आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 629/Ind/2015
Assessment Year: 2012-13

Shri Om Prakash Sharma, 81, S.R. Compound, Lasudiya Mauri, Dewas Naka, Indore.	बनाम/ Vs.	Income-tax Officer, 3(4), Indore.
(Assessee/Appellant)		(Revenue/Respondent)
PAN: AFEPS1290P		
Assessee by	Shri P.M. Chaudhary, Sr. Adv., Shri M. Khandelwal and Shri Prabhawalkar, Adv.	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	06.11.2023	
Date of Pronouncement	18.01.2024	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 20.04.2015 passed by learned Commissioner of Income-Tax (Appeals)-I, Indore ["CIT(A)"], which in turn arises out of assessment-order dated 23.03.2015 passed by learned ITO, 3(4), Indore ["AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2012-13, the assessee has filed this appeal.

2. This is a re-called matter. Originally this appeal was dismissed by Order dated 14.08.2019 of ITAT, Indore Bench for non-prosecution by

assessee. Subsequently, the assessee filed M/A No. 6/Ind/2020, the said M/A was decided by ITAT, Indore Bench vide order dated 24.11.2022 wherein the Order dated 14.08.2019 was re-called and original appeal with same registration number was re-stored. Accordingly, this appeal has come before us for hearing.

3. Originally, the appellant/assessee filed Ground of Appeal in Form No. 36 but subsequently filed 'Revised Grounds' through a separate application dated 13.10.2023. It is submitted that the Revised Grounds are merely reframed by changing the language and no additional ground has been raised. With the consensus of both sides, the Revised Grounds were taken for adjudication. These grounds read as under:

> 1. *That, the Ld. CIT(A) has erred in law in confirming addition of Rs. 2,53,98,000/- made by Ld. AO by treating the amount received by appellant in respect of transfer of his interest in the property inherited by him viz., share in his father's interest in the partnership firm M/s. Bhagirath and Brothers, which devolved upon him as a result of death of his father on 12.6.1990, treating such right as transfer of his share in the immovable property belonging to the partnership firm and subjecting it to the capital gain in spite of the admitted factual position that the property in question belonged to the partnership firm of M/s. Bhagirath and Brothers and further, invoking the provisions of section 50C and treating the stamp duty value (Guideline price) as deemed full value of consideration for such alleged sale of property.*
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> 2. *That, the Ld. CIT(A) has erred in law in confirming the addition in respect of cash deposits of Rs. 33,27,700/- as unexplained investment under section 69 of the Income Tax Act.*

4. The background facts leading to present appeal are such that the assessee-individual filed original return of income of AY 2012-13 on 29.03.2013 declaring a total income of Rs. 2,87,160/- from salary and other sources which was processed u/s 143(1) of the Act. Subsequently, the case

was selected for scrutiny under "CASS" system and statutory notices u/s 143(2)/142(1) were issued to assessee from time to time. Ultimately, the AO completed assessment u/s 143(3) after making certain additions and determining total income at Rs. 2,90,19,565/-. Aggrieved by additions made by AO, the assessee carried matter in first-appeal but did not get any relief. Still aggrieved, the assessee has come in next appeal before us on two grounds as re-produced in preceding paragraph; we proceed to adjudicate in in seriatim.

Ground No. 1:

5. In this ground, the assessee challenges the addition of Rs. 2,53,98,000/- made by AO on account of capital gain and upheld by CIT(A).

6. Facts apropos to this issue are such that during assessment-proceeding, the AO collected details u/s 133(6) from the office of Sub-Registrar indicating that during the relevant year the assessee executed a sale-deed of an immovable property for Rs. 1,80,00,000/- (valued at Rs. 2,61,83,000/- for stamps duty purpose) in his individual name and individual PAN. The AO confronted assessee vide notice dated 05.03.2015 as to why the capital gain arising from transaction had not been declared in his return. The AO also supplied to assessee a proposed working of taxable gain taking into account the deemed full value of consideration at Rs. 2,61,83,000/- as per section 50C. In response, the assessee filed a reply which is re-produced by AO in Para 5 of assessment-order. The crux of

assessee's submission was two-fold i.e. (a) the property belonged to HUF, it was a case of partition of HUF and the distribution of assets by a HUF to its members on partition of HUF is excluded from transfer u/s 47(i); and (b) the impugned property was basically a devolved property bequeathed by his deceased father by way of will (Point No. 1, Page No. 5 of assessment-order). After death of father, when the assessee wanted to leave family and the matter prolonged for a long time between assessee and his brothers, the assessee decided to give up his share in favour of family members and executed sale-deed. Thus, it was a mere devolution of property-cum-forced sale to family members. With these twin-submissions, the assessee claimed before AO that neither the impugned transaction would be taxable nor the deeming provision of consideration u/s 50C would apply. Additionally, the assessee also made a submission that the consideration received under sale-deed had been re-invested in certain properties, therefore the assessee would be entitled to exemption u/s 54/54F which would also reduce taxable gain to Rs. Nil. The AO considered assessee's reply in Para 6 to 9 of assessment-order and upon consideration rejected the same. He observed that the assessee received impugned property from his father in individual capacity. He noted that the assessee also made sale in individual capacity which is evident from sale-deed wherein the assessee's individual name and PAN have been mentioned and there is no mention of assessee's HUF or HUF's PAN. Therefore, the capital gain was earned by assessee in individual capacity and taxable in his individual assessment. The AO rejected

assessee's claim of benefit of section 47(i) available to partition of HUF. The AO also invoked section 50C and adopted full value of consideration at Rs. 2,61,83,000/- (stamps authority valuation) for computation of capital gain as against the actual sale consideration of Rs. 1,80,00,000/- declared in sale-deed. The AO also rejected assessee's claim of exemption u/s 54/54F. Ultimately, the AO made addition by concluding thus in assessment-order:

> *"9. पूंजीगत लाभ में वृद्धि – करदाता द्वारा भमौरी दुबे तहसील व जिला इंदौर में स्थित जमीन व इस पर निर्मित शेड रु 1800000/- में विक्रय की गई । जिसकी वर्तमान गाइड लाईन मूल्य उपपंजीयक द्वारा रु 26183000/- निर्धारित की गई है । इसलिए धारा 50सी के इस संपत्ति का विक्रय मूल्य पूंजीगणना के उद्देश्य में रु. 26183000/- माना जाता है । निर्धारिती द्वारा ये संपत्ति के खरीद के साक्ष्य में कोई भी प्रमाण प्रस्तुत नहीं किये है इसलिए आयकर निरीक्षक श्री रामलखन यादव की रिपोर्ट के आधार पर दिनांक 01.04.1981 का मूल्य रु. 100000/- निर्धारित किया जाता है । जिसका सूचकांक लागत रु. 785000/- निर्धारित किया जाता है इस प्रकार रु. 25398000/- दीर्घकालीन पूंजीगत लाभ निर्धारित किया जाता है एवं करदाता द्वारा HUF के नाम से खरीदा गया रहवाही प्लाट (जिस पर आयकर निरीक्षक की रिपोर्ट के आधार पर दिनांक 08.03.2015 तक कोई निर्माण कार्य नहीं किया गया) एवं अपनी पत्नी के नाम से जमीन में राशि विनियोग की गई है । किन्तु करदाता द्वारा अपने स्वयं के नाम से धारा 54/54F के अंतर्गत छूट लेने हेतु रहवासी संपत्ति (मकान) में कोई भी राशि विनियोग नहीं की गई है और ना ही विनियोग के संबंध में कोई साक्ष्य प्रस्तुत किया गया है जिससे यह प्रतीत हो कि करदाता द्वारा रहवासी संपत्ति में विनियोग किया गया है । अतः रु. 25398000/- दीर्घकालीन पूंजीगत लाभ मानते हुए रु. 25398000/- दीर्घकालीन पूंजीगत लाभ के रूप में करदाता की आय में जोड़ा जाता है । साथ ही आयकर अधिनियम की धारा 271(1)(सी) की शास्ति कार्यवाही आरंभ की जाती है ।*

