto, the assessee stated that there were only two partners in above partnership firm and there was deemed dissolution of said firm pursuant to retirement of the appellant as per the consent decree/arbitration award. The appellant further stated that sec 45(4) is applicable to the present facts as there was

transfer/distribution of capital assets, being development right of Bandra plot, by the firm in favour of the other partner, Mrs. Punwani. The money received by the appellant from retirement/dissolution of a firm is not taxable in his hands and is a capital receipt and if at all any tax has to be paid, it has to be paid by the firm. He relied on various decisions including the decisions of Bombay High Court. He also claimed that various other expenses incurred for the arbitration proceedings and litigation should be allowed. The assessee also claimed deduction u/s.55F of the Act. The AO did not accept the contention of the appellant and stated the firm, Vinky Developers was not registered. The firm carried on no activity. The appellant had also filed no return of income. Therefore, there was no existence of the above firm. In view of the above facts, the AO held that the acquisition of development right in the Bandra plot was held jointly by two individuals i.e. assessee and Mrs. Punwani. The AO further held that in lieu of relinquishment of assessee's right in the development right of the Bandra property, he had received amount of Rs. 2.95 crores and such amount is taxable u/s 45 of the Act The AO thereafter, allowed indexed cost of acquisition and also allowed deduction u/s 54 and determined long-term capital gain at Rs. 2,33,58,240/-and added it to the total income.

5. Upon the assessee's appeal, the ld. Commissioner of Income Tax (Appeals) noted that according to the Assessing Officer the partnership firm Vinky Developers was not in existence because it was neither registered nor any activity was carried on by it. That no return of income was filed by it. In this regard, the ld. Commissioner of Income Tax (Appeals) noted that there was a valid partnership deed between the assessee and Mrs. Vandana Suresh Punwani which had been taken cognizance by Justice Dr. B.P. Saraf, retired Chief Justice of J & K in the arbitration proceedings between the partners and subsequently by the Hon'ble Bombay High Court. The ld. Commissioner of Income Tax (Appeals) gave a finding that he has perused the copies of partnership deed and agreement for the development right in respect of the plot between the Vinky Developers and St. Peter's Church, order of the arbitration award and the order of the Hon'ble Bombay High Court. The ld. Commissioner of Income Tax (Appeals) observed that from

the perusal of the above, it was clear that there was a valid partnership deed between Mrs. V. S. Pulwani and Mr. R. P. Advani (assessee). That the partnership has a profit sharing ratio of 50:50. That duration of partnership was "AT WILL". That the agreement of acquisition of development right was also in the name of the firm M/s. Vinky Developers and not in the name of the assessee. In the arbitration award also reference to the partnership firm Vinky Developers was made. After the payment of sum involved which Mrs. Punwani would be the sole property of M/s. Vinky Developers was also mentioned in the award. In these circumstances, the ld. Commissioner of Income Tax (Appeals) held that the partnership firm cannot be doubted and the same is established. Thereafter, the ld. Commissioner of Income Tax (Appeals) referred to the sequence of events as mentioned hereinabove. He observed that the assessee has received a sum of Rs.2.95 crs. for retirement from the partnership firm and not for relinquishment of right in property at Bandra. He observed that assessee did not have any right in the property at Bandra. That only the partnership firm, M/s. Vinky Developers had a right in the impugned property. Since the assets and liabilities of the firms were taken over by Mrs. Punwanit, the same amounts to distribution of assets by the firm on dissolution to her. The ld. Commissioner of Income Tax (Appeals) opined that the provisions of section 45(4) of the Act will apply.

6. In this connection, the ld. Commissioner of Income Tax (Appeals) referred to the Hon'ble Bombay High Court decision in the case of *CIT vs. A. N. Naik* 265 ITR 346. On the facts and circumstances of the case, the said amount received was a capital receipt not

taxable in the hands of the assessee. In this connection, the ld. Commissioner of Income Tax (Appeals) referred to the certain other case laws from the Hon'ble Andhra Pradhesh High Court in the case of *Chalasani Venkateswara Rao vs. ITO* [2012] 349 ITR 423 (AP). Following these cases laws, the ld. Commissioner of Income Tax (Appeals) held that the liability of capital gain cannot be fastened in respect of payment of Rs.2.95 crores received by the assessee from the other partner.

