THE COMMISSIONER OF INCOME TAX – 23 A

v.

M/S. MANSUKH DYEING AND PRINTING MILLS

(Civil Appeal No. 8258 Of 2022)

NOVEMBER 24, 2022 B

[M. R. SHAH AND M. M. SUNDRESH, JJ.]

Income Tax Act, 1961: s.45(4) – Applicability of – Captial gains – Profits or gains arising from the transfer of a capital asset – Object of introducing s.45(4) – Held: s.45(4) states that the profits or gain arising from the transfer of capital assets by way of distribution of capital assets on account of dissolution of a firm or other association of persons or body of individuals or otherwise shall be chargeable to tax as the income of the firm – The object and purpose of introduction of s.45(4) was to pluck the loophole by insertion of s.45(4) and omission of s.2(47)(ii) – Earlier, there was an exemption of the transfer by way of distribution of capital assets from the ambit of the definition of "transfer" – The same helped the assessee in avoiding the levy of capital gains tax by revaluing the assets and then transferring and distributing the same at the time of dissolution – By amendment, s.45(4) takes into sweep not only the cases of dissolution but also cases of subsisting partners of a partnership, transferring the assets in favour of a retiring partner – In the instant case, assets of partnership firm were revalued and the increased amount was credited to the accounts of the partners in their profit-sharing ratio – The credit of the assets' revaluation amount to the capital accounts of the partners can be said to be in effect distribution of the assets – Some new partners inducted by introduction of small amounts of capital and had huge credits to their capital accounts – The assets so revalued and the credit into the capital accounts of the respective partners can be said to be "transfer" which fell in the category of "otherwise" and therefore, s.45(4) shall be applicable. C D E F G

Allowing the appeal, the Court

HELD: 1. Sub-section (4) of Section 45 came to be amended by the Finance Act, 1987 w.e.f. 01.04.1988. The object and purpose of introduction of Section 45(4) was to pluck the loophole H

by insertion of Section 45(4) and omission of Section 2(47)(ii). While introduction to Section 45(4), clause (ii) of Section 2(47) came to be omitted. Earlier, omission of Clause (ii) of Section 2(47) and Section 47(ii) exempted the transform by way of distribution of capital assets from the ambit of the definition of "transfer". The same helped the assessee in avoiding the levy of capital gains tax by revaluing the assets and then transferring and distributing the same at the time of dissolution. The said loophole came to be plucked by insertion of Section 45(4) and omission of Section 2(47)(ii). The word used "OR OTHERWISE" in Section 45(4) is very important. [Paras 7.1, 7.2][794-B-F]

2. In the present case, the assets of the partnership firm were revalued to increase the value by an amount of Rs. 17.34 crores on 01.01.1993 (relevant to A.Y. 1993-1994) and the revalued amount was credited to the accounts of the partners in their profit-sharing ratio and the credit of the assets' revaluation amount to the capital accounts of the partners can be said to be in effect distribution of the assets valued at Rs. 17.34 crores to the partners and that during the years, some new partners came to be inducted by introduction of small amounts of capital ranging between Rs. 2.5 to 4.5 lakhs and the said newly inducted partners had huge credits to their capital accounts immediately after joining the partnership, which amount was available to the partners for withdrawal and in fact some of the partners withdrew the amount credited in their capital accounts. Therefore, the assets so revalued and the credit into the capital accounts of the respective partners can be said to be "transfer" and which fall in the category of "OTHERWISE" and therefore, the provision of Section 45(4) inserted by Finance Act, 1987 w.e.f. 01.04.1988 shall be applicable. [Para 7.5][798-G-H; 799-A-B]

Commissioner of Income Tax v. A.N. Naik Associates and Ors., **(2004) 265 ITR 346 (Bom.) – relied on**

Commissioner of Income Tax, West Bengal v. Hind Construction Ltd., **(1972) 4 SCC 460 – held inapplicable**

Commissioner of Income-Tax Mumbai v. Texspin Engg. and Mfg. Works, Mumbai, **(2003) 263 ITR 345 (Bom.) – referred to**

Case Law Reference

(1972) 4 SCC 460 held inapplicable Para 2.7

CIVIL APPELLATE JURISDICTION : Civil Appeal No.8258 of 2022.

From the Judgment and Order dated 24.06.2013 of the High Court of Bombay in Income Tax Appeal No.1074 of 2009.

With

Civil Appeal No.8259 of 2022.

Vikramjit Banerjee, ASG, Rupesh Kumar, Ms. Gargi Khanna, Ms. Priyanka Das, Divyansh H Rathi, Siddhartha Sinha, Tathagat Sharma, Ms. Janhvi Prakash, Raman Yadav, Kartik Dey, Raj Bahadur Yadav, Advs. for the Appellant.

Kaustubh Shukla, Ms. Nancy Shamim, Lakshmeesh Kamat, Ms. Simriti Ahuja, Parijat Kishore, Ankur Kashyap, Rahul Shyam Bhandari, Vinodh Kanna B., Advs. for the Respondent.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 24.06.2013 passed by the High Court of Bombay passed in Income Tax Appeal No. 1074 of 2009 (relating to A.Y. 1993-1994) and the judgment and order dated 24.06.2013 passed in Income Tax Appeal No. 1174 of 2009 (relating to A.Y. 1994-1995) by which with respect to the same assessee – M/s. Mansukh Dyeing and Printing Mills, a partnership firm, the High Court has dismissed the said appeals and has confirmed the respective orders passed by the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT") deleting the short term capital gains addition made by the Assessing Officer (AO), the Revenue has preferred the present appeals.

2. The facts leading to the present appeals in nutshell are as under:-

2.1 The respondent assessee, a partnership firm originally consisted of four partners (all brothers) engaged in the business of Dyeing and Printing, Processing, Manufacturing and Trading in Clothing. Under the

A Family Settlement dated 02.05.1991, the share of one of the existing partners – Shri M.H. Doshi having 25% profit share in the firm was reduced to 12% and, for his balance 13% share, three new partners were admitted namely, viz., Smt. Ranjan Doshi (11%), Shri Prakash Doshi (1%) and Shri Rajeev Doshi (1%). It appears that thereafter, Shri
B M.H. Doshi, Shri Manohar Doshi and Shri V.H. Doshi retired from the partnership and reconstituted the partnership firm consisted of the partners namely, viz., Shri Hasmukhlal H. Doshi, Smt. Rajan H. Doshi, Shri Prakash H. Doshi & Shri Rajiv H. Doshi.

2.2 That on 01.11.1992, the firm was again reconstituted and three
C more partners, namely, viz., Smt. Vaishali Shah (18%), Smt. Bhavna Doshi (9%), Smt. Rupal Doshi (9%) and M/s. Ranjana Textile Pvt. Ltd. (10%) were admitted as partners. The contribution of new partners was as under:-

- Smt. Vaishali Shah – Rs. 4.50 lakhs
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- M/s. Ranjana Textiles Pvt. Ltd. – Rs. 2.50 lakhs
- Smt. Bhavna Doshi – Rs. 2.25 lakhs
- Smt. Rupal Doshi – Rs. 2.25 lakhs

It was mentioned in the reconstituted partnership deed that two
E partners, namely, viz., Shri Hasmukh H. Doshi and Smt. Ranjan Doshi had decided to withdraw part of their capital.

2.3 On 01.01.1993, the assets of the firm were revalued and an amount of Rs. 17.34 crores were credited to the accounts of the partners in their profit-sharing ratio. Two of the existing partners, viz., namely
F Shri Hasmukhlal H. Doshi & Smt. Ranjan Doshi withdrew part of their capital which was roughly Rs. 20 to Rs. 25 lakhs. Thus, according to the Revenue, the new partners were immediately benefited by the credit to their capital accounts of the revaluation amount, as Rs. 3.12 crores was credited to Smt. Vaishali Shah (who contributed Rs. 4.50 lakhs); Rs. 1.56 crores to Smt. Bhavna Doshi (who contributed Rs. 2.25 lakhs); Rs.
G 1.56 crores to Smt. Rupal Doshi (who contributed Rs. 2.25 lakhs); and Rs. 1.73 crores to M/s. Ranjana Textiles (who contributed Rs. 2.50 lakhs only).

2.4 The respondent filed its Return of Income for the relevant assessment years. The Return of Income was filed for A.Y. 1993-1994
H @ Rs. 3,18,760/-. The same was accepted under Section 143(1) of the

Income Tax Act, 1961. However, thereafter, the assessment was reopened under Section 147 of the Income Tax Act by issuance of the notice under Section 148. The assessment was reassessed under Section 143(3) read with Section 147 determining the total income of Rs. 2,55,19,490/-. Addition of Rs. 17,34,86,772/- was made towards short term capital gain under Section 45(4) of the Income Tax Act. Similar addition was made for A.Y. 1994-1995.

2.5 As per the A.O., the assessee revalued the land and building and enhanced the valuation from Rs. 21,13,225/- to Rs. 17,56,00,000/- for A.Y. 1993-1994 thereby increasing the value of the assets by Rs. 17,34,86,772/- and therefore the revaluing of the assets, and subsequently crediting it to the respective partners' capital accounts constitutes transfer, which was liable to capital gains tax under Section 45(4) of the Income Tax Act. As land and building was involved, the assessee had claimed the depreciation on building, and the Assessing Officer assessed the amount of short-term capital gain under Section 50.

2.6 The Commissioner of Income Tax (Appeals) [CIT(A)] by order dated 30.07.2004 confirmed the addition on account of Short-Term Capital Gains and held that there is a clear distribution of assets as partners have also withdrawn amounts from the capital account. CIT(A) also observed that value of the assets of the firm which commonly belonged to all the partners of the partnership have been irrevocably transferred in their profit-sharing ratio to each partner. To the extent that the value has been assigned to each partner, the partnership has effectively relinquished its interest in the assets and such relinquishment can only be termed as transfer by relinquishment. Therefore, according to the CIT(A), conditions of Section 45(4) are satisfied and therefore, the assets to the extent of their value distributed would be deemed as income by capital gains in the hands of the assessee firm. The CIT (A) also observed that the transfer of the revalued assets had taken place during the previous year and, therefore, the liability to capital gains arises in the A.Y. 1993-1994. The CIT(A) relied upon the decision of the Bombay High Court in the case of **Commissioner of Income Tax Vs. A.N. Naik Associates and Ors., (2004) 265 ITR 346 (Bom.)** and distinguished the decision of the Bombay High Court in the case of **Commissioner of Income-Tax Mumbai Vs. Texspin Engg. and Mfg. Works, Mumbai, (2003) 263 ITR 345 (Bom.)**.

2.7 In an appeal preferred by the assessee, the ITAT by judgment and order dated 26.10.2006 and relying upon the decision of this Court in

A the case of **Commissioner of Income Tax, West Bengal Vs. Hind Construction Ltd., (1972) 4 SCC 460** allowed the appeal and has set aside the addition made by the A.O. towards Short Term Capital Gains by observing that as observed and held by this Court in the aforesaid decision, revaluation of the assets and crediting to partners' account did not involve any transfer. The ITAT observed and held that the decision B of the Bombay High Court in the case of **A.N. Naik Associates and Ors. (supra)** shall not be applicable and held that the decision of the Bombay High Court in the case of **Texspin Engg. and Mfg. Works, Mumbai (supra)** shall be appliable.

2.8 Relying upon the decision of this Court in the case of **Hind** C **Construction Ltd. (supra)**, by the impugned judgment and order the High Court has dismissed the appeals preferred by the Revenue. Hence the present appeals being Civil Appeal No. 8258 of 2022 (relating to A.Y. 1993-1994) and Civil Appeal No. 8259 of 2022 (relating to A.Y. 1994-1995) have been filed by the Revenue.

D 3. Shri Rupesh Kumar, learned counsel appearing on behalf of the Revenue has vehemently submitted that in the facts and circumstances of the case and in law both, the ITAT as well as the High Court have seriously erred in deleting the additions made by the A.O. towards short term capital gain. It is vehemently submitted that in the present case as E the assets of the firm were revalued to increase the value by an amount of Rs. 17.34 crores on 01.01.1993 relevant to A.Y. 1993-1994 and the revalued amount was credited to the accounts of the partners in their profit-sharing ratio and the credit of the asset's revaluation amount to the capital account of the partner was in effect distribution of the assets valued at Rs. 17.34 crores to the partners and that during the years, F some new partners were inducted by introduction of small amounts of capital ranging between 2.5 to 4.5 lakhs and these partners have huge credits to their capital accounts immediately after joining the partnership, which amount was available to the partners for withdrawal, the amount so revalued and credited in the capital accounts of the respective partners G can be said to be "transfer" and therefore, the provisions of Section 45(4) inserted into the Income Tax Act w.e.f. 01.04.1988 shall be applicable.

3.1 It is submitted that the Hon'ble High Court has not properly appreciated the object and purpose of introduction of Section 45(4). It is H submitted that the introduction of Section 45(4) was accompanied by

the omission of clause (ii) of Section 2(47). Section 47(ii) omitted, exempted transform by way of distribution of capital assets from the ambit of the definition of 'transfer'. It is submitted that this helped the assessee in avoiding the levy of capital gains tax by revaluing the assets and then transferring and distributing the same on dissolution. This loophole was sought to be plugged by insertion of Section 45(4) and omission of Section 2(47)(ii).

3.2 It is submitted that therefore, in the facts and circumstances of the case, the A.O. rightly made the addition towards the short-term capital gains invoking Section 45(4) of the Income Tax Act, which was not required to be deleted by the ITAT.

3.3 It is submitted that after the insertion of Section 45(4), distribution of capital assets to the partners' account is deemed transfer of capital assets and therefore assessable as capital gains in the hands of the firm.

3.4 Now, so far as reliance placed upon the decision of this Hon'ble Court in the case of **Hind Construction Ltd. (supra)** relied upon by the assessee, it is vehemently submitted that the said decision shall not be applicable as the said decision was considering the provisions prior to insertion of Section 45(4) of the Income Tax Act. It is submitted that thereafter Section 45(4) of the Income Tax Act has been inserted with specific object and purpose. It is submitted that therefore the said decision shall not be applicable while considering the effect of Section 45(4) of the Income Tax Act.

3.5 It is submitted that on the contrary, the decision of the Bombay High Court in the case of **A.N. Naik Associates and Ors., (supra)** shall be applicable with full force as the same was dealing with Section 45(4). It is submitted that in the case of **A.N. Naik Associates and Ors., (supra)**, the Bombay High Court has interpreted the words "otherwise" used in Section 45(4) of the Income Tax Act and has observed and held that the word "otherwise" used in Section 45(4) takes into its sweep not only cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner.

3.6 Making above submissions and relying upon the decision of the Bombay High Court in the case of **A.N. Naik Associates and Ors., (supra)**, it is prayed to allow the present appeals.

A 4. Both these appeals are vehemently opposed by Shri Kaustubh Shukla, learned counsel appearing on behalf of the respondent assessee.

4.1 It is submitted that in the present case, admittedly there was no dissolution of partnership firm and/or revaluation on dissolution of the partnership firm. It is submitted that in the present case, there was B reconstitution of the partnership firm and on revaluation, the surplus amount on account of such revaluation was credited to the partners' capital account. It is submitted that the surplus on account of such revaluation credited to the partners' capital account cannot be said to be transfer as per the provisions of Section 45(4) of the Income Tax Act.

C 4.2 It is submitted that as per the provisions of Section 45(4) of the Income Tax Act, two conditions were required to be fulfilled. Firstly, there must be a transfer by way of distribution of capital assets, secondly, that, such transfer should be either on account of dissolution of partnership firm or otherwise.

D 4.3 It is submitted that in the present case, during the year there was neither any distribution of assets of the partnership firm nor dissolution or otherwise of the partnership firm has taken place. The surplus on revaluation of assets was notionally credited to the partners' capital account of all the partners. It is submitted that therefore as rightly observed and held by the ITAT confirmed by the Hon'ble High Court, it E was not a case of transfer/deemed transfer under Section 45(4) of the Income Tax Act and therefore, both, the ITAT as well as the High Court have rightly deleted the addition made towards the short-term capital gains.

4.4 Learned counsel appearing on behalf of the assessee in support F of his above submission that as there was no dissolution of the partnership firm and therefore the transfer of the amount on revaluation to the capital accounts of the respective partners cannot be considered as capital gains. Heavy reliance is placed on the decision of this Court in the case of **Hind Construction Ltd. (supra)** as well as decision of the Bombay G High Court in the case of **Texspin Engg. and Mfg. Works, Mumbai (supra).**

4.5 It is submitted that there can be no income just due to revaluation of capital asset unless the capital asset is also transferred. It is submitted that whenever an asset is revalued, even as per the H accounting norms the corresponding notional surplus due to revaluation

is required to be credited to revaluation reserve account in case of companies or credited to capital account of partners in case of partnership firm. This is only notional or book entry which is not represented by any additional tangible asset or income. It is submitted that once it is established that there is no profit or gain accrued to firm on revaluation resulting in real income, there can also be no distribution of such profits and gains and therefore, the same cannot be added in the income of the partnership firm as capital gains.

