

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

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SUNIL KUMAR SINGH (JUDICIAL MEMBER)**

**ITA No. 2304/MUM/2024
Assessment Year: 2016-17**

Income Tax Officer,
Room No. 216, 2nd floor,
Kautilya Bhavan, BKC,
Bandra East,
Mumbai-400051.

Appellant

Jayshree Shailesh Savla,
A/7, Mani Bhavan, Swastik
Society N S Road, No. 3,
Vile Parle,
Mumbai-400056.
PAN NO. AKSPS 2546 R
Respondent

Assessee by : None
Revenue by : Ms. Rajeshwari Menon, Sr. DR

Date of Hearing : 09/07/2024
Date of pronouncement : 31/07/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 01.03.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)'] for assessment year 2016-17, raising following grounds:



1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the flat of Rs.3,90,00,000/- received by the assessee on account of her retirement from the firm does not amount to transfer

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing exemption in terms of section 54F of the Income tax Act, 1961 claimed on the cost of the flat, which is contrary to the findings that receipt of flat does not amount to the transfer so as to attract capital gains tax

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding the nature of the flat as stock in trade instead of treating it as capital asset

2. Briefly stated, facts of the case are that the assessee was a partner in partnership firm namely M/s Faithful Developers. During the year under consideration, the assessee retired from the partnership firm on 31.10.2016 and retirement deed was executed. At the time of retirement a sum of Rs.3,90,00,000/- was found to be due and payable to the assessee against her capital outstanding, her share of profit and her share in net assets of the firm as on the said date. However, against the consideration of Rs.3,90,00,000/- which was due at the time of the retirement, the assessee agreed for allotment of residential flat by the firm and the agreement for the same was entered into. The consideration received as flat in excess of her share, at the time of retirement was offered as full value of the consideration under the head 'capital gain' and the assessee offered the excess amount received from the partnership firm as capital gain and claimed exemption u/s 54 of the Income-tax Act, 1961 (in short 'the Act') towards investment in the residential flat. In the scrutiny assessment completed u/s 143(3) of the Act dated



28.12.2018, the Assessing Officer held the flat received by her as over and above her capital in the firm. The assessee did not file any document proof regarding investment in the firm including whether the said flat was given to the assessee as part of share of the capital on her retirement. Therefore, the Assessing Officer rejected the claim of the assessee of capital gain and also declined the claim of exemption u/s 54F.

3. On further appeal, the Ld. CIT(A) following the decision of the Hon'ble Supreme Court allowed the appeal of the assessee observing as under:

"7.2.2. I have considered the facts and circumstances of the case. In this regards the landmark case of ACIT v. Mohanbhai Pamabhai (1987) 165 ITR 166 (SC) had approved the decision of Hon'ble Gujarat HC - CIT v. Mohanbhai Pamabhai, (1973) 91 ITR 393(Guj) wherein it was held that when a partner retires from partnership firm and receives consideration, which includes proportionate share of goodwill therein, the same is not taxable as there is no 'transfer'. While approving the decision of the Gujarat HC, the Apex court relied on its decision in the case of Sunil Siddharthbhai v. CIT, (1985) 156 ITR 509 (SC). Relying on Mohanbhai Pamabhai, the Apex Court had in the case of CIT v. R.Lingamallu Raghukumar, (2001) 247 ITR 801 (SC) held that even if consideration paid to retiring partner, exceeds the balance in its capital account, the same shall not be chargeable to tax. A similar view was taken in (i) CIT v.P.H. Patel, (1988) 171 ITR 128 (AP) (ii) Prashant S. Joshi v. ITO, (2010) 324 ITR 154.

7.2.3. In Principal Commissioner of Income-tax, Central-2, Mumbai v. Smt. Hemlata S. Shetty [2019] 104 taxmann.com 58 (Bombay), the Hon'ble Bombay High Court has held that amount received by a partner on her retirement from a partnership firm is not liable to capital gain tax in hands of said partner in view of section 45(4).

7.2.4. In James P. D'Silva v. Deputy Commissioner of Income-tax, Circle-28(3) Mum [2019] 103 taxmann.com 167 (Mumbai - Trib.), the Hon'ble ITAT Mumbai has held that share of capital along with



accrued profit, goodwill, brokerage/commission and payment made to assessee in realisation of his share in net value of assets of firm on his retirement are not liable to be taxed as capital gains and also under section 28(v).

7.2.5. Respectfully following the judgments of the Hon'ble Supreme Court and the jurisdictional High Court and ITAT (supra), I am of the view that the amount received by the assessee at the time of retirement from the firm is not liable to be taxed as capital gains in the hands of the retiring partner. Further, it is held that the disallowance of exemption u/s 54F is incorrect in view of discussion as above. Therefore, the grounds of appeal stands allowed."

4. Despite notifying none attended on behalf of the assessee.
5. We have heard submission of the Ld. Departmental Representative (DR). Relying on the decision of the Hon'ble Supreme Court, the Ld. CIT(A) has held that share of capital along with accrued profit, goodwill, brokerage/commission and payment made to the assessee at the time of realization of his share in net value of assets of the firm is not liable to be taxed as capital gains. But the fact that whether said residential flat was given as part of her share of the capital on retirement has not been verified before the Assessing Officer. Therefore, in facts and circumstances of the case, we restore the matter back to the file of the Assessing Officer for verification whether the residential flat allotted to the assessee was part of the payment received on retirement or was a separate transaction and then decide the issue in dispute in accordance with law, following the decision of the Hon'ble Supreme Court cited by the Ld. CIT(A). The grounds of appeal of the Revenue are accordingly allowed for statistical purposes.



6. In the result, the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the open Court on 31/07/2024.

**Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 31/07/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai