

IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 6462/Mum/2019
(A.Y: 2013-14)

ACIT – 28(1) Room No. 306, 3 rd Floor 6 th Tower, Vashi Railway Station Complex, Vashi, Navi Mumbai – 400703.	Vs.	Shri James Paskal Dsilva C-305, 1 st Floor, Vashi Plaza, Sector – 17, Vashi, Navi Mumbai – 400705.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADTPD7480P		
Appellant	..	Respondent

Appellant by :	Shri. S.N. Kabra. Sr DR
Respondent by :	Shri. Prayag Jha.AR

Date of Hearing	25.05.2022
Date of Pronouncement	02.06.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-26, Mumbai passed u/s 143(3) and 250 of the Act. The revenue has raised the following grounds of appeal:

1. *Whether 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. 8,05,70,000/-*

on account of amount received in capital account from M/s. Blue Circle Infratech, by relying on the decision of Hon'ble ITA, vide order No. 913/Mum/2016 dated 30.01.2019 for the A.Y 2012-13 in assessee's own case?.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the fact that the decision of Hon'ble ITAT vide order No. 913/Mum/2016 dated 30.01.2019 for the A.Y 2012-13 in assessee's own case holding a that the share capital along with accrued profit, good will and brokerage / commission which were received / receivable in terms of consent deed entered among the partners on account of retirement of the assessee from partnership firm and the payment made to the assessee in realization of his share in the net value of the assets of the firm on his retirement are no liable to be taxed as capital gains and also u/s 28(v) of the Act was not accepted by revenue and the same was challenged before Hon'ble Jurisdictional High Court.

3. The appellant prays that the order of Ld. CIT(A) on the above grounds be reversed and that of the AO be restored.

4. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.

2. The brief facts of the case are that, the assessee is an individual and proprietor of business entities in the name and style of M/s. D Silva Enterprises, M/s D Silva Corporation and M/s D Silva Productions engaged in the business as builders and developers, dealing in plots and organize the music and event

management. The assessee has filed the return of income for the A.Y 2013-14 on 30.09.2013 disclosing a total income of Rs.74,51,670/-and the return of income was processed u/s 143(1) of the Act. The case was selected for scrutiny under CASS and notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. During the course of assessment proceedings, the Assessing Officer (A.O.) found that the assessee has entered into partnership with three other partners in M/s. Blue Circle Infratech on 06.11.2006 and the share of the assessee in the firm is 33.33%. After some time, dispute has arisen between the assessee and the partners and was finally settled with a consent deed that the partners have been agreed to give the assessee a total amount of Rs. 19,07,00,000/- on final settlement, out of the said amount only Rs. 2,21,93,334/- have been received by the assessee. The A.O. found that the assessee has received an amount of Rs. 10,27,63,334/- out of the said amount and the Ld. CIT(A) has already upheld an amount of Rs. 2,21,93,334/- was added in the A.Y 2012-13 and the

remaining differential amount of Rs.8,05,70,000/- was treated as unexplained cash credit u/s 68 of the Act and assessed the total income of Rs. 8,80,21,670/- and passed the order u/s 143(3) of the Act dated 03.03.2016.

3. Aggrieved by the order the assessee has filed an appeal before the CIT(A). Whereas the CIT(A) considered the grounds of appeal, submissions of the assessee and findings of the A.O and relied on the judicial decisions and ITAT decision in assessee's own case for the A.Y 2012-13 and has allowed the assessee appeal. Aggrieved by the CIT(A)order, the revenue has filed an appeal before the Hon'ble Tribunal.

4. At the time of hearing the Ld. DR submitted that the Ld. CIT(A) has erred in deleting the addition made by the A.O. on account of amount received in capital account from M/s. Blue Circle Infratech relying on the decision of ITAT in assessee's own case for the A.Y 2012-13 and which is contested before the higher forum and prayed for allowing the revenue appeal.

5. Contra, the Ld. AR supported the order of the CIT(A) and relied on the assessee's own case for the A.Y 2012-13 and judicial decisions.

6. We heard the rival submissions and perused the material available on record. The sole crux of the disputed issue as envisaged by the Ld. DR that the CIT(A) has deleted the addition made by the A.O. The Ld.DR submitted that the CIT(A) has erred in not considering the fact that the ITAT decision in assessee's own case for the A.Y 2012-13 holding that the share capital along with accrued profit, good will and brokerage which were received in terms of consent deed entered among the partners on account of retirement of the assessee from partnership firm and the payment made to the assessee in realization of share in the net value of the assets of the firm on his retirement are not liable to be taxed and the said order of the Honable Tribunal is challenged by the revenue before the Honble High Court. The Ld. AR supported the order of the Ld. CIT(A) and the decision of Hon'ble ITAT in assessee own case A.Y.2012-13. We considered it appropriate to refer to the submissions of the assessee and decision of the CIT(A) in deleting the

addition at page 3 to 10 Para 5 to 6 of the CIT(A) order read as under:

5. During the appellate proceedings, the appellant has filed written submission which is summarised as under: -

Kindly refer to the above appeal filed against the Assessment Order dated 03.03.2016 passed under section 143(3) of the IT Act by the ACIT-28(1), Mumbai. The AO determined assessee's total income at Rs. 8,80,21,670/- as against total income of Rs. 74,51,670/- returned.

2 The assessee's return was selected for scrutiny under CASS and the Ld AO issued statutory notices. The assessee submitted the information and documents called for. The Ld AO made addition of Rs. 8,05,70,000/- while passing Assessment Order. He also initiated penalty proceedings under section 271(1)(c) for furnishing inaccurate particulars of income.

The assessee aggrieved with the Assessment Order filed this appeal.

3 The following Grounds of Appeal have been taken-

"1) The Ld AO erred in determining the assessee income at Rs. 8,80,21,621/- against the appellant's income at Rs. 74,51,670/-

"2) The Ld AO made an addition of Rs. 8,05,70,000/- without appreciating the facts of the case.

"3) The Ld AO has made an addition of Rs. 8,05,70,000/- only on the pretext that during the year the said amount was received from M/s Blue Circle Infratech, wherein the assessee was a partner and also on the pretext that the assessee has retired from the partnership firm. Here it is pertinent to note that due to dispute between the partner, a consent terms was arrived between the partners, wherein the assessee was to receive Rs. 19.07 crores, however the opponent partners failed their commitment as per the consent terms. Hence the consent terms were failed by the opponent partners and by virtue of that consent terms become null and void viz-a-viz the retirement

of the assessee. Hence the partial amount received by the assessee is just an over-drawn capital and not an income."

4) The Ld AO has made an addition of Rs. 23.63 crores in A Y 2012-13 on the basis of consent terms. As per the consent terms the assessee has received Rs. 4.49 crore in A. Y 2012-13 and Rs. 10.28 crores in AY 2013-14 against the amount receivable as per consent terms for Rs. 19.07 cores. Here it is pertinent to note that the Ld AO has filed second appeal for A Y 2012-13 and again ,aking an addition of Rs. 8,05, 70, 000/- towards the amount received from Mis Blue Circle Infratech. Hence the Ld AO is making twice addition on one issue."

"The appellant craves leave to add, amend, alter or delete any or all the above grounds of appeal."

4 ARGUMENTS

4.1 AO's FINDINGS

The Ld AO has stated that the assessee received an amount of Rs. 14,89, 63,334/- in the F Y 2012-13 from M/s Blue Circle Infratech, a partnership firm, on retirement from this firm. He has given the particulars of payment in para 5.2.xi of the impugned order. Relying on the order of the Ld CIT(A) for A Y 2012-13, he has held that an amount of Rs. 8,05, 70,000/- was chargeable to income tax during the A Y 2013-14. He has stated that the assessee received an amount of Rs. 10,27,63, 334/- in A Y 2013-14 out of which Rs. 2,21,93,334/- was already taxed by the AO in the A Y 2012-13 and this addition was upheld by the Ld CIT(A) The Ld AO has made addition of Rs.8,05,70,000/- being difference between Rs.10.27.63.334/- - Rs.2.21.93.334/-

4.2 ASSESSEE'S SUBMISSION :

Before advancing the arguments against the addition made by the Ld AO it may be necessary to narrate the full facts of the case for the sake of convenience. more so because the Ld AO has relied heavily on the facts narrated in the Assessment Order for A Y 2012-13 and also on the order of the Ld CIT(A) for the same year.

4.2.1 The assessee, an individual, is engaged in business. He is proprietor of three concerns namely-

1. M/s D'Silva Corporation- Builder and Developer
2. M/s D'Silve Enterprises- Dealing in land.
3. M/s D'Silva Productions- Film Production

He is Partner in the following Partnership Firms.

1. M/s Blue Circle Infratech.
2. M/s Ahinsa Gruh Nirman.
3. M/s D'Silva Realtors.
4. M/s New Style Shoes.

M/s Blue Circle Infratech was constituted on 06.11.2006 with the following partners-

SL No.	Name of partner	Share in profit /loss
1	Shri Vijay Raychand Nensee	16.67%
2	Shri Ajay Raychand Nensee	16.67%
3	Shri Akshay Arora	33.30%
4	Shri James DSilva	33.33%

(Copy of Partnership Deed of M/s Blue Circle Infratech is attached herewith).

