IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2610 OF 2018

Ramona Pinto, an individual having her) ….Appellant

v/s.

1. Deputy Commissioner of Income Tax – 23(3), Mumbai having his office at Matru Mandir, 1st Floor, Tardeo Road, Mumbai – 400 007)

2. Principal Commissioner of Income Tax – 23, Mumbai having his office at Matru Mandir, 1st Floor, Tardeo Road, Mumbai – 400 007) ….Respondents

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Mr. P.J. Pardiwalla, Senior Advocate a/w. Mr. Nitesh Joshi a/w. Mr. Atul Jasani for appellant.
Mr. Siddharth Chandrashekhar for respondents – Revenue.

CORAM : K. R. SHRIRAM AND
DR. NEELA GOKHALE, JJ.
RESERVED ON : 27th OCTOBER 2023
PRONOUNCED ON : 8th NOVEMBER 2023

JUDGMENT : (PER K.R. SHRIRAM, J.) :

1 In this appeal filed under Section 260A of the Income Tax Act, 1961 (the Act) appellant is impugning an order dated 2nd April 2018 passed by the Income Tax Appellate Tribunal (the Tribunal). By the impugned order, the Tribunal upheld the validity of the reassessment proceedings and also upheld the assessment of a sum of Rs.28 Crores receivable by appellant pursuant to an arbitration award as in the nature of income. The appeal pertains to Assessment Year 2010-2011.

2 In the previous year relevant to Assessment Year 2010-2011, i.e., on 17th September 2009, consent terms were reached between appellant, her brother and other members of the family, pursuant to which, the disputes between them have been settled. Consequent thereto, an arbitration award dated 25th September 2009 came to be passed in terms of the consent terms. Pursuant thereto, appellant became entitled to receive an amount of Rs.28 Crores in full and final settlement of all disputes and claims raised by her against her brother and the other family members and/or P. N. Writer & Co. and/or any claims in respect of the bequest made under the Will dated 16th September 1990 of her late father Mr. Charles D'souza. The said amount of Rs.28 Crores was assessed to tax in reassessment proceedings initiated by respondent no.1 under Section 147 of the Act which assessment stands upheld in further appeal by both the CIT(A) and the Tribunal. The present appeal is against the impugned order dated 2nd April 2018 passed by the Tribunal. This Court was pleased to admit the appeal by its order dated 25th February 2019 on the following substantial questions of law :

> *(i) Whether the Tribunal ought to have held the Respondent No.1 had assumed jurisdiction under section 147 of the Act without fulfilling the jurisdictional pre-conditions and hence, the reassessment proceedings were without jurisdiction?*
>
> *(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal ought to have held that the amount of Rs.28 crores received by the Appellant as per the arbitration Award was not chargeable to tax?*

3 A partnership firm by name M/s. P. N. Writer & Co. (the said Firm) was established in or about the year 1954 between appellant's late father Mr. Charles D'Souza and one Mr. P. N. Writer. The said Firm was reconstituted from time to time and the last partnership deed in this regard, according to appellant, was executed on 18th January 1979. As per the partnership deed, appellant alongwith her late father and brothers were the partners in the said Firm. Appellant was entitled to a share of 20% in the profits or losses made by the said Firm.

4 Appellant's father Mr. Charles D'Souza expired on 24th November 1997 leaving behind his last Will and Testament dated 16th September 1990. Appellant was bequeathed a further share of 5% in the profits and losses of the said Firm. Accordingly, appellant became entitled to a 25% share in the profits and losses of the said Firm. This fact has been also mentioned in the application for probate filed by appellant's brother.

5 It is appellant’s case that somewhere circa 2005, appellant realised that the said Firm was reconstituted vide a Deed of Partnership dated 25th November 1997 entered into between appellant's brothers, viz., William D'Souza and Denzil D'Souza. According to the said Deed, appellant was treated as having retired from the Firm as and from the close of business on 24th November 1997. The said Firm had filed its return of income for Assessment Year 1998-1999 enclosing reconstituted Deed of

Partnership and financial showing appellant as an erstwhile partner. Appellant's case was she continued to be a partner in the said Firm.

6 Since disputes arose, appellant and the continuing partners of the said Firm decided to refer their matter to arbitration. Finally, by an interim order dated 20th July 2007 the Apex Court directed the said Firm to pay an amount of Rs.50,000/- per month to appellant. Subsequently, by a final order dated 28th March 2008 the Apex Court was pleased to appoint Mr. Justice S. P. Bharucha, Chief Justice of India (Retd.) as sole Arbitrator to decide the disputes between appellant, her siblings and the said Firm.

7 Claims and counter-claims were filed before the Arbitrator. During the course of arbitration proceedings, the parties arrived at consent terms, which was taken on record by the Arbitrator and an award in terms of the consent terms was passed on 25th September 2009. As per the consent terms, appellant relinquished all her rights, claims and demands of any nature whatsoever against the said Firm or its partners. In consideration thereof, appellant was to receive an amount of Rs.28 Crores. Appellant was to be paid an amount of Rs.7 Crores on or before 25th December 2009 and the balance amount of Rs.21 Crores was to be paid, in seven equal installments of Rs.3 Crores, on or before 25th December of each subsequent year.

8 Appellant, pursuant to the interim order dated 20th July 2007 of the Apex Court referred earlier, received an amount of Rs.5 lakhs in the

previous year relevant to Assessment Year 2008-2009. In the course of assessment proceedings, respondent no.1 issued a show cause notice for assessment of the said receipt wherein appellant contended that the receipt was related to her retirement from the said Firm and was, therefore, not chargeable to tax under the Act. Being satisfied with the submissions as made by appellant before him, no addition in respect of the said receipt was made in the assessment order dated 26th November 2010 passed under Section 143(3) of the Act.

9 As per the consent terms, during the previous year ending 31st March 2010, appellant received an amount of Rs.7 Crores. Appellant filed return of income for Assessment Year 2010-2011 on 16th July 2010 offering to tax a total income of Rs.18,91,589/-. In the note annexed to the return of income, appellant referred to the receipt of Rs.7 Crores pursuant to the arbitration award. Reference was also made to Rs.4,82,258/- received during the Financial Year 2009-2010 pursuant to the interim order dated 20th July 2007 passed by the Apex Court. Appellant claimed that as the amounts were received upon her retirement from the said Firm, the same were not chargeable to tax under the Act. Appellant also relied on various decisions of the Apex Court and of this Court.

10 The return of income filed by appellant was processed by respondent no.1, i.e., Deputy Commissioner of Income Tax – 23(3), on 20th March 2012 under Section 143(1) of the Act, whereby, the total income

as offered by appellant in her return of income was accepted.

11 Almost two years later, appellant received a notice dated 19th March 2014 from respondent no.1 under Section 148 of the Act alleging escapement of income for Assessment Year 2010-2011. Appellant was directed to file return of income once again which was complied with. Appellant also received a copy of the reasons for reopening. The said reasons referred to the information received in respect of an order dated 21st July 2007 passed by the Supreme Court as well as the arbitration award dated 25th September 2009. The reasons also made reference to the fact that the amount of Rs.7 Crores received by appellant during the Financial Year 2009-2010, corresponding to Assessment Year 2010-2011, has not been offered for tax in the return of income. Based on this, respondent no.1 has formed his belief that income of Rs.7 Crores chargeable to tax for Assessment Year 2010-2011 has escaped assessment.

