IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 69 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ACCURATE TURST

Versus

COMMISSIONER OF INCOME TAX

Appearance:

1. INCOME TAX REFERENCE No. 69 of 1993
MR SN SOPARKAR, SR. ADVOCATE WITH MRS SWATI SOPARKAR for Applicant - Assessee
MR TANVISH U. BHATT for Respondent - Revenue

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 29/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. By this reference, Income Tax Appellate Tribunal, Ahmedabad Bench "C" has raised various questions under Section 256(1) of the Income Tax Act, 1961 (the Act), both at the instance of the assessee and the revenue.

2. It appears that both the assessee and the revenue have filed separate reference applications arising from independent appeals before the Tribunal preferred by the assessee and the revenue - against the order of CIT (Appeals), and hence, following identical questions have been raised and referred by Tribunal pertaining to different reference applications :

Questions at the instance of assessee :

"(1) Whether on the facts and in the circumstances of the case the Tribunal has been right in law in holding that the right or actionable claim was retained by the assessee Trust and that it was never the property of the firm?

(2) Whether on the facts and in the circumstances of the case the Tribunal has been right in law in holding that "right of cause of action was never subject of distribution on dissolution of the firm M/s Accurate Engineering Company?

(3) Whether on the facts and in the circumstances of the case the Tribunal has been right in law in holding that receipt of Rs.31,99,077/- was due to extinguishment of the right or actionable claim resulting into transfer as enshrined in Section 47(2) of the Income Tax Act, 1961?

(4) Whether on the facts and in the circumstances of the case the Tribunal has been right in law in holding that amount realised by the assessee on "transfer" of goodwill was exigible to capital gains tax?

(6) Whether on the facts and in the circumstances of the case the Tribunal has been right in law in holding that amount of Rs.31,99,077/- was taxable capital gains in the hands of the assessee - Trust?

(7) Whether on the facts and in the circumstances of the case the Tribunal has been right in directing

the revenue to find out whether the said capital gain is to be taxed as long term capital gains or short term capital gains?"

Questions at the instance of revenue :

"(1) Whether the Appellate Tribunal is right in law and on facts in holding that the assessee trust does not seem to have adopted a colourable device and therefore, the decision of the Hon'ble Supreme Court in the case of Mcdowell & Company (154 ITR 148) is not applicable?

(2) Whether the Appellate Tribunal is right in law and on facts in holding that the amount of Rs.31,99,077/- is not taxable under Section 28(iv) of the Act?

(3) Whether the Appellate Tribunal is right in law and on facts in holding that the provisions of Section 41(2) could not come into operation in respect of an amount of Rs.2,64,338/-?"

3. The Tribunal has also referred supplementary question at the instance of the assessee, which reads as under :

"Whether in the facts and circumstances of the case the Tribunal was right in law in confirming rejection of the claim of the assessee for deduction in respect of bonus payment?"

4. The assessment year is 1985-86 and the relevant accounting period is year ended on 31st March 1985. The assessee is a private trust assessed in the status of association of persons.

5. The facts relatable to the supplementary independent question regarding bonus liability are that the assessee paid a sum of Rs.1,18,869/- as bonus to employees of erstwhile firm of M/s Accurate Engineering Co., which was dissolved. The assessee's claim for deduction of the amount was rejected by the assessing officer on the ground that the bonus was paid to employees of erstwhile firm and as the employees were not in the service of the assessee trust, there was no liability to pay such bonus.

6. Assessee went in appeal before the CIT (Appeals) and in relation to claim of bonus, succeeded because the CIT (Appeals) held that the firm was floated as a

colourable device, and as such, the liability to pay bonus was that of the assessee trust.

7. Revenue carried the matter in appeal before the Tribunal and the Tribunal, for the reasons stated in its order dated 17th January 1992, held that the partnership firm was a genuine firm and hence, the liability to pay bonus could not be fastened on the assessee trust. The Tribunal further held that the assessee had not carried on any business as it had transferred entire business including all assets and liabilities to the partnership firm on 1st April 1984.

8. The Tribunal has set aside the order of CIT (Appeals) after recording the aforesaid findings without appreciating that the assessee trust had made a claim for deduction before the assessing officer and the same had been denied.

9. Having heard the learned advocate appearing for the assessee and the revenue, it is apparent that the question referred cannot be answered in absence of proper recording of facts and appreciation of evidence by the Tribunal, upon which the Tribunal is expected to give its findings. In the circumstances, the question is left unanswered and the Tribunal shall adjust its decision after undertaking necessary exercise in this regard.

10. In so far as the questions raised by the assessee and the revenue are concerned, as the facts are common, they are being dealt with together.

11. The assessee trust came into existence under a deed of trust executed on 21st August 1980 with effect from 7th August 1980. The trust along with various individuals formed a partnership firm with effect from 16th August 1980 in the name and style of M/s Accurate Engineering Co. (the firm). The trust had 50% share in the profit and loss as per the terms of the partnership deed. The partnership was dissolved under a deed of dissolution dated 30th October 1980 with effect from 30th September 1980. Under the said deed of dissolution, the business of the firm was taken over by the trust; and the trust as proprietor of the business, continued to carry on the business upto 31st March 1984.

12. With effect from 1st April 1984, another partnership firm having the same name M/s Accurate Engineering Co. (new firm) was constituted and the new firm comprised of the trust, five individuals and one limited company, namely M/s Austin Engineering Pvt. Ltd.

(the company). At the time of formation of the new firm, the trust brought in all the assets and liabilities as per balancesheet as on 31st March 1984 of the proprietary business by way of its capital contribution, but retained the goodwill, the tradename, trademark and right to appreciation in the value of the assets of the proprietary business.

13. The new firm was dissolved on 1st July 1984 by dissolution deed, and under the deed, the company was permitted to take over entire running business with all the assets and liabilities of the dissolved firm in lieu of and towards settlement of right, title and interest in the partnership. The remaining partners, including the trust were to receive money value of their respective rights in the partnership business and accordingly, by mutual agreement, a statement of affairs as on 30th June 1984 was prepared showing settlement of accounts of the partner inter-se. The total networth was worked out at a sum of Rs.1,74,35,358/- which was taken to the books of account. Out of this, an amount of Rs.25,00,000/- was worked out as value of goodwill; an amount of Rs.1,54,331/- was worked out as appreciation in value of the assets i.e. land and building; and an amount of Rs.5,44,746/- was worked out as appreciation in value of the plant and machinery. In light of the fact that, as per terms of deed of partnership executed on 1st April 1984, the assessee trust was entitled to the goodwill and the appreciation in value of the assets of the proprietary business, total amount of Rs.31,99,077/- was credited to the account of the trust in the books of the company apart from other entry denoting settlement of other assets of the partnership business.

14. In the aforesaid backdrop of the facts, trust filed return of income on 26th June 1985 declaring total loss of Rs.4,34,427/-. The assessing officer assessed the trust at a total income of Rs.30,70,890/-, which inter alia included addition of the sum of Rs.31,99,077/-. According to the assessing officer, the total sum of Rs.31,99,077/- amounted to a benefit or perquisite within the meaning of section 28(iv) of the Act and was taxable under the head "profits and gains of business or profession". The assessing officer, placing reliance on the Supreme Court decision in case of McDowell & Co. Ltd. v. Commercial Tax Officer, (1985) 154 ITR 148 also held that the entire exercise of contributing proprietary business in the new firm, dissolution of the new firm, and taking over of the entire business by the company, was a colourable exercise, instead of transferring the business of the

trust to the company directly. According to the assessing officer, this mode was adopted by the trust to get over the provision of section 164 of the Act, with special reference to the proviso thereunder which had been inserted with effect from assessment year 1984-85 by the Finance Act, 1984.