7. Against the above order, the Revenue is in appeal before us.

8. We have heard both the counsel and perused the records. The ld. Departmental Representative relied upon the orders of the Assessing Officer.

9. Per contra, the ld. Counsel of the assessee relied upon the findings given by the ld. Commissioner of Income Tax (Appeals). He reiterated that the assessee has received the amount of money pursuant to the dissolution of the firm and in these view of the matter, he claimed that the amount involved was capital receipt, not exigible to taxation. In this connection, the ld. Counsel of the assessee stated that the Assessing Officer's observation that there was no existence of the partnership firm and, hence, the amount received cannot be considered to have been received pursuant to the dissolution of the partnership deed, is not sustainable and has rightly been so found by the ld. Commissioner of Income Tax (Appeals). In this connection, the ld. Counsel of the assessee's submissions *inter alia* reads as under:

> In present case, the following relevant facts exists which confirm the existence of the partnership firm M/s Vinky Developers

- The partnership is evidenced by a written deed executed on 22nd October, 1988
- The Firm had opened the bank account in its name with corporation bank after incorporation.
- Deed contains provision for sharing profits and loss 50:50.
- Partners have contributed the initial capital equally.
- The Agreement for acquisition of development right in respect of plot at Bandra from St. Peter's church has been executed on 9th June,1989 by the assessee as agent on behalf of the firm Vinky Developers and his partner and sum of Rs 5,00,000/- was paid as consideration to St Peter's Church by issuing Pay order & cheque from the said account on behalf of the firm.
- The Supplemental Agreement on 28th March, 1996 (i.e. after more than 6 years 9 months) with St. Peter's Church was also executed on behalf of the firm M/s Vinky Developers by putting their signature as partners.
- Even, when the matter was referred for arbitration proceedings, both the partners have admilled that they were partners and consent award was passed whereby the assessee was to retire from the said firm(s) as partner on receiving consideration of Rs 3.33 crore through post dated cheques due in FY 2007-08 handed over to him by Vandana Punwani, who continued as proprietor of the said firms thereafter.
- Even in the Conveyance deed executed by Mrs Vandana Punwani as proprietor of Vinky Developers on 17th April, 2010 in respect of the Bandra Property (copy whereof was handed over to AO during assessment proceedings refer page nos. 143 to 169 of paper book) the said facts are reaffirmed. Your attention is drawn to page 4 clause (f), page 5 clause (g), page 6 clauseQ), Page 7 clause (o) & page 8 clause (q) which reiterates the same facts again stated hereunder:

i. That Vinky Developers was a partnership firm of the assessee & Vandana Punwani,

ii. That the said firm had acquired development rights from st peter's church vide agreement dated 9lh June, 1989 as also supplemental agreement modifying the consideration & other terms was executed by the said firm,

iii. That subsequently dispute arose between the partners of Vinky Developers i.e. assessee and Vandana Punwani & matter was referred to Arbitration before Dr B P Saraf

iv. All the disputes between the parties (i.e. the Partners of Vinky Developers) were resolved under the consent terms dated 06/07/2007 which culminated into consent award dated 9/8/2007 made by the learned Arbitrator.

If all this evidences are considered together then, it is crystal clear that

1. Vinky Developers the firm existed and
2. the fact that appellant received consideration for retirement from the firm and not for relinquishment of right in property at Bandra.

