

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.3909/M/2018
Assessment Year: 2009-10**

Dr. Vithal V. Kamat, 70-C, Nehru Rd., Vile Parle (E), Mumbai – 400 099 PAN: AACPK9087H	Vs.	Joint Commissioner of Income Tax-8(2), 2 nd Floor, Aayakar Bhavan, M.K. Marg, Mumbai - 400051
(Appellant)		(Respondent)

**ITA No.3870/M/2018
Assessment Year: 2009-10**

Deputy Commissioner of Income Tax-10(1)(2), R.No.209, Aayakar Bhavan, M.K. Road, Mumbai – 400 020	Vs.	Dr. Vithal V. Kamat, 70-C, Nehru Rd., Vile Parle (E), Mumbai – 400 099 PAN: AACPK9087H
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vijay C. Shah, A.R.

Revenue by : Shri Sushilkumar Poddar, D.R.
Shri Rajeev Gubgotra, D.R.

Date of Hearing : 06.11.2020

Date of Pronouncement : 06.11.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The above tilted cross appeals have been preferred by the assessee and the Revenue against the order dated 21.03.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2009-10.

2. The facts in brief are that the assessee filed return of income on 29.09.2009 declaring total income at Rs.2,63,86,107/- which was processed under section 143(1) of the Act. Thereafter, the case of the assessee was selected under scrutiny and statutory notices under section 143(2) of 142(1) were issued and duly served upon the assessee. The assessee is an individual and is engaged in the business of hotel consultancy. During the year, the assessee derived income by way of salary from M/s. Kamat Hotels India Pvt. Ltd. in the capacity of a director Rs. 51,92,900/-, income from business of Rs.29,419/- and income from other sources of Rs.2,12,63,788/-.

3. The grounds raised by the Revenue are reproduced as under:

"1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding the consideration received is retirement benefit without appreciating the fact that the same is in the nature of capital gain.

2. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in treating the same as retirement benefit without appreciating that the other partners of the firm have transferred the land of the project which was treated as long term capital gain and the assessee has taken the shade of the deed to avoid tax as per the provisions of sec. 45 of the Act.

3. On the facts and in the circumstances of the case and in law the Ld. CIT(A) failed to appreciate that consideration received by the assessee is towards the transfer of rights in the buildings, health club etc. which is a capital and the same is taxable as long term capital gain.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made under section 14A read with Rule 8D(2) of Income-tax Rules, 1962 holding that 'no disallowance has to be made' where no exempt income was earned by the assessee in spite of the extant of circular of CBDT bearing No.05/2014 dated 11.02.2014 wherein the Board has clarified that provisions of section 14A of the Act are applicable in the cases of investments in shares which has not yielded any dividend/exempt income.

5. On the facts and circumstances of the case and in law, Rule 8D(2) of the Income-tax Rules, 1962 can be applied even when no exempt income has been earned during the year on the investments made in as much as making such investments require systematic planning and management that cannot be performed without incurring any expenses, and, therefore, to cover such expenses

Rule 8D(2) of Income-tax Rules, 1962 is attracted even when no exempt income is earned.”

4. At the outset, the Ld. D.R. submitted before the Bench that ground No.4 & 5 in the Revenue’s appeal are not pressed and therefore dismissed as not pressed. Ground No.6 & 7 are general in nature.

5. The Revenue has raised a common issue in all these three grounds No.1 to 3 challenging the order of Ld. CIT(A) wherein the Ld. CIT(A) has held that consideration received by the partner of a firm upon retirement from the firm is in the nature of retirement benefit and no capital gain tax is attracted thereon as the said receipt was in the nature of retirement benefit.

6. The facts in brief are that during the course of assessment proceedings the AO noticed that assessee has credited a sum of Rs.45,67,74,730/- under the head “Exempt income and receipt” in the capital account and accordingly the assessee was called upon to furnish the detail of the said amount. The Ld. A.R. submitted before the AO during the course of assessment proceedings that assessee retired from the partnership M/s. Sports Field Construction in terms of deed of admission and retirement dated 04.04.2008. The assessee got his accounts audited under section 44AB of the Act and in the audit report filed along with the return of income, the auditors have reported that assessee has received upon his retirement from M/s. Sports Field Construction a partnership firm on 04.04.2008 subject to takeover of debts and liabilities under the agreement dated 04.04.2008 net amount of Rs.45,67,74,731/- which is not taxable and is taken to the capital account as shown in the

balance sheet. Initially the assessee entered into a partnership business including construction and running of a club vide deed of partnership dated 06.05.1992 with the following partners:

i)	Smt. Amrabai Malsi	21.42%
ii)	Smt. Velbai Devsi Shah	21.42%
iii)	Shri Bipin Talakshi Shah	3.58%
iv)	Smt. Hirbai Nanji Sojpal	3.58%
v)	Shri Smir P. Shah	25%
vi)	Shri Vithal V. Kamat	25%

7. The assessee retired from the said partnership on 04.04.2008 and relinquished his rights, title and interest in the partnership properties. The assessee's account with the partnership was settled on his retirement on 04.04.2008 and a sum of Rs.48.15 crore was received by him by way of retirement in full and final settlement of his account with the firm. The assessee filed the copy of deed of admission and retirement dated 04.04.2008 signed by the four incoming partners and retiring partner Mr. Vithal V. Kamat the assessee duly attested by the solicitor. The assessee received Rs.46.65 crore directly and Rs.1.50 crores deposited in Escrow Account. Besides, the assessee furnished before the AO the deed of reconstitution dated 04.04.2008 and copies of cheques issued by the firm to the assessee. The AO brushed aside the submissions of the assessee and came to the conclusion that the money received by the assessee from the partnership concern Rs.47,13,47,000/- after reducing Rs.1,01,86,000/- payment to the club members was in consideration of transfer of right, title and interest in the properties and as such held the same to be taxable under section 45(1) of the Act. According to the AO the said gain is a long term capital gain on the ground that the said right was acquired since 1992 and cost of acquisition is taken at nil

because assessee was having debit balance of Rs.1,00,04,690/- in the firm which shows that the amount introduced by the assessee for acquiring such rights stood withdrawn. Accordingly, the AO held that the amount received of Rs.48,15,00,000/- as reduced by the payments due to members of Rs.1,01,86,000/- is to be assessed as long term capital gain for the reasons namely;

“(1) Mr. Vithal V. Kamat entered into partnership with five others under the name and style of M/s. Sports Field Construction vide deed of partnership dated 06.05.1992 whose profit sharing ratio was reproduced hereinabove.

