IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM

ITA No. 1871/Mum/2012
(**निर्धारण वर्ष** / Assessment Year:2008-09)

Shri Ashok M. Wadhwa 101A, Marker Tower-a Cuffe Parade, Mumbai 400 005	**बनाम**/ Vs.	ACIT 3(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN No. AAAPW2741E		
(अपीलार्थी /**Assessee)**	:	(प्रत्यर्थी / **Revenue**)

ITA No. 2576/Mum/2012
(**निर्धारण वर्ष** / Assessment Year:2008-09)

D.C.I.T., Circle 3(1) Room No.607, 6th Floor Aayakar Bhavan, Mumbai 400 020	**बनाम**/ Vs.	Shri Ashok Murlidhar Wadhwa 101, Maker Towers A, Cuffe Parade, Mumbai- 400 005
स्थायी लेखा सं./जीआइआर सं./PAN No. AAAPW2741E		
(अपीलार्थी /**Revenue)**	:	(प्रत्यर्थी / **Assessee**)

अपीलार्थी की ओर से / **Assessee by**	:	Shri Manish Malik, A.R
प्रत्यर्थी की ओर से/**Revenue by**	:	Shri Rajesh Kumar Yadav, D.R

सुनवाई की तारीख / **Date of Hearing**	:	13.10.2017
घोषणा की तारीख / **Date of Pronouncement**	:	20.12.2017

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present set of cross appeals filed by the assessee and the revenue are directed against the order passed by the CIT(A)-5, Mumbai, dated 23.01.2012, which in itself arises from the assessment order passed by the A.O under Sec. 143(3) of the Income tax Act, 1961, (for short 'Act'), dated 23.12.2010. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

"1. On the facts and circumstances of the case and in law the CIT(A) erred in confirming the order of the assessing officer in rejecting the appellant's claim of non compete fees of Rs. 40,50,00,000/- being capital receipt not chargeable to tax under the provisions of the Act, made during the course of assessment proceeding on the ground that a new claim cannot be made during the course of assessment proceedings, inspite of the fact that the appellant had filed a revised return and computation making such claim in the course of assessment proceedings and further in para 4.22 of the impugned assessment order the assessing officer had dealt and given a finding on such claim.

2. Without Prejudice on the facts and circumstances of the case and in law the CITA) failed to consider the submissions made during the course of appellate proceedings wherein the appellant had requested the CIT(A) to treat the said ground regarding capital receipt as additional ground of appeal and further requested to adjudicate the same, failing to appreciate the fact that CIT(A) has the power to admit and adjudicate additional ground of appeal.

Without Prejudice

3. On the facts and in the circumstances of the case the CIT(A) erred in directing the assessing officer to charge the said amount received as non -compete fee under the head capital gains as the same is arising by virtue of transfer of right to carry on business.

4. On the facts and in the circumstances of the case and in law the CIT(A) failed to appreciate that the said amount was received by the appellant as non-compete fees to not practice its profession for a period of five years which is evident from the agreement and further in any case there was no transfer of right to carry on business but there was transfer of right to carry on profession which is distinct from business.

5. On the facts and in the circumstances of the case and in law the CIT(A) ought to have appreciated the fact that transfer of right to carry on

profession is not covered by the provisions of section 55(2)(a) of the Act and as such the cost of acquisition would be nil and hence the provisions of section 48 of the Act would fail and consequentially there would be no capital gains which could be computed.

6 *Without Prejudice to the above on the facts and in the circumstances of the case and in law the sum of Rs. 40,50,00,000/- received by the appellant as non compete fees for refraining from carrying its profession of Chartered Accountant was capital receipts as claimed by the appellant in the course of assessment proceedings and as such not chargeable to tax.*

7. *On the facts and in the circumstances of the case and in law the CITA) erred in confirming the order of the assessing officer in disallowing an amount of Rs.7,60,656/- as per the provisions of section 14A read with rule 8D without appreciating the fact that the appellant had not incurred any expenditure directly or indirectly for the purpose of earning such income.*

The appellant craves leave to add/alter/modify/delete any/all grounds of appeal."

2. The revenue on the other hand had carried the order of the CIT(A) in appeal before us by raising the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in holding that non-compete fees of Rs.40,50,00,000/- is taxable as Capital Gain u/s.55(2)(a) of the Act instead of Business Income u/s.28(va) as held by the AO by placing reliance on Hon'ble ITAT 'E' Bench's decision in ITA No.3900/ Muni/ 2010 dated 07.10.2011 in the case of Savita M. Mandhana, wherein the Hon'ble ITAT had held that difference between sale consideration and true value of shares is chargeable as capital gain, without appreciating the fact that in the case relied upon only a consolidated compensation was mentioned in the agreement and the A.O had bifurcated it on an estimate basis. On the contrary, in the present case specific values have been assigned to the sale of shares and separately to non-compete fees. As such the decision relied upon is not justified.

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have appreciated that in the case of Savita M. Mandhana, she was merely a shareholder and not actively engaged in the business and it was in light of this factual matrix that the Hon'ble Tribunal had upheld the taxation as Capital Gain. However, in the instant case, the assessee was a professional actively involved in managing the RSM Business and not merely a shareholder, as such non-compete fees are rightly taxed as Business Income.*

3. *The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*

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

That as the subject matter of the cross appeals filed by the assessee and the revenue mainly revolves around a common issue, therefore, they are being taken up and disposed of together by way of a consolidate order.

3. Briefly stated, the facts of the case are that the assessee who is a chartered accountant and Chief Executive Officer (for short 'CEO') of Ambit Corporate Finance Pvt. Ltd. had filed his return of income for A.Y 2008-09 on 13.09.2008, declaring an income of Rs.31,16,18,726/- . The case of the assessee was taken up for scrutiny assessment under Sec. 143(2) of the 'Act'.

4. That during the course of the assessment proceedings it was observed by the A.O that the assessee besides drawing salary income from Ambit Corporate Finance Pvt. Ltd. was also having income from consultancy and income from investments. The A.O observed that the assessee had in his computation of income disclosed Non Compete Compensation of Rs.40,50,00,000/- under the head long term capital gain (for short 'LTCG'), which was set off by him against loss of Rs.15,73,46,719/- on sale of shares of Ambit investments. The assessee had in his Computation of Income for the year under consideration claimed to have received an amount of Rs.40.50 crore on sale of his partnership interest in the concern M/s RSM & Company. The A.O called upon the assessee to furnish the details of the LTCG of Rs. 40.50 crore which was disclosed by him in his return of income. It was submitted by the assessee that pursuant to an agreement entered into between him and Price Water House Cooper

Pvt. Ltd. (for short 'PWC') and others on 25.04.2007, he had relinquished his right to practice as a Chartered accountant and Financial consultant in India for a period of 5 years, as well as foregone all his interests in RSM & Company and RSM Advisory Services Pvt. Ltd (both hereinafter referred to as 'RSM'), in lieu whereof he was in receipt of an amount of Rs. 40.50 crore by way of non-compete fees from PWC. However, the A.O not finding favour with the claim of the assessee that the amount of Rs.40.50 crore received by him was rightly brought to tax by him under the head LTCG, therein called upon the assessee to explain as to why the said receipt may not be treated as a revenue receipt and subjected to tax u/s 28(va) of the 'Act'. The assessee filed an exhaustive reply dated 23.12.2010 and came up with a fresh claim that the aforesaid amount of Rs. 40.50 crore being in the nature of a 'Capital receipt' was not taxable at all. Alternatively, the assessee tried to drive home his contention that the amount of Rs.40.50 crore had rightly been shown by him under the head LTCG. The assessee raised multiple contentions before the A.O, which can be summarised as under:

"1. That the sum was inadvertently offered under the head capital gains although the same is a capita receipt, not liable for taxation.

2. That this receipt is for not practicing the RSM business, i.e. not practicing the profession of Chartered Accountant, for a period of five years.

3. That the "profession" includes vocation, but it does not provide that profession includes business.

4. That the word "profession" is missing from the Section 28(va), which proves that the legislature never intended to include the profession within the ambit of Section 28(va).

5. That the assessee is eligible to raise a claim for the first time before the assessing officer in the course of the assessment proceedings.

6. That without prejudice to the above claim and pursuant to the show cause notice it was submitted that in any case the said amount received by the assessee, if at all chargeable u/s. 45, as long term

capital gains, and not as suggested in the show cause, u/s 28 of the 'Act',

7. That Section 28(i) is applicable in case of the assessee giving up the management of an Indian Company whereas the assessee has not given up the management of any company."

5. The assessee further filed a revised return of income on 23.12.2010, wherein the receipt of Rs.40.50 crore was claimed by him as not taxable, for the reason that the same as per him was a 'Capital receipt'. However, the A.O after deliberating on the contentions of the assessee did not find favour with the same. The A.O being of the view that the revised return of income filed by the assessee was beyond the time limit contemplated u/s 139(5), therefore, no cognizance of the claim of the assessee that the amount of Rs.40.50 crore being in the nature of a capital receipt was thus exempt, could be validly drawn on the basis of such non-est return of income. That still further the A.O held a conviction that as the aforesaid revised return of income was filed by the assessee only after the final show cause notice was served upon him, therefore, the attempt of the assessee to manoeuvre his tax liability on the basis of an afterthought could not be facilitated by allowing recourse to Sec. 139(5). The A.O deliberating on the contentions of the assessee did not find favour with the same and concluded that the amount of Rs.40.50 crore received by the assessee was a revenue receipt and not a capital receipt, and being of the view that the same was chargeable to tax under Sec. 28(va), brought the same to tax. The A.O while concluding as hereinabove observed as under:-

"(i) The term of the said agreement is for five years.
(ii) Whatever the amount is received by the assessee was received for non competing with the Third Party, Fourth Part and the Fifth Part.
(iii) Vide clause 3 of the said agreement the consideration received by Mr. Wadhwa and its associates 'as termed as "non competition consideration".

(iv) Mr. Wadhwa and its associates can resume the RSM business after five years.

(v) The restriction for providing financial and other services to the persons, within the meaning of said agreement was not observed in the case of HUF, Artificial Judicial Person, and Body of Individual, which implies that Mr. Vadhwa and its associates can provide services to these category of persons.

(vi) As per clause 3A, Mr. Wadhwa and its associates were restricted for using the name RSM. It is therefore, implied that other than RSM, Mr. Wadhwa and its associates can use any name.

(vii) The consideration received by Mr. Wadhwa was a compensation for not competing with the Third Part, Fourth Part and Fifth Part.

(viii) Profit making business structure of the First Part was not to be dysfunctional perpetually, i.e. in other words was not impaired permanently.

(ix) In the facts and circumstances of the case, there is no negative covenants, and assessee was allowed to starts its profit making business structure after 5 years.

(x) The assessee had not surrendered its COP, and continuing the business of Ambit Corporation Finance Ltd, albeit without using the name of RSM.

(xi) The agreement itself uses the word Business, even though, the assessee has contended that it is carrying on profession, and not business."

6. The A.O further made a disallowance of Rs.7,60,656/- u/s 14A r.w. Rule 8D of the Income tax 'Act' Rule 1962 in respect of the dividend income of Rs.48,67,603/- which was claimed by the assessee as exempt. The A.O on the basis of his aforesaid observations assessed the income of the assessee at Rs.31,23,79,380/-.

7. Aggrieved, the assessee carried the matter in appeal before the CIT(A). That during the course of the appellate proceedings it was observed by the CIT(A) that the assessee was a chartered accountant by profession and a partner in a well known firm of chartered accountants by the name of RSM. The firm RSM was practising the profession of a Chartered accountant and carrying out the audit, internal audit, accountancy, risk management, direct and indirect tax advisory, regulatory advisory and transfer pricing, including all or any

of the following as the circumstances may require: corporate reporting, financial accounting, financial statement audit, independent controls and system process consultancy, internal audit, regulatory compliance and reporting, tax structuring, tax compliance, international taxation, taxation and regulatory advice in relation to merger and acquisition, transfer pricing, financial and tax due diligence and regulatory valuation. The CIT(A) observed that the assessee was one of the main partner of the aforesaid firm having 22% share and was responsible for the development and growth of the said concern. The CIT(A) further observed that RSM during the year under consideration had merged with Price Water House Cooper Pvt. Ltd., (PWCPL), Price Water House (PW) and Love Lock and Lewis (LL) of the basis of a transaction agreement. That as per the transaction agreement the assessee was not joining PWCPL or PW or LL. The CIT(A) gathered from the records that as the assessee was the main rain maker for RSM, therefore, he agreed to undertake certain non-compete, non-solicitation and confidentality covenants, subject to the terms and conditions in the agreement for protecting the economic interest of PWCPL and PW and LL in relation to the work carried out by RSM.

8. The CIT(A) deliberating on the details of the agreement dated 25.07.2007 which was entered into between the assessee and PWC and others, therein observed as under:-

> *"(A) The said agreement was entered into between a-i, Mr. Ashok Wadhwa. As main interest holder in RSM & Co.*
>
> *(ii) RSM Advisory Services P. Ltd.(RASPL).*
>
> *(iii) Ambit Corporate finance P. Ltd.*
>
> *(b) Ambit Corporate finance Ltd.*
>
> *(C) Pricewater House Coopers P. Ltd.*
>
> *(d) Pricewater*
>
> *(e) Lovelock and Lewes*

(PW and lovelock and Lewes shall be collectively referred as the Firm). Mr. Wadhwa, ambit, PWCPL and the firms individually referred as party, and collectively as parties.
(B). As per Para E of the said agreement Mr. Wadhwa and Ambit acknowledged to refrain from engaging in RSM business within territory to protect the interest of PWCPL and the firms.

(c). As per clause E of the said agreement, the term of such non-competition activity was agreed at for five years. For the sake of convenience, the same is reproduced as under:-

Non-Competition with PwCPL and The Firms. *As an inducement for PwCPL and the firms to enter into and consummate the transactions envisaged under the transaction agreement (and for consideration specified in clause 6) Mr. Wadhwa and Ambit hereby expressly agree and undertake the following, for a total period of five (5) years commencing the Effective Date (the "Term"):-*

(a). Neither Mr. Wadhwa nor Ambit nor any of their respective Affiliates shall, directly or indirectly, on their own account or as an agent employee, officer, director, consultant, or shareholder or equity owner of any other person: (i) engage or attempt to engage in the RSM Business within the Territory or (ii) otherwise own, manage, operate, finance, control or participate in the ownership, management, operation, financing, or control of, any person engaging in the RSM business, or in any manner connected with the RSM business within the Territory. It is clarified that any RSM business (excluding for the avoidance of doubt any Ancillary Business) sought to be undertaken by Mr. Wadhwa or Ambit or any of their respective Affiliates iii connection with a cross border transaction (including M & A transactions) wherein the target or acquirer is in the Territory, or private equity transactions wherein the investor or the entity in which investment is being made, is in the Territory, shall be deemed to be "RSM Business" within the Territory.)

(b). Nothing in this Agreement shall be construed as limiting or resisting in any manner Mr. Wadhwa's and /or Ambit's or their respective Affiliates ability to directly or indirectly, engage in, conduct, undertake or carry out (i) the Ambit Business (including where applicable, together with Ancillary Business) or any other business/activities other than the RSM Business in or outside the Territory; and (II) The RSM Business outside the Territory subject to (a) above (collectively the "Permitted Activities"); It is understood that the conduct of permitted Activities by Ambit or Mr. Vadhwa of their respective Affiliate's, either directly or indirectly shall not be construed as a breach of any provisions of this agreement.

D. As per clause (d) of the agreement Mr. Wadhwa would continue to develop business activities defined as 'ambit business'. For the sake of convenience, the same is reproduced as under:-

(i) The transaction (as defined in the transaction agreement) does not include Mr. Wadhwa, joining PwCPL or the firms. Mr. Wadhwa has

however indicated that he would continue to further develop business activities defined below as "Ambit Business" under Ambit independently of PwCPL. the Firms or RSM. Given that Mr. Wadhwa has been the main rainmaker for PSM, he has agreed to undertake certain non-compete, non-solicitation and confidentiality covenants, subject to the terms, conditions and exclusions set out in this agreement, which lion-compete, non-solicitation and non-disclosure obligations are acknowledged as reasonable, necessary and justifiable under the circumstances particularly for protecting PwCPL, and the firms economics interest in relation to conduct of business activities that are herein after defined "RSM Business".

E. As per general terms and conditions of the said agreement, (clause 3A) Mr. Wadhwa and his any of the associates was refrained from using the name RSM.

F. As per the general terms and conditions of the said agreement, Mr. Wadhwa and his associate were restricted from providing and services to the person. The "person" is defined in the said agreement as follow:-

"person" shall mean any individual corporation, partnership, limited liability company, limited liability, firm, association, joint venture, joint stock company, trust, unincorporated organization or other entity, or any Government Authority.

G. As per Clause 6 of the said agreement, a consideration of Rs.40.5 crores was payable to Mr. Wadhwa. The clause is reproduced as under:-

"Consideration: Mr. Wadhwa and Ambit hereby acknowledge and agree that the implementation of the Transaction by PwCPL and the Firms constitutes good and valuable consideration for this agreement. Furthermore, in consideration of the non-compete covenants, the indemnities and agreeing to extinguish the brand RSM which Mr. Wadhwa was entitled to use in perpetuity a sum of Rs.40.5 Crores (Rupees Forty Crores and Fifty Lacs only) all of which is payable at the later of either April 30,2007 or the effective date. Mr. Wadhwa and Ambit hereby acknowledge and agree that the payment of the aforesaid consideration is good, adequate and reasonable consideration for entering into this agreement and providing the covenants given in clauses 3, 3A, 4 and 5 and the indemnity obligations under clause 8 to this agreement which covenants an indemnification obligations are agreed to be fair and reasonable in light of the specific circumstances, specific, knowledge and position of W. Wadhwa and Ambit. All monies payable to Mr. Wadhwa under this agreement shall be subject to the deduction of applicable taxes and other deductions as required under applicable law."

9. The CIT(A) after deliberating on the aforesaid clauses of the transaction agreement, therein observed that as per the terms of the same the assessee had undertaken not to engage or attempt to engage in RSM business directly or indirectly in India. The CIT(A) after

circumscribing the scope and gamut of the business of RSM, which the assessee pursuant to the aforesaid agreement had undertaken not to engage or attempt to engage, directly or indirectly in India, observed, that it was for entering into the said non-compete covenants and for surrendering of his share in RSM that the assessee had received a sum of Rs.40.50 crore, which was offered by him in his return of income under the head LTCG. The CIT(A) observed that the A.O not being persuaded to accept the claim of the assessee that the aforesaid receipt was liable to be brought to tax under the head LTCG, therein, being guided by his conviction that the same was clearly in the nature of a non-compete fee which was to be taxed as the business income of the assessee under Sec. 28(va) of the 'Act', had thus brought the same to tax as such.

10. That during the course of the appellate proceedings the assessee raised multiple submissions before the CIT(A), viz. (i) that the amount received for entering into the restrictive covenant, being in the nature of a capital receipt was not taxable at all; (ii) the provisions of Section 28(va) applied only on a receipt which was received for not carrying out any activity related to "business", while for the word "profession" was consciously omitted from section 28(va)(a); (iii) that as the consideration of Rs.40.50 crore was received by the assessee for giving up his rights to his share in partnership, extinguishment of the right to brand name and for non-compete obligation related to the same, therefore, the same in the backdrop of definition of 'Capital asset' u/s 2(14), could only be subjected to tax under Sec. 45, as was claimed in the original return of income. The CIT(A) observed that the revised return of income which was filed by the assessee for claiming that the receipt of sum of Rs.40.50 crore was not chargeable to tax, being in

the nature of a capital receipt, was however not accepted by the A.O for two reasons, viz. (i). that as the revised return of income was filed beyond the time limit contemplated u/s 139(5) of the 'Act', therefore, the same was a non-est return and could not be acted upon; and (ii). the manoeuvring of the taxability of the assessee on the basis of an afterthought could not be allowed in the garb of the provisions of Sec 139(5).

11. The CIT(A) after deliberating on the contentions of the assessee in the backdrop of the facts of the case, observed, that as per Sec. 28(va)(a), any sum, whether received or receivable, in cash or kind, under an agreement for not carrying out any activity in relation to any business was liable to be booked as the 'business income' of the assessee under the aforesaid statutory provision. The CIT(A) was persuaded to be in agreement with the claim of the assessee that the scope and gamut of Sec. 28(va), which only referred to the term "any business", could not be stretched to bring within its sweep the term "Profession". The CIT(A) in order to support his aforesaid view relied on the judgment of the **Hon'ble High Court of Gujarat** in the case of **G.K. Choksi Vs. CIT (2001) 252 ITR 863 (Guj),** wherein the Hon'ble High Court had held that 'Profession' and 'business' for the purpose of the Income tax Act were two different connotations. The CIT(A) further observed that the said judgment of the Hon'ble High Court of Gujarat had thereafter been confirmed by the **Hon'ble Supreme Court** in the case of **G.K. Choksi and Company Vs. CIT (2007) 295 ITR 376 (SC).** Thus, the CIT(A) was persuaded to accept the contention of the assessee that as the scope of Sec. 28(va) stood restricted to the term 'business', therefore, the same could not be interchangeably used and substituted for the term 'Profession". However, the CIT(A) was of the

view that the contention of the assessee that the receipt was not liable to be taxed at all, for the reason that it was in the nature of a capital receipt, had rightly been rejected by the A.O. The CIT(A) held a strong conviction that as the assessee had himself offered the amount of Rs.40.50 crore as taxable under the head LTCG in his return of income and paid the tax on the admitted taxable income, therefore, claiming of the said amount as not taxable by filing of a belated revised return of income was rightly rejected by the A.O keeping in view the judgment of the **Hon'ble Supreme Court** in the case of **Goetz (India) Ltd., Vs. CIT (2006) 284 ITR 323 (SC).** The CIT(A) was further of the view that if the said claim of the assessee was accepted, then the same would tantamount to reduction of the returned income on which tax had already paid by the assessee, which would lead to refund of the admitted tax liability of the assessee, which was beyond the purview of the statutory provisions. The CIT(A) taking support of the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Shelly Products (2003) 261 ITR 367 (SC),** observed, that an assessee cannot be entitled to any refund of an admitted tax. Thus, on the basis of his aforesaid observations, the CIT(A) concluded that the A.O had rightly rejected the claim of the assessee that the receipt of Rs.40.50 crore being in the nature of a capital receipt was not taxable.

12. The CIT(A) further deliberated on the claim of the assessee as to whether the receipt of Rs.40.50 crore was liable to be taxed u/s 28(va) as 'business income', or under Sec. 45 as 'Capital gain'. The CIT(A) observed that as the assessee had transferred his share in RSM along with the brand value attached to it, therefore, the A.O being of the view that the consideration of Rs. 40.50 crore received by the assessee was attributable to the non-compete consideration, was thus liable to

be taxed in the hands of the assessee u/s 28(va) of the 'Act'. The CIT(A) after deliberating on the facts of the case observed that admittedly the assessee was not carrying on any business of his own, but it was the firm RSM, in which he was having a share, which was carrying on the business. The CIT(A) observed that the assessee had only a "right to carry on business" and for this he had entered into a non-compete agreement for not carrying on any business which would compete with the business of PWCPL and others. The CIT(A) was of the view that the provision of Sec. 28(va) were attracted only in a case where the assessee was "carrying on business", and not where the assessee only had a "right to carry on business". The CIT(A) further observed that where the capital asset is in the nature of "right to carry on business", then the same would come within the ambit of capital gain tax u/s 55(2)(a) of the 'Act', which specifically took within its scope and gamut, the "right to carry on any business". Thus, the CIT(A) on the basis of his aforesaid observations concluded that where a capital asset is in the nature of "right to carry on business", then the same would be liable to be brought to tax under the head 'Capital gain'. The CIT(A) on the basis of his aforesaid conviction, relying on the order of the **ITAT 'E' Bench, Mumbai** in the case of **ACIT Vs. Savita M. Mandhana (ITA No. 3900/Mum/2010; dated 7.10.2011)**, concluded that the A.O was not justified in characterising the receipt of Rs.40.50 crore as the business income of the assessee u/s 28(va) of the 'Act' and directed him to assess the same under the head 'Capital gains'.