7. During first-appeal, the CIT(A) upheld AO's order by observing thus:

5. Brief facts of this case are that on demise of appellant's father Late Shri Bhagirath Sharma on 12.06.1990, the 1/3rd part of property owned by partnership firm M/s Bhagirath & Brothers devolved on legal heirs whose names are mentioned at Page No. 2 of sale deed itself. As a result of this appellant got his share of 4501 sq. ft. land and 1111 sq. ft. shed constructed on it.(Out of total 1.86 Acre land & 20000 sq. ft. construction). As per the sale deed dated 30.05.2011, appellant received such property on death of his father, as his son, in individual capacity and sold such property to his brothers Shri Kailash Sharma and Shri Moolchand Sharma, for a sale construction of Rs.1,80,00,000/-. Even sale deed shows sale of this property by appellant Shri Omprakash Sharma, in individual capacity, as PAN mentioned in sale deed is AEFPS1290P, which pertains to him in individual capacity. Therefore there was no reason for appellant not to show capital gain on sale of such land, in his return, but appellant failed to show such land sale and & consequent capital gain in his return. The two excuses submitted by appellant for not showing such income in his return, first that income belonged to his HUE and second that there was no capital gain as it was merely a devolution of property in coparceners on death of his father, are both found false. Firstly on demise of his father, appellant as his son got a share in father's property in individual capacity and even sale deed for transfer of such share of appellant also shows his PAN i.e. AEFPS1290P. Secondly the event of death of father took place on 12.06.1990 and sale deed is about sale of appellant's part of property to his two brothers on 30.5.2011. Hence these two events of devolution and sale are distinct events. This being a sale of capital asset now owned and held by appellant, it will definitely attract capital gain tax, on the long term capital gain earned by appellant.

5.1 Ground No. 1 of appeal is against addition of Rs. 2,53,98,000/- on sale of capital assets namely 4501 sq. ft. land and 1111 sq. ft. shed, as discussed in point 5. The sale price of Rs.1,80,00,000/- stated in the sale deed was replaced by A.O. by adopting the amount of Rs.2,61,83,000/- which was the value of such property taken by stamps valuation

authority. A.O. thus invoked the provisions of section 50C of the Income tax Act, which provide for such replacement of value of property by the value arrived at by stamp valuation authority, if value given in sale deed is less than value arrived at by stamp value authority. The A.O. was very judicious in his approach to estimate the cost price of such asset in hands of appellant at only Rs. 1 lacs. In this manner A.O. correctly arrived at long term capital gain of Rs.2,53,98,000/-.Since appellant has neither raised any objection on application of section 50C of the Income Tax Act, nor raised any objection on working of long term capital gain,hence long term capital gain worked out by A.O. of Rs.2,53,98,000/- is hereby confirmed. **Ground No. 1 of appeal is dismissed.**

6. Although in the grounds, appellant has not made any claim for deduction u/s 54F of the Income Tax Act, during appeal hearing appellant has claimed deduction u/s 54F of the Income tax Act, on two properties, one property stated to be a house property with investment of Rs100.58 lacs purchased in name of appellant's wife Smt. Kamlesh Sharma and another property stated to be a residential plot of land purchased with investment of Rs.138.05 lacs in name of Shri Omprakash Sharma (HUF). Since none of these properties is purchased in name of appellant and appellant in individual capacity is not even a joint owner in any of these two properties, hence condition laid down under provisions of section 54F of the Income Tax Act, are not fulfilled regarding ownership of appellant over new property. For this purpose reliance is place on the decision in case of Prakash v/s ITO (2008) 173 taxman 311 (Bom.). Besides no deduction u/s 54F of the Income tax Act, is available on merely a land plot purchased in name of appellant's HUF as such deduction is available only on a residential house purchased by appellant. Besides this appellant also failed to show that he does not already own other residential property. In view of these facts, deduction u/s 54F of the Income tax Act, will not be available on such long term capital gain.

8. Now, the issue before us is whether or not the capital gain assessed by AO was taxable in the hands of assessee? To address this issue, Ld. Senior Advocate representing the assessee [Hereafter referred as "Ld. AR"] initially carried us to the copy of sale-deed dated 30.05.2011 placed at Page No. 100-113 of Paper-Book and drew our attention to following paragraph mentioned on Page No. 2 of the deed:

"विक्रेतापक्ष यह विक्रयपत्र क्रेता पक्ष के हित में निम्न शर्तों एवं दायित्वों के अधीन निम्नानुसार लिख देतै है कि :-

यह कि ग्राम भमौरी दुबे तहसील व जिला इंदौर में स्थित सर्वे नंबर 263/2 रकबा 1.00 एकड एवं सर्वे नंबर 263/3 रकबा 0.86 एकड होकर कुल रकबा 1.86 एकड़ भूमि व उस पर निर्मित शेड मेसर्स भागीरथ एंड ब्रदर्स के स्वामित्व एवं अधिपत्य का है ।

सर्वप्रथम उपरोक्त वर्णित संपत्ति मेसर्स भागीरथ एण्ड ब्रदर्स (भागीदारी फर्म) में पंजीकृत विक्रय पत्र क्रमांक 1अ/1606/दिनांक 13.03.1970 के द्वारा क्रय की है । उक्त फर्म के भागीदार श्री भागीरथ शर्मा का स्वर्गवास दिनांक 12.06.1990 को हो गया होने से उपरोक्त वर्णित संपत्ति में से उनका एक तिहाई अविभाजीत हिस्सा विक्रेतापक्ष, क्रेतापक्ष एवं श्रीमती गंगादेवी पति स्व.श्री भागीरथजी शर्मा एवं हंसा पिता स्व.श्री भागीरथजी शर्मा को उनके वैधानिक उत्तराधिकारी नाते प्राप्त हुआ है । विक्रेता पक्ष इस विक्रयपत्र द्वारा क्रेता पक्ष को मेसर्स भागीरथ एण्ड ब्रदर्स की संपत्ति अर्थात ग्राम भमौरी दुबे तहसील व जिला इंदौर में स्थित सर्वे नंबर 263/2 रकबा 1.00 एकड एवं सर्वे नंबर 263/3 रकबा 0.86 एकड होकर कुल रकबा 1.86 एकड़ भूमि व उस पर निर्मित 20000 वर्गफीट शेड के एक तिहाई भाग में से अपना अविभाजित भाग अर्थात 4501 वर्गफीट भूमि उस पर निर्मित 1111 वर्गफीट शेड (जिसे इस लेख में "उक्त संपत्ति" कहा गया है) विक्रय कर रहे है । वर्तमान में उक्त संपत्ति विक्रेतापक्ष के स्वामित्व एवं आधिपत्य की है तथा विक्रेतापक्ष को उसे विक्रय करने का पूर्ण अधिकार प्राप्त है । उक्त संपत्ति व्यवसायिक क्षेत्र में स्थित होकर औद्योगिक उपयोग की है । विक्रेतापक्ष ने उक्त संपत्ति के अतिरिक्त इस विक्रय पत्र द्वारा अन्य किसी संपत्ति का विक्रय नहीं किया है ।"

Referring to this para, Ld. AR submitted that the sale-deed executed by assessee clearly mentions that there was a property consisting of 1.86 acres of land and 20,000 square feet of shed constructed thereon owned by one M/s Bhagirath & Brothers, a partnership firm [hereafter referred as "firm/partnership firm"]. That the said property was purchased by partnership firm vide purchase-deed dated 13.03.1970. That Shri Bhagirath Sharma, one partner of the said firm (who was father of assessee) was having '1/3rd undivided share in property'. That Shri Bhagirath Sharma expired on 12.06.1990 and his '1/3rd undivided share in property' devolved upon 6 legal heirs, namely assessee (son of late Shri Bhagirath Sharma mentioned as "seller" in the sale-deed); Shri Kailash Sharma, Shri Ashok Sharma & Shri Mool Chand Sharma (3 brothers of assessee and sons of late Shri Bhagirath Sharma mentioned as "purchaser" in the sale-deed); 2 other family members Smt. Ganga Devi (mother of assessee and wife of late Shri Bhagirath Sharma) and Smt. Hansha (sister of assessee and daughter of late Shri Bhagirath Sharma). Accordingly, the assessee being one of the legal heirs out of 6 legal heirs had share measuring 4,501 square feet in land and 1,111 square feet in constructed-shed. To clarify the calculation of assessee's share, we may mention that the partnership firm owned 1.86 acres of land (1 acre = 43,560 square feet, therefore 1.86 acres = 81,021 square feet) and 20,000 square feet of construction. Therefore, 1/3rd share of assessee's father comes to 27,007 square feet of land and 6,666 square feet of construction and assessee's 1/6th share in father's share comes to

4,501 square feet of land and 1,111 square feet of construction. The assessee, described as "Seller" in the sale-deed, sold his share, namely 4,501 square feet of land and 1,111 square feet of construction to his 3 brothers described as "Purchaser" in the sale-deed [The CIT(A) has in advertently mentioned 2 brothers in place of 3 brothers]. Ld. AR that the sale-deed itself clearly mentions the status of property i.e. the property was actually owned by firm M/s Bhagirath & Brothers and not by assessee's late father. The assessee's father only had 1/3rd undivided share in the property of firm which upon his death devolved upon 6 legal heirs (including assessee). Ultimately, the assessee executed sale-deed to transfer/relinquish his own undivided share in father's 1/3rd undivided share in the property owned by firm. Ld. AR submitted that although a sale-deed has been executed by assessee with his individual name and PAN but there is no taxable income earned by assessee-individual because of two alternative reasons mentioned below:

(i) The first reasoning advanced by Ld. AR is such that the impugned sale-deed had been executed by assessee as a part of a 'family settlement' agreed between assessee and his family members, therefore it was not a sale in fact. To prove existence of 'family settlement', Ld. AR drew our attention to a "Memorandum of Family Settlement" dated 30.05.2011 on stamp paper of Rs. 100/- made between all 6 legal heirs (including assessee), which is filed by assessee as an "additional evidence" under Rule 29 of Income-tax (Appellate Tribunal) Rules, 1963 on 21.06.2017 and also re-filed at Page No.

87-91 of the "Written-Submission" filed by assessee on 13.10.2013. Referring to this document, Ld. AR tried to demonstrate that there was a 'family settlement' arrived at between family members (including assessee) under which the assessee agreed to relinquish/transfer the impugned undivided share in property of firm and it is only in furtherance of such 'family settlement' that the assessee executed sale-deed. Then, relying upon certain judgements copies filed in Paper-Book, Ld. AR submitted that the 'family settlement' does not entail any taxation under Income-tax, therefore the present case of assessee being a situation of 'family settlement', there arises no taxability.

(ii) The second plank of reasoning advanced by Ld. AR is such that the impugned property was actually owned by partnership firm and the assessee's late father had no right in the property. When the assessee's father had no right, the assessee cannot have any right. Therefore, even if a sale-deed had been executed by assessee for whatever reason, it cannot give rise to any income or taxable income in the hands of assessee. To explain as to why the assessee's father had no right in the said property, Ld. AR relied upon section 14 of The Indian Partnership Act, 1932 which prescribes thus:

> *"**14. The property of the firm -** Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm; and includes also the goodwill of the business.*
>
> *Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."*

Then, Ld. AR invited our attention to a commentary given by an author on aforesaid section 14, filed at Page No. 34 of the Paper-Book, reading as under:

> *"7. No part of property of the firm or a definite share belong to any partner individually – It may be said that the rule adopted by English Courts is that real estate intended by the partners to constitute a part of the partnership property or treated by them as belonging to the partnership is regarded in equity as converted in to personality for all purposes and also for the settlement of the claims of the partners inter se. The law in India is not different. Secs. 14 and 15 of the Indian Partnership Act, 1932, speak about what would constitute the property of a firm and declare that such property shall be held and utilized for the purpose of the partnership thereby indicating that so long as the partnership continues no part of the assets of a partnership assets could be utilized for a purpose other than that of the partnership. A partner, therefore, seeking to get his share could not get his share in species in the movable and immovable properties but only after the assets have been converted into money, debts and liabilities discharged and it is only in the residue that he could get his proportionate share. The statute enjoins this process being gone through before a partner gets a share in the assets of the partnership and it is governed by Secs. 46,48 and 49 of the Partnership Act. It would, therefore, follow that a partner cannot predicate of a definite share in immovable property which he could transfer or give up.*
>
> *The concept of realty distinguished from personally under the English Law and by the English lawyers and jurists is not always identical with what the Indian Law and lawyers understand. The idea of ownership or real estate by a Hindu coparcenery is unique. To some measure an immovable property owned by a partnership is skin to, such a property belonging to a Hindu Joint Family. The ownership vests in each member of the coparcenary but there is a restriction on his power of disposal. The coparceners may agree not to partition the joint property and that will be binding upon them through their heirs may not be bound by such agreement. Similarly during a partnership the partners cannot take away their property that they may put into the stock of partnership. The individual owner becomes a joint owner with other partners. He retains an interest in that immovable property. Partnership is only the relationship between the partners. The firm is only an alias for the partners. When a firm is said to own a property, it is same as saying that the partners jointly own the property. Though in the mercantile world the firm is used as a quasi corporation, for sake of convenience, it is really not so. It is different from an Incorporated company, private or public. According to the definition of immovable property in the General Clauses Act any profit arising from land is also immovable property. An interest in the future sale-proceeds of an immovable property was held by the Judicial Committee to be immovable property. A partner's interest or share in the firm's assets is his proportion of partnership after payment of the firm's debts and liabilities out of the assets. In that sense his interest in the partnership may be taken to be an interest in the immovable property belonging to the firm. Many of cases, both English and Indian, undoubtedly held such interest of partners not to be immovable*

property. But that view is not consistent with the Indian concept of realty and ownership, or the view of the Judicial Committee referred above.

Thereafter, Ld. AR relied upon decision of Hon'ble Supreme Court in **Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and 13 others (1966) SCC Online SC 6 : (1966) 3 SCR 400 : AIR 1966 SC 1300**; we quote below the paras referred by Ld. AR during hearing:

1. In this appeal by special leave from a judgment of the High Court of Andhra Pradesh the question which arises for consideration is whether the interest of a partner in partnership assets comprising of movable as well as immovable property should be treated as movable or immovable property for the purposes of s. 17(1) of the Registration Act, 1908.

4. Direct cases upon this point of the courts in India are few but before we examine them it would be desirable to advert to the provisions of the Partnership Act itself bearing on the interest of partners in partnership property. Section 14 provides that subject to contract between the partners the property of the firm includes all property originally brought into the stock of the firm or acquired by the firm for the purposes and in the course of the business of the firm. Section 15 provides that such property shall ordinarily be held and used by the partners exclusively for the purposes of the business of the firm. Though that is so a firm has no legal existence under the Act and the partnership property will, therefore, be deemed to be held by the partners for the business of the partnership. Section 29 deals with the rights of a transferee of a partner's interest and sub-s. (1) provides that such a transferee will not have the same rights as the transferor partner but he would be entitled to receive the share of profits of his transferor and that he will be bound to accept the account of profits agreed to by the partners. Sub-section (2) provides that upon dissolution of the firm or upon a transferor-partner ceasing to be a partner the transferee would be entitled as against the remaining partners to receive the share of the assets of the firm to which his transferor was entitled and will also be entitled to an account as from the date of dissolution. Section 30 deals with the case of a minor admitted to the benefits of partnerships. Such minor is given a right to his share of the property of the firm and also a right to a share in the profits of the firm as may be agreed upon. But his share will be liable for the acts of the firm though he would not be personally liable for them. Sub-section (4) however, debars a minor from suing the partners for accounts or for his share of the property or profits of the firm save when severing his connection with the firm. It also provides that when he is severing his connection with the firm the court shall make a valuation of his share in the property of the firm. Sections 31 to 38 deal with incoming and outgoing partners. Some of the consequences of retirement of a partner are dealt with in sub-sections (2) and (3) of section 32 while some others are dealt with in sections 36 and 37. Under section 37 the outgoing partner or the estate of a deceased partner, in the absence of a contract to the contrary, would be, entitled to at the option of himself or his representatives to such share of profits made since he ceased to be a partner as may be attributable to the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the

property of the firm. The subject of dissolution of a firm and the consequences are dealt with in chapter VI, sections 39 to 55. Of these the one which is relevant for this discussion is section 48 which runs thus:

> *"In settling the accounts of a firm after dissolution the following rules shall, subject to agreement by the partners, be observed:*
>
> *(a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.*
>
> *(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :-*
>
> > *(i) in paying the debts of the firm to third parties:*
> >
> > *(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;*
> >
> > *(iii) in paying to each partner rateable what is due to him on account of capital; and*
> >
> > *(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits."*

From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing, to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in cl. (a) and sub-clauses (i), (ii) and (iii) of clause (b) of section 48. It has been stated in Lindley on Partnership, 12th ed. at p. 375:

> *"What is meant by the share of a partner is his proportion of the partnership assets after they have been ill realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner passes to his representatives, or to a legatee of his share ..... and which on his, bankruptcy passes to his trustee."*

7. It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the trading asset of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in

proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by section 29(1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners. There are not many decisions of the High Courts on the point in the few that there are the preponderating view is in support of the position which we have stated.