(2) Under the said deed of partnership the first four partners namely Smt. Amrabai Malsi, Smt. Velbai Devsi Shah, Shri Bipin Talakshi Shah and Smt. Hirbai Nanji Sojpal were brought in the partnership. The land measuring 15,260 sq. yard comprised in survey No.41L situated at Lokhandwala, Mumbai as their capital contribution with all right title and interest in the said land and were allotted in the partnership firm as stated hereinabove. As per clause 6 of the partnership deed the land was valued at Rs.5 crores which was treated as capital contribution of the above four partners in the firm and the other two partners Shri Samir P. Shah and Shri Vithal V. Kamat were to bring minimum of Rs.1.5 crore as their capital contribution in the firm as required from time to time. As per para 8 of the partnership deed any further capital contribution which may be required for the purpose of partnership business was to be contributed by Shri Samir P. Shah and Shri Vithal V. Kamat. As per clause (3) of the partnership deed, the objective of the partnership firm was to develop the said land into flats, shops and to construct health club in the name of Kamat Klub Lokhandwala and thus this was a limited venture partnership concern. The AO noted that assessee had physical possession of the said immovable property. Vide deed of admission and retirement dated 04.04.2008, the four partners were retired namely Smt. Amrabai Malsi, Smt. Velbai Devsi Shah, Shri Bipin Talakshi Shah and Smt. Hirbai Nanji Sojpal and four new partners were taken in the partnership in the M/s. Runwal Developers Pvt. Ltd. namely;

- (1) M/s. Runwal Developers Pvt. Ltd.
- (2) Subhash S. Runwal
- (3) Sandeep S. Runwal and
- (4) Suboth S. Runwal

According to the AO, the said deed was only signed by Mr. Vithal V. Kamat and not by other retiring partners. The AO also noted that the other partners sold their share in the land namely Shri Smt. Amrabai Malsi and Smt. Velbai Devsi Shah to M/s. Runwal Developers Pvt. Ltd. on 26.12.2007 for Rs.11 crore and

the amount was offered by the respective partners as long term capital gain in A.Y. 2008-09 and similarly Bipin T. Shah sold his share in the property to M/s. Runwal Developers Pvt. Ltd. for Rs.5.86 crores on which the said partner has duly paid taxes in the capacity of executor of will late Shri Nanji Sojpar and Smt. Hirbai Nanji. Thus according to the AO the said deed of retirement and admission dated 04.04.2008 was signed by four incoming partners and one by Mr. Vithal V. Kamat and thus held that amount received by the assessee is a consideration for transfer of capital assets and hence same is taxable under section 45(1) of the Act and ultimately added the same to the income of the assessee under the head "long term capital gain" by making addition of Rs.47,13,14,000/- by framing assessment vide order dated 26.12.2011 passed under section 143(3) of the Act.

8. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into consideration the contentions and submissions as raised by the counsel of the assessee during the course of appellate proceedings by observing and holding as under:

"4.4.1 The admitted facts related to these issues are:

(i) M/s. Sportsfield Construction, a partnership firm, was formed vide Deed of Partnership dated 6.5.1992. The objects of the partnership included development of the said plot of land, enter into agreements for sale of flats, shops to be constructed and to establish sports complex. The firm was validly constituted and duly registered with the Registrar of Firms vide entry dated 30th July, 1999. Initially the firm had 6 partners including the appellant as under:

(i)	Smt. Amratbai Malsi	21.42%
(ii)	Smt. Velbai Devsi Shah	21.42%
(iii)	Shri Bipin Talakshi Shah	3.58%

(iv)	Smt Hirbai Naji Sojpal	3.58%
(v)	Shri Samir P. Shah	25%
(vi)	Shri Vithal V. Kamat	25%

(ii) The partners (i) to (iv) above brought in a plot of land admeasuring 15,250 sq. yards forming part of survey No.41 situated at Lokhandwala, Andheri, Mumbai valued at Rs.1.50 crores as their capital contribution in the firm and were paid on account towards the credit balance of Rs.1.50 crores on transfer of the land to the firm. The firm continued its business along with the land owned by it till 7.4.2009.

(iii) Over a period of 16 years, there were changes in the constitution of the partnership firm viz., Smt. Hirbai Nanji, one of the partners, died on 22nd August 2001 and Shri Bipin Talakshi Shah her daughter's son was nominated in her place to have the benefit of all her share, right, title and interest in the firm and thus his share increased to 7.16% from 3.58%. Mr. Sameer Shah retired on 11th August, 2002 from the firm in terms of deed of retirement dated 29th January, 2003, and he transferred his share in the firm to the appellant thus the share of the appellant increased to 50%.

(iv) Four persons (three individuals and one company) from Runwal group were admitted as partners of the firm and agreed to bring in capital, simultaneously, the appellant opted to retire from the partnership firm as from 1 ,4.2008. The Deed of Admission and Retirement dated 4.4.2008 was executed by four incoming partners and the appellant and was witnessed by reputed law firms in Mumbai. The appellant gave public notice in three prominent news papers and received Rs. 48.15 Crores as amount towards retirement from the firm in settlement of his accounts in the firm's books.

(v) In order to verify the contention of the appellant the AO issued summons to the three outgoing and four incoming partners u/s 131 of the Act and recorded their statements of three outgoing partners and collected information from four incoming partners and used the same as evidence in making the assessment of the appellant, without giving opportunity to the appellant to cross-examine those evidences.

(vi) To deal with Gr. No. 1 above taken by the appellant in this appeal, my predecessor CIT(A), during the present appellate proceedings, directed the AO to allow the appellant to cross-examine the outgoing partners whose statements were recorded. From the statements of three partners recorded by the A.O. on 13.12.2011, information, provided by incoming partners on 15.12.2011 and during the cross-examination of the three partners held on 26.9.2016, genuineness of the partnership firm, its assets and the business, as well as continuity of the firm and the land in the ownership of the firm till 8.4.2009 was affirmed by the outgoing as well as the incoming partners. In fact, the three outgoing partners give irrecoverable power of attorneys to Runwals to deal with the partnership firm. The land owned by the firm Sportsfield Construction was transferred to one of the partners i.e Runwal Developers Pvt. Ltd., by Deed of Conveyance executed on 8.4.2009 by the three partners.

(vii) In para 6.11 of the assessment order the A.O. held that "*The above facts gathered *jg during the course of assessment proceedings show that the document*

titled as "Deed of admission and retirement" was apparently prepared to camouflage the transaction of transfer of development rights and right of possession by the assesses to the buyer of the Property (RDPL), as consideration given in consequence to the retirement of a partner. In fact, this document was merely a devise to avoid tax. In this context, reliance was placed by the A.O. on the judgment, of Apex Court in McDowell and Co. Ltd. Vs. CTO(1985) 154 ITR 148."

Accordingly, the A.O. concluded that the transaction in consequence to which the appellant received Rs.48.15 crore was nothing but an amount received on "transfer" [Section 2(47)] of "capital asset" [Section 2(14)] and hence the same is taxable u/s 45(1) of the Act. Under Para 6.13 of the assessment order the AO held as under:

"6.73 In view of the above, the amount of Rs. 47,13,14,000/- (after deducting payment of Rs. 1, 01, 86.000/- made to club members) received by the assessee as a result of transfer of right, title and interest in the property is taxable as capital gain under section 45(1) of the Act. This gain is assessed as long term capital gain of the assessee for the reason that the right was held since 1992 and the cost of acquisition is taken at Nil because the assessee was having debit balance of Rs. 1,04,690/-in the firm."

In the background of above admitted facts the rival submission is considered.

"4.4.2 What is material here for the adjudication of the controversy is the status of the claimed land which is held to have been transferred along with the share, if any, of the appellant to decide whether any amount was taxable on account of money received by the appellant on the retirement from the partnership firm.

4.4.3 Admittedly, the land was not owned by the appellant and was brought in as their contribution to the capital of the firm by other partners. The said land was transferred by those partners directly to incoming partner without any involvement of the appellant.

4.4.4 The admitted position of both the appellant and revenue, is that the appellant had no right or claim over the land which was contributed by the other partners and the sale of the same was done by those partners directly. If the arguments of the A.O. is to be accepted that the retirement of the appellant from firm was nothing but a disguised sale of capital asset being land, the consequential action is liable to be taken in the hands of those partners who owned the land and by whom the said land was transferred.

4.4.5 Admittedly, the land was transferred by the other partners who were the original owners of land and had brought the land to the partnership firm as their contribution towards capital of the firm. The said land stood reverted to those partners only after the appellant had retired from the partnership firm causing the moving out of the older partners and incoming of new partners and no right in the ownership of the subject land is stated to have been created in favour of the appellant either by the A.O. or the outgoing partners other than appellant who were examined by the A.O.

4.4.6 Once the appellant is not shown by the revenue to have any rights or share in the ownership of the land which admittedly was owned by the other partners and which was also sold by those partners only, it is not understood on what basis the A.O. has presumed that the money received by the appellant was on account of the sale of the land and therefore was liable to tax as the long term capital gains. For

invocation of the of section 45 of the Act, the ownership is a mandatory criterion. Unless it is shown by the A.O. that the capital asset said to have been transferred was owned by the appellant, the incidence of tax would not arise on account of such transfer in the hands of an appellant who is not the owner of the capital asset having been transferred.

4.4.7 In the instant case, it is the admitted position that the land was never owned by the appellant. The land was earlier owned by the partners other than appellant and once it was brought in the partnership firm as contribution to the capital by the partners other than the appellant, the ownership of the land stood vested in the partnership firm and once the appellant retired from the partnership firm vide Deed of Admission and Retirement dated 4.4.2008, the ownership of the land remained with the firm. The same is neither in dispute nor is required to be proved separately as it is the admitted position of the parties to the dispute, i.e. the appellant as well as the revenue that the land was transferred by the partners other than the appellant in favour of the incoming partner. Consideration for which was paid to those partners by the new partners and on which the incidence of capital gain has already taken place and the taxes necessary are also reported to have been paid by the recipients of capital gains even by the AO.

4.4.8 If the contention of the A.O. that "Deed of Admission and Retirement was prepared to camouflage the transaction of transfer of development right and right of possession" is accepted for the sake of argument which though cannot be the case in terms of the law governing retirement of existing partners and admission of new partners, in that case the transfer of land is to be considered in the hands of the owner of the land being the partnership firm. As the A.O. has held that the firm was not dissolved when the existing partners moved out and the new set of partners moved in, the admitted continuity of the firm negates the further action of the A.O. as the appellant being a partner of the firm could not have owned the land which was owned by the partnership firm only. It is trite that a partnership firm is a separate legal entity under the provisions of the Partnership Act as well as the Income-tax Act. Eventhough the partners of the firm are jointly and severally responsible for the affairs of the partnership firm, the independent status of the partnership firm in contradistinction to the partners of the such firm is specifically mandated in law.

4.4.9 In the present case the ownership of the land stood vested in the partners other than the appellant. In the alternate if the partnership firm is held to be continuing or to have / continued at the time of transfer of land, the ownership of the subject land having been vested in the partnership firm, the incidence of tax would arise in the hands of the owner, i.e. the partnership firm.

4.4.10 The charging section of the Act which is the governing parameter specifically requires that it is the income of the person which is to be brought to tax. The enabling provisions of section 45 of the Act provides that wherever a capital asset owned by the assessee is transferred any gain in such transfer would be liable to tax depending on the nature of the gain being either long term or short term.

4.4. 11 Reading conjointly the provisions of section 4 and section 45 of the Act, it follows that to apply the legal obligation to pay tax on the transfer of a capital asset the ownership is the deciding criterion as the wordings of section 45 are plain and simple. For the sake of convenience, the same is reproduced as under:

"45(1): Any profits or gains arising from the transfer of a capital asset effected in any previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place."

4.4.12 In the present case it is the admitted position of the A.O. that the land was never owned by the appellant in any manner whatsoever. The Hon'ble Apex Court has variously defined the property as a bundle of rights. For the land being the property of the appellant it was incumbent upon the A.O. to show that the appellant had some overriding rights in the ownership of the land. That is not the case of the A.O. To the contrary, it is the admitted position of the A.O. that the appellant was never the owner of the land.

4.4.13 As the basic ingredient of section 45 is not available i.e. the ownership of land in the hands of the appellant, the provisions of section 4 being the charging section would not apply to the case of the appellant.

4.4.14 Even otherwise admittedly the owners of the land being the outgoing partners other than the appellant have not suggested in any manner in their examination before the learned A.O. or otherwise that the appellant was the owner of the land at any point of time. The A.O. also has not considered the appellant to be the owner of the land.

4.4.15 That being the case, it follows that the appellant not being the owner of the land which is stated to have been transferred does not come under the purview of section 45 of the Act and therefore cannot be subjected to section 4 of the Act. It further follows that the appellant cannot be held liable to pay tax for the transfer of land as long term capital gains as simply put no transfer of land has been effected by the appellant for the simple reason that the appellant never owned the land.

4.4.16 Though this issue has not been the subject of consideration between the parties i.e. the appellant and the A.O. it is considered necessary to examine the status of the receipt of Rs. 48.15 cr in the hands of the appellant. The law laid down by the Hon'ble Apex Court in the case of *Kanpur Coal Syndicate [1964] 53 ITR 225 (SC)* which is good law and applies to the present Act as well the same is considered to be appropriate and necessary in the facts of the case.

4.4.17 It is the rule that a capital receipt is not to be subjected to tax and the provisions of section 45 are exception to the rule. Therefore, a capital receipt would ordinarily be not subjected to tax unless the same is shown to be falling under the domain of section 45. The provisions of section 45 prescribes the criterion of ownership of the capital asset and the transfer of the same. It is already the legal and factual position that the capital asset considered by the A.O. i.e. land was never owned by the appellant. Further the amount received by the appellant was not on account of transfer of any asset but because of the retirement from the partnership firm and thereby the liquidation of the status of the appellant as a partner of the partnership firm. This does not require separate mentioning that while the status of being a partner in a partnership firm is a right but the same is a capital right and cannot be construed as a right leading to revenue implications.

Consideration of AO's argument and relevant case laws:

4.4.18 The AO has argued that neither assessee is exempt u/s 10(2A) nor the transaction under reference is covered by any of exceptions provided u/s 47 of the Act. The A.O. has further observed that the decisions relied upon by the appellant were delivered for assessment year prior to the amendment of section 47(ii) w.e.f. 1.4.1988. however, perusal of the facts as marshaled by the A.O. the appellant has neither claimed exemption u/s 10(2A) nor considered under any of the exceptions prescribed u/s 47. The Finance Act, 1987 brought number of changes in the concept of transfer, taxability of issues related to firm and the partners. The provisions of section 47(ii) was omitted and sections 45(3) and 45(4) were brought in. According to CIT v. A.N. Naik Associates (136 Taxman 107) it is held:

“The purpose and object of the Act of 1987 was to charge tax arising on distribution on capital assets of firms which otherwise was not subject to taxation. If the language of Sub-section (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 sec 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 term otherwise means even retirement of a partner will come under purview of sec 45(4). In view of sec 45(4) if there is any capital gain tax has to be levied in the assessment of the firm and not in the assessment of the partner. This view is even upheld by Chalasani Venkateshwara Rao vs. ITO 349ITR 413 (Andhra Pradesh HC).

4.4.19 The AO has himself negated the taxability of receipt in the hands of appellant u/s 45(4). From the conclusion of the AO it is seen that the sole basis for his conclusion depends on his understanding that certain rights in the nature of capital assets were transferred in lieu of consideration received on the date of retirement and the same is taxable as long term capital gains u/s 45(1) of the Act. Detailed discussion in the preceding para clearly establishes that argument of the A.O. is factually incorrect and legally untenable.

The Hon'ble Supreme Court and the Hon'ble High Courts including the jurisdictional High Court had occasions to review the taxability of receipt in the hands of retiring partners under the identical facts and circumstances of the case to that of the appellant's case, and on each occasion it has been held that such receipt is neither in lieu of capital asset, nor a transfer as defined u/s 2(47) of the Act, nor it can be chargeable to tax u/s 45(1) of the Act. Some of the landmark judgments are discussed below:

(i) **Add. CIT v. Mohanbhai Pamabhai H987** 165 ITR 166 (SO):

"the extended definition of the term 'transfer' under section 2(47) of the Act, by which relinquishment and extinguishment of any right in a capital asset is considered as transfer would not apply when a partner retires from the partnership and there would be no transfer of interest in the partnership assets. The Hon'ble

Supreme Court confirmed the decision of the Hon'ble Gujarat High Court in Addl. CIT v. Mohanbhai Pamabhai [1987] 165 ITR 166 (SC).

CIT v. Lingamallu Raghu Kumar [20011 247 ITR 801 (SC): .

"The Supreme Court held, while affirming the principle laid down in Mohanbhai Pamabhai (supra) 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 and the amount received by the retiring partner is not "capital gain" under sec 45 of the Act".

(iii) Sunil Siddharthbhai vs. CIT (1985) 156 ITR 509 (SC):

"What the partner gets upon dissolution or upon retirement is the realisation of a preexisting right or interest. It is nothing strange in the law that a right or interest should exist in praesenti but its realisation or exercise should be postponed. Therefore, what was the exclusive interest of a partner in his personal asset is, upon its introduction into the partnership firm as his share to the partnership capital, transformed into an interest shared with the other partners in that asset. Qua that asset, there is a shared interest. During the subsistence of the partnership, the value of the interest of each partner qua that asset cannot be isolated or carved out from the value of the partner's interest in the totality of the partnership assets. And in regard to the latter, the value will be represented, by his share in the net assets on the dissolution of the firm or upon the partner's retirement.

(iv) Prashant S. Joshi [20101 324 ITR 154 fBom):

"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 remains 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). A Division Bench of the Guj'arat High Court in CIT v. Mohanbhai Pamabhai [1973] 91 ITR 393/?e/d that 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. [Para 13]

The appeal against the judgment of the Gujarat High Court was dismissed by a Bench of three Judges of the Supreme Court in Addl. CIT v. Mohanbhai Pamabhai [1987] 165 ITR 166. [Para 14]"

CIT vs. Dynamic Enterprises [20131 (40 taxmann.com 318) (Karnataka) (Full Bench)

"In the instant case, after the retirement of three partners, the partnership continued to exist and the business was carried on by the remaining five partners. There was no dissolution of the firm or at any rate there was no distribution of

capital asset when three partners retired from the partnership firm. What was given to the retiring partners is cash representing the value of their share in the partnership. No capital asset was transferred on the date of retirement under the deed of retirement deed dated 1-4-1994. In the absence of distribution of capital asset and in the absence of transfer of capital asset in favour of the retiring partners, no profit or gain arose in the hands of the partnership firm."

(i) CIT-III Pune v. Rivaz A. Shaikh F20141 221 Taxman 118 (Bom):

"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. Joshi (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 801/12002] 124 Taxman 127 wherein it has been held that amounts received on retirement by a partner is not subject to capital gains tax."

From the above it is clear that the Supreme Court, Bombay High Court and Karnataka Full Bench have held that on retirement of a partner from the firm there is no element of transfer of interest in partnership assets by the retired partner to the continuing partners and the amount received by him for his share of net partnership assets and goodwill is not assessable to capital gains.

The argument of the appellant that the land belonged to and continued to be owned and possessed by the partnership firm for 16 years, right from year 1992 to year 2009 is not in dispute. Legally, both under the provisions of the Partnership Act, 1932 (Section 14) and the Clauses of the Deed of Partnership dated 6.5.1992 and as held by the Supreme Court and various High Courts, the partners of the firm do not have any individual right of ownership nor can they transfer the assets of the firm in their individual capacity and that can be effected only by the partnership firm being the owner of the property. None of the documents on record prove that

the appellant had the development rights or possession of the immovable property i.e. land. The appellant validly and legally retired by giving public notice and executed the deed of retirement on 4.4.2008, which was signed by the four incoming partners who were holding irrevocable POA from the outgoing partners, and was duly witnessed by two solicitors and partnership firm continued thereafter along with the land. Therefore, in law no partner can have individual rights in the partnership property and assets and as requirements of the law were fully complied with to retire from the partnership firm and I do not agree with the A.O. that the appellant did not retire from the firm or that the Deed of Admission and Retirement was apparently prepared to camouflage the transfer of development rights and possession of land. Thus it cannot be held that the said document was merely a devise to avoid tax.

The appellant has validly retired from the firm. After the retirement, the firm continued its business on "as is where is" basis with the remaining partners. Thus, the amount received by the appellant on retirement from the partnership firm which has been assessed as capital gains in the hands of the appellant, is not sustainable in the eyes of law not being the case where provisions of section 45 can be applied. The same is therefore directed to be deleted. The appellant gets the corresponding relief. The addition of Rs.47,13,14,000/- stands deleted and the grounds of appeal is accordingly allowed."

9. The Ld. D.R. submitted that the AO has analyzed the sequence of events and the manner in which the whole transaction was envisaged and planned in order to circumvent the tax liability. The Ld. D.R. submitted that the assessee had entered into a partnership with five partners in the name of M/s. Post Field Construction vide deed dated 06.05.1992. Under the said deed of partnership the first four partners have brought in 15,250 sq. yards into the firm. The Ld. D.R. drew our attention to para 6 of the partnership deed wherein the land was valued at Rs.1.5 crore as capital contribution of the four partners and other two partners Shri Samir P. Shah and Shri Vithal V. Kamat were to bring in minimum of Rs.1.50 crores as their capital contribution. The purpose of the said partnership was to develop the said land, enter into agreements for sale of flats/shops and also establish a sports complex as may be decided by Shri Samir P. Shah and Shri Vithal V. Kamat and the

said firm was to be dissolved upon the completion of the development of the property. The assessee was active partner and developed the land and brought the funds to construct the health club and thus assessee had the physical possession of the said property. The Ld. D.R. stated that in terms of the deed of admission and retirement dated 04.04.2008, the assessee retired from the partnership w.e.f. 01.04.2008 relinquishing right, title and interest in the properties and under the said deed four new partners from Runwal Group were taken as incoming partners. On his retirement, the assessee was given a payment of Rs.48.15 crores out of which Rs.1.5 crore was kept in Escrow Account with the solicitor M/s. Kanga & Co. for discharging the club members' liability. The Ld. D.R. submitted that the said deed of admission cum retirement dated 04.04.2008 wherein the four partners retired and four new partners were taken in was signed only by the incoming partners and Mr. Vithal V. Kamat only and none other retiring partners have signed the document. According to the AO the said document is a crucial document and accordingly he required the assessee to file the document signed by all the partners but the assessee expressed his inability. Thereafter, this whole arrangement came to light after the AO issued summons under section 131 of the Act to other partners which revealed that Smt. Amrabai Malsi, Smt. and Smt. Velbai Devsi Shah have sold their share of land to M/s. Runwal Developers Pvt. Ltd. on 26.12.2007 and received Rs.11 crore and the said amount was offered to tax in their respective returns in A.Y. 2008-09. Similarly, Shri Vipin T. Shah sold his share in the property on 07.03.2009 to M/s. Runwal Developers Pvt. Ltd. at a total consideration of Rs.5.86 crore on which also

the said retiring partner paid the taxes in the capacity of executor of will of late late Shri Nanji Sojpar and Smt. Hirbai Nanji. Thus, the Ld. D.R. submitted that this whole retirement of partners and induction of new partners was planned and remained a mystery as the assessee has not co-operated by non furnishing the documents. Thus the AO came to conclusion that Rs.48.15 crore was nothing but an amount received for transfer of capital asset as the same is taxable as capital gain under section 45(1) of the Act. Finally, the AO added Rs.47,13,14,000/- after deducting the liability to the members of the club Rs.1,01,86,000/- which was rightly done so however, the Ld. CIT(A) has failed to appreciate all these facts and simply allowed the appeal of the assessee by holding that the compensation received on retirement of a partner is exempt from tax without going into the sham nature of these transactions to avoid the tax liability. Therefore, the Ld. D.R. prayed that the appeal of the Revenue may kindly be allowed by setting aside the order of the AO.

10. The Ld. A.R., on the other hand, relied heavily on the order of Ld. CIT(A) and submitted that the Ld. CIT(A) after considering the facts of the case and ratio laid down by the Hon'ble Apex Court and Hon'ble Karnataka High Court have reached a correct conclusion and rightly reversed the order of AO. The Ld. A.R. submitted that Shri Vithal V. Kamat who became the partner in the partnership vide deed of partnership dated 06.05.1992 determined partner in the firm till 01.04.2008. The Ld. A.R. submitted that the assessee received Rs.48.15 crore upon retirement from the firm and disclosed the receipt of consideration on retirement from M/s. Sports Field Construction

as exempt from tax. The Ld. A.R. submitted that the AO had also issued summons to other outgoing partners as well as incoming partners under section 131 of the Act and collected information from them. The Ld. A.R. submitted that AO collected this information behind the back of the respondent during the assessment proceedings without offering any opportunity to the respondent to cross examine the parties on the statement on the basis of which the AO drew the adverse inference. The Ld. A.R. also submitted that the allegation of the AO that admission cum retirement deed was not a deed in the nature of retirement deed as the same was not signed by all these parties. The belief of the AO that assessee has development rights and right of possession in the plot of land which was transferred for Rs.48.15 crores is wrong as the respondent has no title or interest in the said immovable property and therefore the observation of the AO is wrong that the transaction was in the nature of transfer of immovable property by various partners to M/s. Runwal Developers Pvt. Ltd. and Rs.47,13,14,000/- after deduction of Rs.1,01,86,000/- liabilities towards the club members received by the assessee and was taxable under section 45(i) of the Act as capital gain. The Ld. A.R. submitted that the erstwhile M/s. Sports Field Construction through the assessee negotiated with M/s. Runwal Developers Pvt. Ltd. vide MOU dated 12.11.2003 for development of the said plot on certain terms and conditions. The Ld. A.R. submitted that the said MOU could not materialize and the firm could not develop the said plot of land. The Ld. A.R. submitted that vide deed of admission and retirement dated 04.04.2008 the said firm was reconstituted by admitting four

partners and their nominees and the existing partners including the assessee retired w.e.f. 01.04.2008. The only objection of the AO that the said deed is not signed by all these partners and therefore i.e. the conclusion of the AO that it is a sham and a device to circumvent the tax liability is wrong and against the provisions of the Act as interpreted by the various courts and judicial firm. The Ld. A.R., in defence of his arguments, has relied on a series of decisions namely;

- (i) Addl. CIT vs. Mohanbhai Pamabhai (1987) 165 ITR 166 (SC) affirming the order of Hon'ble Gujarat High Court as reported in (1973) 91 ITR 393 (Guj.)
- (ii) Tribhuvandas G. Patel v. CIT [1999] 236 ITR 515 (SC)
- (iii) CIT v. R. Lingmallu Raghu Kumar [2002] 124 TAXMAN 127 (SC)
- (iv) [1983] 141 ITR 674 (AP) CIT v. L. Raghu Kumar
- (v) [2019] 104 taxmann.com 58 (Bombay) Pri. CIT, Central-2, Mumbai v. Smt Hemlata S. Shetty
- (vi) [2018] 93 taxmann.com 302 (Bombay) Pri. CIT-26 Mumbai v. R. F. Nangrani NUF
- (vii) [2014] 41 taxmann.com 455 (Bombay) / [2014] 221 Taxman 118 (viii) (Bombay) (MAG.) CIT-III, Pune v. Riyaz A. Sheikh
- (viii) [2010] 189 Taxman 1 (Bombay) / [2010] 324 ITR (Bombay) / [2010] 230 CTR 232 (Bombay) Prashant S. Joshi v. ITO, Ward 19(2)(4)
- (ix) [2019] 104 taxmann.com 444 (Bombay) (2019) 263 Taxman 120 (Bombay) Pri. CIT - 30 v. Electroplast Engineers
- (x) (1997) 95 Taxman 9 (Gujarat) / [1997] ITR 221 (Gujarat) / [1997] 142 CTR 115 (Gujarat) CIT v. Anant Narhar Nimkar (HUF)
- (xi) [2013] 40/taxmann.com 318 (Karnataka) (FB) / [2014] 223 Taxman 331 (Karnataka) (FB) / [2013] 359 ITR 83 (Karnataka) (FB) / [2013] CIT v. Dynamic-Enterprises
- (xii) [2002] 257 ITR 544 (Kerala) / [2002] 125 TAXMAN 802 (KER.) CIT v. Kunnmkulam Mill Board
- (xiii) Order of ITAT A Bench, Mumbai in appeal ITA No.3609/M/2013 (A.Y. 2004-05) Mrs. Kaushalya R. Sampat v. ITO 9(3)(2) Mumbai
- (xiv) [2018] 89 taxmann.com 95 (Pune - Trib.) Smt.Vasumati-Prafullachand Sanghavi v. Deputy CIT, Cir-1, Jalgaon.
- (xv) Order of ITAT B Bench, Pune in appeal ITA No. 469/PN/11 (A.Y. 2007-08) ITO Wd. 3(2), Pune v, Shri Rajnish M. Bhandari

11. The Ld. A.R. therefore prayed that in view of the ratio laid down by the Hon'ble Supreme Court and various High Courts and also co-ordinate benches of the Tribunal, the appeal of the

Revenue may kindly be dismissed and the order of the Ld. CIT(A) may kindly be upheld being a reasoned and speaking order passed after following the ratio laid down by the various judicial forums.

12. The Ld. A.R. also without prejudice submitted that in para No.6.13 of the assessment order the AO has himself recorded that the cost of acquisition is nil because the assessee was having debit balance of Rs.1,04,069/- and Ld. A.R. submitted that this was also challenged before the Ld. CIT(A) that when the cost of acquisition is nil the computation provision of long term capital gain fails and on that plea also the said receipt can not be brought to tax. The Ld. A.R. relied on the decision of Hon'ble Supreme Court in CIT vs. B.C. Srinivasa Setty (128 ITR 294). It is also submitted that where the machinery provision of section 48 breaks down consequently, the charge under section 45 also fails. The Ld. A.R. taking the same plea submitted before the Bench that even on that account the capital gain of computational provision could not be invoked to the money received by the assessee upon his retirement as his share in the assets of the firm as there is no transfer involved.

13. We have heard the rival submissions of both the parties and perused the material on record and the impugned order passed by the Ld. CIT(A). The undisputed facts are that the assessee became the partner in the partnership firm called M/s. Sports Field Construction vide deed of partnership dated 06.05.1992. The details of other partners who joined the partnership have been given in para 6 (supra). So in all, there were six partners in the firm. The first four partners namely

Smt. Amrabai Malsi, Smt. Velbai Devsi Shah, Shri Bipin Talakshi Shah and Smt. Hirbai Nanji Sojpal brought into the partnership firm as land measuring 15,250 sq. yards situated at survey No.41L situated at Lokhandwala, Mumbai as their capital contribution which was valued at Rs.1.5 crores. The other two partners namely Shri Samir P. Shah and Shri Vittal V. Kamat were to bring in Rs.1.5 crores as capital contribution in the firm. The sole objective of the firm was to develop the said plot of land. As per the terms of the partnership deed, the said plot was to be brought into the partnership firm and other partners also to contribute their respective contribution. Thereafter, Smt. Hirbai Nanji Sojpal died on 22.08.2001 leaving behind her will and testament dated 10.10.2000 under which Shri Bipin Talakshi Shah as executor and trustee and nominated him in her place in the partnership firm and accordingly the share of the said person increased to 7.16% from 3.58%. Pertinent to state that certain disputes arose between Shri Samir T. Shah and the assessee and the firm filed a suit in Bombay High Court seeking the dissolution of the firm, however, the same was resolved by filing Consent Terms under which Shri Samir P. Shah retired on 11.08.2002 from the said firm vide deed of retirement dated 29.01.2003 and his share in terms of the Consent Terms was transferred to the assessee and thus assessee's share in the firm increased to 50% in terms of deed of retirement dated 29.01.2003. Finally, in between the firm also entered into a MOU with M/s. Runwal Developers Pvt. Ltd. dated 12.11.2003 for the development of the plot on certain terms and conditions which could not materialize. Thereafter, a deed of admission cum retirement was executed on 04.04.08 retiring all the

existing partners and inducting four new partners namely M/s. Runwal Developers Pvt. Ltd. and the three nominees. Upon said retirement Shri Vithal V. Kamat he received a consideration of Rs.48.15 crore as share in the assets of the firm as full and final settlement of his account in the firm. The AO added Rs.47,13,14,000/- as long term capital gain in the hands of the assessee by holding that the said amount was received in consideration of transfer of interest of the assessee in the said assets of the firm and after deducting Rs.1,01,86,000/- from the total consideration of Rs.48.15 crores, added the same to the income of the assessee as long term capital gain under section 45 of the Act. The Ld. CIT(A) after taking into consideration the facts, contentions and submissions as made by the assessee during the course of assessment proceedings and also after considering the ratio laid down by various judicial forums allowed the appeal of the assessee on this issue by holding that the compensation received by the assessee upon retirement from the partnership firm as his share in the assets of the partnership firm is not liable to tax as there is no transfer of assets involved. In the case of Addl. CIT vs. Mohanbhai Pamabhai (supra) the Hon'ble Supreme Court has affirmed the decision of the Hon'ble Gujarat High Court as reported in (1973) 91 ITR 393 (Guj.) wherein the Hon'ble Bombay High Court has held that any money received by the partner upon retirement from the partnership firm as his share in the assets of the partnership concern is not a consideration for transfer of his interest in the partnership to the continuing partners and there is no transfer within the meaning of section 2(47) of the Act. Hon'ble Supreme Court in the case of CIT v. Tribhuvandas G.

Patel (supra) has held that any amount paid to the partner upon his retirement towards his share in assets is not a transfer within the meaning of section 47(ii) of the Act and not liable to capital gain. In the case of CIT v. Lingamallu Raghu Kumar (supra) the Hon'ble Supreme Court has held that where the assessee received on retirement from the firm a sum more than what is due towards his capital and profit amount received was not assessable to capital gain as there was no transfer of any asset as contemplated in section 2(47) of the Act. Even we find merit in the alternative plea taken by the assessee that if the computational provision of capital gain as provided under section 48 of the Act breaks down then the charging provision as provided under section 45 of the Act would also fail as held by the Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Setty (128 ITR 294). Therefore, the case of the assessee is squarely covered by the decisions of the Hon'ble Apex Court as discussed above and in view of the ratio laid down in the above decisions by the Apex Court, we are inclined to dismiss the appeal of the Revenue by upholding the order of Ld. CIT(A) on this ground.

ITA No.3909/Mum/2018(Assessee's Appeal)

14. The various grounds raised by the assessee are reproduced below:

"1. DISALLOWANCE OF FINANCE CHARGES OF Rs. 2,74,4627-:

On the facts and circumstances of the case and in law, the Id. Commissioner (Appeals) erred in confirming the disallowance made by the Assessing Officer in respect of finance charges being interest paid by the appellant to his bankers of Rs. 2,74,462/-.

2. DISALLOWANCE U/S 14A OF THE INCOME-TAX ACT READ WITH RULE 8-D:

(a) On the facts and circumstances of the case and in law, the Id. Commissioner (Appeals) erred in confirming the disallowance of Rs. 3,59,793/- made by the

Assessing Officer u/s 14A of the Act read with Rule 8-D in relation to exempt income earned by the appellant, which is erroneous both on facts and in law

(b) The Id. Commissioner (Appeals) erred in failing to appreciate that the Assessing Officer has not recorded any satisfaction with regard to the claim of the appellant that no expenditure was incurred in relation to exempt income, which is a pre-requisite for making such a disallowance and consequently no disallowance can be made under section 14A of the Act.

(c) The Id. Commissioner (Appeals) erred in not appreciating that following items of expenditure ought not to have been considered by the Assessing Officer to compute the disallowance under rule 8-D as these expenditure had no nexus with the exempt income:

(ii)	Professional Fees paid to Trade Mark solicitors	Rs. 7,30,124/-
(iii)	Interest paid (finance charges) which were already 2,74,462/- disallowed	Rs.
(iv)	Consultants fees	Rs. 20,000/-
(v)	Depreciation on computer etc.	Rs. 26,384/-
	Total	Rs. 10,50,970/-

(d) The disallowance of Rs. 3,59,793/- made by the Assessing Officer and confirmed by the Id. Commissioner (Appeals) out of balance expenditure of R\$. 32,920/- (Total expenditure of Rs. 10,83,890/-less expenses covered by sub-ground (c) above) is not only absurd but not warranted and in any case, the disallowance is excessive."

15. The issue raised in ground No.1 is against the confirmation of disallowance of Rs.2,74,462/-by CIT(A) as made by the AO in respect of finance charges.

16. The facts in brief are that during the course of assessment proceedings, the AO found that assessee has debited in the P&L Account as finance charges of Rs.2,74,462/- and accordingly he called upon the assessee to justify the said claim. The assessee submitted before the AO that the funds were borrowed during the preceding previous year for the purpose of business of the assessee which included hotel consultancy and trademark etc. Besides the assessee has also advanced loans and deposits on which the assessee received interest income of Rs.2,09,44,575/-

which was credited to capital account of the assessee as per the past practice but duly offered to tax as income from other sources. Thus the assessee submitted that the interest paid is allowable expense. The said submission of the assessee did not find favour with the AO and after observing that assessee has received income from royalty of Rs.55,500/- and trade market fee Rs.10,57,809/-, doesn't require any borrowed capital. The AO also observed that similar expenses were disallowed in the earlier year also which has been accepted by the assessee and finally disallowed and added Rs.2,74,462/- to the income of the assessee by observing that the borrowed funds were not used for the purpose of business. Similarly, the Ld. CIT(A) has dismissed the appeal of the assessee on this issue by observing and holding as under:

“This ground relates to the disallowance of finance charges of Rs.2,74,462/- u/s 36(1)(iii) of the Act. Consistently, the appellant earned interest income from loans and deposits, which was credited to his capital account, as in earlier years and assessed under the head "income from other sources". It is a fact that the appellant did not utilize the funds borrowed from banks for earning any income for the year. The A.O. noted that similar expenses have been disallowed in the appellant's own case in earlier years which had been accepted by the appellant. Accordingly the AO disallowed the finance charges debited to profit and loss account of the appellant u/s 36(1)(iii) of the Act. I find no reason to deviate from the finding of the AO. Thus, the disallowance made by the AO is confirmed and ground on this issue is dismissed.”

17. After hearing both the parties and perusing the material on record, we observe that assessee has not utilised the borrowed money for the purpose of his business. The Ld. CIT(A) has given a finding of fact that share of profit was assessed to tax on the income under the head “Income from other sources” which comprised of interest income from loans and deposits. We are in agreement with the conclusion drawn by the Ld. CIT(A) as the assessee has failed to establish that these expenses were

incurred for the purpose of business of the assessee. Accordingly, we are inclined to uphold the order of Ld. CIT(A) on this issue by dismissing the ground raised by the assessee. Ground No.1 is dismissed.

18. The issue raised in second ground of appeal is against the confirmation of disallowance of Rs.3,59,793/- by Ld. CIT(A) as made by the AO under section 14A read with rule 8D.

19. The facts in brief are that the AO during the course of assessment proceedings observed that the assessee has earned exempt income of Rs.19,44,307/- which was claimed under section 10(34) as exempt, however, the assessee has not disallowed any expenditure under section 14A read with rule 8D. Accordingly, the assessee was called upon to work out the said disallowance which was worked out by the assessee vide written submission dated 15.11.2011 at Rs.3,59,793/- and accordingly the same was disallowed by the AO.

20. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by holding that even if no expenditure is incurred to earn the exempt income, AO has to make disallowance in terms of section 14A read with rule 8D2(iii). Hence, the assessee challenged this conclusion of Ld. CIT(A).

21. After hearing both the parties and perusing the material on record, we observe that the assessee has incurred a total expenditure of Rs.10,83,890/- which were incurred for the purpose of business of the assessee and none was having any connection to the exempt income Rs.10,50,970/-. The details of the said expenses are as under:

i.	Professional Fees paid to Trade Mark Solicitors	Rs.7,30,124/-
ii.	Interest paid (finance charges) which were already disallowed	Rs.2,74,462/-
iii.	Consultants fees	Rs. 20,000/-
iv)	Depreciation on computer etc.	Rs. 26,384/-
	Total	Rs.10,50,970/-

Thus the remaining expenditure out of the total expenditure was Rs.32,920/- which can be only attributed to the exempt income. In our opinion, the disallowance can not exceed the actual expenditure incurred by the assessee. Accordingly, we are inclined to partly allow the ground by directing the AO to restrict the disallowance to Rs.32,920/- and deleting the balance of Rs.3,26,873/-

22. In the result, the appeal of the of the assessee is partly allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 06.11.2020.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 06.11.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.