9. In this regard, the ld. Counsel of the assessee placed reliance on several case laws which reads as under:

- CIT vs. R. Lingmallu Raghukar (124 Taxman 127 (SC))
- ACIT vs. Mohanbhai Pamabhai (165 ITR 166 (SC))
- CIT vs. Riyaz A. Sheikh (41 taxmann.com 455)(Bom)
- Prashant S. Joshi vs. ITO (324 ITR 154) (Bom.)
- Sharadha Terry Products Ltd vs. Asst. CIT (180 TTJ 284) (Chennai-Trib)
- Chalasani Venkateswara Rao vs. ITO (349 ITR 423) (AP)
- ACIT vs. N. Prasad (153 ITD 257) (Hyd.)
- Mahul Construction Corporation vs. ITO (88 taxmann.com 181) (Mum-Trib)
- Amit Kumar Choudhury vs. DCIT (2018) (2 TMI 1368)(Kol)
- Shri Sachin Bhausaheb Nikam vs. DCIT (2016) (10TMI554)(Pune)
- Ajay Kumar Doshi vs. Asst. CIT (2015) (12 TMI 1750)(Kol)
- R. F Nangrani HUF, vs. DCIT and vice versa (2014) (12 TMI 11 75) (Mum-Trib)
- DCIT vs. Mohmed Yusuf Ismail Tadha (2014) (11 TMI606)(Guj)
- Smt. Hemlata S. Shetty vs. ACIT (2015) (12 TMI 11 74) (Mum-Trib)
- ITO vs. Om Namah Shivay Builders & Developers (43 SOT 397) (Mum)
- Davangere Maganur Bassappa vs. ITO (325 ITR 139)(Kar)
- ITO vs. Marketers (24 SOT 59) (Amritsar) (URO)
- Suvardhan vs. CIT (156 Taxman 229) (Kar)

10. Upon careful consideration, we note that the assessee has received the impugned amount from the other partner in the firm M/s. Vinky Developers. The basis of A.O.'s order in this case is that according to him there is no existence of partnership firm. However, this finding is not in accordance with the documents on records. As rightly noted by the ld. Commissioner of Income Tax (Appeals), there is a valid written partnership deed, wherein profit sharing ratio is 50:50. The partners have contributed initial capital equally. The firm had opened bank account also after incorporation. The agreement for acquisition of the development right in respect of the plot at Bandra was executed on 09.06.1989 by the assessee as agent on behalf of the firm, M/s. Vinky

Developers. The supplementary agreement in this regard was also executed on behalf of the firm M/s. Vinky Developers. In the arbitration proceedings also both the partners admitted that they were partners. In the concerned award passed, it was clearly mentioned that the assessee was to retire from the said firm in lieu of the consideration to be given to him by Mrs. Vandana Suresh Punwani who was to continue as proprietor of the said firm thereafter. In these circumstances, the Assessing Officer's premise that there was no existence of the partnership firm, is not sustainable. Furthermore, the arbitration award clearly mentions that the amount is being paid to the assessee upon his retirement from the partnership firm. Since the partnership firm consists of two firms which got dissolved upon his retirement so the proceeds have to be considered as sum received pursuant to the dissolution of the partnership firm and/or retirement of the assessee from the partnership firm. The matter has even travelled to the Hon'ble Bombay High Court and the arbitration proceeding has been considered by the Hon'ble Bombay High Court also. Hence, the sum received by the assessee is clearly pursuant to the retirement of the assessee from the firm which cannot be taxed as capital gain. The agreement of acquisition of the development right was also in the name of the firm M/s. Vicky Developers and not in the name of the assessee. Hence, the Assessing Officer's reference that the same was received by the assessee pursuant to his relinquishment of his right in the development right is not sustainable, as the assessee has no individual right in the said agreement. In this connection, the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Riyaz A. Sheikh* [2014] 41 taxmann.com 455 (Bom) supports the case of the assessee. In this case, it was held that the amount received by an erstwhile partner on his retirement from

partnership firm arising on transfer of goodwill is not liable to be taxed as long term capital gain. Similar view was expounded by the Hon'ble Apex Court in the case of *CIT vs. R. Lingmallu Raghukar* (124 taxman 127 (SC)). In this case it was held that excess amount received by assessee on retirement from partnership firm was not assessable to capital gains as there was no transfer of any assets as contemplated by expression 'transfer' as defined in section 2(47) of the Act.

11. In the background of the aforesaid discussion and precedent, we hold that the Assessing Officer's view that there was no partnership firm and the amount received by the assessee cannot be said to be receipt on account of his retirement from the firm, is not sustainable. Accordingly, we do not find any infirmity in the order of the ld. Commissioner of Income Tax (Appeals) and accordingly we uphold the same.

12. In view of the aforesaid discussion, the order of the ld. Commissioner of Income Tax (Appeals)'s for both the years is upheld and accordingly, the appeals by the Revenue stand dismissed.

13. In the result, the appeals filed by the Revenue stand dismissed.

Order pronounced in the open court on 27.08.2018

Sd/-	Sd/-
(Pawan Singh) Judicial Member	(Shamim Yahya) Accountant Member

Mumbai; Dated : 27.08.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai