

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.913/MUM/2016 (A.Y: 2012-13)**

Shri James P. D'Silva C-305, Vashi Plaza, Sector -17, Vashi Navi Mumbai – 400 705  <b>PAN: ADTPD 7480 P</b>	v.	D.C.I.T Circle – 28(3) Tower No. 6, 3 <sup>rd</sup> Floor, Vashi Railway Station Complex, Vashi Navi Mumbai – 400 703
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO.1171/MUM/2016 (A.Y: 2012-13)**

A.C.I.T Circle – 28(1) 3 <sup>rd</sup> Floor, Tower No. 6 Vashi Railway Station Complex, Vashi Navi Mumbai – 400 703	v.	Shri James P. D'Silva C-305, Vashi Plaza, Sector -17, Vashi Navi Mumbai – 400 705  <b>PAN: ADTPD 7480 P</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**Assessee by : Dr. Prayag Jha**

**Department by : Shri Sushil Kumar Poddar**

**Date of Hearing : 25.01.2019**

**Date of Pronouncement : 30.01.2019**

**ORDER**

**PER C.N. PRASAD (JM)**

1. These two cross appeals are filed by the assessee and Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)–26 Mumbai [hereinafter in short “Ld.CIT(A)”] dated 31.12.2015 for the Assessment Year 2012-13 in allowing the appeal of the assessee partly.

2. Revenue in its appeal raised the following grounds: -

(i) *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs. 48,65,000/- made by the Assessing Officer on account of advances received even though the assessee had failed to produce any supporting documentation or confirmation as evidence that could support this claim despite granting number of opportunities to the assessee which resulted into addition on account of unexplained credit."*

(ii) *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law by confirming only Rs.8,08,60,000/- out of addition on two grounds totaling to Rs. 22,14,63,126/- made by the Assessing Officer on account of amount received and/or receivable from M/s Blue Circle Infratech even though the assessee had failed to produce any supporting documentation or confirmation as evidence that could support that these are capital receipts"*

(iii) *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law by confirming only Rs.8,08,60,000/- out of addition on two grounds totaling to Rs. 22,14,63,126/- made by the Assessing Officer on account of amount received and/or receivable from M/s Blue Circle Infratech without appreciating the facts that whatever assessee had received through capital account and as advance was over and above the share of profit and capital introduced."*

(iv). *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law by confirming only Rs.8,08,60,000/- out of addition on two grounds totaling to Rs. 22,14,63,126/- made by the Assessing Officer on account of amount received and/or receivable from M/s Blue Circle Infratech without appreciating the facts that the assessee is following the due basis of accounting."*

(v) *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law by reducing the quantum of addition from Rs. 23,14,63,126/- to Rs.19,27,00,000/- made by the Assessing Officer on account of amount received and/or receivable from M/s Blue Circle Infratech without appreciating the fact that during the year the assessee has received Rs.9,41,63,126/- and Rs. 12,73,00,000/- was received and or receivable from M/s*

*Blue Circle Infratech which were over and above the introduced capital and share of profit."*

*(vi). Without prejudice to above grounds, on the facts and in the circumstances of the case and in law, the learned CIT(A), has erred in holding that in the year under consideration only an amount of Rs.8,08,60,000/- was received from M/s Blue Circle Infratech without appreciating the fact that during the year assessee has received Rs.9,41,63,126/- through capital accounts and Rs.-4,47,68,663/- as investment in balance sheet."*

3. Revenue also filed amended grounds as under:

*(i). Ground Nos. II, III & in view of the, the figure ₹.8,08,60,000/- to be substituted by ₹.8,33,93,334/-. Further, in Ground No. iv, "due basis of accounting" be substituted as "mercantile system of accounting".*

*(ii). Ground No. vi, the figure ₹.8,08,60,000/- to be substituted by ₹.8,33,93,334/-.*

4. The assessee raised following grounds in its appeal: -

*"1 The learned CIT (A) erred in not appreciating that the learned AO had passed a high pitched assessment order and had created huge demand without giving the appellants reasonable and proper opportunity of being heard.*

*2 The learned CIT (A) erred in sustaining the addition of Rs.8,08,60,000/- without appreciating the facts of the case properly.*

*3 The learned CIT (A) erred in not adjudicating all the Grounds of Appeal raised by the appellants before him.*

*3.1 The learned CIT (A) erred in not adjudicating Ground No-3 raised by the appellants in which additions of Rs. 1,00,00,000/- on account of goodwill and Rs.12,73,00,000/- on account of brokerage and commission were contested.*

*3.2 The learned CIT (A) erred in not deciding specifically Ground No-4 in which the appellants had challenged the addition of Rs.9,41,63,126/- which was made without giving the assessee opportunity of being heard.*

*4 The above Grounds of Appeal are without prejudice to one another.*

*5 The Appellants crave leave to amend or alter any of the above grounds or to add new grounds during the course of appeal proceedings.*

*6 The learned CIT (APPEAL) erred in making on addition of Rs. 2,21,93,334/- on account of amount received in A.Y. 2013-14 only on the pretext that the assessee has received the amount from Partnership firm.*