4.6 It is submitted that the decision of the Bombay High Court in the case of **A.N. Naik Associates and Ors., (supra)** shall not be applicable as in that case before the Bombay High court, the assets of the partnership firm was transferred to a retiring partner by way of a deed of retirement and as a family settlement was entered into and the business of those firms as set out therein was distributed in terms of the family settlement as the party desired that various matters consisting of the business and assets thereto be divided and separately partitioned. It is submitted that once that be the case, the transfer of assets of the partnership to the retiring partners would amount to transfer of capital assets in the nature of capital gains and business profits which are chargeable to tax under Section 45(4) of the Income Tax Act. It is submitted that in that context, it was held that the word "otherwise" takes into its sweep not only cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner. It is submitted that in this context, the Bombay High Court held that Section 45(4) shall be attracted.

4.7 Making above submissions, it is prayed to dismiss the present appeals.

5. We have heard the learned counsel appearing for the respective parties at length.

6. The short question, which is posed for the consideration of this Court is the applicability of Section 45(4) of the Income Tax Act as introduced by the Finance Act, 1987.

7. The relevant portion of Section 45, with which we are concerned, is sub-section (4), which reads as under:-

> "(4) The profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not

being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer."

7.1 Sub-section (4) of Section 45 came to be amended by the Finance Act, 1987 w.e.f. 01.04.1988. From a reading of the above sub-section, to attract the capital gains, what would be required is as under:-

1. Transfer of capital asset by way of distribution of capital assets;

a. On account of dissolution of a firm;

b. Or other association of persons;

c. Or body of individuals;

d. Or otherwise;

shall be chargeable to tax as the income of the firm, association or body of persons."

7.2 The object and purpose of introduction of Section 45(4) was to pluck the loophole by insertion of Section 45(4) and omission of Section 2(47)(ii). While introduction to Section 45(4), clause (ii) of Section 2(47) came to be omitted. Earlier, omission of Clause (ii) of Section 2(47) and Section 47(ii) exempted the transform by way of distribution of capital assets from the ambit of the definition of "transfer". The same helped the assessee in avoiding the levy of capital gains tax by revaluing the assets and then transferring and distributing the same at the time of dissolution. The said loophole came to be plucked by insertion of Section 45(4) and omission of Section 2(47)(ii). At this stage, it is required to be noted that the word used "OR OTHERWISE" in Section 45(4) is very important.

7.3 In the present case, it was the case on behalf of the assessee relying upon the decision of this Court in the case of **Hind Construction Ltd. (supra)** that unless there is a dissolution of partnership firm and thereby the transfer of the amount on revaluation to the capital accounts of the respective partners, Section 45(4) of the Income Tax shall not be applicable. It is the case on behalf of the assessee that there can be no income just due to revaluation of the capital assets unless capital assets

is also transferred. According to the assessee, the amount credited on revaluation to the capital accounts of the partners is only notional or book entry, which is not represented by any additional tangible assets or income. Therefore, the sum and substance of the submission on behalf of the assessee is that unless there is a dissolution of the partnership firm, and there is only transfer of the amount on revaluation to the capital accounts of the respective partners, Section 45(4) of the Income Tax Act shall not be applicable.

7.4 However, in view of the amended Section 45(4) of the Income Tax Act inserted vide Finance Act, 1987, by which, "OR OTHERWISE" is specifically added, the aforesaid submission on behalf of the assessee has no substance. The Bombay High Court in the case of **A.N. Naik Associates and Ors., (supra)** had an occasion to elaborately consider the word "OTHERWISE" used in Section 45(4). After detailed analysis of Section 45(4), it is observed and held that the word "OTHERWISE" used in Section 45(4) takes into its sweep not only the cases of dissolution but also cases of subsisting partners of a partnership, transferring the assets in favour of a retiring partner. While holding so, it is observed in paragraphs 14, 21, 22 and 24 as under:-

> **"14.** Pursuant to the inclusion of sub-section (4) in section 45, on the dissolution of a partnership the profits or gains arising from the transfer of capital asset are chargeable to tax as income of the firm. It is contended on behalf of the assessee that even after introduction of section 45(4), the position will be the same as the definition clause *i.e.* namely section 2(47) has not been amended. Secondly it is contended that the expression "otherwise" must be read *edjusdem generis* with the expression dissolution of firm. So considered, there is no dissolution on the firm. So considered, there is no dissolution on the facts of the case. On behalf of the revenue, it was, however, argued that the amendment was brought about to remove the mischief occasioned by parties avoiding to pay tax, considering the law as declared and to plug the loopholes. The expression otherwise must be read to mear transfer of capital assets of the assessee firm include to a partner. As the section is a self contained code, there was no need to amend the definition of transfer under section 2(47) of the Act. The Position therefore, will have to be examined in the context of the law as amended after 1988……..
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21. With the above, we may now proceed to answer the issue. On retirement of a partner or partners from an existing firm, and who receives assets from the firm, the law before 1998 would really be of no support, as by section 45(4) what was otherwise not taxable has been made taxable. Section 45(4) seems to have been introduced with a view to overcome the judgment of the Apex Court in *Malabar Fisheries Co.* v. *Commissioner of Income-Tax, Kerala* (supra) and other judgments which took a view that the firm on its own has no right but it is the partners who own jointly or in common the asset and thereby remedy the mischief occasioned. Distribution of capital assets on dissolution now is subject to capital gains tax unless it does not fall within the definition of transfer under section 2(47) What would be the effect of partners of a subsisting partnership distributing assets to partners who retire from the partnership. Does the asset of the partnership, on being allotted to the retired partner/partners fall within the expression "otherwise". As noted earlier on behalf of the assessee it has been contended that the expression "otherwise" would have to be read "*ejusdem generis*" with "dissolution of partner or body of individuals" and for that purpose reliance was placed on a judgment of the Division Bench in (*Commissioner of Income-Tax, Bombay City II* v. *Trustees of Abdulcadar Ebrahim Trust*), 1975 (100) I.T.R. 85. Section 45 is a charging section. The purpose and object of the Act of 1988 was to charge tax arising on distribution of capital assets of firms which otherwise was not subject to taxation. If the language of sub-section (4) is construed to mean that the expression "otherwise" has to partake in the nature of dissolution or deemed dissolution, then the very object of the amendment could be defeated by the partners, by distributing the assets to some partners who may retire. The firm then would not be liable to be taxed thus defeating the very purpose of the Amending Acts. Prior to the Finance Act, 1987 in case of a partnership it was held that the assets are of the partners and not of the partnership. Therefore if on retirement a partner receive his share of the assets, may be in the form of a single asset, it was held that there was no transfer and similarly on dissolution of the partnership. Another device resorted to by an assessee was to convert an asset held independently as an asset of the firm in which the individual was a partner. The decision of the Supreme

Court in (*Kartikeya* v. *Sarabhai* v. *C.I.T.*), 1985 (156) I.T.R. 509 took a view that this would not amount to transfer and, therefore, fell outside the scope of capital gain. The rationale being that the consideration for the transfer of the personal asset was indeterminate, being the right which arose or accrued to the partner during the subsistence of the partnership to get his share of profit from time to time and on dissolution of the partnership to get the value of his share from the not partnership asset. Parliament with the avowed object of blocking this escape route for avoiding capital gains tax by the Finance Act, 1987 has introduced sub-section (3) of section 45. The effect of this was that the profits and gains arising from the transfer of a capital asset by a partner to a firm is chargeable as the partner's income of the previous year in which the transfer took place. On a conversion of the partnership assets into individual assets on dissolution or otherwise also formed part of the same scheme of tax avoidance. To plug these loophole the Finance Act, 1987 brought on the statute book a new sub-section (4) in section 45 of the Act. The effect is that the profits or gains arising from the transfer of a capital asset by a firm to a partner on dissolution or otherwise would be chargeable as the firm's income in the previous year in which the transfer took place and for the purposes of computation of capital gains, the fair market value of the asset on the date of transfer would be deemed to be the full value of the consideration received or accrued as a result of transfer. Therefore, if the object of the Act is seen and the mischief it seeks to avoid, it would be clear that intention of Parliament was to bring into the tax not transactions whereby assets were brought into a firm or taken out of the firm.

22. The expression "otherwise" in our opinion, has not to be read *ejusdem generis* with the expression, dissolution of a firm or body or assets of persons. The expression "otherwise" has to be read with the words 'transfer of capital assets" by way of distribution of capital asset's. If so read, it becomes clear that even when a firm is in existence and there is a transfer of capital assets it comes within the expression "otherwise" as the object of the amending Act was to remove the loophole which existed whereby capital gain tax was not chargeable. In our opinion, therefore, when the asset of the partnership is transferred to a retiring partner the partnership which is assessible to tax ceases

A to have a right or its right in the property stands extinguished in favour of the partner to whom it is transferred. If so read it will further the object and the purpose and intent of amendment of section 45. Once, that be the case, we will have to hold that the transfer of assets of the partnership to the retiring partners would amount to the transfer of the capital assets in the nature of capital gains and business profits which is chargeable to tax under section 45(4) of the I.T. Act. We will, therefore, have to answer question No. 3 by holding that the word "otherwise" takes into its sweep not only the cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner.

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24. Considering this clause as earlier contained in section 47, it meant that the distribution of capital assets on dissolution of a firm *etc*. were not regarded as transfer. The Finance Act, 1987 w.e.f. 1-4-1988, omitted this clause, the effect of which is that distribution of capital assets on the dissolution of a firm would henceforth be regarded as 'transfer'. Therefore, instead of amending section 2(47), amendment was carried out by the Finance Act, 1987, by omitting section 47(11), the result of which is that distribution of capital assets on the dissolution of a firm would be regarded as 'transfer'. Therefore, the contention that it would not amount to a transfer has to be rejected. It is now clear that when the asset is transferred to a partner, that falls within the expression otherwise and the rights of the other partners in that asset of the partnership is extinguished. That was also the position earlier but considering that on retirement the partners only got his share, it was held that there was no extinguishment of right. Considering the amendment, there is clearly a transfer and if, there be a transfer, it would be subject to capital gains tax."

7.5 In the present case, the assets of the partnership firm were revalued to increase the value by an amount of Rs. 17.34 crores on 01.01.1993 (relevant to A.Y. 1993-1994) and the revalued amount was credited to the accounts of the partners in their profit-sharing ratio and the credit of the assets' revaluation amount to the capital accounts of the partners can be said to be in effect distribution of the assets valued at Rs. 17.34 crores to the partners and that during the years, some new partners came to be inducted by introduction of small amounts of capital

ranging between Rs. 2.5 to 4.5 lakhs and the said newly inducted partners had huge credits to their capital accounts immediately after joining the partnership, which amount was available to the partners for withdrawal and in fact some of the partners withdrew the amount credited in their capital accounts. Therefore, the assets so revalued and the credit into the capital accounts of the respective partners can be said to be "transfer" and which fall in the category of "OTHERWISE" and therefore, the provision of Section 45(4) inserted by Finance Act, 1987 w.e.f. 01.04.1988 shall be applicable.

7.6 Now, so far as the reliance placed upon the decision of this Court in the case of **Hind Construction Ltd. (supra)** is concerned, at the outset, it is required to be noted that the said decision was pre-insertion of Section 45(4) of the Income Tax Act inserted by Finance Act, 1987 and in the earlier regime – pre-insertion of Section 45(4), the word "OTHERWISE" was absent. Therefore, in the case of **Hind Construction Ltd. (supra)**, this Court had no occasion to consider the amended / inserted Section 45(4) of the Income Tax Act and the word used "OTHERWISE". Under the circumstances, for the purpose of interpretation of newly inserted Section 45(4), the decision of this Court in the case of **Hind Construction Ltd. (supra)** shall not be applicable and/or the same shall not be of any assistance to the assessee. As such, we are in complete agreement with the view taken by the Bombay High Court in the case of **A.N. Naik Associates and Ors., (supra).** We affirm the view taken by the Bombay High Court in the above decision.

8. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court and that of the ITAT are unsustainable and the same deserves to be quashed and set aside and are accordingly quashed and set aside. The order passed by the Assessing Officer is hereby restored.

Present appeals are accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Devika Gujral
(Assisted by : Shevali Monga, LCRA)

Appeals allowed.