13. The CIT(A) further adverting to the disallowance by the A.O of an amount of Rs.9,60,656/- u/s 14A r.w. Rule 8D, therein deliberated on the facts involved in the case of the assessee in the backdrop of the

legal position, and concluded that the A.O had rightly computed the disallowance in terms of the provisions of Section 14A r.w. Rule 8D, and thus confirmed the said disallowance.

14. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee submitted that as the amount of Rs. 40.50 crore received by the assessee by way of non compete fee was a capital receipt, therefore, the same was not liable to be brought to tax at all. The ld. A.R averred that the lower authorities had gravely erred by declining to adjudicate upon the said claim of the assessee, despite the fact that the same was purely a legal issue which was raised on the basis of the facts already available on record. Alternatively, it was submitted by the ld. A.R that as the assessee was not carrying on a 'business', but a 'Profession', therefore, the provisions of Sec. 28(va) of the 'Act' were not applicable to the case of the assessee. The ld. A.R to buttress his aforesaid contention and in his attempt to point out infirmities in the order of the lower authorities, therein took us through the relevant extracts of the same. The ld. A.R in support of his contention that a question of law can be raised by an assessee at any point of time, therein relied on the judgment of the **Hon'ble High Court of Madras** in the case of **Helios and Metheson Information Technologies Ltd., Vs. ACIT (2011) 332 ITR 403 (Mad)**. The ld. A.R taking support of the aforesaid judgment submitted that as the adjudication on the validity of the taxability of the amount under consideration involved purely a legal issue, therefore, the lower authorities had erred in declining to adjudicate the same. Per contra, the Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was averred

by the ld. D.R that the lower authorities had rightly declined to admit the claim of the assessee that the amount being a capital receipt was not liable to be taxed at all, for the reason that not only the assessee had voluntarily offered the amount for tax under the head LTCG in his return of income, but also for the reason that the aforesaid claim was raised on the basis of an invalid revised return which had no existence in the eyes of law. It was further submitted by the ld. D.R that the A.O had rightly held that the non-compete fees of Rs.40.50 crore received by the assessee was liable to be brought to tax as the business income of the assessee u/s 28(va) and was not to be assessed as capital gain in the hands of the assessee. The ld. D.R further submitted that the CIT(A) had gravely erred in law by concluding that the amount received by the assessee by way of non compete fees was liable to be assessed under the head capital gain.

15. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal is sought for adjudicating two issues, viz. (i). the exigibility to tax of the amount of Rs. 40.50 crore received by the assessee; AND (ii). the validity of disallowance under Sec. 14A r.w Rule 8D of an amount of Rs. 7,60,656/-. We find that the issue as regards the chargeability to tax of the amount of Rs. 40.50 crore which is claimed by the assessee to have been received by way of non-compete fee, would require deliberation by us on three main issues which had emerged before us, viz. (i). the validity of the claim of the assessee that the amount of Rs.40.50 crore received by him as non-compete fee, being in the nature of a 'Capital receipt' was not taxable; (ii). whether the amount of Rs. 40.50 crore received by the assessee was liable to be brought to

tax as the business income of the assessee u/s 28(va); AND (iii). that if the answer to both the issues at S.no. (i) and (ii) was in negative, then whether the amount of Rs. 40.50 crore was rightly brought to tax by the assessee under the head LTCG.

16. We have deliberated on the facts of the case and have given a thoughtful consideration to the issue before us. We shall first take up the validity of the claim of the assessee that as the amount of Rs. 40.50 crore which was received by him by way of non-compete fee was in the nature of a 'Capital receipt', therefore, the same was not liable to be taxed. We find that the aforesaid claim of the assessee that the non-compete fees of Rs.40.50 crore received by him was a 'Capital receipt' and thus not taxable at all, was raised by him for the very first time by filing on 23.12.2010 a revised return of income and a letter dated 17.12.2010. We find that as the revised return of income filed by the assessee was beyond the statutory time limit within which the same could have been validly filed under Sec.139(5) of the 'Act', therefore, the same was characterised by the A.O as an invalid and a non-est return of income, and thus, was not taken cognizance of by him. We find that the assessee in his appeal before the CIT(A), had assailed the refusal on the part of the A.O to adjudicate his claim that the non-compete fee of Rs. 40.50 crore received by him, being in the nature of a 'Capital receipt', was thus not taxable at all. We find that the CIT(A) being of the view that as the assessee himself had offered the amount of Rs. 40.50 crore to tax under the head 'Capital gain', and had accordingly paid the tax on the same, therefore, the A.O had rightly declined to accept the aforesaid claim of the assessee which was raised on the basis of a belated revised return of income. The CIT(A) fortified his aforesaid view by placing reliance on the judgment

of the **Hon'ble Supreme Court** in the case of **Goetz (India) Ltd. Vs. CIT (284 ITR 323)(SC).**

