IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

MP No.123/Bang/2019 [in ITA No.1700/Bang/2016]
Assessment year : 2008-09

The Income Tax Officer, Ward 2(2)(3), Bengaluru.	Vs.	Smt. Savitri Kadur, 4th Floor, Chitrapur Bhavan, 8th Main, 15th Cross, Malleshwaram, Bengaluru – 560 055. **PAN: ABYPK 8686R**
APPLICANT		RESPONDENT

Applicant by	:	Smt. R. Premi, Addl. CIT(DR)(ITAT), Bengaluru.
Respondent by	:	Shri Padamchand Khincha, CA

Date of hearing	:	11.09.2020
Date of Pronouncement	:	28.09.2020

O R D E R

Per N.V. Vasudevan, Vice President

This miscellaneous petition is filed u/s. 254(2) of the Income-tax Act, 1961 [the Act] by the revenue praying for rectification of certain apparent errors in the order of Tribunal dated 03.05.2019 in ITA No.1700/Bang/2016 for the assessment year 2008-09.

2. The only issue that arose for consideration in the appeal was as to whether the Revenue authorities were justified in treating sum of Rs.11,61,800/- as capital gains chargeable to tax which sum was received by the assesee on his retirement from a partnership firm by name M/s PSI Hydraulics. The facts and circumstances under which aforesaid issue

arises for consideration are that the Assessee and one D. Venkatesh formed a partnership by a Deed of Partnership dated 1.4.2004. Miss Suvidha Venkatesh, D/o. D. Venkatesh was inducted as partner in the firm w.e.f. 1.4.2007. On 8.6.2007 a MOU was signed by the three partners and it was agreed that the Assessee would retire from the firm w.e.f. 1.4.2007 and a sum of Rs.339.50 lakhs would be paid to the Assessee. On 9.6.2007 deed of retirement was signed. The Assessee gave up all her rights as partner of the firm and its assets, nor was the Assessee liable to pay any of its liabilities. The capital account of the Assessee as on 1.4.2006 showed an opening balance of Rs.1,64,14,044. Profit for the year of Rs.46,20,591 was credited to his account. Similarly on revaluation of the land and building on 15.1.2007, a sum of Rs.53,26,462 and Rs.9,24,650 respectively was credited to her account. Another sum of Rs.18,12,528 was also credited as interest on capital in her capital account. After reducing the Partner's drawing and other payments made the balance to the credit of Assessee's capital account was Rs.2,77,88,200/-. The difference between the sum of Rs.3,39,50,000 and the sum of Rs.2,77,88,200 viz., a sum of Rs.61,61,800 was taxed as capital gain by the AO. The Assessee had invested a sum of Rs.50 lacs in specified bonds and therefore the AO allowed deduction upto Rs.50 lacs and brought to tax Rs.11,61,800/- as Long term capital gain. The AO was of the view that sum of Rs.61,61,800/- was liable to be taxed as capital gain. The CIT(A) confirmed the order of the AO.

3. On further appeal by the Assessee, the Tribunal by its order dated 3.5.2019 held that the question whether there will be incidence of tax on capital gain on retirement of a partner from the partnership firm would depend on the upon the mode in which retirement is effected and would depend on several factors like the intention as is evidenced by the various clauses of the instrument evincing retirement or dissolution, the manner in

which the accounts have been settled and whether the same includes any amount in excess of the share of the partner on the revaluation of assets and other relevant factors which will throw light on the entire scheme of retirement/reconstitution. The final conclusion of the Tribunal in paragraph-31 was as follows:

> "31. Keeping in mind the legal position as set out in the earlier paragraphs, let us examine the facts of the present case. The facts of the case are almost identical to the facts in the case of Sudhakar M.Shetty (supra). The Assessee and D.Venkatesh formed a Partnership by a deed of partnership dated 1.4.2004. Miss.Suvidha Venkatesh, D/O.D.Venkatesh was inducted as partner in the firm w.e.f. 1.4.2007. On 8.6.2007 an MOU was signed by the three partners and it was agreed that the Assessee would retire from the firm w.e.f. 1.4.2007 and a sum of Rs.339.50 lakhs would be paid to the Assessee. On 9.6.2007 deed of retirement was signed. The Assessee gave up all her rights as partner of the firm and its assets nor was the Assessee liable to pay any of its liabilities. The capital account of the Assessee as on 1.4.2006 showed an opening balance of Rs.1,64,14,044. Profit for the year of Rs.46,20,591 was credited to his account. Similarly on revaluation of the land and building on 15.1.2007, a sum of Rs.53,26,462 and Rs.9,24,650 respectively was credited to her account. Another sum of Rs.18,12,528 was also credited as interest on capital in her capital account. After reducing the Partner's drawing and other payments made the balance to the credit of Assessee's capital account as on 31.3.2007 was Rs.2,77,88,200/-. On 9.6.2007 the Assessee's was paid Rs.38,38,200 towards Goodwill and another sum of Rs.2,39,00,000/- being part of the consideration of Rs.339.50 lacs payable on retirement. The difference between the sum of Rs.3,39,50,000 and the sum of Rs.2,77,88,200 viz., a sum of Rs.61,61,800 was taxed as capital gain by the AO. Out of the above, Rs.38,38,200 was Goodwill. Therefore to the extent of Rs.2,77,88,200 being closing balance as on 31.3.2007 in the capital account and Rs.38,38,200/- being Goodwill, was the sum payable as per the capital account of the Assessee. The claim of the Assessee that the entire sum of Rs.61,61,800 is Goodwill is not substantitated by entries in the books of accounts of the

> Assessee and the book entries are only for Rs.38,38,200/- recorded in the Assessee's capital account as well as Goodwill Account. The capital gain therefore would be Rs.339.50 lacs minus Rs.2,77,88,200 + 38,38,200 = Rs.23,23,600/-. The Assessee had invested a sum of Rs.50 lacs in specified bonds and therefore the AO allowed deduction upto Rs.50 lacs. Therefore there would no capital gain which is chargeable to tax."

4. In this MA the revenue has submitted that while in para 34 the Tribunal has upheld the action of the revenue authorities in taxing the excess paid over and above the sum standing to the credit of the capital account of the Assessee as capital gain has modified the computation of the capital gain by treating value of goodwill also as part of the credit in the partners capital account. According to the revenue, the value of Goodwill should not be considered as cost of acquisition or sum standing to the credit of the partners capital account because as per section 55(2)(a) of the IT Act, the cost of the goodwill has to be taken as nil. If this provision is applied the capital gain would be the same as calculated by the AO.

5. The ld. DR reiterated the stand of revenue as contained in the miscellaneous petition. It was also submitted by the ld. DR that goodwill is a self-generated asset and in terms of section 55(2)(a) of the Income-tax Act, 1961 [the Act], cost of acquisition of goodwill is to be regarded as NIL. The ld. counsel for the assessee, on the other hand, submitted that that the order of Tribunal does not suffer from any mistake apparent on the face of record.

6. We have given careful consideration to the rival submissions. We are of the view that the issue before the Tribunal was with regard to chargeability of capital gains on retirement of a partner from the partnership firm. The conclusion of the Tribunal was that the right of a partner in the firm is a capital asset and when that is relinquished, the consideration paid on such relinquishment, over and above the sum credited to the capital

account of the concerned partner should be regarded as capital gain and brought to tax. Goodwill was not an asset which was subject matter of transfer and therefore the provisions of section 55(2)(a) of the Act will not apply. What was subject matter of transfer was right of partner in the partnership firm which comprises of several components, goodwill being one of the components. Apart from the above, we are also of the view that the issue that is sought to be agitated by the revenue in this miscellaneous petition is a highly debatable issue. The jurisdiction u/s. 254(2) of the Act confined only to rectifying mistakes that are apparent on the face of record. In the garb of an application u/s 254(2) of the Act, the assessee cannot seek a review of the order of Tribunal. There is no mistake apparent on the face of the record. We are, therefore, of the view that there is no merit in this petition filed by the revenue and accordingly dismiss the same.

7. In the result, the miscellaneous petition by the revenue is dismissed.

Pronounced in the open court on this 28th day of September, 2020.

Sd/- Sd/-

(B R BASKARAN) (N V VASUDEVAN)
ACCOUNTANT MEMBER VICE PRESIDENT

Bangalore, Dated, the 28th September, 2020.

/*Desai S Murthy /*

Copy to:
1. Applicant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.