4.2.2 Dispute started amongst the partners in 2011. The three partners namely Shri Vijay Raychand Nensee, Shri Ajay Raychand Nensee and Shri Akshay Arora were one side together and the assessee, the fourth partner was forced to retire. A Deed of Release was signed on 12.05.2011. The first three partners decided to continue with the business of the firm and the assessee was retired from partnership we.f. 04.05.2011. The assessee agreed to release his share of 33.67% percent in the firm subject to payments. This Deed was duly registered by the Sub-Registrar, Panvel- 1.(A copy of Deed of Release is attached herewith) (A copy Profit & Loss account & Balancesheet as on 04-05-2011 is attached herewith).

- 9 -

4.2.3 The amounts assured to the assessee to be paid on retirement were not paid actually. The cheques given to the assessee got dishonored. The assessee made application for appointment of Court Receiver. He also gave legal notice dated 23.02.2012 to the opponents. The assessee filed a Miscellaneous Application No. 57/ 2012 in the Court of District Judge, Raigad at Alibag, under Section 9 of the Arbitration and Conciliation Act. (A copy of Miscellaneous application is attached herewith.)

4.2.4 The dispute was finally settled and Consent Terms were agreed which were ratified in the Court of District Judge, Raigad at Alibag on 04.04.2012. A copy of the Consent Terms is placed in the Paper Book. In this manner the Civil Miscellaneous Application No. 57 of 2012 was disposed of by the District Judge-2, Raigad, Alibag.

4.2.5 According to the Consent Terms the assessee was to receive the following amounts from the firm-

- i. Rs. 5, 34, 00,000/- towards Share Capital and Accrued profit.
 - ii. Rs. 1.00.00. 000/- Goodwill of the firm.
 - iii. Rs. 12,73,00,000/- towards brokerage and commission.
- Rs.19,07,00,000/-Total

4.2.6 As per the Consent Terms payments were made in the following manner-

1. Rs 3.16.66. 666/- Amount debited to retiring partners account for Income Tax payable as on 31.03.2011 and 04.05.2011.
2. RS.3,50,00,000/- Payments made by Cheque/RTGS. Rs. 6,66,66,666/- Total

4.2.7 Assessee was given the following Cheques-

Date	Check no.	Amount	Bank
26.05.2012	427081	2,21,93,334/	Citibank, Vashi Branch
26.06.2012	427082	2,54,60,000/	Citibank, Vashi Branch
26.07.2012	427085	2,54, 60, 000/	Citibank. Vashi Branch
26.08.2012	427087	2,54,60, 000/	Citibank, Vashi Branch
26.09 2012	427188	2, 54. 60. 000/	Citibank, Vashi Branch

These payments were towards brokerage commission of Rs.12,73,00,000/- The assessee was to

receive 5 cheques of Rs. 2, 54, 60, 000/- each. However. Rs. 32.66,666/- was deducted from the amount of cheque being difference between Rs. 6,66,66,666/- Rs.6,34,00,000/-

Only cheque for Rs. 2, 21, 93,334/- was cleared. The other four cheques got dishonored by the bank.

4.2.8 In the A Y 2012-13 the Learned Assessing Officer made following additions based on the Consent Terms and Books of Account-

SL No.	Amount	Nature
1	1,00,00,000/-	Goodwill as LTCG Taxable @ 20%
2	4,67,00,000	9,41,63,126 Credited in capital account of D'Silva Enterprises
3	4,74,63,126/-	
4	12,73,00,000	Commission and brokerage
	23,14,63,126	Total

4.2.9 The Ld AO held that the assessee's interest in the firm was capital asset and there was transfer u/s 2(47) of the I T Act. He taxed the Goodwill as Long Term Capital Asset. He brought to tax Rs. 9, 41.63, 126/- as assessee's undisclosed income us 68 of the Act. He also taxed the amount of Rs. 12.73. 00. 000/- as assessee's income as received or accrued since the assessee followed mercantile system of accounting.

4.2.10 The Learned CIT(A) decided the assessee's appeal, vide order dated 31.12.2015, in Appeal No. CIT(A)-26/1 T/207/2015-16. He confirmed an addition of Rs.8,08,60,000/- on the ground that this amount was received by the assessee on revenue account. The Ld CIT(A) held that the amount received by the assessee from M/s Blue Circle Infratech was on revenue nature and was liable. to income tax.