17. We have given a thoughtful consideration to the issue as regards the validity of the refusal on the part of the lower authorities to adjudicate the claim of the assessee, that the amount received by him by way of non-compete fee, being a 'Capital receipt', was thus not taxable at all. We though are in agreement with the view of the lower authorities, that as observed by the the **Hon'ble Apex Court** in the case of **Goetze (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC)**, there is no provision under the Act which empowers the A.O to make an amendment in the return of income, except for on the basis of a valid revised return of income, which we find in the case before us the assessee had failed to file. However, we are also not oblivious of the fact that the Hon'ble Apex Court had in the case of Goetze (India) Ltd. (supra) specifically observed that the observations recorded in its order were limited to the power of the assessing authority, and does not impinge on the power of the Income-tax Appellate Tribunal under Sec. 254 of the Income tax Act, 1961. We find that the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Pruthvi Brokers & Shareholders Pvt. Ltd (2012) 349 ITR 336 (Bom)**, after taking cognizance of the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra), had concluded that the assessee is entitled to raise before the appellate authorities not merely additional legal submissions, but is also entitled to raise additional claims before them. The Hon'ble High Court held that the appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. We are of the

considered view that as per the settled position of law, even if a claim involving purely a question of law had not been raised before the A.O, the same can be raised for the first time before the appellate authorities, subject to the condition that the same arises from the facts available on record.

18. We are of the considered view that as the claim of the assessee that the amount of Rs. 40.50 crore received by him as non-compete fee was a 'Capital receipt', therefore, the same was not exigible to tax, involves purely a question of law based on the facts available on record, therefore, the same is maintainable for adjudication before us. We have deliberated on the facts pertaining to the issue under consideration before us. We find that the fact that the amount of Rs. 40.50 crore was received by the assessee by way of non-compete fees is not in dispute before the lower authorities. We find that the issue that the amount received by the assessee by way of non-compete fees is a 'Capital receipt', is no more *res integra* pursuant to the judgment of the **Hon'ble Supreme Court** in the case of **Guffic Chem P. Ltd. Vs. Commissioner of Income-tax and another (2011) 332 ITR 602 (SC).** The Hon'ble Apex Court had in its aforesaid judgment observed that amount received by an assessee as non-compete fees under a negative covenant was a 'Capital receipt', and though the same vide the Finance Act, 2002 was w.e.f 01.04.2003 made taxable under Sec. 28(va) of the 'Act', however, the same was taxable as a 'Capital receipt' and not as a 'revenue receipt'. We are of the considered view that now when the non-compete fee of Rs. 40.50 crore was received by the assessee pursuant to the restrictive/negative covenant in the agreement entered into between him and Price Water House Cooper Pvt. Ltd. and others on 25.04.2007, as per which he had relinquished

his right to practice as a Chartered accountant and Financial consultant in India for a period of 5 years, as well as foregone all his interests in RSM & Company and RSM Advisory Services Pvt. Ltd, therefore, the same being clearly in the nature of a compensation received by the assessee for refraining from carrying on his profession, was thus a 'Capital receipt'.

19. We now advert to the issue as to whether the amount of non-compete fee of Rs. 40.50 crore received by the assessee pursuant to the restrictive/negative covenant in the agreement entered into between him and Price Water House Cooper Pvt. Ltd. and others on 25.04.2007, as per which he had relinquished his right to practice as a Chartered accountant and Financial consultant in India for a period of 5 years, as well as foregone all his interests in RSM & Company and RSM Advisory Services Pvt. Ltd, was liable to be assessee as the income of the assessee under Sec. 28(va), or not. We find that the provision of Section 28(va) very clearly provides that the same would be applicable in a case where any sum was received or receivable under an agreement for not carrying out any activity in relation to any business. We are of the considered view that the conscious, purposive and intentional absence of the term 'Profession' in the said statutory provision reveals the clear legislative intent, as per which the said statutory provision was designed to exclusively cater to taxing of the amounts which were received by an assessee in relation to any business. We are of the considered view that the mandate of the said statutory provision, viz. Sec. 28(va) has to be gathered from the plain and simple language used therein. We are afraid that we cannot assume upon ourselves the powers of the legislature and distort the simple and plain meaning of the said statutory provision in the garb of

giving effect to the underlying intent of the legislature. We are of the considered view that as the tribunal is a creature of law which is bound by the rule of strict literal interpretation while construing a statutory provision, therefore, no word howsoever meaningful it may so appear can be allowed to be read into the statutory provision, unless the same had specifically been provided for. We have deliberated at length on the terms and phraseology used by the legislature in Sec. 28(va)(a), and therein construing the same as per the rule of strict literal interpretation, are of the considered view that no violence can be done to the conscious, purposive and intentional absence of the word 'Profession' in the said statutory provision. We are thus of the considered view that as held by the **Hon'ble High Court of Gujarat** in the case **J.K. Choksi Vs. CIT (252 ITR 863) (Guj)**, now when for the Income tax Act, the terms 'business' and 'profession' are separate and distinct, and business does not include profession, therefore, we are unable to adopt the interpretation accorded by the A.O, which had been vehemently stressed and relied upon by the ld. D.R before us. We may herein observe that our aforesaid view that the applicability of Sec. 28(va) was only restricted to a case where the amount had been received in relation to any 'business' and was not applicable to the extent the same was received in relation to a 'profession', can be well gathered from the fact that the legislature in all its wisdom had vide the Finance Act, 2016, with effect from 01.04.2017 made available the term '*or profession*' in Sec. 28(va)(a) of the 'Act'. The aforesaid prospective insertion of the term *'or profession'* in the aforementioned statutory provision, viz. Sec. 28(va)(a) makes its abundantly clear beyond any scope of doubt that prior to AY: 2017-18 the applicability of Sec. 28 (va)(a) was restricted only in context of amounts which were received or receivable by way of non compete fees

in relation to any business, and was not applicable where such sum was received or receivable under an agreement for not carrying out any activity in relation to a profession. We have given a thoughtful consideration to the issue before us, and are of the considered view that the CIT(A) had rightly observed that the provision of Sec. 28(va)(a) were not applicable to the amount of Rs.40.50 crore which was received by the assessee by way of non-compete fees from PWC and others, in terms of the agreement dated 25.07.2007 for not practising the profession of a Chartered Accountant for a period of 5 years.

20. We thus in the backdrop of our aforesaid observations, are of the considered view that the non-compete fee of Rs. 40.50 crore received by the assessee pursuant to the agreement dated 25.07.2007, which therein refrained him from practising the profession as a chartered accountant for a period of 5 years, is a 'Capital receipt', which however, in the backdrop of our aforesaid observations would not be exigible to tax under Sec. 28(va) of the 'Act'.

21. That as we have held that the non-compete fee of Rs. 40.50 crore received by the assessee is a 'Capital receipt', therefore, the issue raised before us as to whether the same was rightly held by the CIT(A) as chargeable to tax as LTCG, thus, does not survive. The **Grounds of appeal No. 1 to 6** raised by the assessee are allowed, while for the **Grounds of appeal No. 1 to 2** which are the effective grounds raised by the revenue before us are dismissed, in terms of our aforesaid observations.

22. We now advert to the issue pertaining to disallowance of Rs.7,60,656/- made by the A.O u/s 14A r.w. rule 8D. Briefly stated, the facts pertaining to the issue under consideration are that the assessee had shown dividend income of Rs.48,67,603/- as his exempt

income. However, no expenditure was attributed by the assessee in respect of the said exempt income. The A.O taking support of the judgment of the **Hon'ble High Court of Bombay** in the case of **Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT & Anr. (2010) 328 ITR 0081 (Bom)**, therein applied the formula contemplated in Sec. 14A r.w Rule 8D and worked out the disallowance at Rs.7,60,656/-. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was submitted by the assessee before the CIT(A) that now when the assessee had not incurred any expenditure for the purpose of earning of the dividend income, therefore, the A.O had wrongly invoked the provisions of Sec. 14A and carried out the aforesaid disallowance of Rs.7,60,656/-. The CIT(A) after deliberating on the aforesaid statutory provisions, viz. Sec. 14A r.w. rule 8D, therein observed that the A.O not being satisfied with the claim of the assessee that no part of the expenditure was attributable to earning of the exempt income, had thus made the aforesaid disallowance in terms of rule 8D of the Income tax Rules, 1963. The CIT(A) after deliberating on the issue under consideration, therein concluded that the A.O had rightly applied the provisions of Section 14A r.w. rule 8D and confirmed the aforesaid disallowance of Rs.7,60,656/- in the hands of the assessee.

23. We have given a thoughtful consideration to the facts of the case and are of the considered view that the very process of determination of the amount of expenditure incurred in relation to exempt income would be triggered, only if the A.O. returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. We are of the considered view that it is only if the A.O. is not satisfied with the correctness of the claim of the assessee that no expenditure had been incurred in relation to the exempt

income, therein only after recording cogent reasons as regards the same, that the A.O. can embark upon the determination of the amount of expenditure in accordance with the method prescribed in Section 14A r.w. Rule 8D. We find that our aforesaid view stands fortified by the recent judgment of the **Hon'ble Supreme Court** in the case of : **Godrej & Boyce Manufacturing Company Limited (supra),** wherein the **Hon'ble Apex Court** had held as under:-

> *"Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.*

24. We are of the considered view that in the present case it can safely be concluded that the A.O had failed to arrive at a satisfaction that having regard to the accounts of the assessee, as placed before him, it was not possible for him generate the requisite satisfaction with regard to the correctness of the claim of the assessee that no expenditure had been incurred by him in respect of the exempt income. We therefore in the backdrop of our aforesaid observations are thus unable to persuade ourselves to uphold the disallowance of Rs.7,60,656/- made by the A.O under Section 14A r.w.r. 8D, which thereafter had been sustained by the CIT(A). We thus set aside the order of the CIT(A) on the issue under consideration and delete the

addition of Rs. 7,60,656/-. The **Ground of appeal no. 7** raised by the assessee is allowed.

25. The appeal of the assessee is allowed and the appeal of the revenue is dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 20/12/2017.

Sd/-	Sd/-
(G.S. Pannu)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 20.12.2017
Ps. Rohit Kumar

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**