*7 The learned CIT (A) has calculated the amount received at Rs. 8,08,60,000/- on receipt basis, but factually and actually amount received is of Rs. 4,47,68,663/-."*

5. In the form of additional ground, the assessee raised following ground: -

(i). *“On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in not considering the provisions of section 28(iv) and section 45(4) of the I.T. Act, 1961.”*

6. Briefly stated the facts are that, the assessee, an individual, is engaged in business of real estate and film production. He is proprietor of three concerns namely- (1). M/s D'Silva Corporation- Builder and Developer, (2). M/s D'Silva Enterprises- Dealing in land and (3). M/s D'Silva Productions- Film Production and assessee is Partner in the four Partnership Firms namely (1). M/s Blue Circle Infratech, (2). M/s Ahinsa Gruh Nirman, (3). M/s D'Silva Realtors and (4). M/s New Style Shoes. For the present cross appeals, only M/s Blue Circle Infratech and M/s D'Silva Productions are relevant. M/s Blue Circle Infratech was constituted on 06.11.2006 with the following partners which is evident from and a copy of Partnership Deed placed at page 59 to 66 of Paper Book -

<b><u>Sl. No.</u></b>	<b><u>Name of Partner</u></b>	<b><u>Share in Profit/ Loss</u></b>
1	Shri Vijay Raychand Nensee	16.67%
2	Shri Ajay Raychand Nensee	16.67%
3	Shri Akshav- Arora	33.30%
4	Shri James D'Silva	33.33%

7. We observe that disputes have arisen amongst the partners in 2011 and the three partners namely Shri Vijay Raychand Nensee, Shri Ajay Raychand Nensee and Shri Akshay Arora forced the assessee to retire

from the firm. A Deed of Release was signed on 12.05.2011, the first three partners decided to continue with the business of the firm and the assessee was retired from partnership w.e.f. 04.05.2011. This Deed was duly registered by the Sub-Registrar, Panvel- 1. The assessee agreed to release his share of 33.67% percent in the firm subject to payments. However, the amounts assured to the assessee to be paid on retirement were not paid and the cheques given to the assessee got dishonored.

8. The assessee filed application for appointment of Court Receiver and gave legal notice dated 23.02.2012 to the other partners. The assessee filed a Miscellaneous Application No. 57 of 2012 in the Court of District Judge, Raigad at Alibag, under Section 9 of the Arbitration and Conciliation Act. The dispute was finally settled and Consent Terms were agreed which were ratified in the Court of District Judge, Raigad at Alibag on 04.04.2012. A copy of the Consent Terms is placed at pages 101 to 108 of the Paper Book. According to the Consent Terms the assessee was to receive the following amounts from the firm:

- (i) Rs. 5,34,00,000/- towards Share Capital and Accrued profit,
  - (ii) Rs. 1,00,00,000/- Goodwill of the firm,
  - (iii) Rs. 12,73,00,000/- towards brokerage and commission.
- Total Rs. 19,07,00,000/-

9. As per the Consent Terms, payments of ₹.3,16,66,666/- towards Amount debited to retiring partner's account for Income Tax payable as

on 31.03.2011 and 04.05.2011 and ₹.3,50,00,000/- made by Cheque/ RTGS totaling to ₹.6,66,66,666/-. Assessee was issued following Cheques: -

Date	Cheque No.	Amount (Rs.)	Bank
26.05.2012	427081	2,21,93,334/-	Citibank, Vashi Branch
26.06.2012	427082	2,54,60,000/-	Citibank, Vashi Branch
26.07.2012	427085	2,54,60,000/-	Citibank, Vashi Branch
26.08.2012	427087	2,54,60,000/-	Citibank, Vashi Branch
26.09.2012	427188	2,54,60,000/-	Citibank, Vashi Branch

These payments were towards brokerage/commission of ₹.12,73,00,000/-. The assessee was to receive 5 cheques of ₹.2,54,60,000/- each. However, ₹.32,66,666/- was deducted from the amount of 1 cheque being difference between Rs.6,66,66,666/- (-) ₹.6,34,00,000/-. However, cheque issued for ₹.2,21,93,334/- only was cleared and the other four cheques got dishonored by the bank.

10. The Learned Assessing Officer while completing the assessment u/s. 143(3) of the Act made following additions based on the Consent Terms and Books of Accounts of the assessee.

<u>SI No.</u>	<u>Addition (Rs.)</u>	<u>Nature</u>
1	1,00,00,000/-	Goodwill as LTCC taxable @ 20%.
2	4,67,00,000/-	Credited in capital account of D'Silva Enterprises u/s. 68 of the Act.
3.	4,74,63,126/-	
4	12,73,00,000/-	Commission and brokerage.
5.	23,14,63,126/-	Total

11. The Learned AO held that the assessee's interest in the firm was capital asset and there was transfer u/s 2(47) of the I T Act. The Assessing Officer taxed the Goodwill as Long Term Capital Gain. He brought to tax ₹.9,41,63,126/- as assessee's undisclosed income u/s 68 of the Act. He also taxed the amount of ₹.12,73,00,000/- as assessee's income as received or accrued since the assessee followed mercantile system of accounting. Addition of ₹.48,65,000/- was also made under section 68 of the Act by the Assessing Officer. The assessee contested these additions in appeal.