8. We may also refer to the decision of a Full Bench in Ajudhia Pershad Ram Pershad v. Sham Sunder & Ors. in which Cornelius J., has discussed most of the decisions we have earlier referred to in addition to several others and reached the conclusion that while a partnership is in existence no partner can point to any part of the assets of the partnership as belonging to him alone."

Thus, Ld. AR contended that the law of partnership is very clear. Even the Hon'ble apex Court has interpreted and held that a partner does not have any right in any specific asset of partnership firm; the partner's right extends only to share profits during continuity of firm and to share residual assets in the event of dissolution. Therefore, according to Ld. AR, the assessee's father late Shri Bhagirath Sharma did not have any right or interest in the impugned property which in law was owned by firm. Ld. AR went on submitting that it is a settled principle of law that *"no one can confer a better title than what he himself has"*. Therefore, when assessee's late father had no legal title in the impugned property, how can assessee have? Hence, even if the assessee has executed a sale-deed to transfer undivided interest in the impugned property owned by firm, there cannot be any income or taxable income in the hands of assessee.

9. Per contra, Ld. DR for revenue strongly opposed above submissions made by Ld. AR. He submitted that the assessee has sold his share in property through a registered sale-deed to his brothers for a consideration of Rs. 1,80,00,000/- and in fact received a total consideration of Rs. 60,00,000/- from each of the 3 brothers through cheque. He submitted that the assessee has himself replied to AO that he acquired ownership right by way of will of his father (Point No. 1 / Page No. 5 of assessment-order). He submitted that it is a clear-cut sale of right/asset by assessee for a consideration which now the assessee is trying to cover under 'family settlement'. Ld. DR further submitted that the 'Memorandum of family settlement' filed by assessee bears the date of 30.05.2011 and the sale-deed was also executed on the very same date of 30.05.2011; therefore it is a case of sale under the guise of 'family settlement'. He submitted that in any case, the assessee has sold his share in father's asset/right, received hefty consideration and thereby earned *de facto* income which cannot remain untaxed. Therefore, the AO has rightly assessed and the CIT(A) has also rightly upheld the AO's action. Ld. DR prayed that no interference is required with the orders of lower-authorities.

10. In rejoinder, Ld. AR submitted that the "Memorandum of family settlement" has been made on the very same day on which the sale-deed was made because nobody wants a time-gap in such matters. Therefore, no adverse inference should be taken based on date of execution.

11. We have considered rival submissions of both sides and perused the orders of lower-authorities as well as the material held in case file. The controversy before us is whether the AO was right in assessing capital gain in the hands of assessee? The admitted undisputed facts are such that (i) the assessee executed a registered sale-deed on 30.05.2011 in favour of his 3 brothers, (ii) the sale-deed was executed by assessee as "seller" in his individual name and individual PAN, and (iii) the assessee received a total consideration of Rs. 1,80,00,000/- from 3 brothers (Rs. 60,00,000/- from each one). There can hardly be any dispute on the point that if a person sells a property/right in divided or undivided property for a consideration, the resultant gain is taxable. But, in the present case, the assessee is claiming certain factual-cum-legal propositions to plead that the transaction done by him did not give rise to any taxable income. We would discuss those propositions one by one in subsequent paras.

12. Initially, the assessee claimed before AO that the property belonged to HUF, that it was a case of partition of HUF and the distribution of assets by a HUF to its members on partition of HUF is excluded from transfer u/s 47(i). Taking cognizance of this claim of assessee before AO, then Bench of ITAT, Indore, asked the assessee to file document to prove the partition of HUF. The assessee filed "additional evidences" under an application in terms of Rule 29 of Income-tax (Appellate Tribunal) Rules, 1963 on 21.06.2017; we re-produce below the application filed by assessee alongwith Annexure-B and C referred therein for an immediate reference:

N.Parik & CO.
CHARTERED ACCOUNTANTS

207, 2nd Floor, Capt. C.S. Nayudu Arcade,
10/2, Old Palasia, Near Greater Kailash Hospital,
INDORE-452001 (M.P.) Tel.:0731-4071193.
E-mail: itnparik@gmail.com, auditnparik@gmail.
Website: www.nparik.in

To,
The Honorable Income Tax Appellant Tribunal
Indore Bench
Indore (M.P.)

Date:

Subject: Submission of Additional Evidences in the case of Shri Om Prakash Sharma having PAN AFEPS1290P for Assessment Year 2012-13

Reference: Appeal No. -629/2015

Respected Sir,

With reference to the above mentioned Subject we would like to submit Additional Evidences. As per Rule 29 of the Income Tax (Appellant Tribunal) Rules, 1963, in the following circumstances additional evidences may be submitted before the Honorable Income Tax Appellant Tribunal:

1. *Orders have been passed by lower authorities without giving sufficient opportunity.*
2. *ITAT requires evidence or documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders.*
3. *For any other substantial cause.*

In our case, the Appellate Authority has asked us to submit the documents which can prove the partition of the HUF and details or documents of distribution of any other assets also. So, as per the requirements and directions of the H'ble ITAT we are hereby submitting the following documents as additional evidence in four (4) copies:

Bhopal: 137, 2nd Floor, Zone II, M.P. Nagar, Bhopal-462011. Tel.: 0755-3299867. Cell: 98264-10260. E-mail: npabhp@yahoo.c
New Delhi: First Floor, Sunanda Building, 17/10, Old Rajindra Nagar, New Delhi-110060. Tel.: 011-25810860

1. Copy of Declaration of Gift as per **"Annexure A"**
2. Copy of Memorandum of Family Settlement as per **"Annexure B"**
3. Copy of Partition Deed as per **"Annexure C"**

From the above annexure it is very clear that the partition of the Hindu Undivided Family did took place and that *the asset or shares transferred to the family members pursuant to a family arrangement or partition cannot be constructed as a transfer under section 2(47) of the Income Tax Act, 1961.*

The applicability of section 50C arises only when there is transfer as per section 2(47) but the partial partition as undertaken at the instance of the appellant is exempt from the definition of transfer and hence the provisions of section 50C are not attracted. Now from the above it is very clear that the transactions is mere a *Family Settlement.*

Kindly consider the above documents.

Thanking You,

Yours Sincerely,
For, Shri Om Prakash Sharma,

(Counsel of the Appellant)

"Annexure B"

मध्य प्रदेश MADHYA PRADESH S 601178

MEMORANDUM OF FAMILY SETTLEMENT

FAMILY SETTLEMENT WITH CASH PAYMENT EQUALISATION

THIS MEMORANDUM OF FAMILY SETTLEMENT is made on this 30th day of May'2011 between:-

1. **Omprakash Sharma**
S/o (Late) Shri Bhagirath Ji Sharma
Aged 57 yrs residing at 1 New Palasia, Indore
(Hereinafter referred to as the party of the FIRST part which includes his legal heirs, successors and assigns)

2. **Smt.Ganga Devi Sharma**
Wd/o (Late) Shri Bhagirath Ji Sharma
Aged 75 yrs residing at 3 Shanti Niketan Colony,
Near Bombay Hospital, Indore

3. **Kailash Sharma**
S/o (Late) Shri Bhagirath Ji Sharma
Aged 55 yrs residing at 21 Shanti Niketan Colony,
Near Bombay Hospital, Indore

4. **Ashok Sharma**
S/o (Late) Shri Bhagirath Ji Sharma
Aged 53 yrs residing at 307 AD, Scheme No.74-C, Indore

5. **Moolchand Sharma**
S/o (Late) Shri Bhagirath Ji Sharma
Aged 51 yrs residing at 3 Shanti Niketan Colony,
Near Bombay Hospital, Indore

6. **Smt.Hansa Sharma**
W/o (Late) Shri Bhagirath Ji Sharma
Aged 46 yrs residing at Chittorgarh (Rajasthan)

(Hereinafter collectively referred to as the parties of the SECOND part which includes their legal heirs successors and assigns)

WHEREAS, Shri Bhagirath Ji Sharma, the father of parties mentioned at Sl.No.1, 3, 4, 5 and 6 and Husband of party mentioned at Sl.No.2 herein had during his lifetime acquired, built and developed or otherwise was in possession of properties mentioned in the Schedules – A and B hereunder written.