15. The assessee trust carried the matter in appeal before the CIT (Appeals). The CIT (Appeals) held that the action of the assessing officer in bringing to tax a sum of Rs.31,99,077/- under Section 28(iv) of the Act was incorrect. However, he upheld the applicability of ratio of decision in case of McDowell & Co. Ltd. (supra), but according to him, the floating of the new firm was a colourable device and hence, the transaction had to be viewed at from the angle of bringing to tax the transfer of the assets from the trust to the company directly.

15.1 The Commissioner (Appeals) held that the total sum of Rs.31,99,077/- was exigible to tax under the head "capital gains" under Section 45 of the Act as well as under the head "profits and gains of business or profession" under Section 41(2) of the Act. That goodwill was a separate asset; it had actual cost where the business of the old firm was taken over by the trust on 1st October 1980 and accordingly, the assessing officer was directed to compute the same by adopting the same basis, as was adopted by the parties while working out the goodwill as on 30th June 1984.

16. The assessee and the revenue carried the matter in second appeal before the Tribunal on being aggrieved by the aforesaid order of the CIT (Appeals). The grievance made by the trust before the Tribunal was against confirmation of applicability of the Supreme Court case in case of McDowell & Co. Ltd. (supra); bringing to tax the sum of Rs.31,99,077/- under Sections 45 and 41(2) of the Act and other additions which are not relevant for the present.

17. On the other hand, the revenue challenged the order of CIT (Appeals) to the extent it was held that the provisions of section 28(iv) of the Act were not applicable as well as direction to tax a sum of Rs.2,64,338/- under Section 41(2) of the Act and Rs.29,34,739/- as capital gains under Section 45 of the Act.

18. The Tribunal, taking up the issue of device in the first instance, did not concur with the views expressed by the assessing officer and the CIT (Appeals).

The Tribunal has found that the new firm was genuine and on that basis, the new firm was granted registration under the provisions of the Act. That during the short period of its existence i.e. three months, the new firm had carried on substantial business and for this, the Tribunal referred to the balancesheet and profit & loss account of the new firm. The Tribunal further found that there was no material to show that the new firm had been granted registration under the Act under a misconception of law, or due to a mistake; and even if there was a mistake, no remedial action had been initiated by revenue to rectify such a mistake. In other words, the registration granted to the new firm had become final and remained undisturbed. It has further been found by the Tribunal that the revenue has not been able to place on record any fact or circumstance or the evidence on the basis of which it could be held that the trust had taken recourse to a colourable device. The Tribunal has further found that, in the process of transferring the proprietary business, by the Trust to the new firm, and on dissolution, by the new firm to the company, the assessee trust had been subjected to a greater tax liability. In light of these findings, the Tribunal held that no case was made out by revenue to show that the assessee trust had adopted a colourable device and the ratio of the Apex Court decision in case of McDowell & Co. Ltd. (supra) was not applicable.

18.1 The learned counsel for revenue has neither been able to dispute the aforesaid findings of fact, nor point out how such findings are incorrect in any manner. Hence, in absence of any infirmity in the impugned order of the Tribunal on this count no interference is called for.

18.2 Question No.1, therefore, referred at the instance of revenue, stands answered accordingly in the affirmative i.e. in favour of the assessee and against the revenue.

19. The Tribunal thereafter took up for consideration applicability of provisions of section 28(iv) of the Act. It has upheld the order of CIT (Appeals) on the basis of decision rendered by this Court in the case of Commissioner of Income Tax, Gujarat-I v. Alchemic Pvt. Ltd., (1981) 130 ITR 168. It has concurrently been found by both the CIT (Appeals) and the Tribunal that the assessee trust had received the amount in cash and had not been given any benefit or perquisite which arose from conducting of business or exercise of profession. In the circumstances, in light of the ratio of the aforesaid

decision rendered by this Court as well as the findings recorded on appreciation of evidence by the CIT (Appeals) and the Tribunal, it is not possible to state that any error has been committed by the Tribunal when it came to the conclusion that the amount of Rs.31,99,077/- is not taxable under Section 28(iv) of the Act.