12 Appellant filed objections before respondent no.1 disputing exercise of jurisdiction under Section 148 of the Act. Appellant urged that a receipt is chargeable to tax only when it is of an income character and there was nothing in the reasons to show as to how the amount of Rs.7 Crores received by appellant was in the nature of income. It was also urged that the amount related to her retirement from the said Firm, i.e., in lieu of relinquishment of her claim as a partner of the said Firm and, accordingly, as held in ***CIT V/s. Mohanbhai Pamabhai***[1] and in ***Prashant S.***

1 (1987) 165 ITR 166

Joshi V/s. ITO[2] the amount was not chargeable to tax.

13 The objections were disposed by respondent no.1 by an order dated 21st August 2014. In the order disposing objections, a reference has been made to the information received by respondent no.1 from the Assessing Officer of P. N. Writer & Co., i.e., the said Firm, stating that appellant had separated from the said Firm in 2009 and an amount of Rs.28 Crores was agreed to be paid to appellant as a settlement. Therefore, as per the information with respondent no.1 the amount of Rs.28 Crores was to be received for separation from the said Firm. Therefore, the information/material available with respondent no.1 at the time of formation of his belief that appellant's income chargeable to tax has escaped assessment was information received from the Assessing Officer of the said Firm and the note placed by appellant in her return of income. It is appellant's case that both sources of information revealed that the receipt was in respect of her retirement from the partnership firm of P. N. Writer & Co. In the order disposing objections, it was also alleged that the copy of the arbitration award, Will of appellant's father, calculation on how appellant was awarded Rs.28 Crores were not available and, therefore, there was nothing which would conclusively prove that the amount received was not income.

14 This order was challenged by filing a writ petition in this Court being Writ Petition No.2668 of 2014. The petition was allowed to be

2 (2010) 324 ITR 154 (Bom)

withdrawn by an order dated 13th February 2015 with a clarification that all contentions of the parties are kept open to be urged before the authorities under the Act.

15 Pursuant thereto, respondent no.1 resumed the reassessment proceedings and issued notice dated 18th March 2015 under Section 142(1) of the Act. In the notice, appellant was asked to show cause as to why the amount of arbitration award should not be assessed as business income under Section 28(iv) of the Act. Alternatively, appellant was also asked to show cause why the amount received as per the arbitration award should not be regarded as for relinquishment of the partnership interest, and hence, charged to capital gains. Appellant responded making detailed submissions on non applicability of the provisions of Section 28(iv) and provisions relating to capital gains. Appellant also filed copies of the statement of claim made before the Arbitrator and also various documents including request to the Registrar of Firms confirming that she has ceased to be a partner of the said Firm.

16 Respondent no.1 passed the assessment order on 30th March 2015 determining appellant's total income at Rs.28,18,91,590/-. Therein, the amount of Rs.28 Crores was added as business income by invoking Section 28(iv) of the Act. Alternatively, he held that the amount of arbitration award was chargeable to tax as capital gains. It was further alleged that appellant had not retired from the said Firm because the

consent terms did not mention so and further held that the entire amount was not towards her retirement from the said Firm.

17 Aggrieved by the assessment order, appellant filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. During the course of hearing before the CIT(A), appellant filed valuation reports in respect of various properties owned by the said Firm to justify the amount of Rs.28 Crores that was received as her share from the said Firm. It was explained to the CIT(A) that the reserves of the company P. N. Writer & Co. Pvt. Ltd., which had taken over the business of the said Firm for the year ending 31st March 2006, was over Rs.100 Crores. The CIT(A) dismissed the appeal by an order dated 3rd February 2017. While dismissing the appeal, the CIT(A), however, accepted appellant's contention that the provisions of Section 28(iv) had no application to the present case and that the amount of Rs.28 Crores could not be assessed as capital gains in the hands of appellant. The CIT(A), however, held the amount of arbitration award as income from other sources under Section 56(1) of the Act because the amount had been received for settlement of a composite bundle of rights. For holding that the amount was not received in respect of retirement from the said Firm, CIT(A) observed that the consent terms did not mention about appellant’s retirement and also made a reference to settlement of rights under the father's Will and also other assets being equity shares in two private companies which had no connection with the said Firm, shares

of which have to be transferred by appellant and her husband to the other group. It was also mentioned that the manner in which the accounts were taken for the retirement of appellant from the said Firm were not explained and there was also no basis for the manner in which the amount of Rs.28 Crores had been arrived at in the consent terms. It is appellant's case that the CIT(A) failed to appreciate that the dispute between appellant and her brothers was primarily in respect to her wrongful retirement from the said Firm and as reference was also made to the inheritance from the father which also mainly comprised of further partnership interest of 5% in the said Firm being given to her, even assuming that any part of the said award also related to the inheritance right as per the father's Will, no part of such amount would be chargeable to tax under the Act.

18 Aggrieved by the order dated 3rd February 2017 passed by the CIT(A), appellant filed an appeal before the Tribunal. Appellant raised all grounds before the Tribunal which dismissed the appeal by the impugned order dated 2nd April 2018. The Tribunal upheld the reassessment proceedings to be valid on the ground that *prima facie* there was material on record which shows that income chargeable to tax had escaped assessment. The Tribunal also concluded that there was a live nexus between the material available with respondent no.1 and the belief formed by him with respect to escapement of income. The Tribunal, however, referred to the amount of arbitration award as special income which has to

be considered in a wider sense. Miscellaneous application was filed before the Tribunal which came to be dismissed.

19 *Mr. Pardiwalla submitted as under* :

(a) The reassessment proceedings have been initiated without fulfilling the jurisdictional pre-conditions in Section 147 and Section 148 of the Act as no income chargeable to tax had escaped assessment. This was because on receipt of the amount of Rs.28 Crores all claims of appellant against her brother and their family members and against the partnership firm of P. N. Writer & Co. stand duly satisfied and appellant had no further claims whatsoever against them and/or against the said Firm. Appellant also could not claim any rights in respect of the bequests made to her by her father in his Will, i.e., his share of 5% in the said Firm. Hence, the amount received in terms of the arbitration award was received for retirement from the said Firm or relinquishment of her rights under the Will. As such the receipt can never represent income chargeable to tax and hence, reassessment proceedings could not be initiated in the absence of any income chargeable to tax having escaped assessment.

(b) Mere reference in the reasons recorded to the consent terms and the arbitration award would never form the basis of a belief that income chargeable to tax had escaped assessment, unless, respondent no.1 made out a *prima facie* case in the reasons that the amount received/receivable by appellant under the arbitration award was of an

income nature which burden has not been discharged. The information based on which the belief was formed was that received from the Assessing Officer of the said Firm, P. N. Writer & Co., which clearly revealed that appellant had retired from the said Firm and in settlement thereof it was agreed that she will receive an amount of Rs.28 Crores, which information was already in possession of respondent no.1. Thus, there was no fresh tangible material available to the Assessing Officer. In any event, as the said amount was not of an income nature, the live link or rational nexus between the information and the belief as formed by respondent no.1 was missing. Since the issue relating to taxability of the amount received by appellant as per the interim order dated 20th July 2007 was considered by respondent no.1 in the Assessment Year 2008-2009, wherein, he had accepted that the said amount was not chargeable to tax, initiation of reassessment proceedings for the Assessment Year 2010-2011 was a clear case of change of opinion which was not permissible in law.