12. The Learned CIT(A) deleted addition of ₹.48,65,000/- made u/s. 68 of the Act. Out of the total addition of ₹.23,14,63,126/- as shown in the above table, he sustained the addition to the extent of ₹.8,08,60,000/- and deleted an amount of ₹.10,18,40,000/-, vide order dated 31.12.2015. He held that the amount which was actually received only was liable to tax and amount which was not received and was subject matter of further litigation and there was no certainty about receipt of the same was not to be taxed. The Ld.CIT(A) also held that the amounts received by the assessee were of revenue nature. The Ld. CIT(A) passed an Order of Rectification dated 18.01.2016, pursuant to the assessee's letter dated 16.01.2016, whereby he modified his observations made in his order dated 31.12.2015. He held that the addition sustained was

₹.8,33,93,334/- and not ₹.8,08,00,000/- and the amount of relief granted was ₹.14,80,69,792/- and not ₹.10,18,40,000/-.

13. Ld. Counsel for the assessee with respect to the additions made towards goodwill and brokerage/commission, it is submitted that addition of ₹.1,00,00,000/- on account of Goodwill and ₹.12,73,00,000/- on account of brokerage and commission was made by the Ld. AO. It is submitted that the order regarding Consent Terms was passed on 04.04.2012, and therefore if the income accrued to the assessee on the basis of the Consent Terms, then the amounts received were to be taxed in A.Y 2013-14 and not in A.Y 2012-13. Thus, the entire addition deserves to be deleted on this technical ground alone as these amounts were not received in A.Y. 2012-13. Ld. Counsel submitted that the Ld. CIT(A) in fact has noted that because of the dispute and litigation there was uncertainty about the payments and therefore since the assessee received the payments in A.Y 2013-14 addition in A.Y. 2012-13 is unjustified and be deleted fully.

14. Ld. Counsel for the assessee without prejudice to contentions raised above submitted that the amount of ₹.1,00,00,000/- as per Consent Terms on account of Goodwill was not liable to Income Tax. He submitted that this amount was paid to the assessee pursuant to the Consent Terms on his retirement from the Firm. Goodwill if any was generated by M/s Blue



Circle Infratech over a period of time. Even after retirement of the assessee, the Firm continued its business with three partners and Goodwill remained the property of the firm, hence the amount of ₹.1,00,00,000/- received by the assessee was not liable to income tax.

15. He further submitted that this issue is covered by the decision of the ITAT, Hyderabad Bench in the case of ACIT v. Shri N. Prasad in ITA No.1200/Hyd/2010 dated 27.01.2014. Ld. Counsel for the assessee submitted that this issue is also covered in assessee's favour by the judgment of the Gujarat High Court in CIT v. Mohanbhai Pamabhai [91 ITR 393]. He submitted that the Court held that there was no transfer of interest by the assessee in Goodwill within meaning of section 2(47) and therefore, the amount received in respect of Goodwill could not be regarded as capital gain chargeable to tax. Appeal filed by the Revenue against this order was dismissed by the Supreme Court in Addl CIT v. Mohanbhai Pamabhai [165 ITR 166].

16. With regard to the amount of ₹.12,73,00,000/- stated to be received by assessee as brokerage and commission it was argued that no amount was received in A Y 2012-13. An amount of ₹.2,21,93,334/- was actually received in A Y 2013-14. The other four cheques for ₹.2,54,60,000/- were dishonored by the bank. The amount of ₹.2,21,93,334/- was also not chargeable to income tax because it was received by the assessee on

retirement from the firm. There was no transfer of asset within the meaning of section 2(47). Reliance was placed on the judgment of Bombay High Court in the case of Prashant S Joshi v. ITO [324 ITR 154]. In this case the Bombay High Court held that what is realized is the interest which the partner enjoys in the assets during the subsistence of the partnership by virtue of his status as a partner and in terms of the partnership agreement. Consequently, what the partner gets upon dissolution or upon retirement is the realization of a pre-existing right or interest and there is no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners. It is submitted that the Hon'ble High Court relied on the judgments of Hon'ble Apex court in Addl CIT v Mohanbhai Pamabhai (supra), Sunil Siddharthbhai v. CIT [156 ITR 509] and CIT v. Lingamallu Raghukumar [247 ITR 80].

17. Ld. DR vehemently supported the orders of the Assessing Officer.

18. Coming to the ground No. 3.2, the capital and share of profits of ₹.9,41,63,126/- which was added u/s. 68 of the Act by the Assessing Officer, Learned Counsel for the assessee argued that this amount is total of ₹.4,67,00,000/- credited to the capital account with M/s D'Silva Enterprises, which is the proprietary concern of the assessee and ₹.4,74,63,126/- credited to capital account of James P. D'Silva, the assessee. It was argued that the amount of ₹.4,74,63,126/- was received

by the assessee on account of share of profits from M/s Blue Circle Infratech. An amount of ₹.4,78,57,241/- was credited to the assessee's capital account as assessee's share of profit in the firm M/s Blue Circle Infratech. Referring to P&L Account of M/s Blue Circle Infratech for A.Y. 2011-12 which is placed at page 92 of Paper Book it is submitted that M/s Blue Circle Infratech had earned STCG of ₹.24,67,32,955/- during F.Y.2010-11 relevant to A.Y. 2011-12. Net profit of the firm was ₹.14,39,47,362/-. The assessee's share of profit was ₹.4,79,82,454/- and this amount was credited to his capital account. Ld. Counsel for the assessee submitted that this amount is exempt from income tax under section 10(2A) of the Act. In any case this was share of profit for the A.Y. 2011-12 and could not have been added in A.Y. 2012-13.

19. Ld. Counsel for the assessee further submitted that the assessee retired from partnership w.e.f 04.05.2011 and P&L Account was prepared on this date. The assessee's share of loss for the period from 01.04.2011 to 04.05.2011 was ₹.3,94,115/-. The assessee was not provided with the copy of the audit report of the firm on time. He however, prepared his own accounts which were audited. According to his Capital Account his share of profit from M/s Blue Circle Infratech for A.Y. 2011-12 was ₹.4,78,57,241/-. It is submitted that assessee credited this amount in his ledger account on 01.04.2011. Assessee also debited loss of ₹.3,94,115/-

for the period from 01.04.2011 to 04.05.2011 in his capital account. The amount of ₹.4,74,63,126/- is the net of these two amounts. It is submitted that the Ld AO has made addition of this amount u/s. 68 of the Act which is not correct and this amount is evidently the assessee's share of profit from M/s.Blue Circle Infratech. Income of the firm is separately taxed and the share of profit was exempted from tax u/s 10(2 A) of the Act. Therefore, it is submitted that addition to this extent was not correct. It is further submitted that the other amount of ₹.4,67,00,000/- is credited to the capital account of D'Silva Enterprises. This amount has been taxed u/s 68 of the I T Act without looking into facts of the case. This amount was received in M/s D'Silva Enterprises, assessee's proprietary concern. This was on account of withdrawal of assessee's capital from M/s. Blue Circle Infratech. Since this amount was on account of withdrawal of own capital from the firm it was not chargeable to tax. In any case, amount received from a partnership firm on the assessee's retirement from the firm was not chargeable to income tax. Reliance was placed on Prashant S Joshi v ITO (supra), Addl CIT v Mohanbhai Pamabhai [165 ITR 166], Sunil Siddharthbhai v CIT [156 ITR 509], CIT v Lingamallu Raghukumar [247 ITR 801].

20. Ld. DR vehemently supported the orders of the Assessing Officer.

21. With respect to Ground No. 4 to 6 i.e. addition sustained by the Ld.CIT(A) based on the receipt by the assessee, it is submitted that the Ld. CIT(A) erred in confirming the addition of ₹.8,08,60,000/- on the ground that this amount was received by the assessee on revenue account. The Ld. CIT(A) held that the amount received/receivable by the assessee from M/s Blue Circle Infratech was on revenue nature and was liable to income tax. By passing a rectification order dated 18.01.2016 the Ld.CIT(A) corrected this amount to ₹.8,33,93,334/-. The Ld CIT(A) also modified the amount of reduction/ deletion to ₹.14,80,69,792/- in place of ₹.10,18,40,000/-, vide order dated 18.01.2016, passed under section 154. It was argued that the Ld.CIT(A) was not right in upholding addition to the extent of the amount received by the assessee. It is submitted that the Ld.CIT(A) did not appreciate the fact that the amount was received by the assessee on his retirement from the firm M/s Blue Circle Infratech and amounts received on account of withdrawal of capital and also share of profit in the firm were not liable to tax. It is submitted that any amount received over and above the capital and share of profit was also not liable to tax because there was no transfer of asset and such receipt was also not of revenue nature. It is submitted that this issue is covered in favour of the assessee by the judgment of the Jurisdictional High Court in the case of Prashant S Joshi v ITO (supra). The High Court categorically held

that amount paid to a partner upon retirement after taking accounts and upon deduction of liabilities does not involve an element of transfer within meaning of section 2(47) of the I T Act and not chargeable to income tax. The Court also held that section 28 provides certain categories of income which shall be chargeable to income tax under the head "Profits and gains of business or profession". Clause (iv) of section 28 specifies the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of profession. Section 28(iv) does not apply to benefits which are paid in cash or money. The Court held, that the payment made to a partner in realization of his share in net value of assets upon his retirement from a firm is not liable to income tax. Reliance was placed on the decision of *Smt. Vasumati Prafullchand Sanghavi v. Dy.CIT* [169 DTR (Pune) 227]. In this case the assessee had received an amount of ₹.21,52,73,777/- on retirement from a firm. The revenue had brought to tax this amount. The Tribunal held that an amount received by the assessee for relinquishment of rights in a firm on retirement from partnership is not chargeable to tax as capital gains or income from other sources. The Tribunal also held that such amount cannot be said to be amount received without consideration and could not be brought to tax as income from other sources u/s 56(2)(vi). The Tribunal relied on their

earlier judgment dated 29.10.2010 in the case of Riyaz Shaikh v. ITO, ITA No. 352/Pn/2006, which was confirmed by the Jurisdictional High Court.

22. Ld. Counsel for the assessee further submits that the Ld. CIT(A) erred in not considering the specific provisions of section 45(4) of the I T Act. According to this section profits or gains arising from transfer of a capital asset by way of distribution of capital asset on the dissolution of the firm or otherwise shall be chargeable to tax as income of the firm. Evidently no addition was to be made in the hands of assessee in respect of the amount received by him on his retirement from the firm, M/s Blue Circle Infratech. The Ld AO and the Ld CIT(A) ignored these provisions and made addition in the hands of the assessee without appreciating properly the facts and circumstances of the case and the provisions of the Act. The amounts received by the assessee on retirement from the firm were also not chargeable to tax under section 28(iv) or 28(v). This issue is squarely covered by the judgment of the Jurisdictional High Court in the case of Prashant S Joshi v 1TO (supra).

23. Ld. DR vehemently supported the orders of the Assessing Officer.

24. We have heard the rival submissions, perused the orders of the authorities below. Assessee is in the business of real estate and film production. Assessee conducting the business as a proprietary concern

of M/s. D'Silva Productions and various other concerns including the firm M/s. Blue Circle Infratech (BCI) which was constituted on 6.11.2006 with four partners as explained in earlier paragraphs. As the disputes arose among the partners the assessee was forced to retire from the firm accordingly the deed for release was signed on 12.05.2011 and the assessee retired from the partnership w.e.f. 04.05.2011. The assessee was not paid his share of capital and profits of the firm as promised in the release deed. Assessee approached the court for appointment of court receiver to protect his interest in the firm. Finally, the assessee and the partners settled the dispute by entering into consent terms, which was filed before the Court of District Judge, Raigad which is at Page Nos. 101 to 108 of the Paper Book. Based on the consent terms the Civil Miscellaneous Application filed by the assessee in the court of District Judge, Raigad was disposed off on 04.04.2012 in terms of the consent terms filed before the District Judge. The consent terms entered into by the assessee along with other partners are as under: -

*"1. The applicant and the opponents have settled their dispute amicably pertaining to surrender of all rights, title and interest both in the properties of the firm as well as Brokerage/Commission, Capital Contribution as well as goodwill valuation and profit accrued thereon from the commencement of Partnership till the date of retirement by the Applicant. The Total agreed amount for the above settlement finally quantified at ₹.19,07,00,000/- (Rupees Nineteen Crore Seven Lakh Only) payable by the Opponents jointly and severally to the Applicant and the bifurcation of the said amount is under:*

*a) An Amount of ₹.5,34,00,000/- (Rupees Five Crore Thirty Four Lakh Only) towards share capital and accrued profit thereon and an amount of ₹. 1,00,00,000/- (Rupees One Crore only) towards the Goodwill of the Firm thus totally aggregating to*



₹.6,34,00,000/- (Rupees Six Crore Thirty Four Lakh Only) the payment has been made to the Applicant as under:

Description	Cheques /RTGS No.	Bank	Date	Amount
Amount Debited to the Retiring Partner towards the Income Tax Payable as on March 31, 2011 and May 4, 2011.				3,16,66,666
Payment Made	005777	Axis	31.01.2012	50,00,000
Payment Made	RTGS	Axis	22.02.2012	50,00,000
Payment Made	427069		26.03.2012	1,00,00,000
Payment Made	427086		1 31.03.2012	1,50,00,000
TOTAL				6,66,66,666/-

An amount of ₹.6,66,66,666/- (Rupees Six Crores Sixty-Six Lakh Sixty-Six Thousand Six Hundred Sixty-Six) is received and/or debited in the account of the Applicant for share capital and accrued profit and goodwill of the firm, thereby leaving an additional payment of ₹.32,66,666/- which has been received by the Applicant the same amount shall be reduced in the Brokerage/Commission Receivable by the Applicant.

b) ₹.12,73,00,000/- (Rupees Twelve Crore Seventy Three Lakh Only) towards Brokerage/Commission shall be payable by the Opponents jointly and severally to the Applicant unconditionally and without any deductions in 5 (Five) equal monthly installments of ₹.2,54,60,000/- (Rupees Two Crore Fifty Four Lakh Sixty Thousand Only) each, provided however an amount of ₹.32,66,666/- shall be reduced from the First installment payable to the Applicant, for which the Opponents have already issued 5 postdated cheques, as per the details mentioned here under and the same shall be honored on its presentation on the date mentioned in the cheques:

Date	Cheque No.	Amount (Rs.)	Drawn On
26.05.2012	427081	2,21,93,334/-	Citibank, Vashi Branch
26.06.2012	427082	2,54,60,000/-	Citibank, Vashi Branch
26.07.2012	427085	2,54,60,000/-	Citibank, Vashi Branch
26.08.2012	427088	2,54,60,000/- /	Citibank, Vashi Branch
26.09.2012	427188	2,54,60,000/-	Citibank, Vashi Branch

2) The Opponents who are continuing partners of the firm jointly and severally undertake that the postdated cheques referred to in the sub clauses of Clause No.1, hereinabove would be honored on their presentation on their respective due dates and in case of dishonor of any of the aforesaid cheque, the applicant is having a right to file civil or criminal litigation against the said opponents. The same hereby is admitted by the opponents.