19.1 Question No.2 at the instance of revenue, therefore, is answered in the affirmative i.e. in favour of the assessee and against the revenue.

20. The Tribunal thereafter has dealt with the applicability or otherwise of provisions of Section 41(2) of the Act. It has been found by the Tribunal that the new firm was dissolved and there was no sale or transfer of the assets from the new firm to the company. That what had taken place was settlement of accounts amongst the partners inter-se. That assets of the new firm had neither been sold nor discarded nor demolished nor destroyed in any manner. The Tribunal, therefore, held that the sum of Rs.2,64,338/- could not be brought to tax as balancing charge under Section 41(2) of the Act. Nothing has been pointed out to show that the aforesaid findings recorded by the Tribunal are erroneous in any manner. It is apparent that, on a plain reading, provisions of section 41(2) of the Act cannot be invoked.

20.1 Therefore, question No.3 at the instance of revenue is answered in the affirmative i.e. in favour of the assessee and against the revenue.

21. That brings up for consideration as to whether the sum of Rs.31,99,077/- or any part thereof is exigible to tax under Section 45 of the Act. In this connection, the Tribunal has held that, as per clause (5) of the partnership deed dated 1st April 1984, assessee trust had retained with it goodwill and the right to appreciation in the value of the assets of the proprietary business. The latter, according to the Tribunal, was akin to an actionable claim. The Tribunal, therefore, held that even if the settled legal position, namely there would be no exigibility to capital gains tax when assets / moneys are received at the time of dissolution, is accepted, the assessee cannot get the benefit of the said legal position considering the fact that goodwill and the right to appreciation in the value of the assets was never put in the common corpus or hotchpotch of the new firm. The Tribunal further recorded a finding to the effect that the company paid these moneys exclusively to the assessee trust to the exclusion of other partners of the new firm which was dissolved. That payment of of Rs.31,99,077/was

not made on the dissolution of the new firm; in other words, the receipt was not because there was dissolution of the new firm, but by virtue of the agreement, emanating from various clauses of the partnership deed dated 1st April 1984 and the dissolution deed dated 1st July 1984. That accordingly, assessee parted with goodwill and the right to appreciation in value of the assets of the proprietary business in favour of the company and on transfer, consideration of Rs.31,99,077/- was received which constituted capital gains chargeable under Section 45 of the Act.

22. In relation to the cost of goodwill, after referring to the decision rendered by the Supreme Court in case of Commissioner of Income Tax, Bangalore v. B.C.Srinivasa Setty, (1981) 128 ITR 294, the Tribunal held that, on principle, there could be no dispute that goodwill, which is self-generating asset, would normally not have any cost of acquisition. However, the Tribunal has found that, as recorded by CIT (Appeals), goodwill was taken over along with all assets, liabilities, quota rights etc. when the trust took over the entire business of the firm at the time of dissolution on 30th September 1980. That while taking over the business at that time, trust paid for goodwill also, and though the same was not quantified or disclosed in the books of account, the same could be determined as on 30th September 1980 adopting the same basis which was adopted for determination of goodwill as on 1st July 1984.

23. Mr.S.N.Soparkar, the learned Senior Advocate appearing on behalf of the trust submitted that, (a) a fair reading of the partnership deed of the new firm could lead to only one conclusion, namely that the assessee had transferred ownership rights in the assets of the proprietary business and the agreement amongst partners was to realise incremental value in the event of sale of such assets; an owner of an asset has only one right in an asset - to realise its value; (b) such a right cannot be split into two rights, namely to realise original value and also to realise incremental value; (c) as per provisions of sections 14, 13(b), 37, 48 and 49 of the Indian Partnership Act, 1932, all the assets would vest in the firm and assessee was entitled to only the surplus at the time of dissolution. The same was, therefore, exempted under Section 47(ii) of the Act. In support of the aforesaid proposition, he submitted various illustrations for consideration like the right of creditors of a partnership may have, as to what the partners can agree to while entering into a partnership etc. He placed reliance on the following decisions :

