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Sum received by partner on retirement from firm is exempt from capital gain tax: Bombay HC

May 25, 2018 | [\[2018\] 93 taxmann.com 302 \(Bombay\)](#)

IT : Amount received by retiring partner on retirement from firm on account of goodwill will not be subjected to tax as capital gains in his hands

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[2018] 93 taxmann.com 302 (Bombay)
HIGH COURT OF BOMBAY
Principal Commissioner of Income-tax-26 Mumbai
v.
R.F. Nangrani HUF*
M.S. SANKLECHA AND SANDEEP K. SHINDE, JJ.
IT APPEAL NO. 33 OF 2016†
APRIL 18, 2018

Section [45](#) of the Income-tax Act, 1961 - Capital gains - Chargeable as (Firm/partner, in case of) - Assessment year 2009-10 - Whether amount received by retiring partner on retirement from firm on account of goodwill will not be subjected to tax as capital gains in his hands - Held, yes [Para 3] [In favour of assessee]

CASES REFERRED TO

Riyaz A. Sheikh v. ITO, [IT Appeal No.352 (PN) of 2006, dated 29-10-2010] (para 3), *CIT v. Riyaz A. Sheikh* [\[2014\] 41 taxmann.com 455/221 Taxman 118 \(Mag.\) \(Bom.\)](#) (para 3), *Tribhuvandas G. Patel v. CIT* [\[1999\] 236 ITR 515 \(SC\)](#) (para 3) and *CIT v. Rajnish M. Bhandari* [IT Appeal No.2058 of 2012, dated 18-3-2013] (para 3).

A.R. Malhotra and **N.A. Kazi** for the Appellant. **Ajaykumar R. Singh** and **Ravindra Poojary** for the Respondent.

ORDER

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 10th December, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

2. The Revenue urges the following questions of law for our consideration :—

- "(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.14,15,61,370/- made u/s 45(1) of the Income Tax Act under the head long term capital gains?
- (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in not appreciating that the right of partner in the partnership firm is a capital asset u/s 2(14) of the Act and retirement of partner lead to extinguishment of such right in the firm amounting to transfer u/s 2(47) of the Act giving rise to capital gains exigible to tax?
- (iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in not holding the transaction amounting to transfer within the meaning of section 2(47) of the Act as mode of retirement employed was a lumpsum consideration of the retiring partner relinquishing his share in the partnership and its assets in favour of continuing partners and further erred in not appreciating that the said proposition laid down by the Hon'ble Bombay High Court in the case of Tribhuvandas G. Patel has not been disapproved by the Hon'ble Apex Court or other Courts as held by the Pune Bench of the Tribunal in the case of *Shevantibhai C. Mehta v. ITO* (2004) 83 TTJ 542?
- (iv) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified that in not considering that in the case of *Commissioner of Income Tax v. Riyaz A. Sheikh*, the retiring partner received the amount from partnership firm arising on transfer of goodwill, however, in the case of Assessee there is no goodwill in the balance sheet of M/s. Landmark Development?
- (v) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in not considering that the Assessee did not fulfill the conditions laid down in Section 54F of the Act as the allowability should be restricted to cost of construction incurred after the date of transfer and not prior to the said date?
- (vi) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in not considering that claim of deduction, if any, allowable should be restricted to as claimed in the return of income filed u/s 139(1) and not u/s 139(4)?"

3. **Regarding question Nos. (i) to (iv):—**

- (a) The impugned order of the Tribunal allowed the respondent assessee's appeal on the common issues as made out in question nos. (i) to (iv) i.e. whether the amount received as goodwill on retirement is taxable in the hands of the retiring partner as capital gain. This by following the order of its co-ordinate bench in the case of *Riyaz A. Sheikh v. ITO*, [IT Appeal No.352 (PN) of 2006, dated 29-10-2010] and the order of this Court upholding the above view of the Tribunal reported as *CIT v. Riyaz A. Sheikh* [2014] 41 taxmann.com 455/221 Taxman 118 (Mag.). In the aforesaid decision, the question urged by the Revenue for consideration of this Court is as under :—

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

- (b) This Court dismissed the Revenue's appeal upholding the order of the Tribunal that amounts received as goodwill on retirement from a partnership firm is not subject to capital gains tax in the hands of the retiring partner. This after consideration of all binding decisions which the Revenue seeks to rely upon including the decision of the Supreme Court in *Tribhuvandas G. Patel v. CIT* [1999] 236 ITR 515.
- (c) Mr. Malhotra, learned Counsel appearing in support of the appeal submits that the decision of this Court in *Riyaz A. Sheikh (supra)* will not apply as the amounts received by the respondent was not on account of goodwill. Particularly because there is no goodwill in the balance sheet of the partnership firm M/s. Land Mark Developers. It is also submitted that the decision in *Riyza A. Shaikh (supra)* did not properly appreciate the position in law while rejecting the appeal. It was also submitted that the amounts received by the respondent on account of goodwill will be taxable even when there is no cost of acquisition, in view of amended Section 55 of the Act. Therefore, this appeal requires admission.
- (d) So far as the first objection is concerned, we find that there is nothing on record to indicate that it was a Revenue's contention before the authorities that the amount received by the respondent was not goodwill. In fact, the submission that in the absence of goodwill being indicated in the balance sheet of the partnership firm, there could not be no goodwill available to the firm is an issue being urged for the first time before this Court. Therefore, in the absence of this issue being raised before the authorities under the Act, it will not be question arising from the case. Thus, there is nothing on record on facts to indicate that the amount received by the respondent is not goodwill. Therefore, the decision of this Court in *Riyaz A. Sheikh (supra)* will apply.
- (e) So far as the issue of cost of acquisition of goodwill is concerned, the same will not arise for consideration in the present facts. This is so as in *Riyaz A. Sheikh (supra)*, this Court has already decided that the amounts received on retirement on account of goodwill by the retiring partner will not be subjected to tax as capital gains in his hands. The question of cost of acquisition being NIL is a matter of computation of capital gains. This issue of computation would only come into play once it is held that the amounts received on account of goodwill by a partner is liable to capital gains tax under the Act. Therefore, this submission also has no merits.
- (f) So far as the second objection is concerned that the order of this Court in *Riyaz A Sheikh (supra)* did not properly appreciate the law, we note it was rendered on 26th February, 2013. The aforesaid order of this Court would have been applied by all authorities within the State to the retiring partners on receipt of goodwill. In fact, this Court itself has specifically dismissed an identical question raised by the Revenue in *CIT v. Rajnish M. Bhandari* [IT Appeal No.2058 of 2012, dated 18-3-2013] by following *Riyaz A. Sheikh (supra)*. In this case, no distinguishing features on facts in the present case have been shown from that existing in the matter of *Riyaz A. Sheikh (supra)*. The submission that the law was not properly appreciated in the above case is not a distinction which would warrant interference. The remedy if any would be an appeal to the Apex Court.
- (g) In response, Mr. Malhotra, informs us that the decision of this Court in *Riyaz A. Shaikh (supra)* was not appealed to the Apex Court because of low tax effect. At the relevant time, the CBDT Circular / Instruction No.3/2011 dated 9th February, 2011 governed the filing of appeals by the Revenue. In such cases, the Instruction particularly states that when a appeal is not filed for low tax effect, it must also record that the decision is not acceptable. No such record is shown. Further, nothing has been shown to us as to whether the decision in case of *Rajnish M. Bhandari (supra)* has been challenged, if not, why not. We must proceed on the basis that it has been accepted. In any event, the decision of a co-ordinate bench is binding upon us in the absence of any distinction being shown to us on facts. It must be clarified that non-filing of an appeal for low tax

effect from an order of a co-ordinate bench of this Court would not result in the order losing its status as a binding precedent.

- (h) The rule of law would oblige us to follow decisions of a co-ordinate bench in the absence of any distinction on facts as the law has to be applied equally to all concerned. This would be the position in the absence of it being stayed, till the same is set aside and / or modified by a higher forum.
- (i) In the above view, question nos. 1 to 4 which deal with the same issue, do not give rise to any substantial question of law as the impugned order has merely followed the decision of this Court in *Riyaz A. Sheikh (supra)*. Thus, not entertained.

4. Regarding question Nos. (v) and (vi) :—

- (a) It is an agreed position between the parties that these questions do not survive in the absence of question nos. (i) to (iv) being admitted.
- (b) In the aforesaid circumstances, these questions in the context of the present facts are academic. Therefore, the proposed questions would not give rise to any substantial questions of law. Thus, not entertained.

5. The appeal is dismissed. No order as to costs.

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*In favour of assessee.

†Arising out of order of ITAT, dated 10-12-2014.