WHEREAS, Shri Bhagirath Ji Sharma died intestate on 12/06/1990 leaving behind movable and immovable assets more particularly described in **Schedule – A** and **Schedule – B** hereunder written.

WHEREAS, on demise of Shri Bhagirath Ji Sharma on 12/06/1990 the parties hereto have become the co-owners with equal share as his lawful legal heirs.

WHEREAS the parties aforesaid being in possession as absolute joint owners in the equal share, free from all encumbrances whatsoever, the movable and immovable properties described in the schedule A and B written hereunder have with an intention to put an end to their community of ownership with Shri Omprakash Sharma, the party of the first part, have divided and forever separated the share of Shri Omprakash Sharma in the properties mentioned in the said schedule - A for the purpose of same being hereafter jointly owned by Smt.Ganga Devi, Shri Kailash, Shri Ashok, Shri Moolchand and Smt.Hansa, the parties of the Second Part. The parties hereto have earlier settled within themselves the division of properties belonging to late Shri Bhagirath Ji Sharma more particularly described in Schedule - A.

WHERAS the immovable property mentioned in Schedule – B being residential house at 1 New Palasia, Indore will continue to remain in co-ownership of the parties mentioned in serial no.1 to 6 above.

AND WHEREAS, Shri Omprakash Sharma had decided to be out of the Co-ownership and Smt.Ganga Devi, Shri Kailash, Shri Ashok, Shri Moolchand and Smt.Hansa have mutually decided to pay and partition the assets, so that Shri Omprakash is separated from the common ownership and hereafter does not remain as a Co-owner alongwith Smt.Ganga Devi, Shri Kailash, Shri Ashok, Shri Moolchand and Smt.Hansa in respect of movable and immovable properties mentioned in Schedule – A written hereunder.

NOW THEREFORE THIS MEMORANDUM witnesseth the terms of Family Settlement decided in the past and now reduced to writing for any future use:-

1. Deposit with the Company as described at Sl.No.1 in the Schedule A
deposit with the company has been withdrawn. The said deposit is allocated and paid as under:-

S.No.	Name	Amount	Chq No
1	Shri Omprakash Sharma	213461.17	172573
2	Smt.Ganga Devi Sharma	213461.17	172603
3	Shri Kailash Sharma	213461.17	172604
4	Shri Ashok Sharma	213461.17	172605
5	Shri Moolchand Sharma	213461.16	172606
6	Smt.Hansa Sharma	213461.16	172607
		1280767.00	

2. Equity Share in the Pvt Ltd. Company as described at Sl.No.2 in the Schedule A
Equity shares in the Pvt Ltd Company were divided between the parties as under:-

S.No.	Name	Equity Share	Distinctive No	Certificate No.
1	Shri Omprakash Sharma	1		
2	Smt.Ganga Devi Sharma	1		
3	Shri Kailash Sharma	1		
4	Shri Ashok Sharma	1		
5	Shri Moolchand Sharma	1		
6	Smt.Hansa Sharma	1		
		6		

3. Immovable Property as described at Sl.No.3 in Schedule A
that in consideration of, a payment of Rs.60,00,000/- made by Shri Kailash Sharma vide Pay Order/Demand Draft No.806568 dated 30/05/2011 drawn on Dean Bank Navlakah Branch, Indore drawn in favour of Shri Omprakash Sharma, a payment of Rs.60,00,000/- made by Shri Ashok Sharma vide Pay Order/Demand Draft No. 806569 dated 30/05/2011 drawn on Dean Bank Navlakah Branch, Indore in favour of Shri Omprakash Sharma, a payment of Rs.60,00,000/- made by Shri Moolchand Sharma vide Pay Order/Demand Draft No. 806570 dated 30/05/2011 drawn on Dean Bank Navlakah Branch, Indore in favour of Shri Omprakash Sharma, totaling to Rs.1,80,00,000/- (Rupees One Hundred Eighty Lacs Only), Shri Omprakash Sharma had released/relinquished/sold all his rights, titles and interest (to the extent of his 1/6th share in the immovable property as above) equally in favour of Shri Kailash, Shri Ashok and Shri Moolehand. A release/ relinquishment/sale deed to this effect is to be registered at the appropriate registering authority and by doing so the share of Shri Kailash, Shri Ashok and Shri Moolchand in the above immovable properties will be augmented to that extent.

4. Immovable Property as described in Schedule B

That the immovable property being residential house mentioned at Serial No.1 in Schedule – B will continue to be under the co-ownership of the parties mentioned at serial no.1 to 6 above.

5. That from the date of oral partition Shri Omprakash shall have no claim on any of the properties mentioned in the Sehedule A written hereunder. Shri Omprakash Sharma hereby further declares that he has no claim on any business/ businesses conducted by Shri Kailash, Shri Ashok and Shri Moolchand at Indore and/or at Pithampur along with other family members. Similarly, Shri Kailash, Shri Ashok and Shri Moolchand has or had never been any interest in any of the business/ businesses conducted by Shri Omprakash at Indore.

6. That Shri Omprakash Sharma has full information of all the properties and the business run by (Late) Shri Bhagirath Ji Sharma and shall not hereafter raise any claim of any kind whatsoever saying and pointing towards any other business/ businesses and claiming it to be of (Late) Shri Bhagirath Ji Sharma.

7. That there existed a Joint Hindu Undivided Family between Shri Bhagirath Ji, Smt.Ganga Devi, Shri Omprakash, Shri Kailash, Shri Ashok, Shri Moolchand and Smt.Hansa and such Hindu Undivided Family owned certain movable assets in the form of deposit with the partnership firms and Pvt Ltd Company. It is hereby declared and confirmed by the parties hereto that such Hindu Undivided Family has been partitioned and the parties hereto have got their equal share in the said Hindu Undivided Family and a separate partition deed to that effect is being executed and signed by the parties hereto. That Shri Omprakash Sharma has separated from the Bhagirath Sharma (HUF) by taking a sum of Rs.1,60,401.12 (Rupees One Lac Sixty Thousand Four Hundred One and Paise Twelve only).

8. That, except immovable property mentioned in Schedule – B written hereunder, there is nothing remaining in Co-ownership with Shri Omprakash Sharma, no property nor any business/ businesses and there has never been any partnership.

9. That Shri Omprakash Sharma hereto confirm and declare that all the disputes and differences with the parties of the Second part are settled and that there remains no claim or demand of any nature whatsoever against the parties of the Second Part.

10. That the parties hereto expressly agree and declare that they have arrived at the Family Settlement and in order to put an end to the possible future dispute between the parties and with a view to bring about amity and goodwill amongst them and with a view to maintaining peace and bring about harmony in the family, this memorandum is recorded because when the parties had orally partitioned and settled the family properties amongst themselves no formal document had been executed but there was exchange of cheque and consideration amongst the parties. The parties hereto further agree and declare that the terms of the Memorandum of Family Settlement arrived at between them and recorded herein are fair and bona fide and in the interest of all the parties.

11. The parties hereto shall sign and execute or cause to be signed and executed all such documents, deeds, writing and/or instructions as may be necessary to give effect to this Family Settlement arrived at amongst the parties on 29/05/2011 and which is recorded in the Memorandum of Family Settlement.

IN WITNESS WHEREOF the parties have set and subscribed their respective hands on the day and year first herein above written:

Signed and delivered by the withinnamed
Omprakash Sharma
S/o (Late) Shri Bhagirath Ji Sharma
(the party of the First Part)
in the presence of _____

Signed and delivered by the withinnamed
Smt.Ganga Devi Sharma
Wd/o (Late) Shri Bhagirath Ji Sharma
Kailash Sharma
S/o (Late) Shri Bhagirath Ji Sharma
Ashok Sharma
S/o (Late) Shri Bhagirath Ji Sharma
Moolchand Sharma
S/o (Late) Shri Bhagirath Ji Sharma
Smt.Hansa Sharma
D/o (Late) Shri Bhagirath Ji Sharma
(hereinafter referred to as the parties of the Second Part)
in the presence of _____

Witness:
1 _____
2 _____

SCHEDULE A

(Forming part of Memorandum of Family Settlement)

Details of Properties owned by Late Shri Bhagirath Ji Sharma

S.No.	Details of Assets		Remarks
1	Deposit - In the form of Unsecured Loan with Bhagirath Coach & Metal Fabricators Pvt Ltd.,Indore	1280767.00	Held in the name of Late Shri Bhagirath Ji Sharma
2	6 Equity Shares in Bhagirath Coach & Metal Fabricators Pvt Ltd., Indore (Certificate No._____ having distinctive nos ___ from ____)	6.00	Held in the name of Late Shri Bhagirath Ji Sharma
3	**Immovable Property:** 1/3 share as partner in the land of partnership firm M/s Bhargirath & Bros. at A B Road, Indore. (total land approx 81000 sq ft) There being 3 partnes in the said partnership firm the Share of Late Shri Bhagirath Ji in the said land being 1/3rd of the total land.		Held jointly in the name of the partnes of the firm.

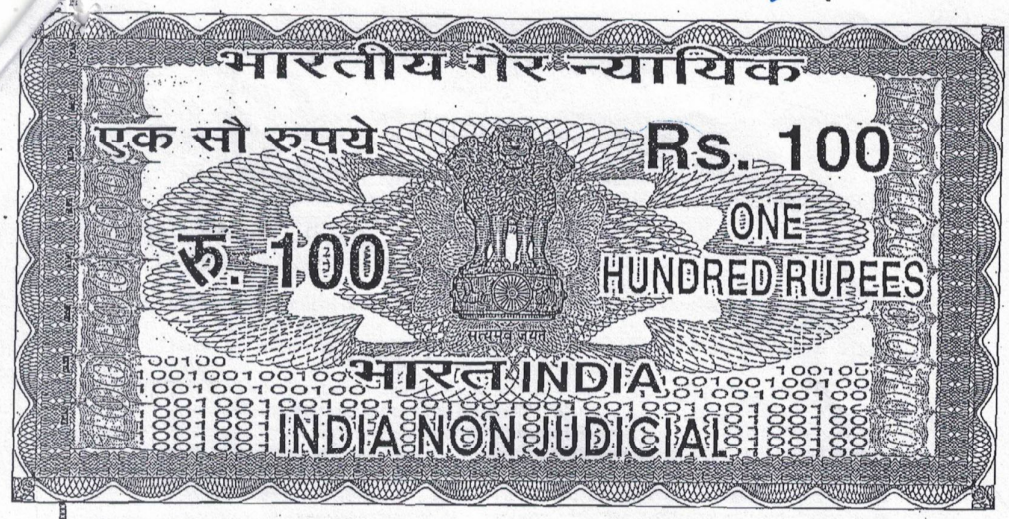
SCHEDULE B

(Not forming part of Memorandum of Family Settlement and will continue to be under co-ownership of legal heirs of Late Shri Bhagirath Ji Sharma as mentioned in serial no.1 to 6)

	Immovable Property: Residential house at 1 New palasia, Indore having plot and G+2 stories Construction having construction of approx 4500 sq ft.		Held in the name of Late Shri Bhagirath Ji Sharma

"Annexure C"

28/5/11



मध्य प्रदेश MADHYA PRADESH

S 601176

30.5.11

PARTITION DEED

THIS DEED OF PARTITION made at Indore this 30th day of May in the year Two Thousand Eleven between:-

1. Smt.Ganga Devi Sharma wd/o Late Shri Bhagirath Ji Sharma, Aged 75 years, Occupation Housewife residing at 3 Shanti Niketan Colony, Near Bombay Hospital, Indore, hereinafter referred to as the party of the FIRST PART;
2. Shri Omprakash Sharma s/o Late Shri Bhagirath Ji Sharma Aged 57 years, Occupation Business residing at 1 New Palasia, Indore hereinafter referred to as the party of the SECOND PART;
3. Shri Kailash Sharma s/o Late Shri Bhagirath Ji Sharma Aged 55 years, Occupation Business residing at 21 Shanti Niketan Colony, Near Bombay Hospital, Indore, hereinafter referred to as the party of the THIRDART;
4. Shri Ashok Sharma s/o Late Shri Bhagirath Ji Sharma Aged 53 years, Occupation Business residing at 307 AD, Scheme No.74-C, Indore, hereinafter referred to as the party of the FOURTH PART;
5. Shri Moolchand Sharma s/o Late Shri Bhagirath Ji Sharma Aged 51 years, Occupation Business residing at 3 Shanti Niketan Colony, Near Bombay Hospital, Indore, hereinafter referred to as the party of the FIFTH PART; and
6. Smt.Hansa Sharma d/o Late Shri Bhagirath Ji Sharma Aged 46 years, Occupation Housewife residing at Chittorgarh (Rajasthan), hereinafter referred to as party of the SIXTH PART

WHEREAS:

(1) Whereas the parties hereto are the members and coparceners of Shri Bhagirath Sharma (HUF) a joint and Hindu Undivided Family.

(2) Whereas the HUF – Shri Bhagirath Sharma (HUF) owns certain movable assets in the form of deposit with Pvt.Ltd.Company and Partnership firms. The list of such movable assets in the form of deposit owned by the HUF is more particularly described in Schedule "A" hereunder written and each of the parties hereto is entitled to share in the Schedule "A" movable property.

(3) Whereas the parties hereto desire to effect a partition of the said movable property between themselves as they no longer desire to continue as members and coparceners of the Shri Bhagirath Sharma (HUF) a Hindu Undivided Family and desire to be separated.

(4) Whereas the parties hereto have agreed that the movable property described in schedule "A" in the form of deposit with companies and partnership firms are withdrawn.

(5) Whereas the parties have agreed that the amount receivable against the said Schedule "A" movable property will be divided equally amongst the parties hereto more particularly described in Schedule "B" hereunder written.

NOW THIS DEED WITNESSETH AS UNDER

(1) That on signing of this document the Bhagirath Sharma (HUF) stands dissolved disintegrated. It is hereby declared that there is no HUF of Shri Bhagirath Ji Sharma w.e.f. today and the parties hereto are independent and no longer coparceners or members of Shri Bhagirath Ji Sharma (HUF).

(2) That the parties hereto have agreed that the said Schedule "A" movable properties will be equally partitioned amongst them as described in Schedule "B".

(3) In the consideration aforesaid, each of the parties hereto grant and release all his/her undivided share, right, title and interest in the property allotted to the other of them as aforesaid so as to constitute each party the sole and absolute owner of the property allotted to him/her free and discharged from all rights, title, interest claims and demands of the other party hereto or concerning the same but subject to the taxes, rates, dues and duties and assessment payable to Government or any other public body in respect thereof.

(4) Each party covenants with the other that he/she has not done any act deed or thing whereby or by means whereof he/she is prevented from conveying and releasing the property to the other in the manner aforesaid.

(5) The original deed of partition will remain in the custody of the Party of the First Part and the duplicate copy hereof will remain in the custody of the Parties of the other parts.