[a] Addanki Narayanappa v. Bhaskara Krishnappa, AIR 1966 SC 1300

[b] Commissioner of Income Tax v. Dewas Cine Corporation, [1968] 68 ITR 240

[c] Commissioner of Income Tax v. Shreyas Chinubhai, (1999) 237 ITR 358 (Gujarat)

[d] Commissioner of Income Tax v. Anant Narhar Nimkar (HUF), (1997) 224 ITR 221 (Gujarat)

[e] Commissioner of Income Tax v. R.Lingmallu Raghukumar, (2001) 247 ITR 801 (SC)

An alternative contention was raised that even if the view adopted by the Tribunal that the assessee had an independent right was correct, such a right had no cost and hence, the computation machinery would fail and therefore, no capital gains tax could be levied.

24. In relation to goodwill, it was fairly submitted that he was not contending that the same had been transferred to the new firm, but was assailing the order of the Tribunal to the extent of cost. That reference to dissolution deed of 30th September 1980 would show that the said document only recorded acquisition of goodwill at the time of dissolution, but there was no statement that the assessee had actually paid any cost at the time of dissolution. That in fact the Tribunal itself had found that books of account of the firm as well as assessee reflected that there was no goodwill and the same was created for the first time at the time of dissolution of the new firm on 30th June 1984. That, therefore, in absence of any cost of goodwill, the same was not taxable. He placed reliance on an unreported decision of this Court rendered on 9th/10th December 2004 in Income Tax Reference No.225 of 1991 in case of Commissioner of Income Tax v. Manoharsinhji P. Jadeja. It was submitted that ratio of this decision would apply to the alternative contention relatable to the right of accretion in the value of the assets of the proprietary business also.

25. Mr.Tanvish U.Bhatt, the learned standing counsel appearing on behalf of revenue submitted that the Tribunal had recorded that, as per Clause (10) of dissolution deed dated 30th September 1980, entire balance standing to the credit of the outgoing partners was to be paid by the trust and this would include value of all assets of the partnership, including goodwill. That therefore the CIT (Appeals) and the Tribunal were justified in stating that it was possible to work out the cost of goodwill as on the said day, the assessee having

actually paid for the same. He supported the order of the Tribunal and submitted that the Tribunal had found, as a matter of fact, that goodwill and the right to appreciation had never gone to the new firm and therefore, the contention that the amount had been received at the time of settlement of accounts cannot be accepted. He, therefore, urged that no interference was called for in the order of the Tribunal in relation to the aforesaid items.

26. Partnership deed executed on 1st day of April 1984 between assessee trust, five individuals and the company assumes importance and the relevant extracts of the same as are necessary read as under :

"WHEREAS it is agreed by and between the parties to this Deed, that the entire business of the party of the first part along with all the assets, whether movable or immovable, right, interest, claims, benefits and liabilities of any nature whatsoever shall be brought by the party of the first part as its capital contribution in the partnership business as depicted by an audited Balance Sheet of the business as on 31-3-84 which shall, when it is signed by the auditors, form part of this Deed and shall always be deemed to be forming part of the Deed from the date of execution of the Deed; and

WHEREAS it is agreed by and between the parties to this Deed that the party of the First Part alone shall be entitled to goodwill, trade name, trade mark and to the appreciation in the value of the assets of the proprietary business, introduced in the partnership business as at 31-3-94, to the entire exclusion of all the other partners, as and when the occasion arises to value the same on account of transfer of the said assets or on dissolution of the firm or ceasing to be a partner or on the retirement of the party of the First Part or otherwise, and ..... "

"5. The Party of the First Part has, as and by way of its capital contribution to the partnership business, brought in its entire business with all the assets and liabilities, as per the balance sheet as on 31st March 1984 of the business of the party of the First Part retaining with it the right to goodwill, tradename, trademark and appreciation in the value of the assets of the proprietary business

brought in the partnership business. Further capital of Rs.25,00,000/- has been agreed to be introduced by the following partners as and when required as follows : ....."

"7. The net profits or losses of the partnership after payment of outgoing shall be shared in the following manner :

1. Accurate Trust through its Trustee SHRI G.V.MODHA	20%
2. SHRI GULABRAI V. MODHA	4%
3. SHRI RAMNIKLAL N. RAMBHANIA	4%
4. SHRI NAROTTAM C. VADGAMA	4 %
5. SHRI SHASHIKANT M. THANKI	4 %
6. SHRI JESHANKER R. BHAGAYATA	4 %
7. M/s Austin Engineering Co. Pvt. Ltd. through its Director SHRI N.C.VADGAMA	60%
Total	100 %

However, all the capital profits and losses whether realised or not and all accretions, appreciations and depletion in the value of the assets of the business of the party of the First Part introduced as capital contribution to the partnership business as at 31-3-1984, whenever occasion arises to ascertain the value thereof whether on dissolution or on retirement of the party of the First Part ceases to be in existence or on the sale of the entire business or otherwise shall belong to the party of the First Part i.e. ACCURATE TRUST. All other capital profits or losses other than those exclusively belonging to or to be borne by the party of the First Part shall be shared by all the partners in their profit sharing ratio as stated hereinabove in this clause."

"17. The goodwill, tradename, trademark and right to appreciation in the value of the assets of the business brought in as on 31-3-84 by the

party of the First part shall exclusively belong to the party of the First Part and no other partner other than the party of the First Part shall have any right, title and interest of any nature over the goodwill, tradename, trademark and appreciation in the assets of the business brought in as at 31-3-84 of the business other than right to use the tradename and trademark in the business of the partnership so long as the party of the First Part remains to be a partner unless otherwise mutually decided by the partners."

"21(a). If any of the partners of the Second to the Sixth Part shall die during the continuance of partnership, then either the spouse of any one of the legal heirs of the deceased as the majority of partners for the time being may decide shall be admitted as partner or for the benefit of the partnership depending upon the age of such spouse or heir as the case may be. However, the spouse or the legal heir shall intimate the firm in writing within three months of the death of such partner regarding his / her intention to join the partnership or otherwise. After the expiry of the said period of three months or in case of intimation of refusal to join the firm, the continuing partners shall take over the property and business of the firm and shall pay to the spouse or heir of the deceased partner as the case may be his / her share of goodwill, if due, and capital appreciation which the deceased was entitled to and the amounts to the credit of his fixed capital and current account and share of profit till the time of death.

21(b) In case Mr.GULABRAI V. MODHA representing the Trust viz. the party of the First Part shall die during the continuation of the partnership, anyone of the Trustees of ACCURATE TRUST, as the majority of the partners for the time being may decide shall be admitted as partner in place of the deceased partner. However, the Board of Trustees of the party of the First Part shall intimate within three months from the death of the partner their intention to join the person selected by the majority partners in the partnership or otherwise. After the expiry of the said period of three months or in case of intimation of refusal to join the firm,

> the continuing partners shall pay to the Board of Trustees of ACCURATE TRUST the entire value of goodwill, trademarks, appreciation in the assets brought in as at 31-3-1984 and other assets as per profit sharing ratio, credits to the fixed capital and current account and share of profit till the point of death."

27. Thus, as can be seen from the preamble of the partnership deed, the intention of the parties is very clear. The trust which is the party of the first part undertakes to bring in as capital contribution in the partnership business the entire business of the trust along with all the assets, whether movable or immovable, right, interest, claims, benefits and liabilities of any nature whatsoever; But at the same time, it is categorically stated that trust alone shall be entitled to goodwill, tradename, trademark, and to the appreciation in the value of the assets of the proprietary business, introduced in the partnership business as at 31st March 1984, to the entire exclusion of all other partners. However, it is specified that the entitlement shall be only when the specific occasion arises, namely, (1) on account of transfer of the said assets, (2) on dissolution of the firm, (3) on ceasing to be a partner, (4) on retirement of the trust, and (5) otherwise. Therefore, it is clear that when the phrase "said assets" is used, the right to appreciation in the value of the assets of the proprietary business is to be at par and has the same characteristic as goodwill, tradename or trademark would have. The contention on behalf of the assessee that it is not having the same characteristic is not borne out from the language employed in the agreement and the intention expressed by the parties.