(c) The Act does not provide that whatever is received by a person must be regarded as income liable to tax and in all cases, in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision. (***Parimisetti Seetharamamma V/s. Commissioner of Income Tax***[3] and ***Mehboob Productions Private Limited V/s. Commissioner of Income Tax***[4]).

3 (1965) 57 ITR 532 (SC)
4 (1977) 106 ITR 758 (Bom.)

The Revenue has not discharged the burden in the present case. In the present case, the amount is received primarily for settlement of relinquishment of the rights in the partnership firm as is apparent from a perusal of clauses 1, 4 and 10 of the Consent Terms. The settlement of other issues is only incidental and provided for only to preserve family peace and amity.

(d) An amount received by a partner upon retirement from the said Firm is not chargeable to tax. Upto 31st March 1988, i.e., before insertion of Section 45(4) by the Finance Act 1987 with effect from 1st April 1988, the amount received by a partner upon retirement from the firm was in the nature of working out of his rights as a partner and not for transfer of his partnership interest to the continuing partners. (***Tribhuvandas G. Patel V/s. CIT***[5] and ***CIT V/s. Lingmallu Raghukumar***[6]).

That the amount was received for retirement from the said Firm as is clear from the statement of claim before the Arbitrator, the consent terms, the correspondence between the Attorneys and information relating to reconstitution of the said Firm being filed with the Registrar of Firms. The valuation of the properties of the said Firm also supported this position. ***CIT V/s. Mohanbhai Pamabhai*** [91 ITR 393 (Guj)] was approved by the Apex Court in *Mohanbhai Pamabhai* (Supra).

Section 45(4) of the Act, as initially introduced and as in force in the assessment year concerned brings to tax any distribution of capital

5 (1999) 236 ITR 515 (SC)
6 (2001) 247 ITR 801 (SC)

assets upon, *inter alia*, retirement of a partner, where, the tax liability is imposed on the partnership firm and not on the retiring partner. The said provision will not result in imposing of any tax liability on appellant as first of all there was no distribution of capital assets but receipt of a monetary amount. In any event, the liability to pay tax, if any, under the said provision will be on the firm and not the retiring partner [*Prashant S. Joshi* (Supra)].

(e) Assuming without admitting that any portion of the arbitration award relates to the inheritance by appellant under the Will of her late father or otherwise, in the absence of Estate Duty or a similar tax, no tax is chargeable in respect of the same. In any event, the same would be on the Estate and not on a legatee. Even the provisions of Section 56(2)(vii) which seek to tax an amount received without consideration specifically excludes from the ambit of the charge any amount received pursuant to a bequest.

(f) A perusal of the statement of Mr. Denzil D'souza recorded by respondent no.1 in the course of the assessment proceedings, reveals that the amount received by appellant is pursuant to a family arrangement. Assuming without admitting that the said receipt is relatable to a family arrangement, it will still not be chargeable to tax as such arrangement is an agreement between the members of the same family for the benefit of the family either by compromising doubtful or disputed rights or for preserving

the peace, honour, security and property of the family by avoiding litigation and the amounts so received are not exigible to tax. (***CIT V/s. AL. Ramanathan***[7], ***CIT V/s. Sachin P. Ambulkar***[8] and ***CIT V/s. R. Nagaraja Rao***[9]).

20 *Mr. Chandrashekhar submitted as under* :

(a) the amount received/receivable by appellant as a part of the arbitration award would be chargeable to tax under Section 28(iv) of the Act which reads as under :

> *28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—*
>
> *xxxxxxxxxxx*
>
> *(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.*
>
> *xxxxxxxxxxx*

This submission can be rejected straight away because the CIT(A) has, in paragraph 7.8 of his order, accepted appellant's contentions relying on ***Mahindra and Mahindra Ltd. V/s. CIT***[10] as approved by the Apex Court that Section 28(iv) does not apply to benefits in cash or money and that the benefit or perquisite which can be brought to tax under the said Section is a benefit in kind. A monetary amount, as in the present case, cannot be assessed under the said Section. ***CIT V/s. Mafatlal Gangabhai & Co. (P.) Ltd.***[11] also supports this view where the Apex Court was considering a similar provision which used the words "whether convertible into money

7 (2000) 245 ITR 494 (Mad)
8 (2014) 42 taxman.com 22 (Bom)
9 (2013) 352 ITR 565 (Karn)
10 (2003) 261 ITR 501/(2018) 404 ITR 1 (SC)
11 (1996) 219 ITR 644 (SC)

or not" following the words "any benefit or amenity or perquisite". Their submission was that what is within the mischief of the sub clause is an expenditure incurred for providing a benefit, amenity or perquisite to an employee and that a cash payment to the employee is not an "expenditure" contemplated by the sub clause and the use of the qualifying words "whether convertible into money or not" puts the matter beyond doubt. The Apex Court held that the language employed in the sub clause is not capable of taking within its ambit cash payments made to the employees by the assessee because they cannot be brought within the purview of the words "any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisite" more so because of the following words "whether convertible into money or not". Infact the Tribunal also accepted this position in the impugned order.

Therefore, as this aspect of the matter has been decided in favour of appellant by both the Appellate Authorities and the Revenue was not in appeal before the High Court, it was also not open to the Revenue to raise the issue at this stage.

(b) Under what category of income the receipt has to be fitted, one has to look at the motive behind the payment as held in ***P.H. Divecha V/s. Commissioner of Income Tax***[12]. Since the consent terms does not clearly spell out that it was for relinquishing the rights under the partnership firm, the Tribunal was justified in arriving at its conclusion.

12 (1963) 48 ITR 222 (SC)

So also the intention of the parties has to be ascertained on the facts of each case as held in ***Rajah Manyam Meenakshamma V/s. Commissioner of Income Tax***[13].

(c) On 25th November 1997 the partnership firm was reconstituted after the demise of appellant's father and there were only two partners in the said Firm viz., appellant and her brother Mr. Denzil D'souza. Since appellant has retired from the said Firm, it will tantamount to a dissolution of the said Firm which would make the amount of Rs.28 Crores received upon dissolution of the said Firm as chargeable to tax. The Apex Court in ***Erach F. D. Mehta V/s. Minoo F. D. Mehta***[14] supports the view that when there are only two partners in a partnership, if one of them retires, it will amount to dissolution of the firm.

(d) the amount received/receivable by appellant would be chargeable to tax as “Income from other sources”. Section 56(1) of the Act provides income of every kind which is not to be excluded from the total income under the Act is to be charged to tax under the head income from other sources if it is not chargeable under any other heads. The Tribunal has correctly held that the receipt was a special income and hence, the receipt was taxable in nature.

(e) Reliance was placed on orders of the Tribunal in ***Shevantibhai C. Mehta V/s. ITO***[15] and ***Savitri Kadur V/s. DCIT***[16]. These

13 (1956) 30 ITR 286 (AP)
14 1970 (2) SCC 724
15 (2004) 4 SOT 94 (Pune)
16 (2019) 106 taxman.com 314 (Bang)

orders, in our view, are contrary to the judgments of the Apex Court in *Mohanbhai Pamabhai* (Supra), *Tribhuvandas G. Patel* (Supra), *Lingmallu Raghukumar* (Supra) and of this Court in the case of *Prashant S. Joshi* (Supra) and hence, do not lay down the correct position.

FINDINGS :

21 The law as regards jurisdiction under Section 148 of the Act is very clear. The following jurisdictional pre-conditions are required to be fulfilled :

> *(i) the assessee's income chargeable to tax has escaped assessment;*
>
> *(ii) the Assessing Officer must have formed a belief that the assessee's income chargeable to tax has escaped assessment;*
>
> *(iii) the belief as formed by the Assessing Officer that the assessee's income chargeable to tax has escaped assessment must not be based on a change of opinion;*
>
> *(iv) his belief must not be based on same material as was available with him in the original proceedings i.e., some fresh tangible material should come to his notice subsequent to the framing of the intimation/assessment;*
>
> *(v) the Assessing Officer cannot initiate reassessment proceedings with a view to make further enquiries or investigation into the facts of the case without forming the belief that the assessee's income chargeable to tax has escaped assessment.*

In our view, the said jurisdictional pre-conditions have not been fulfilled. Therefore, it can be stated that the assumption of jurisdiction by respondent no.1 under Section 148 of the Act to reassess appellant's income is without jurisdiction.

22 The reasons recorded by respondent no.1 for reopening the assessment reads as under :

> *Reason for reopening of assessment in the case of Mrs. Ramona Pinto for the Assessment Year 2010-11*
>
> *The assessee has filed return of income for the assessment year 2010-11 on 16.07.2010 declaring total return of income of Rs.18,91,589/-. The return was processed u/s. 143(1) on 20.03.2012.*
>
> *Information is received that the Supreme Court vide its order dated 21.07.2007 has ordered partners of P.N. Writers and Co. to pay Rs.50,000/- every month beginning from the month of July 2007. As per the settlement in arbitration proceedings which concluded on 25.09.2009 assessee had received Rs.7,00,00,000/- during F.Y. 2009-10 corresponding to A.Y. 2010-11.*
>
> *The assessee in her return of income filed for A.Y. 2010-11 has not offered this amount of Rs.7,00,00,000/-.*
>
> *In view of the above, I am satisfied that income of Rs.7,00,00,000/- has escaped assessment for A.Y 2010-11. The assessment for A.Y. 2010-11 is therefore required to be reopened.*

23 A bare perusal of the reasons shows that there was no mention as to whether and how the amount as per the arbitration Award was in the nature of income. Apart from referring to the fact that there was a decision of the Supreme Court as well as arbitration award pursuant to which appellant had received the amount of Rs.7 Crores, nothing else has been mentioned in the reasons. The belief formed by respondent no.1 without any statement on whether and how the receipt was of an income nature would render the reasons as vague and incomplete thereby making the reassessment proceedings initiated under Section 148 of the Act bad in law. In the order dated 21st August 2014, respondent no.1, while disposing the

objections raised by appellant to his assumption of jurisdiction under Section 148 of the Act has stated that the receipt of Rs.7 Crores was not in respect of appellant's retirement from the said Firm. The order, however, states that the information/material available with respondent no.1 at the time of formation of his belief comprised of information received by him from the Assessing Officer of P. N. Writer & Co. as well as the note placed by appellant in her return of income filed for Assessment Year 2010-2011. The information reveals that the said receipt was towards appellant's retirement from the said Firm. Therefore, justification given by respondent no.1 in the order dated 21st August 2014 for taxability of the said receipt as not relating to appellant's retirement from the said Firm was contrary to the information/material available with him.

The law is very settled in as much as the belief formed by the Assessing Officer has to be based on the information/material available with him at the time of formation of the belief. There was no material whatsoever available with respondent no.1 at that point of time to show that the said receipt of Rs.7 Crores by appellant as referred to in the reasons did not relate to her retirement from the said Firm. In the absence of any statement in the reasons recorded for reopening the assessment regarding taxability of the said receipt and in view of non-sustainability of the justification provided by respondent no.1 in the order dated 21st August 2014, the reassessment proceedings initiated under Section 148 of the Act,

in our view, will be bad in law.

24 It is also well settled that for the purposes of adjudicating the validity of assumption of jurisdiction under Section 148 of the Act, one has to only look at the reasons recorded by the Assessing Officer before reopening the assessment. Such reason cannot be supplemented or improved subsequently. For Assessment Year 2008-2009 also appellant had received similar amounts from the said Firm. After scrutinising the character of such receipt, it was held by the predecessor of respondent no.1 that the receipt was not taxable in nature. Therefore, the formation of the belief that the amount received for the current year was taxable, in our view, tantamounts to a change of opinion which is not permissible in law.

25 One of the reasons given by respondent no.1 in the order dated 21st August 2014 disposing the objections was that a copy of the arbitration award, Will of appellant's father, calculation of how she was awarded Rs.28 Crores as per the award and conclusive proof that the amount received was not a capital receipt has not been provided by her or does not form part of the record. Such a reason for justification of the validity of assumption of jurisdiction under Section 148 of the Act indicates that proceedings have been initiated only with a view to make enquiries or investigate into the facts of appellant's case. It is well settled in law that reassessment proceedings could be initiated by an Assessing Officer if he has reason to believe that assessee's income chargeable to tax has escaped

assessment. However, such proceeding cannot be initiated with a view to enquire or investigate on the aspect of whether any income chargeable to tax had escaped assessment. In the present case, as respondent no.1 has initiated reassessment proceedings without forming the requisite belief and only with a view to enquire/investigate into the facts, his assumption of jurisdiction under Section 148 of the Act, in our view, would be bad in law.

26 We should also note that with a view to justify the taxability of Rs.7 Crores in the hands of appellant, respondent no.1, in the order dated 21st August 2014 disposing the objections, has referred to the following aspects :

> *(i) the amount is received by the Appellant in lieu of arbitration Award which is taxable in the year of decision when amount is payable;*
>
> *(ii) the amount has been received by the Appellant on account of her expulsion from the firm of P.N. Writer & Co. and the decision of the Hon'ble Supreme Court in the case of Mohanbhai Pamabhai (supra) which was concerned with amount received by a partner upon her retirement from the firm would not apply to amount received on expulsion;*
>
> *(iii) the Appellant has received the said amount as she has given up her rights and interests in the firm. According to Respondent No.1, this would tantamount to a transfer and the difference between the market value of the assets of the firm and the cost would be chargeable to capital gains under section 45 of the Act.*

None of these circumstances find any mention in the reasons recorded by respondent no.1 for reopening the assessment. Moreover, this also indicates that even at the stage of disposing the objections the Assessing Officer was not clear on the basis why appellant's income chargeable to tax has escaped assessment.

27 Having considered the consent terms with the arbitration award and the statement of claim, it is clear, the amount of Rs.28 Crores was receivable by appellant in terms of the arbitration award dated 25th September 2009. As per the award, appellant has relinquished all her claims against the partnership firm of P. N. Writer & Co. as well as the partners. Appellant had initiated arbitration proceedings as she was wrongfully shown as retired from the said Firm. This is brought out by the statement of claim made by appellant before the Arbitrator. Even the claim based on the father's Will was mainly related to the additional 5% share of the said Firm. Therefore, the real dispute between the parties related to the termination of appellant's partnership interest in the said Firm. The consent terms were arrived at between the parties with a view to settle this dispute. It goes without saying that when appellant's rights and claims in the said Firm were settled by the consent terms and the arbitration award, there could not be her continuance as a partner with the said Firm. Therefore, the arbitration award was receivable by appellant in respect of her retirement from the said Firm. As held by the Apex Court in *Mohanbhai Pamabhai* (Supra) and this Court in *Prashant S. Joshi* (Supra) amount receivable upon retirement from the said Firm could not be of an income nature. In our opinion, the Tribunal was not correct in holding that the amount of arbitration award receivable by appellant was not relatable to her retirement from the said Firm. For this purpose, the Tribunal relied upon

the following aspects :

> *(i) The consent terms did not speak anything about her retirement from the said firm.*
>
> *(ii) The consent terms also nowhere mentioned that the amount of Rs.28 Crores was awarded to the Appellant for her retirement from the firm.*
>
> *(iii) The arbitration Award was also for withdrawal of her rights under her father's will;*
>
> *(iv) By the consent terms and the arbitration award, the Appellant had withdrawn all claims and rights against the firm and its partners;*
>
> *(v) As per the consent terms the Appellant and her husband was also required to transfer certain assets being shares of companies to the counter parties in the arbitration which were completely unconnected with the firm;*
>
> *(vi) There was no positive balance in the capital account of the Appellant in the books of the said firm. Therefore, the amount received was not relatable to the firm; and*
>
> *(vii) The Appellant had also not been able to establish the basis on which the amount of Rs.28 Crores had been arrived at.*

28 The Tribunal has failed to appreciate that there was a dispute between appellant and her brothers with respect to her wrongful retirement from the said Firm. For invocation of arbitration proceedings the matter was carried right upto the Hon'ble Supreme Court. The settlement amount was receivable by appellant for relinquishment of her rights and claims as a partner of the said Firm. In these circumstances, though there may be no mention of her retirement from the said Firm in the consent terms or the arbitration award, the only inference possible would be that she no longer continued as a partner of the said Firm after such settlement. It is also not anybody's case that appellant has not played any role in the said Firm or received any share from the said Firm after the settlement.

Further, the said Firm - P. N. Writer & Co. had also filed the relevant information with respect to change of constitution of the firm with the Registrar of Firms which showed that appellant had retired from the said Firm with effect from 24th November 1997. The arbitration award was also given for withdrawal of all claims and rights in respect of the suits filed by appellant against the said Firm and its partners. This fact also supports appellant's claim to show that the rights settled were in respect of her partnership interest in the said Firm. As regards the observation on no positive balance in appellant's capital account with the said Firm, the same is an irrelevant factor because for working out of rights upon retirement one is not required to look at the balance in the capital account. Further, appellant had produced a valuation report valuing the immovable assets of the partnership firm which discloses that the value of the immovable properties of the said Firm was more than Rs.100 Crores. The fact that the partners agreed to a payment of Rs.28 Crores fits in with this value.

Further, the said Firm had also transferred its business on a going concern basis to a private limited company by name P. N. Writer & Co. Pvt. Ltd., in Financial Year 1992-1993. Balance Sheet of the said company as on 31st March 2006 revealed that there were substantial reserves which showed that the business of the said Firm was extremely profitable. Therefore, the Tribunal was not correct in holding that the amount of

arbitration award was not relatable to appellant's retirement from the said Firm.

29 Moreover, the amount of arbitration award was also related to the settlement of the inheritance rights which appellant was entitled to under her father's Will. An amount received in satisfaction of the inheritance rights also cannot be regarded as of an income nature chargeable to tax under the Act. The Tribunal failed to appreciate that the relevant details formed part of the arbitration proceedings and appellant had raised this as an alternative claim in view of the stand taken by respondent no.1 in the assessment order and the CIT(A) in the appellate order.

As regards the reference by the Tribunal to the fact that appellant and her husband had transferred equity shares of two companies to the counter parties in the arbitration proceedings and, therefore, amount received by appellant under the arbitration award also related to such transfer, the Tribunal should have appreciated that when the rights between the parties inter se were settled, it was also agreed that appellant would transfer the said shares to her brother's group. It is quite obvious that it is an overall family settlement which has been arrived at.

30 Even if we go alongwith the Tribunal that appellant had received the amount of Rs.28 Crores under the arbitration award for transfer of a composite bundle of rights, it was not open to assess the entire

amount of the award as income from other sources. The dominant component in the settlement was appellant's separation from the said Firm. The Tribunal ought to have considered each component of the rights and claims which were relinquished and withdrawn by appellant and bifurcated the amount of arbitration award between each of such rights and claims. Instead of doing this exercise and considering whether the amount was capital or revenue in nature, the ITAT has simplicitor accepted the conclusion reached by the CIT (A) to the effect that such receipt is of an income nature chargeable to tax as income from other sources. The Tribunal has failed to consider this issue in a proper perspective.

31 The Tribunal interestingly holds that it is judicially settled that the amount should be considered as special income and it must be considered in its wider sense. The Tribunal failed to appreciate that a receipt on capital account cannot be assessed as income unless it was specifically brought within the scope of the definition of the term "income" in Section 2(24) of the Act as held by the Apex Court in ***CIT V/s. D. P. Sandhu Bros.***[17]. The Tribunal erred in evolving a concept of "special income" when no such concept exists either in the Act or in the jurisprudence and saying that the same is judicially settled.

32 Upto 31st March 1988, i.e., before insertion of Section 45(4) by the Finance Act 1987 with effect from 1st April 1988, the amount received by a partner upon retirement from the firm was in the nature of working

17 273 ITR 1

out of his rights as a partner and not for transfer of his partnership interest to the continuing partners. That the amount was received for retirement from the said Firm is clear from the statement of claim filed before the Arbitrator, the consent terms, the arbitral award and information relating to reconstitution of the Firm being filed with the Registrar of Firms. The valuation of the properties of the said Firm also supported this position. As held in *Mohanbhai Pamabhai* (Supra) and *Tribhuvandas G. Patel* (Supra) the amount received by a partner upon retirement from the Firm is not chargeable to tax.

Section 45(4) of the Act, as initially introduced and as in force in the assessment year concerned brings to tax any distribution of capital assets upon, *inter alia*, retirement of a partner, where, the tax liability is imposed on the partnership firm and not on the retiring partner. The said provision will not result in imposing of any tax liability on appellant as first of all there was no distribution of capital assets but receipt of a monetary amount. In any event, the liability to pay tax, if any, under the said provision will be on the Firm and not the retiring partner. [*Prashant S. Joshi* (Supra)].

Even if the portion of the arbitration award relates to the inheritance by appellant under the Will of her late father or otherwise, in the absence of Estate Duty or a similar tax, no tax is chargeable in respect of the same. In any event, the same would be on the estate and not on a

legatee. Even the provisions of Section 56(2)(vii) which seek to tax an amount received without consideration specifically excludes from the ambit of the charge any amount received pursuant to a bequest.

33 A perusal of the statement of Mr. Denzil D'souza recorded by respondent no.1 in the course of the assessment proceedings reveals that the amount received by appellant is pursuant to a family arrangement. Even if the said receipt is relatable to a family arrangement, it will still not be chargeable to tax as such arrangement is an agreement between the members of the same family for the benefit of the family either by compromising doubtful or disputed rights or for preserving the peace, honour, security and property of the family by avoiding litigation and the amounts so received are not eligible to tax. We find support for this view in *AL. Ramanathan* (Supra), *Sachin P. Ambulkar* (Supra) and *R. Nagaraja Rao* (Supra).

34 In the course of hearing, Mr. Chandrashekhar has urged that the said submission should be rejected as an afterthought as done by the Tribunal. In this regard, we would refer to letter dated 26th March 2015 filed by appellant before respondent no.1 in the course of reassessment proceedings, wherein, it was alternatively urged that the said payment would not be chargeable to tax as it is received pursuant to a family arrangement. Hence, it is not an after thought and the relevant facts formed part of the record.

35 Alternatively, even if the amount received/receivable under the arbitration award is regarded as damages, the nature of the dispute which was settled was with respect to disputes pertaining to the partnership firm or inheritance and, hence, the receipt should be capital in nature (***CIT V/s. Saurashtra Cement Ltd.***[18]). Further, it has been held by this Court in ***CIT V/s. Abbasbhoy A. Dehgamwalla***[19] that the amount received as damages also cannot be brought to tax as capital gains.

36 Burden to show that a particular receipt is of an income nature is on the Revenue which has not been discharged in the facts of the present case. The mere rejection of an assessee's explanation without any positive finding as to the true character of the receipt cannot justify a conclusion being reached by an Assessing Officer that the amount is of an income nature.

37 Reliance by Mr. Chandrashekhar on *P. H. Divecha* (Supra) does not help the Revenue because in that case the assessee had received compensation in respect of termination of the agreement giving exclusive right to sell a product in a particular territory to appellant. It has been held therein that such compensation was for loss of a source of income and hence, will not be chargeable to tax.

38 Even the judgment of the Hon'ble Andhra Pradesh High Court in *Rajah Manyam Meenakshamma* (Supra) relied upon by

18 (2010) 325 ITR 422 (SC)
19 (1992) 195 ITR 28

Mr. Chandrashekhar won't help the Revenue. Though, the proposition that the nomenclature given by the parties is not decisive and the substance of the transaction ought to be considered cannot be disputed, it is not shown what, according to the Revenue, is the correct nature of the receipt so as to make the same as chargeable to tax under the Act.

We are also not able to accept Mr. Chandrashekhar's submissions that on 25th November 1997, i.e., when the partnership firm is reconstituted after the demise of appellant's father, there were only two partners in the said Firm, viz., appellant and her brother Mr. Denzil D'souza, and since appellant has retired from the said Firm it will tantamount to a dissolution of the said Firm which would make the amount of Rs.28 Crores received upon dissolution of the said Firm as chargeable to tax. After the demise of appellant's father, the said Firm was reconstituted by Mr. William D'souza and Mr. Denzil D'souza as continuing partners and appellant being shown as retired from the said Firm. Hence, the said Firm was not dissolved but continued to exist. In fact, clause (9) of the partnership deed, copy whereof forms part of the Memo of Appeal also clarifies that death of a partner shall not dissolve the firm. Further, after the death of William D'Souza, his children were inducted as partners, and were partners at the time that the consent terms were arrived at. At no point of time was only a single person left as partner. In any event, the principle as applicable to non taxability of the amount received by a retiring partner would equally apply

to the amount received upon dissolution. Further, as per Section 45(4) of the Act, assuming that there was a distribution of capital assets upon dissolution of the firm, it is the firm and not the partner who has to pay the tax. Therefore, reliance placed by Mr. Chandrashekhar on the judgment of the Apex Court in *Erach F. D. Mehta* (Supra) would also be of no relevance as the case at hand is not a case where one out of two partners has retired resulting into a dissolution of the firm.

39 One of the further submissions as made by Mr. Chandrashekhar was that the amount received/receivable by appellant would be chargeable to tax as “Income from other sources”. In this regard, Section 56(1) of the Act provides income of every kind which is not to be excluded from the total income under the Act is to be charged to tax under the head income from other sources if it is not chargeable under any other heads. Hence, the receipt has to be first of an income nature for it to be assessed as under the residual head. As stated ealier, whether the receipt is for retirement from the partnership firm or in lieu of inheritance or pursuant to the family arrangement or as damages, it shall not be chargeable to tax under the Act. Mere referring to the receipt, as a special income as done by the Tribunal would also not by itself make the receipt as taxable in nature. There is no such concept of special income. The said term is defined in Section 2(24) of the Act and the Revenue has not established as to how the receipt of Rs.28 Crores falls either within any of the sub

clauses thereof or even under the general connotation of income as elucidated by this Court in *Mehboob Productions* (Supra) as being a return for either capital or labour.

40 The consent terms entered into between the parties, which formed part of the arbitral award, reads as under :

> *1. In full and final settlement of all disputes and claims raised by the Claimant against the Respondents in present arbitration and/or against the family partnership firm of P. N. Writer & Company, and all counter claims made by the Respondents against the Claimant, Respondent No.1 in the first instance, and failing him, Respondent Nos.2 to 6 (Respondent Nos. 1 to 6 are hereinafter collectively referred to as "the Respondents") do pay to the Claimant a sum of Rs.28,00,00,000/- (Rupees Twenty Eight Crores Only) in the manner set forth hereinafter :*
>
> *xxxxxxxxxxxxxxxxxxx*
>
> *2. In consideration of payment of Rs.28,00,00,000/- (Rupees Twenty Eight Crores Only) with interest thereon, if any, the Claimant relinquishes all rights, claims and demands of any nature whatsoever against the Respondent abovenamed, the partnership firm of P .N. Writer & Co. and all other entities owned and/or controlled by the Respondents.*
>
> *3. The payment of the aforesaid amount of Rs.28,00,00,000/- (Rupees Twenty Eight Crores Only) and interest thereon, if any, shall stand secured by a charge on the following properties :*
>
> *(a) Warehouse at Plot No.D-178/3, Shirwani, T.T.C. Ind. Area, Thane-Belapur Road, Thane - 400 613- estimated value of Rs.6.60 crores;*
>
> *(b) Warehouse at Plt No - 272/1, hope Farm Circle, Whitefield, Bangalore - 560 066 - estimated value of Rs.12 crores;*
> *(c) Warehouse & office at No.3, 2nd Street. Third Main Road, CIT Nagar, (extn), Nandanam, Chennai - 600 035 - estimated value of Rs.4.20 crores;*
>
> *(d) Office at 41, Dickenson Road, Bangalore - 560 042 - estimated value of Rs.1.20 crores;*
>
> *(e) Flat at Orion Building, 174 St. Cyril Road, Bandra(w), Mumbai - 400 050 - estimated value of Rs.1.95 crores;*

(f) Office at Roy Apartments, Sahar Road, Andheri(E), Mumbai-400 099 - estimated value of Rs.90 lacs;

(g) Office at Jayant Villa Worli, Mumbai - 400 025 - estimated value of Rs.60 lacs;

(h) Office at Central Plaza, 2/6, Sarat Bose Road, Kolkata - 700 020 - estimated at Rs.100 lacs.

The Respondents represent and confirm that the above properties are owned and possessed by the Respondents and/or the firm P. N. Writer & Co. and are presently unencumbered.

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4. On receipt of the aforesaid sum of Rs.28,00,00,000/- (Rupees Twenty Eight Crores Only) and interest thereon, if any, all claims of the Claimant against the Respondents abovenamed and against the partnership firm of P. N. Writer & Co. will stand duly satisfied and the Claimant will have no further claims whatsoever either against the Respondents abovenamed and/or against the partnership firm of P. N. Writer & Co. The Claimant will also not claim any rights in respect of the bequests made to her under the Will dated 16th September, 1990 of her late father Mr. Charles D'souza.

5. The Claimant do withdraw all suits/legal proceedings filed by her against the Respondents abovenamed, and/or against firms and entities owned and/or controlled by them including those listed hereinafter :

(i) Suit No.2002 of 2008 filed in the Hon'ble Bombay High Court;

(ii) Suit No.238 of 2009 filed in the Hon'ble Bombay High Court; and

(iii) Contempt Petition No.70 of 2006 in Arbitration Petition No.428 of 2005 filed in the Hon'ble Bombay High Court.

6. On the aforesaid legal proceedings being withdrawn, the Claimant will not make any further claims either against the Defendants/Respondents arrayed as parties to the aforesaid proceedings and/or against any firm and/or entity owned and/or controlled by the Respondents.

7. The Respondents do withdraw Suit No.3187 of 2006 filed by them before the Hon'ble Bombay High Court; inter alia against the Claimant abovenamed and on withdrawal of the same will not make any further claims either against the Claimant and/or against any property belonging to her and her husband.

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9. The Claimant and her husband Mr. Etienne Pinto have no interest in the properties/shares mentioned below (a-f) and will execute all necessary documents to facilitate transfer of the properties which presently stand in their names, either to the names of the Respondents and/or to persons nominated by them against receipt of entire sum of Rs.28,00,00,000/- (Rupees Twenty Light Crores Only) with interest thereon, if any. It is however made clear that any stamp duty, registration charges or tax that may become payable to facilitate such transfer, either by the Claimant and/or by her husband, will be borne or paid by the Respondents :-

(a) 55 equity shares of Rs.1000 each fully paid up in Oceanair Transport and Investment Company Pvt. Ltd.;

(b) 2001 equity shares of Rs.1000 each fully paid up in JOSCO International Shipping Agency Pvt. Ltd;

(c) 1/5 share of 2 Bighas 8 Biswas Part of Khasra No.875/2/1 situate at Burari, Delhi registered originally in the names of all the partners and family members;

(d) Agricultural lands admeasuring 52 acres 132 Guntas under GUT Nos.533, 534, 904, 913, 914, 885 & 886 in Shillim Village, Maharashtra;

(e) Plot of land situated at 159/1A, GST Road, Vandalur, Chennai - 600 048 registered originally in the name of all the partners and family members;

(f) Any other properties/shares/interest if found to be held by the Claimant and/or her husband for and on behalf of the Respondents/Firm and/or sister concerns.

10. The Respondents agree to indemnify and keep the Claimant indemnified in respect of all and/or any demands and/or claims made by any party that may presently be pending and/or filed in future, against the Claimant in her capacity as a partner of P. N. Writer & Co.

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These consent terms also indicate that these are for retirement from the partnership firm and in any case could be only considered as a family settlement.

41 The reliefs sought in the statement of claim filed before the Arbitral Tribunal also read as under :

> *(a) that this Hon'ble Tribunal order and declare that the partnership deed dated 18th January 1979 continues to remain valid, subsisting and binding on the parties thereto and that as per the terms of the said partnership deed dated 18th January 1979, the Claimant and Respondent No.1 are the only surviving partners of the said partnership firm of P.N. Writer & Co.;*
>
> *(b) that this Hon'ble Tribunal order and declare that the purported Supplementary Deed of Partnership dated 1st April 1992 is void ab-initio and in any event not binding on the Claimant;*
>
> *(c) that this Hon'ble Tribunal order and declare that the purported partnership deeds dated 25th November 1997 and 12th April 2003 having been fraudulently executed are void ab-initio and create no rights and/or interest of any nature whatsoever with respect to the said partnership, its business and assets in favour of the parties thereto;*
>
> *(d) that this Hon'ble Tribunal direct the Respondents to deliver up the following documents for cancellation. and that the same be cancelled by this Hon'ble Tribunal.*
>
> > *(i) the purported Supplementary Deed Partnership dated 1st April 1992;*
> >
> > *(ii) the purported partnership deed dated 25th November 1997; and*
> >
> > *(iii) the purported partnership deed dated 12th April 2003;*
>
> *(e) that this Hon'ble Tribunal appoint an independent valuer to ascertain the loss caused to the said partnership firm, and the Claimant, on account of the transfer of the business and assets of the said partnership firm to the said P. N. Writer & Co. Pvt. Ltd., and thereafter direct the Respondents to compensate the Claimant on account of the aforesaid loss;*
> *(f) that this Hon'ble Tribunal direct that the said partnership firm of P.N. Writer & Co. constituted under the partnership deed dated 18th January 1979 stand dissolved;*
>
> *(g) that this Hon'ble Tribunal direct Respondent No.1 to disclose on oath the assets and accounts of the said partnership firm;*
>
> *(h) that this Hon'ble Tribunal direct that the accounts of the said partnership firm be taken from such date as this Hon'ble Tribunal deems fit;*

(i) that this Hon'ble Tribunal appoint some fit and proper person as Receiver of the assets of the firm, for the purpose of distribution thereof;

(j) that in the alternative to prayers (e) and (h) above, Respondent No.1 by himself and/or through his servants and/or agents be restrained by an order and permanent injunction of this Hon'ble Tribunal from in any manner whatsoever preventing the Claimant from participating in the business of the said partnership firm, and for this purpose having full and free access to all its offices, properties, records and accounts;

(k) that Respondent Nos.3 to 5 be restrained by an order and permanent injunction of this Hon'ble Tribunal from holding themselves out or in any manner purporting to act as partners of the partnership firm of P. N. Writer and Co.;

(l) for costs, both of the present arbitration as well as with respect to Arbitration Petition No.428 of 2005 and all related and connected matters arising therefrom;

(m) for such further and other relief's as the nature and circumstances of the case may require.

Therefore, the amount of Rs.28 Crores can be considered as amount received by a partner upon retirement from the said Firm and is not chargeable to tax.

42 Suit No.2002 of 2008 referred to in the consent terms is a suit where appellant was challenging the decision of the brothers to transfer the business of the said Firm to P. N. Writer & Co. Pvt. Ltd. Suit No.238 of 2009 filed in the Bombay High Court referred to in the consent terms is a suit by appellant against Denzil D'Souza for rights in a flat that belonged to the father and which was not included to in the Will. These indicate in the alternative an overall family settlement and even in that case if we hold that the receipt was relatable to a family arrangement, it will still not be chargeable to tax as such arrangement is an agreement between the

members of the same family for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family peace, honour, security and property of the family by avoiding litigation and amounts so received or not exigible to tax. The relevant portion in *AL. Ramanathan* (Supra) read as under :

> *xxxxxxxxxxxxxxxxxxx*
>
> *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the transactions of the assessee amount to a family arrangement and cannot be termed as a transfer and there was no chargeable capital gains arising from that transaction?"*
>
> *2. A perusal of the records goes to establish that the dispute arose in that family and the family arrangement was arrived at in consultation with the panchayatdars and accordingly re-alignment of interest in several properties had resulted. The family arrangement was arrived at in order to avoid continuous friction and to maintain peace among the family members. The family arrangement is an agreement between the members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. So, family arrangements are governed by principles which are not applicable to dealings between strangers and the family arrangement among them is for the interest of the family, for the harmonious way of living. So, such re-alignment of interest by way of effecting a family arrangement among the family members would not amount to transfer.*
>
> *3. This court has held in CIT v. R. Ponnammal [1987] 164 ITR 706 that :*
>
> > *". . . the family arrangement had been brought about by the intervention of the panchayatdars and this clearly showed that the sons and daughters of the assessee were laying claims to the property which the assessee got under the will of her father and it was not relevant at the time when the family arrangement was entered into to find out as to whether such claims if made in a court of law would be sustained or not. If the assessee found it worthwhile to settle the dispute between herself, her sons and daughters by making the family arrangement, the said arrangement could not be ignored by a tax authority. In view of the finding of the Tribunal, the family arrangement dated*

> *December 17th, 1971, had to be held to be a valid piece of document and, hence, the Tribunal was right in its view that no transfer of property was involved within the meaning of Section 2(xxiv) of the Gift-tax Act and, hence, there was no liability to gift-tax either under Section 4(1)(a) or under Section 4(2) and consequently no question of inclusion of the income of the minor in the hands of the assessee would also arise."*

It is the settled law that when parties enter into a family arrangement, the validity of the family arrangement is not to be judged with reference to whether the parties who raised disputes or rights or claimed rights in certain properties had in law any such right or not. In Maturi Pullaiah v. Maturi Narasrmham, AIR 1966 SC 1836, the Supreme Court has observed that :

> *"17. Briefly stated, though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, courts will more readily give assent to such an arrangement than to avoid it."*

In Kale v. Deputy Director of Consolidation, the Supreme Court has laid down the propositions which are the essentials of a family arrangement that :

> *"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;*
>
> *(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence ;"*

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In *Sachin P. Ambulkar* (Supra) the Division Bench of Bombay High Court framed the following questions of law and concluded as under :

> *1. The questions of law raised by the Revenue in this appeal reads thus :*

(A) Whether the consideration received under the family settlement on transfer of right, title and interest in the family property is a transfer under Section 2(47) of the I.T. Act and liable to be taxed as Capital Gain under Section 45 of I.T. Act?

(B) Whether on the facts and circumstances of the case and on true and proper interpretation of the family settlement dated 15th October, 2003 the consideration of Rs.2,25,00,000/- received by the assessee on transfer of his right, title and interest in the family property to the party of the second part under family settlement is a Capital Gain liable to be taxed u/s. 45 of I.T. Act?

2. The ITAT in para 19 of its order has recorded thus :

"19. We find that in the instant case there has been a genuine dispute among the family members and several suits were filed and judgments were pronounced. Finally the parties to the suits decided to come to a settlement and the family arrangement was reached and a Consent Decree was passed by the Bombay High Court in Suit No.4616 of 1998 on 16th October, 2003. The Royalty paid by the Court Receiver was only an interim relief of their share of income from the properties of G.D. Ambulkar, which right arose on account of their preexisting right in the properties as per Will of G.D. Ambulkar. Family arrangement is a device by which dispute between family members as to their respective property rights were settled. Such settlement may involve division of the property as between them and consequently a release of rights by one or the other in favour of the allottees. Conflicting legal claims get so settled. Since the settlement only defines a pre-existing joint interest as separate interests, there is no conveyance, if the arrangement is bonafied. Since there is no conveyance, there is no need for registration of such arrangements, when orally made, even if later reduced to writing."

3. The ITAT following the decision of the Apex Court in the case of Maturi Pullaiah and Anr. v. Maturi Narasinhamand ors. AIR 1966 (SC) 1836, held that there is no transfer of assets in the family arrangement and the amount received by the assessee is part of the family arrangement and not towards the transfer of any capital assets and hence no Capital Gains Tax liability arises. In our opinion, the decision of the ITAT is based on finding of facts, hence no question of law arises. Accordingly, the appeal is dismissed.

Also in *R. Nagaraja Rao* (Supra) the Karnataka High Court held as under :

> *The Revenue has preferred this appeal against the order passed by the Tribunal which held that the tansactions and the family arrangement made between the assessee and the other family members cannot be treated otherwise than a family arrangement. Hence there is no transfer either of the movable or immovable as such. The assessee is not liable to pay any capital gains. There was a family arrangement by a deed dated 21-12-1992 between the children of late J.N. Radhakrishna and Saraswathi Bai That each of the parties were holding apart from personal properties, the family properties and shares in different business concerns and each of the family business has been independently managed by one of the parties. Disputes arose between the parties. The dispute was referred to an arbitrator. The arbitrator suggested a settlement which the parties agreed In terms of the settlement the assessee had to resign from Kaveri Breweries, a partnership firm and transfer has interest to Sri Neelakanta Rao for a consideration of Rs.35,000/- being the capital balance of the firm, Accordingly, the assessee transferred the shares, Sri Neelakanta Rao transferred the shares held by in favour of the assessee. The assessee claimed there was no transfer which give rise to any capital gains However the assessing authority held that there was a transfer, there was a capital gain and therefore the assessee is liable to pay the tax Aggrieved by the said order, the assessee preferred an appeal to the Commissioner of Income Tax (appeals). The appellate Commissioner confirmed the order of the assessing authority, Aggrieved by these two orders the assessee preferred an appeal to the Tribunal, The Tribunal after considering the judgment of the Apex Court in the case of Ram Charan Das v. Girja Nandini Devi AIR 1966 SC 323 and also of the Gauhati High Court in the case of Ziauddin Ahmed v. CGT [1976] 102 ITR 252 held that admittedly there are lot of disputes between the family members of the asssessee who are none other than the relatives of one other and in that event, the family arrangement and settlement entered into between the parties on the suggestion made by the arbitrator cannot be termed as a transfer either in respect of movable or immovable properties or in respect of commercial properties. Therefore, the Tribunal held that there is no transfer and it was only a family arrangement. Therefore he was not liable to pay tax on capital gains Accordingly he set aside the order passed by the lower authorities. Aggrieved by the said order the Revenue has preferred this appeal .*
>
> *2. The substantial question of law which is framed in this appeal on 12-8-2006 reads as under :*
>
> *xxxxxxxxxxxxxxxxxxxx*

2. Whether, the Tribunal was correct in holding that the transfer of shares took place by virtue of family arrangement and there was no transfer as there was family disputes and such arrangement took place at the instance the arbitrator.

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This Court had an occasion to Consider the aforesaid questions in the case of KN, Madhudhan Gift Tax Appeal Nos.1 & 2 of 2008 disposed off on 6th September, 2010, in the aforesaid Judgment it was held that the word transfer does not include partition or family settlement as defined under the Act. It is well settled that a partition is not a transfer, What is recorded in a family settlement is nothing but a partition Every member has an anterior title to the property which is the subject-matter of a transaction, that is, partition or a family arrangement. So there is a adjustment of shares, crystallization of the respective rights in the family properties and therefore it cannot be construed as a transfer in the eye of law. When there is no transfer there is no capital gain and consequently no tax on capital gain is liability to be paid. The tribunal on proper consideration of the entire material on record has categorically held that the transaction question is a family arrangement. There is no transfer, there is no capital gain and therefore there is no liability to pay capital gain tax. The order is in accordance with law. The substantial questions of law are answered in favour of the assessee and against the revenue, No merits in this appeal. Accordingly, this appeal is dismissed.

43 In the circumstances, we answer the substantial questions of law as framed in favour of appellant. The Tribunal ought to have held respondent no.1 had assumed jurisdiction under Section 147 of the Act without fulfilling the jurisdictional pre-conditions and hence, the reassessment proceedings were without jurisdiction. Further, on the facts and in the circumstances of the case and in law, the Tribunal ought to have held that the amount of Rs.28 Crores received by appellant as per the arbitration award was not chargeable to tax.

44 Appeal disposed accordingly. No order as to costs.

(DR. NEELA GOKHALE, J.) (K. R. SHRIRAM, J.)

Gauri Gaekwad