4.2.11 The Learned CIT(A) passed an Order of Rectification dated 18.01.2016, pursuant to the assessee's letter dated 16.01.2016, whereby he modified his observations made in his order dated 31.12.2015. He held that the amount of sustained addition was Rs.8,33,93,334/- and not Rs.8,08,00,000/- and the amount of reduction granted was Rs. 14,80,69,792/- and not Rs.10,18,40,000/-.

4.2.12 This addition was contested before the ITAT, along with some other issues. With regard to the addition sustained by the Ld CIT(A) in A Y 2012-13, on account of brokerage and commission it was argued before the ITAT that the Ld CIT(A) was not right in upholding addition to the extent of the amount received by the assessee. He did not appreciate the fact of the case that the amount was received by the assessee on his retirement from the firm M/s Blue Circle Infratech. Amounts received on account of withdrawal of capital and also share of profit in the firm were not liable to tax. Any amount received over and above the capital and share of profit was also not liable to tax because there was no transfer of asset and such receipt was also not of revenue nature liable to income tax.

4.2.13 This issue is covered in favour of the assessee by the judgment of the Jurisdictional High Court in the case of Prashant S Joshi v ITO (2010) 189 Taxman 1 (Bombay). The High Court categorically held that amount paid to a partner upon retirement after taking accounts and upon deduction of liabilities does not involve an element of transfer within meaning of section 2(47) of the IT Act and not chargeable to income tax.

4.2.14 The Bombay High Court held-

"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 "ransfer" in relation to a capital asset and this definition gives an artificially extended meaning to the term "ransfer" 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."

'A. 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 present but its realization 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.'

4.2.15 With regard to taxability under section 28iv) of the IT Act, the amount received from a partnership firm by a partner on his retirement, the Bombay High Court held-

"17. Learned counsel appearing on behalf of the revenue has sought to urge that the amount received by the assessee is chargeable to tax under clauses (iv) and (v) of section 28. As already noted earlier, reliance on the provisions of section 28(iv) and (v) has been placed in the order passed by the Assessing Officer on 16-11-2009 in the companion petition, while disposing of the objections of the assessee. Section 28 provides certain categories of income which shall be chargeable to income-tax under the head "Profits and gains of business or profession". Clause (iv) of section 28 specifies the value of an; benefit or perquisite, whether convertible into money or not, arising from business or the exercise of profession. Ex facie, section 28(iv) does not apply to benefits which are paid in cash or money.

" This is concluded by the judgment of Hon'ble Mr. Justice S.H. Kapadia (as the learned Judge than was) speaking for a Division Bench of this Court in Mahindra & Mahindra Ltd. v. CIT [2003]261 ITR 501 Similarly, clause (v) of section 28 refers to any interest, salary, bonus; commission or remuneration, by whatever name called, due to, or received by, a partner of a

firm from such firm. A payment made to a partner in realisation of his share in the net value of the assets upon his retirement from a firm, does not fall under clause (v) of section 28. In the companion petition, the attention of the Court is also drawn to the circumstances that on the date on which reasons were recorded by the Assessing Officer, the revenue had challenged the order of the CIT(A) before the Tribunal. One of the grounds of appeal is that the assessee had claimed in the income-tax returns that his share of Rs. 50 lakhs received from the firm as a capital asset was not exigible to tax. The revenue, therefore, submitted that when the recipient claimed the receipt as capital expenditure, in the hands of the firm, the payment is also to be treated as capital expenditure.

4.2.16 This legal issue has been decided recently by the ITAT Pune Bench in the case of Smt. Vasumati Prafullchand Sanghavi v Dy.CIT [2018] 169 DTR (Pune) 227. In this case the assessee had received an amount of Rs.21, 52,73,777/- on retirement from a firm. The revenue had brought to tax this amount. The Tribunal held that an amount received by the assessee for relinquishment of rights in a firm on retirement from partnership is not chargeable to tax as capital gains or income from other sources. The Tribunal also held that such amount cannot be said to be amount received without consideration and could not be brought to tax as income from other sources us 56(2) /vi). The Tribunal relied on their earlier judgment dated 20.10.2010 in the case of Rivaz Shaikh v ITO, ITA No. 352/Pn/2006, which was confirmed by the Jurisdictional High Court.