28. This intention and the interpretation become more explicit and clear when one reads Clause 5 which deals with capital contribution as well as Clause 7 which deals with the profit / loss sharing ratio. Clause 5 and former part of Clause 7 in fact reiterate the intention stated in the preamble.

29. Clause 7 in the latter part talks of capital profits and losses (whether realised or not) and once again states that all accretions, appreciations as well as depletions in value of the assets of the business of the Trust introduced as capital contribution to the partnership business as at 31-3-1984 shall belong to the Trust, in contradistinction, in the immediately following sentence, to capital profits or losses relatable to other

assets. Other assets have been specified to be "other than those exclusively belonging to or to be borne by the party in the first part", namely the Trust, and they are to be shared by all the partners in the ratio as stated in the earlier part of the said Clause.

30. Once again Clause 17 emphatically reiterates the intention of the parties and similarly when Clause 21(a) and 21(b) are read, it becomes absolutely clear that what was retained by the trust was an independent and a separate asset, namely, right to accretion. The submission on behalf of the assessee that once all the assets had been contributed by way of capital to the partnership, there would be no other right available, is not only not borne out by the terms of the partnership deed, but also does not appear to be a correct proposition. It is an accepted position that ownership of a property or an asset is comprised of a bundle of rights and it is always possible for a person to part with some of those rights while retaining the others with the owner. This is exactly what has happened in the present case. The trust has, while contributing the capital on 1st April 1984, contributed assets of the proprietary business, but in relation to those assets retained the right of accretion in the value of such assets.

31. It may be that such right is embedded or dormant and comes alive or becomes active and enforceable only on the happening of contingency, but that does not mean that the right is not in existence on the day capital contribution was made. The contention on behalf of assessee that the right would come into existence only on the date of happening of one of the specified events, in this case - dissolution, cannot be accepted. If, as contended, the right was not in existence on the day when capital was contributed in the partnership, the assessee trust could not have contracted as it did with other partners to retain such a right. It is pertinent to note that goodwill, tradename or trademark were also not in existence in the books i.e. the same have been valued on 30th June 1984 for the purposes of ascertaining and evaluating a pre-existing right and the necessary entry came to be made in the books only on that day. It is not even the case of the assessee that the said assets were not in existence on the date of contribution of capital in the partnership. The only case is: there was no ascertainable cost. Therefore, taking into consideration the fact that all the items appear simultaneously and together in the deed of partnership, the assessee cannot successfully urge that one set of assets existed, but

only quantification was deffered; while the other set of assets did not exist at all and came into existence and were quantified on the date of dissolution only.

32. Section 14 of the Partnership Act talks about the property of the firm and states that the property of the firm would include all property, rights and interests in property originally brought into stock of the firm, subject to contract between the parties; and unless a contrary intention appears, such property as may be acquired with money belonging to the firm are deemed to have been acquired for the firm.

32.1 Section 13(b) of the Partnership Act stipulates that partners are entitled to share equally in the profits earned and contribute equally to the losses sustained, but the opening portion of the section again states that this is subject to contract between the partners.

32.2 Section 37 of the Partnership Act provides for right of outgoing partner in certain cases to share subsequent profits. Though this section was referred to, it is not shown how and in what manner the provisions would have any bearing to the controversy at hand. In the present facts of the case, it is nobody's case that a person who has either expired or ceased to be a partner is represented by the estate or his representative to any share of profits where the business has been continued by the surviving and continuing partners. In the present case, once dissolution has taken place, there are no surviving or continuing partners. Any business carried on subsequently, even by one or more of the erstwhile partners, would constitute a separate and independent business. Therefore, this section has no application.

32.3 Section 48 of the Partnership Act provides for mode of settlement of accounts between partners, but even this provision is subject to agreement by the partners. The emphasis on clause (b)(iv) of Section 48 of the Act is misplaced, as can be seen from the terms of the contract between the parties, the entitlement to the goodwill etc. and the right of accretion are not residue, but are independent assets which, as found by the Tribunal, never entered the partnership. Therefore, the contention that the payment received by the trust in relation to both goodwill and the right to accretion is under Section 48(b)(iv) of the Partnership Act, does not merit acceptance.

32.4 Section 49 of the Partnership Act deals with

payment of firm debts and payment of separate debts. The section only provides that where there are joint debts due from the firm as well as separate debts due from any partner, the property of the firm is required to be applied in the first instance in payment of debts of the firm and in case any surplus is available, then shares of each partner shall be applied in payment of his separate debts. In fact, the latter sentence of the provision which reads "The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.", would go to show that partnership law itself envisages two kinds of properties: properties of the firm and separate properties of the partner. Therefore, the contention that creditors of the firm would have a right to proceed against all the assets without being limited to the original value of the assets, is against the specific provision laid down by Section 49 of the Act. In fact, this submission proceeds on the fallacious premise that there were no separate assets in existence. This aspect has already been dealt with hereinbefore and needs no repetition.

33. In the circumstances, it is not possible to accept the stand of the assessee that, in absence of any separate asset, the amount received by the trust was part and parcel of share of profits only at the time of settlement of accounts on dissolution. All the provisions of the Partnership Act on which reliance has been placed specifically give way to the terms agreed upon by partners when the partnership deed provides to the contrary. As the partnership deed dated 1st April 1984 shows parties carved out separate assets which never entered the partnership, never assumed the characteristic of partnership properties.

34. In so far as the alternative contention that the right to appreciation in value of the assets of the proprietary business had no cost, it is an accepted position that the said aspect was not urged before the Tribunal. The learned advocate for the assessee appears to be correct to the extent when he submits that the said aspect could not be contended before the Tribunal in light of the fact that the finding that the said right constituted a separate asset was recorded by the Tribunal for the first time only in the impugned order. In the circumstances, it would be in the fitness of things, if parties are permitted to agitate this issue before the Tribunal. The Tribunal shall decide the same in accordance with law after permitting the parties to lead evidence and place necessary facts on record in this

regard.

35. In relation to bringing to tax capital gains on transfer of goodwill, the Tribunal has confirmed finding of C.I.T. (Appeals), including the direction to work out value / cost of goodwill as on 30th September 1980 on the same basis, as was adopted on 1st July 1984. Nothing has come on record to show as to whether any evidence in this regard was led before the authorities below. The position in law is well settled by now. The Tribunal shall accordingly apply the same after giving an opportunity to the parties to place on record necessary facts and evidence in this regard.

36. In the result, question Nos. 1 and 2 at the instance of the assessee are answered in the affirmative i.e. in favour of the revenue and against the assessee.

36.1 In so far as the question No.3 referred at the instance of the assessee is concerned, it is apparent that the said question does not bring out correct controversy between the parties and as framed, does not make sense. In the result, the said question is left unanswered.

36.2 In so far as the question Nos.4 and 6 at the instance of the assessee are concerned, they are answered in the affirmative, subject to the final working out of the cost portion in accordance with law. In the event the assessee succeeds in establishing that goodwill and the right to accretion were assets where no cost was conceivable, and in fact had no cost, the Tribunal shall adjust its decision accordingly while finally disposing of the appeal in terms of Section 260() of the Act.

36.3 In relation to question No.7 at the instance of the assessee, it would be consequential to the decision that the Tribunal may arrive at qua question Nos. 4 and 6 and hence, question No.7 is left unanswered.

37. The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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