3) On execution hereof and on receipt of the aforesaid quantum by cheques and postdated cheques, subject to clearance of the same, the Applicant agrees to

*withdraw all the allegations, imputations, claims and counter claims of whatsoever nature vis-a-vis Partnership Business and his retirement thereof."*

25. The Assessing Officer while completing the assessment rejected the submissions of the assessee that the amounts received from the firm M/s Blue Circle Infratech are not taxable as they are only advances and not accrued to the assessee. The Assessing Officer held that assessee retired as partner from the BCI during the year under consideration and as part of settlement an amount of ₹.1,00,00,000/- was quantified as goodwill to be received by the assessee and the partners shares and rights in the firm is a capital asset within the section 2(14) of the Act and extinguishment of such right would amount to transfer as per Clause (i) and (ii) of Section 2(47) of the Act. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT v. A.N. Naik Associates and Another [265 ITR 346]. He further observed that under section 47(ii) of the I.T. Act any distribution of capital assets on the dissolution of a firm would not be considered as transfer for the purposes of section 45 of the Act. He observed that these clauses were omitted by the Finance Act, 1987 w.e.f. 01.04.1988 and consequently such receipt of a part of assets of the erstwhile firm would come within the definition of transfer. Placing reliance on the decision of the ITAT Hyderabad Bench in the case of Ms. Girija Reddy, Assessing Officer concluded that there was a transfer of interest of the retiring partner over the assets of the partnership firm on

her retirement and therefore there was a liability to tax on account of capital gains. Hence goodwill was assessed as capital gains in the hands of the assessee.

26. The issue of whether the goodwill received by the assessee on retirement is liable for capital gains tax or not has been concluded by the Hon'ble Jurisdictional High Court in the case of Prashant S. Joshi v. ITO (supra) wherein it was held that when an amount paid to a partner upon retirement after taking accounts and upon deduction of liabilities there is no involvement of an element of transfer within section 2(47) of the Act. While holding so the Hon'ble Jurisdictional High Court observed as under:

*"13. During the subsistence of a partnership, a partner does not possess an interest in specie in any particular asset of the partnership. During the subsistence of a partnership, a partner has a right to obtain a share in profits. On a dissolution of a partnership or upon retirement, a partner is entitled to a valuation of his share in the net assets of the partnership which remain after meeting the debts and liabilities. An amount paid to a partner upon retirement, after taking accounts and upon deduction of liabilities does not involve an element of transfer within the meaning of Section 2(47). Chief Justice P.N. Bhagwati (as the learned Judge then was) speaking for a Division Bench of the Gujarat High Court in Commissioner of Income Tax, Gujarat V/s. Mohanbhai Pamabhai<sup>3</sup> dealt with the issue in the following observations: -*

*" ...When, therefore, a partner retires from a partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts on the footing of notional sale of the partnership assets and given to him, what he receives is his share in the partnership and not any consideration for transfer of his interest in the partnership to the continuing partners. His share in the partnership is worked out by taking accounts in the manner prescribed by the relevant provisions of the partnership law and it is this and this only, namely, his share in the partnership which he receives in terms of money. There is in this transaction no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners : vide also the recent decision of the Supreme Court in Commissioner of Income-tax v. Bankey Lal Vaidya. It is true that section 2(47) defines "transfer" in relation to a capital asset and this definition gives an artificially extended meaning to the term "transfer" by including within its scope and ambit two kinds of transactions which would not ordinarily constitute "transfer" in the accepted connotation of that word, namely, relinquishment of the capital asset and extinguishment of any rights in it. But even in this artificially*

*extended sense, there is no transfer of interest in the partnership assets involved when a partner retires from the partnership. "*

*The Gujarat High Court held that there is, in such a situation, no transfer of interest in the assets of the partnership within the meaning of section 2(47). When a partner retires from a partnership, what the partner receives is his share in the partnership which is worked out by taking accounts and this does not amount to a consideration for the transfer of his interest to the continuing partners. The rationale for this is explained as follows in the judgment of the Gujarat High Court*

*"... What the retiring partner is entitled to get is not merely a share in the partnership assets; he has also to bear his share of the debts and liabilities and it is only his share in the net partnership assets after satisfying the debts and liabilities that he is entitled to get on retirement. The debts and liabilities have to be deducted from the value of the partnership assets and it is only in the surplus that the retiring partner is entitled to claim a share. It is, therefore, not possible to predicate that a particular amount is received by the retiring partner in respect of his share in a particular partnership asset or that a particular amount represents consideration received by the retiring partner for extinguishment of his interest in a particular asset. "*

14. The appeal against the judgment of the Gujarat High Court was dismissed by a Bench of three learned Judges of the Supreme Court in *Addl. Commissioner of Income Tax, Gujarat V/s. Mohanbhai Pamabhai*<sup>4</sup>. The Supreme Court relied upon its judgment in *Sunil Siddharthbhai v. Commissioner of Income Tax, (1985) 156 ITR 509 (S.C.)*. The Supreme Court reiterated the same principle by relying upon the judgment in *Addanki Narayanappa & Anr. V/s. Bhaskara Krishnappa & Ors. [(1966) SC 1300]*. The Supreme Court held that what is envisaged on the retirement of a partner is merely his right to realise his interest and to receive its value. What is realised is the interest which the partner enjoys in the assets during the subsistence of the partnership by virtue of his status as a partner and in terms of the partnership agreement. Consequently, what the partner gets upon dissolution or upon retirement is the realisation of a pre-existing right or interest. The Supreme Court held that there was nothing strange in the law that a right or interest should exist in praesenti but its realisation or exercise should be postponed. The Supreme Court *inter alia* cited with approval the judgment of the Gujarat High Court in *Mohanbhai Pamabhai (supra)* and held that there is no transfer upon the retirement of a partner upon the distribution of his share in the net assets of the firm. In *Commissioner of Income-Tax V/s. R. Lingmallu Raghukumar*<sup>5</sup>, the Supreme Court held, while affirming the principle laid down in *Mohanbhai Pamabhai* that when a partner retires from a partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts, there is no element of transfer of interest in the partnership assets by the retired partner to the continuing partners."

27. Similarly, in the case of *CIT v. Mr. Riyaz A. Sheikh* in ITA.No. 1969 of 2011 dated 26.02.2013 the following question was sought to be raised by the Revenue in its appeal.

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in reversing the decision of CIT(A) and deleting the addition of ₹.66,20,005/- made by the assessing officer towards long term capital gain on transfer of goodwill?"

The Hon'ble Jurisdictional High Court following its decision in the case of Prashant S. Joshi v. ITO (supra) and the decision of the Hon'ble Supreme Court in the case of CIT v. R. Lingamallu Rajkumar [247 ITR 801] reiterated its decision that the amounts received on retirement by a partner is not subject to capital gain tax and therefore refused to entertain the proposed question of law by observing as under: -

*"2. We find that by the impugned order, the Tribunal while holding that amounts received by a partner on his retirement from partnership firm are exempt from capital gains tax relied upon the decision of this Court in the matter of Prashant S. Joshi V/s. Income Tax Officer & Anr. reported in [2010] 324 ITR 154 (Bom). Counsel for the revenue is unable to point out as to how the decision in the matter of Prashant S. Joshi (supra) inter alia holding that no capital gains are payable by an erstwhile partner on amounts received on retirement would not be applicable to the present case. The only submission on behalf of the revenue is that there was an earlier decision of this Court in the matter of N.A. Mody V/s. CIT reported in [1986] 162 ITR 420 and it has not been considered in the decision rendered in the matter of Prashant S. Johsi (supra).*

*3. In the impugned order, the Tribunal does refer to the decision of this Court in the matter of N.A. Mody (supra) and states that it follows the decision of this Court in the matter of CIT V/s. Tribhuvandas G. Patel reported in 115 ITR 95 and the same has been reversed by the Apex Court in Tribhuvandas G. Patel V/s. CIT reported in 263 ITR 515. This Court in the matter of Prashant S. Joshi (supra) has also referred to the decision of Tribuvandas G. Patel (supra) rendered by this Court and its reversal by the Apex Court. Moreover, the decision of this Court in the case of Prashant S. Joshi (supra) placed reliance upon the decision of the Supreme Court in the case of CIT V/s. R. Lingamallu Rajkumar reported in [2001] 247 ITR 801, wherein it has been held that amounts received on retirement by a parnter is not subject to capital gains tax. In the above circumstances, we see no reason to entertain the proposed question of law."*

28. Similar view has been taken by the Hon'ble Jurisdictional High Court recently in the case of PCIT v. R.F. Nangrani HUF [93 taxmann.com 302].

29. Assessing Officer brought to tax ₹.9,41,63,126/- being the amount credited in capital account of M/s. D'Silva Enterprises and capital credited to assessee James P. D'Silva account as undisclosed income u/s. 68 of

the Act. We see no justification at all in treating such amounts as addition u/s. 68 of the Act. We find that major part of these amounts have been received as part of settlement in terms of consent terms entered into by the assessee for withdrawing his share of capital / profits from the firm BCI. These amounts represent ₹.4.67 Crores credited to capital account of M/s. D'Silva Enterprise and ₹.4.79 Crores withdrawn from BCI as share of profit by the assessee as stated in Para 18 above. Therefore, these amounts cannot be taxed as undisclosed income u/s. 68 of the Act.

30. We further observe that the Hon'ble Bombay High Court in the case of Prashant S. Joshi v. ITO (supra) held as under: -

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

*This is concluded by the judgment of Hon'ble Mr. Justice S.H. Kapadia (as the learned Judge then was) speaking for a Division Bench of this Court in Mahindra & Mahindra Ltd. V/s. Commissioner of Income Tax.9 Similarly, clause (v) of section 28 refers to any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm. A payment made to a partner in realisation of his share in the net value of the assets upon his retirement from a firm, does not fall under clause (v) of section 28. In the companion petition, the attention of the Court is also drawn to the circumstances that on the date on which reasons were recorded by the Assessing Officer, the revenue had challenged the order of the CIT(A) before the Tribunal. One of the grounds of appeal is that the assessee had claimed in the Income tax returns that his share of Rs.50 lacs received from the firm as a capital asset was not exigible to tax. The revenue, therefore, submitted that when the recipient claimed the receipt as capital expenditure, in the hands of the firm, the payment is also to be treated as capital expenditure.”*



31. As could be seen from the above the Hon'ble Jurisdictional High Court held that payment made to partner in realization of his share in the net value of the assets upon his retirement from the firm, does not fall under clause (v) of section 28 of the Act. It is not in dispute that the assessee retired from BCI by virtue of consent terms entered into among the partners including the assessee which was settled in the court of law as the assessee approached the District Court for appointment of a receiver and to protect the properties as there was a dispute among the partners, and finally the case was disposed off on 04.04.2012 by the District Judge in civil Miscellaneous Application No 57 of 2012 and closed the proceedings in terms of the consent application filed by the assessee and the existing partners. It is not in dispute that by virtue of the consent terms the assessee finally agreed for settlement and quantified the amount payable to him on his retirement from the firm at ₹.19.07 crores comprising of ₹.5.34 crores towards share capital and accrued profit, ₹.1,00,00,000/- towards goodwill and ₹.12.73 Crores towards brokerage/commission. Though it was settled in the consent deed that ₹.12.73 crore was paid towards brokerage and commission in effect these amounts was paid to the assessee in realisation of his share in the net value of assets upon his retirement from the firm BCI. The firm continued with the existing partners and the assessee on his retirement from the firm

was entitled to the sums as specified in the consent terms. However, the Assessing Officer brought to tax the amounts settled through settlement deed i.e. share of capital and share in profits, commission/brokerage and goodwill on assessee retirement from BCI.

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



goodwill ₹.1,00,00,000/-, share capital and share of profit of ₹.9,41,63,126/- and the brokerage/commission of ₹.12.73 crores and recompute the income for the year under consideration. Grounds raised by the assessee are allowed.

33. Coming to the Revenue's appeal the first ground of appeal is in respect of deletion of addition of ₹.48,65,000/- made u/s. 68 of the Act. On a perusal of the of the order of the Ld.CIT(A), we notice that out of ₹.48,65,000/- assessee received only ₹.11,25,000/- during the assessment year under consideration and the balance amount was received from M/s. Brand Value Communication Ltd., in earlier years. Ld.CIT(A) also observed that the advances were received by the assessee in the course of conducting the business of film production and the details provided shows that these amounts were received as advances and therefore cannot be considered as income. Learned Counsel for the assessee submitted that since the advances to the extent of ₹.37.40 lakhs was received in Assessment Year 2011-12 the same cannot be considered as unexplained cash credit during the current Assessment Year. Since in the current Assessment Year what has been received by the assessee is only ₹.11.25 lakhs, it was submitted that the source for these ₹.11.25 lakhs only is liable to be explained by the

assessee and since it was not done the matter may be restored to the file of the Assessing Officer.

34. On hearing both sides, we find force in the submissions of the assessee as well as observation of the Ld.CIT(A) in concluding that there shall not be any addition of ₹.37.40 lakhs which was received as advances in the business of film production in the earlier Assessment Years, as unexplained cash credit u/s. 68 of the Act in the current Assessment Year which is under consideration. Thus to this extent the addition is directed to be deleted. However, with respect ₹.11.25 Lakhs which was received by the assessee in the current Assessment Year, since no proper explanation was given by the assessee, we restore this issue of explaining the source for ₹.11.25 lakhs to the Assessing Officer for fresh adjudication. Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee. This ground is partly allowed.

35. The other grounds in the appeal of the Revenue are directed against the relief granted by the Ld.CIT(A) in respect of the additions made by the Assessing Officer towards goodwill, share capital and share of profit, brokerage/commission received by the assessee on retirement from BCI. Since, we have deleted the addition made by the Assessing Officer which

were treated as income of the assessee and for the reasons explained above, the other grounds in the appeal of the Revenue are dismissed.

36. In the result, appeal of the assessee is allowed and appeal of the Revenue is partly allowed.

Order pronounced in the open court on the 30<sup>th</sup> January, 2019

Sd/-  
**(N.K. PRADHAN)**  
**ACCOUNTANT MEMBER**  
Mumbai / Dated 30/01/2019  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

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

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**