SCHEDULE "A"

(Details of Undivided Movable Property being Deposit with Companies and Partnership Firms belonging to the Bhagirath Sharma – HUF a Joint Hindu Undivided Family)

Serial Number	Description	Nature	Amount
1	Deposit with Bhagirath Coach & Metal Fabricators Pvt Ltd., Indore	Unsecured Loan	2,11,965.00
2	Deposit with Mohan Trading Company, Indore	Unsecured Loan	7,50,441.70
		TOTAL	9,62,406.70

SCHEDULE "B"

(Details of Partition of Movable Property of Bhagirath Sharma – HUF a Joint Hindu Undivided Family amongst the members/coparceners)

S.No.	Name of the Member/Coparcener	Amount	Mode of Payment
1	Smt.Ganga Devi Sharma Wd/o Late Shri Bhagirath Ji Sharma	1,60,401.12	Cheques
2	Shri Omprakash S/o Late Shri Bhagirath Ji Sharma	1,60,401.12	Cheques
3	Shri Kailash S/o Late Shri Bhagirath Ji Sharma	1,60,401.12	Cheques
4	Shri Ashok S/o Late Shri Bhagirath Ji Sharma	1,60,401.11	Cheques
5	Shri Moolchand S/o Late Shri Bhagirath Ji Sharma	1,60,401.11	Cheques
6	Smt.Hansa Sharma w/o Shri Kailash Sharma	1,60,401.12	Cheques
		962,406.70	

Each of the parties hereto has received the sum of Rupees as mentioned above in full satisfaction of their rights. There have no claims left on each other. All claims stand settled. There is no immovable property in the HUF.

With the blessings of Late Shri Bhagirath Ji Sharma who has formed this HUF, we the parties aforesaid show benevolence to him but with the advent of time and change of circumstances we part as friends and become independent from each other today.

Witness:

1.

2.

Signed by the parties hereto:

1. (Smt.Ganga Devi Sharma)
2. (Omprakash Sharma)
3. (Kailash Sharma)
4. (Ashok Sharma)
5. (Moolchand Sharma)
6. (Smt.Hansa Sharma)

On perusal of these documents filed by assessee himself, we find that the "Partition-Deed" has been filed as "Annexure-C". A careful reading of "Partition-Deed" reveals that the HUF had only movable property in the form of certain unsecured loans given to parties which were partitioned. The deed also makes it clear that there is no immovable property in HUF. Thus, the claim of transfer of impugned property under 'partition of HUF' as projected by assessee before AO, stands unproved. It seems that realizing this eventuality, the assessee has himself mentioned on Page No. 2 of the application under Rule 29 *"family arrangement or partition"*, *"Family Settlement"*. Needless to mention that the Ld. AR, during hearing before us, has also not made any pleading *qua* the claim of 'partition of HUF'. We may also mention here that even if we assume that there was a partition of HUF then also the exclusion from 'transfer' u/s 47(i) is available only to HUF at the time of distribution of assets to its members on partition; the said exclusion is not available to a member who transfers his share/right in divided or undivided property. The act of transferring any share/right in property by a member to other members would be a posterior event to the partition of HUF and such act does not fit in section 47(i). Therefore, the assessee's claim of 'partition of HUF' and thereby exclusion from taxation is an unproved claim besides being untenable in section 47(i); we are rejecting the same.

13. Now, we turn to the two claims/contentions argued by Ld. AR before us as narrated in foregoing para 8(i) and 8(ii). The first claim is such that

the assessee executed sale-deed as part of 'family settlement' and 'family settlement' is not taxable under Income-tax. We find that the assessee has never claimed before lower-authorities the factum of "family settlement" although the assessee claimed "partition of HUF". As stated earlier, the theory of "family settlement" has been pushed for the first time in the application under Rule 29 by mentioning *"family arrangement or partition"*, *"Family Settlement"*. Further, in the "additional evidences" filed under Rule 29, the assessee has filed "Memorandum of Family Settlement" alongwith "Partition-Deed" because the "Partition-Deed", as mentioned earlier, does not support assessee's stand. Further, the Ld. AR for assessee has also refrained from making any pleading *qua* 'partition of HUF' claimed by assessee before lower authorities. Instead, Ld. AR harped on 'family settlement'. We may mention that in the reply filed to AO, the assessee mentioned that it was a case of forced sale to his family members but there also the assessee did not talk of 'family settlement', the assessee only tried to get out of taxability by claiming income of HUF or claiming partition of HUF. Now in such a situation, if we allow the claim of 'family settlement' at this stage, it would amount to upsetting the whole proceeding done by lower-authorities and giving concession to assessee to set up a new case. We are afraid that we can do this. Therefore, without going into the merit of the additional evidence titled "Memorandum of Family Settlement" filed by assessee, we are straightaway rejecting the assessee's claim of "family settlement' itself. Rejected thus.

14. So far as the second claim argued by Ld. AR that the assessee's father/assessee did not have any right in the property which was owned by partnership firm and therefore there is no income earned by assessee even if a sale-deed has been executed, the bench instantly enquired from Ld. AR as to whether the partnership firm existed after death of assessee's father? In reply, Ld. AR accepted that the firm existed. So far as the provisions of partnership law are concerned, we agree with Ld. AR that a partner does not have any right in specific asset of a partnership firm. There cannot be any quarrel on this interpretation held by Hon'ble Apex Court. But the present case of assessee is quite different and involves a different controversy. Here the case is such that the assessee's father was having 1/3rd share in partnership firm and after death of father, there were 6 legal heirs including assessee. Accordingly, the assessee sold his 1/6th share in '1/3rd share of assessee's father in undivided property of firm' to his 3 brothers. To materialize this, the assessee executed a sale-deed and received actual consideration of Rs. 1,80,00,000/- from his brothers through cheques. This is a transaction *inter-se* between assessee and his brothers. The partnership firm is nothing to do with this transaction of sale. As admitted by Ld. AR for assessee, the firm continued even after death of assessee's father. Therefore, it seems that the entire property continued intact in the books of firm and remained unaffected by the transaction of sale made in-between the assessee and his brothers. The assessee as seller and his 3 brothers as purchasers have acted upon the sale-deed and essentially the assessee's

right became right of brothers for a consideration. Therefore, when a *de facto* transaction of sale by assessee has been made and the assessee has received a hefty consideration of Rs. 1,80,00,000/- for transfer of his right, it would attract taxability and it is nothing to do with the provisions of section 14 of the Indian Partnership Act. The department is not asking to pay tax on any kind of 'notional' transfer, the revenue's case is such that the assessee has made an actual sale which is taxable. Needless to mention that the assessee is also claiming to have utilized the sale consideration of Rs. 1,80,00,000/- for making investments in newer properties (it is a different point that the assessee claimed exemption u/s 54/54F on the basis of those newer investments but the AO has disallowed exemption on a different premise). Therefore, we do not find any merit in the second claim of assessee argued by Ld. AR too. The same is hereby rejected.

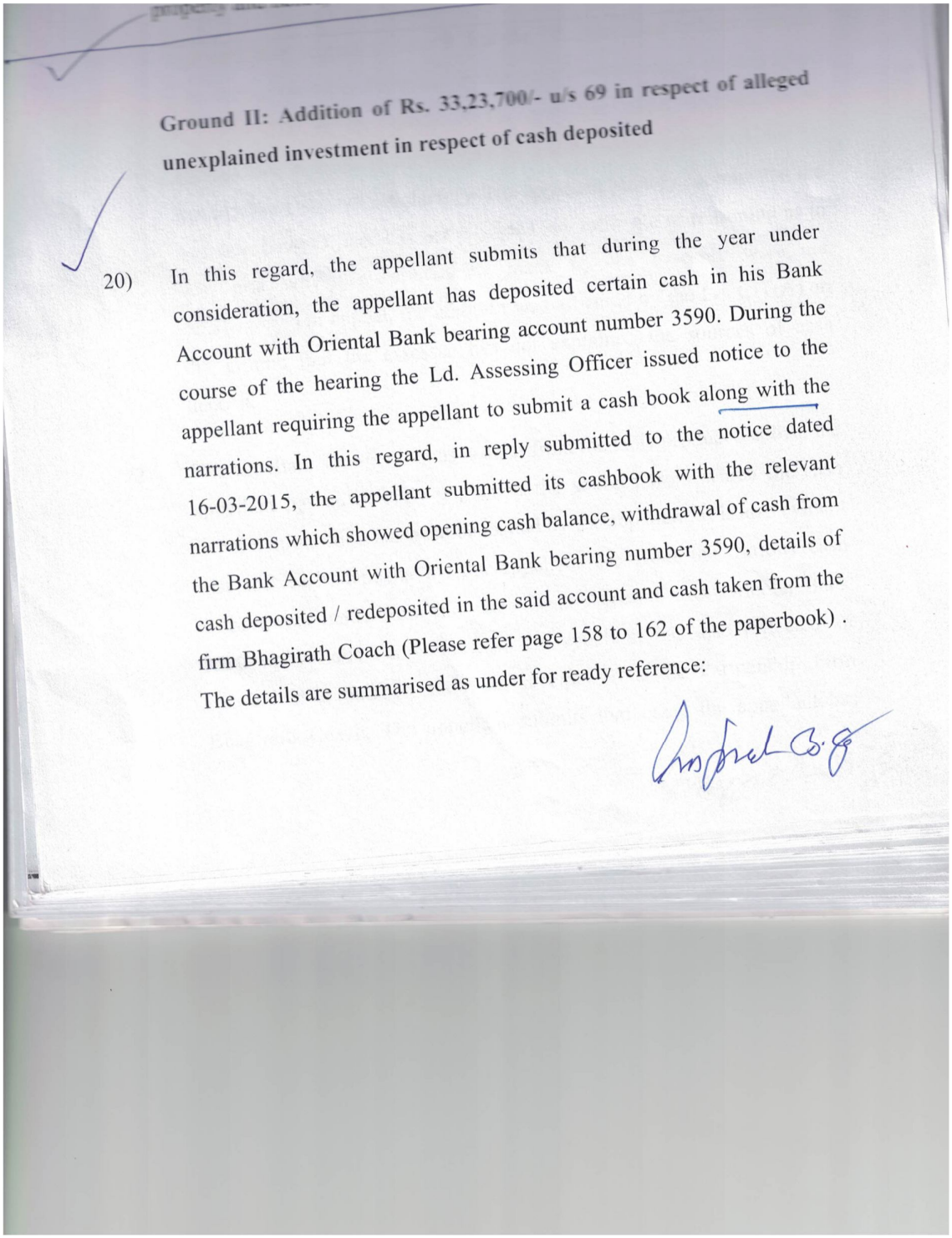
15. In view of above discussions and for the reasons stated therein, the Ground No. 1 raised by assessee is found to be devoid of any merit and the same is hereby dismissed.

Ground No. 2:

16. In this ground, the assessee challenges the addition of Rs. 33,23,700/-made by AO on account of unexplained cash deposits in bank a/c and upheld by CIT(A).

17. Ld. AR submitted that the AO has made this addition, vide a small Para 10 of assessment-order, on the premise that the assessee did not

explain the source of cash-deposits made in bank a/c. During first-appeal, the CIT(A) has merely confirmed AO's observation in his own wording. Ld. AR submitted that during assessment-proceeding, when the AO questioned the assessee on this issue vide notice dated 16.03.2015 u/s 142(1), the assessee filed a cogent reply with a copy of cash-book. The assessee's reply is filed at Page No. 154 of the Paper-Book and copy of cash-book is also filed at Page No. 158-162 of Paper-Book. The cash-book contains all entries of inflow and outflow which also includes many entries of cash withdrawals from bank as well as salary/funds received by assessee from M/s Bhagirath Coach (another firm where assessee was an employee). Thus, the entries of deposits in bank a/c and the sources thereof are adequately proved from Cash-Book submitted by assessee. Despite this, the AO has made a wrong observation that the assessee did not make any submission. Ld. AR has also filed a detailed note in his Written-Submission at Page No. 18-20; the same is re-produced below:



Ground II: Addition of Rs. 33,23,700/- u/s 69 in respect of alleged unexplained investment in respect of cash deposited

20) In this regard, the appellant submits that during the year under consideration, the appellant has deposited certain cash in his Bank Account with Oriental Bank bearing account number 3590. During the course of the hearing the Ld. Assessing Officer issued notice to the appellant requiring the appellant to submit a cash book along with the narrations. In this regard, in reply submitted to the notice dated 16-03-2015, the appellant submitted its cashbook with the relevant narrations which showed opening cash balance, withdrawal of cash from the Bank Account with Oriental Bank bearing number 3590, details of cash deposited / redeposited in the said account and cash taken from the firm Bhagirath Coach (Please refer page 158 to 162 of the paperbook) . The details are summarised as under for ready reference:

S. No.	Particulars	Amount (Rs.)	Amount (Rs.)
1	Opening Cash Balance	5,40,000	
2	Cash withdrawn from Oriental Bank Account 3590	33,23,168	
3	Cash from Partnership Firm M/s Bhagirath Coach (Salary + withdrawals)	5,50,000	
4	Cash Deposit in Oriental Bank Account 3590		31,55,200
5	Closing Cash Balance		12,57,968

21) The appellant regrets to submit that the Ld. Assessing Officer without considering the reply furnished by the appellant has added an amount of Rs. 33,27,700 in the hands of the appellant under section 69 as unexplained investment on the ground that the explanation provided by the appellant was not satisfactory. The appellant humbly submits that the Ld. Assessing Officer has not provided any rationale or reasoning as to how and why the submissions made by the assessee were not satisfactory. On appeal, the addition was affirmed by the Ld. CIT(A) on the ground that the assessee has not explained the sources of cash deposit.

22) The appellant submits that as is clear from the table produced above, the appellant has sufficiently explained the sources from which the cash deposit in question has been deposited by the appellant. It is also evident that the cash deposits by the appellant are from the various cash withdrawals made from the same Bank Account with Oriental Bank 3590 on various dates. Further, the appellant has also reflected an opening cash balance and cash receipts from the Partnership Firm Bhagirath Coach. The appellant submits that once, the appellant has

given its explanation, it is for the revenue authorities to controvert the same by conducting further inquiry and by bringing on record relevant evidence to deny the submissions made by the appellant. From the order it is apparent that the lower authorities have merely rejected the submissions made by the appellant in an cryptic manner without assigning cogent reasons and without conducting proper inquiries and even without considering the submissions made by the appellant. The appellant, thus, regrets to submit that the addition has been made by the lower authorities without any application of mind. The appellant therefore respectfully submits that having provided reasonable explanation as to the sources of cash deposit, no addition can be made in the hands of the appellant that too in an cryptic and summary manner as done in the present case.

23) The appellant further submits that the non application of mind is also apparent from the fact that the addition has been made under section 69 of the Act which deals with the investments. The issue involved in the present case relates to the cash deposit made in the bank account by the appellant which by no stretch of imagination could be said to be an investment for the purpose of section 69 of the Act and therefore, no addition can be made in the hands of the appellant by invoking section 69 of the Income Tax Act, 1961. Thus, on this ground also, the impugned addition deserves to be set aside and / or deleted.

24) The appellant accordingly prays and submits that the addition of Rs. Rs. 33,27,700 for cash deposit deserves to be deleted / set aside.

Submitted by

Indore

Dated: 13/10/2023

Appellant

Placing reliance on above submission, Ld. AR prayed that the addition has been wrongly made/upheld at lower level and it must be deleted.

18. We have gone through the orders of lower-authorities, the documents filed in the Paper-Book and the Written-Note filed by Ld. AR. After a careful consideration, we find that the assessee has filed a Cash-Book during proceeding before AO in which the entries of cash-inflow, outflow and opening-closing balances are adequately reflected. We also find that the Written-Note filed by Ld. AR also gives a summarized picture of Cash-Book to show that the assessee was having sufficient cash balance for deposit in bank a/c. Ld. DR for revenue though dutifully supported the orders of lower-authorities yet could not contradict or rebut the submissions made by Ld. AR. Hence, we are inclined to accept that the assessee was having sufficient cash balance for making deposits as is demonstrated by Cash-Book. The addition made by AO is therefore not warranted. The same is hereby deleted. This ground is thus allowed.

19. Resultantly, this appeal is partly allowed.

Order pronounced in open court on 18.01.2024.

sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 18.01.2024.
CPU/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar, Income Tax Appellate Tribunal, Indore Bench, Indore