4.2.17 The ITAT F Bench Mumbai, has decided the assessee's appeal for A Y 2012-13, vide order dated 30.01.2019 in ITA No. 913/MUM/2016. The assessee's appeal has been allowed. The addition made by the Ld AO in respect of the amount received by the assessee on retirement as partner from M/S Blue Circle Infratech has been deleted. The Hon'ble ITAT has concluded their decision as below- "32. The full bench decision of the Hon'ble Karnataka High Court in the case of CIT v. M/S. Dynamic Enterprises (259 ITR 83) has taken a similar view that when retiring partner took cash towards value of his share in partnership firm, there was no distribution of capital assets

- 16 -

among the partners and there was no transfer of capital asset and therefore no profits or gains are chargeable to tax u/s. 45(4) of the Act. We observe that the decision relied on by the Assessing Officer in the case of CiT v. AN. Naik Associates and Another (supra) is distinguishable on facts and has no application to the assessee's case. Therefore, in view of our above discussion, the share of capital along with accrued profit, goodwill and brokerage / commission which were received / receivable in terms of consent deed entered among the partners on account of retirement of the assessee from the partnership firm and the payment made to the assessee in realisation of his share in the net value of the assets of the firm on his retirement are not liable to be taxed as capital gains and also u/s. 28(V) of the Act,.

4.2.18 The facts of the case for A Y 2013-14 are identical with those of the A Y 2012-13. While making addition of Rs. 8,05,70,000/- the Ld AO has followed the Assessment Order for A Y 2012-13. He has also relied upon the decision of the Ld CIT(A) for A Y 2012-13. The legal issue involved in this case is settled in assessee's favour by the judgment of the Bombay High Court in the case of Prashant S joshi v ITO (2010] 189 Taxman 1 (Bombay). The Supreme Court also has decided this issue in favour of the assessee in the case of Addl CIT v Mohanbhai Pamabhai (1987) 165 ITR 166 (SC). This issue is also decided by the Mumbai TAT in assessee's own case for A Y 2012-13.

In the circumstances the addition of Rs. 8. 05, 70,000/- made by the Ld AO deserves to be deleted

The Grounds of Appeal raised by the assessee may kindly be allowed.

6. I have considered the facts of the case and the appellant's submissions

6.1 Grounds No 1,2,3 & 4 of the appeal are against addition of Rs 8,05,70,000/-. In this case addition was made on account of amount received in Capital account from M/s Blue Circle Infratech. Part amount was received in AY 2012-13, wherein

TAT vide order No ITA No. 913/MUM/2016 dated 30.01.2019 has allowed in favour of the assessee. The facts of the case in instant year are also same as the balance amount of Rs. 8,05,70,000/- was received during the year. The Hon'ble ITAT has held as under:

32. The full bench decision of the Hon'ble Kamataka high Court in the case of CIT v. M/s. Dynamic Enterprises [259 ITR 83] has taken a similar view that when retiring partner took cash towards value of his share in partnership firm, there was no distribution of capital assets among the partners and there was no transfer of capital asset and therefore no profits or gains are chargeable to tax us. 45(4) of the Act. We observe that the decision relied on by the Assessing Officer in the case of CIT v. AN. Naik Associates and Another (supra) is distinguishable on facts and has no application to the assessee's case. Therefore, in view of our above discussion, the share of capital along with accrued profit, goodwill and brokerage / commission which were received / receivable in terms of consent deed entered among the partners on account of retirement of the assessee from the partnership firm and the payment made to the assessee in realisation of his share in the net value of the assets of the firm on his retirement are not liable to be taxed as capital gains and also u/s. 28(v) of the Act

In view of the facts of the case and respectfully relying on the decision of Hon'ble ITAT Mumbai in assessee own case, the disallowance made by AO is deleted and the grounds of appeal are 'Allowed'

7. In the result the appeal is allowed.

7. We find the CIT(A) has considered the facts, circumstances, provisions of law, and judicial decisions and Honble Tribunal decision in the assessee own case and passed a reasoned order. The Ld.DR could not controvert the observations of the CIT(A) with any

- 18 -

new cogent material or information to take a different view. Accordingly, we follow the judicial precedence of Honble Tribunal decision and we do not find any infirmity in the order of the CIT(A) on the disputed issue of granting relief to assessee and uphold the same and dismiss the grounds of appeal of the revenue.

8. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 02.06.2022.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 02.06.2022

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

आदेशानुसार / BY ORDER,

1.

(Asst. Registrar)
ITAT, Mumbai

		Date	<u>Initial</u>	
1.	Draft dictated on	26.05.2022		PS
2.	Draft placed before author	31.05.2022		PS
3.	Draft proposed & placed before the second member			PS
4.	Draft discussed/approved by Second Member.			PS
5.	Approved Draft comes to the Sr.PS/PS			PS
6.	Kept for pronouncement on			
7.	File sent to the Bench Clerk			
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed			