



IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

ITA-217-2013 (O&M)

Reserved on 17.09.2024

Date of Pronouncement: 23.10.2024

**RAJIV MEHRA PROP. H.D. MEHRA CHEMICALS WORKS, LAHORI
GATE AMRITSAR, PUNJAB**

.....Appellant

V/s.

THE COMMISSIONER OF INCOME TAX, AMRITSAR, PUNJAB.

.....Respondent

**CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJAY VASHISTH**

Present: Mr. Pankaj Jain, Senior Advocate, assisted with
 Mr. Divya Suri, Advocate,
 Mr. Sachin Bhardwaj, Advocate and
 Mr. Yogesh Mittal, Advocate for the appellant.

Ms. Urvashi Dhugga, Senior Standing Counsel,
for the respondent-Income Tax Department.

SANJEEV PRAKASH SHARMA, J.

1. This Appeal has been preferred by the appellant-assessee (Rajiv Mehra) assailing order dated 30.03.2013 passed by the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT").

2. This Appeal was admitted on 07.07.2014 by this Court, for determination of the following substantial questions of law:-

- i. *Whether under the facts and circumstances of the case, the additional evidences admitted by the first fact finding authority having 'material bearing' to case proceedings is sustainable action?*
- ii. *Whether according to the facts and circumstances of the case, under Section 2(47)(i)(ii), 47(iii), 48, 49 of the Income Tax Act, 1961, the cost of acquisition would 'relate back' to date of 'transfer through will' to the beneficiary (son)?*



3. The Appellant-Assessee (Rajiv Mehra) was adopted by Permanand Mehra through adoption deed dated 07.06.1965. Property namely House No.21, *Khasra* No.291 measuring 3 *Kanals* 4-1/2 *Marlas* situated at Tungbala Urban, Maqbool Road, Tehsil & District Amritsar was purchased by Permanand Mehra by way of Registered Deed dated 06.06.1963. A Will was executed by Permanand Mehra in favour of the Appellant-Assessee on 26.04.1983. The Appellant-Assessee's father expired on 21.05.1997. In his Will, he gave life interest to his wife Vimal Kumari, but did not gave her right of title, nor a right to sell, mortgage or alienate the house. The Appellant-Assessee's mother, Vimal Kumari Mehra also bequeathed all her property, moveable or immovable in the name of her son, Rajiv Mehra, Appellant-Assessee herein and to his Hindu Undivided Family.

4. The settlement was also arrived at between Rajiv Mehra and Sudha Arora on 02.09.2003, wherein they stated that after the death of their parents, they have agreed upon the verbal agreement that as per the wish of our parents, Rajiv Mehra-Appellant-Assessee will be the sole owner of the immovable property i.e. House No. 21, total area 3 *Kanals* 4 ½ *Marlas*, bearing *Khasra* No.291, *Khewat* No. 245, *Khatoni* No.901, as per *jamabandi* for the year 2000-2001, situated at area Tungbala Urban, Maqbool Road, Tehsil & District Amritsar and movable property i.e. ornaments etc. have been given to Sudha Arora.

5. The property was thereafter sold on 11.12.2007 for a sum of ₹2 Crores. Return of income was filed on 31.03.2009 at an amount of ₹1,25,980/- wherein a claim was made for long term capital gain and indexed cost of ₹1,05,29,550/- was mentioned on account of the inherited house. It



was stated that expenses on construction of a new house was ₹1,10,45,705/- and therefore, the long term capital gain ₹1,05,29,550/- was claimed as exempted in terms of Section 54 of the Income Tax Act, 1961 (hereinafter referred to as “the Act of 1961”) and the returned income was processed under Section 143(1) of the Act of 1961 on 18.02.2010.

6. A notice dated 17.08.2009 was issued for scrutiny under the CASS Scheme which was served upon the Appellant-Assessee on 19.08.2009. The additions were made in the assessment, treating the acquisition of the house w.e.f. 02.09.2003 i.e. the date of memorandum of family settlement, working out the indexed cost from that date instead of the cost taken earlier as on 01.04.1981 and reducing the claim for exemption under Section 54 of the Act of 1961, since declined payments were to be treated as investment made in new residential house after determining the assessed income at an amount of ₹90,69,880/-, vide order dated 30.12.2010.

7. The order dated 30.12.2010 was challenged in Appeal before the Commissioner of Income Tax (Appeals) (for short “the CIT(A)”) and further additional grounds were also taken in that Appeal.

8. The Appeal of the Appellant-Assessee was partly allowed by the CIT(A) vide order dated 01.09.2011. The said order passed by the CIT(A) on 01.09.2011 was challenged in Appeal by the Revenue before the ITAT. During the pendency of the Appeal, the Appellant-Assessee filed a paper-book with material facts containing all his particulars. The Appeal filed by the Revenue was allowed by the ITAT vide its order dated 19.03.2013, but it did not take into consideration the documents filed by the Appellant-Assessee as there was no application moved by the Appellant-Assessee under



Rule 46A of the Act of 1961 for admitting additional evidence under the provisions of the Income Tax Rules, 1962 (hereinafter referred to as “the Rules of 1962”).

9. The question No. (i) is whether the additional evidence as produced by the Appellant-Assessee before the ITAT should have been considered by it.

10. While in civil proceedings, the provisions contained under Order 41 Rule 27 CPC, enables the appellate Court to take additional evidence under exceptional circumstances, but in cases relating to Income Tax, Rule 46-A of the Rules of 1962 will have to be taken into consideration.

11. Rule 46-A of the Rules of 1962 provides as under:-

“46A. *Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals).*

(1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely :-

- (a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or*
- (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer ; or*
- (c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal ; or*
- (d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*



(2) *No evidence shall be admitted under sub-rule (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.*

(3) *The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity-*

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) *Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.”*

12. In the present case, the Assessing Officer (AO) has passed an assessment order on 30.12.2010. The AO has noticed that during verification, the residential house sold, has been the ancestral property of the family, and was acquired by the Appellant-Assessee as a result of memorandum of family settlement arrived at between the parties on 02.09.2003 and therefore, the indexation cost acquisition of the residential house has been taken as per the provision of Section 48 and 49 of the Act of 1961 to be 551/463 while the Appellant-Assessee had claimed indexation cost by multiplier of 551/100 while it should be 551/463.



13. It is noticed that no Will was produced before the Assessing Officer and CIT(A), however, at the stage of Appeal before the ITAT, the Appellant-Assessee produced the Will which was considered by it. The ITAT has found that there was no application moved under Section 46-A of the Rules of 1962 and the additional evidence as well as grounds regarding the Will having been executed in favour of the Appellant-Assessee, could not have been considered.

14. We are in agreement with the view taken by the ITAT in this regard. The provisions of the Act of 1961 are to be read as it is. No addition or subtraction can be made in the Rules of 1962 nor any principles of natural justice, where not applicable, can be applied, nor can any other provisions regarding equity be made applicable while construing the provisions of the Rules. It is an admitted position that there was a violation of Rules 46-A of the Rules of 1962 and therefore, such documents could not be taken into consideration. No reason has come forward for not placing the so-called Will during the time of assessment. Accordingly, question No.(i) is answered in favour of the Revenue and against the Appellant-Assessee.

Question No.(ii)

15. In order to answer question No.(ii), it would be appropriate to extract Sections 2(47)(i)(ii), 47, 48 and 49 of the Act of 1961:-

“Section 2(47)(i)(ii)

(47) "transfer", in relation to a capital asset, includes,—

- (i) the sale, exchange or relinquishment of the asset ; or
- (ii) the extinguishment of any rights therein ; or

**Section 47 in The Income Tax Act, 1961**

47. Transactions not regarded as transfer.

Nothing contained in section 45 shall apply to the following transfers :—

[\(i\)](#) *any distribution of capital assets on the total or partial partition of a Hindu undivided family;*

[\(ii\)](#) *[***]*

[\(iii\)](#) *any transfer of a capital asset under a gift or will or an irrevocable trust: [Provided that this clause shall not apply to transfer under a gift or an irrevocable trust of a capital asset being shares, debentures or warrants allotted by a company directly or indirectly to its employees under [any Employees' Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued by the Central Government in this behalf].]*

[\(iv\)](#) *any transfer of a capital asset by a company to its subsidiary company, if—*

[\(a\)](#) *the parent company or its nominees hold the whole of the share capital of the subsidiary company, and*

[\(b\)](#) *the subsidiary company is an Indian company;*

[\(v\)](#) *any transfer of a capital asset by a subsidiary company to the holding company, if—*

(a) the whole of the share capital of the subsidiary company is held by the holding company, and

(b) the holding company is an Indian company :

Provided that nothing contained in clause (iv) or clause (v) shall apply to the transfer of a capital asset made after the 29th day of February, 1988, as stock-in-trade;

[\(vi\)](#) *any transfer, in a scheme of amalgamation, of a capital asset by the amalgamating company to the amalgamated company if the amalgamated company is an Indian company;*

[\(via\)](#) *any transfer, in a scheme of amalgamation, of a capital asset being a share or shares held in an Indian company, by the amalgamating foreign company to the amalgamated foreign company, if—*



(a) at least twenty-five per cent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company, and

(b) such transfer does not attract tax on capital gains in the country, in which the amalgamating company is incorporated;

[\(viaa\)](#) any transfer, in a scheme of amalgamation of a banking company with a banking institution sanctioned and brought into force by the Central Government under sub-section (7) of section 45 of the Banking Regulation Act, 1949 (10 of 1949), of a capital asset by the banking company to the banking institution.

Explanation.—For the purposes of this clause,—

(i) "banking company" shall have the same meaning assigned to it in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);

(ii) "banking institution" shall have the same meaning assigned to it in sub-section (15) of section 45 of the Banking Regulation Act, 1949 (10 of 1949);

[\(viab\)](#) any transfer, in a scheme of amalgamation, of a capital asset, being a share of a foreign company, referred to in the Explanation 5 to clause (i) of sub-section (1) of section 9, which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the amalgamating foreign company to the amalgamated foreign company, if—

[\(A\)](#) at least twenty-five per cent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company; and

[\(B\)](#) such transfer does not attract tax on capital gains in the country in which the amalgamating company is incorporated;

[\(vib\)](#) any transfer, in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company;

[\(vic\)](#) any transfer in a demerger, of a capital asset, being a share or shares held in an Indian company, by the demerged foreign company to the resulting foreign company, if—



- (a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and
- (b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated :

Provided that the provisions of sections 391 to 394 of the Companies Act, 1956 (1 of 1956) shall not apply in case of demergers referred to in this clause;

(vica) any transfer in a business reorganisation, of a capital asset by the predecessor co-operative bank to the successor co-operative bank [or to the converted banking company];

(vicb) any transfer by a shareholder, in a business reorganisation, of a capital asset being a share or shares held by him in the predecessor co-operative bank if the transfer is made in consideration of the allotment to him of any share or shares in the successor co-operative bank [or to the converted banking company].

Explanation.—For the purposes of clauses (vica) and (vicb), the expressions "business reorganisation", ["converted banking company",] "predecessor co-operative bank" and "successor co-operative bank" shall have the meanings respectively assigned to them in section 44DB;

(vicc) any transfer in a demerger, of a capital asset, being a share of a foreign company, referred to in the Explanation 5 to clause (i) of sub-section (1) of section 9, which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the demerged foreign company to the resulting foreign company, if—

- (a) the shareholders, holding not less than three-fourths in value of the shares of the demerged foreign company, continue to remain shareholders of the resulting foreign company; and
- (b) such transfer does not attract tax on capital gains in the country in which the demerged foreign company is incorporated:



Provided that the provisions of sections 391 to 394 of the Companies Act, 1956 (1 of 1956) shall not apply in case of demergers referred to in this clause;

([vid](#)) any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking;

([vii](#)) any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamating company, if—

(a) the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company except where the shareholder itself is the amalgamated company, and

(b) the amalgamated company is an Indian company;

([viiia](#)) any transfer of a capital asset, being bonds or Global Depository Receipts referred to in sub-section (1) of section 115AC, made outside India by a non-resident to another non-resident;

([viiiaa](#)) any transfer, made outside India, of a capital asset being rupee denominated bond of an Indian company issued outside India, by a non-resident to another non-resident;

([viiiab](#)) any transfer of a capital asset, being—

(a) bond or Global Depository Receipt referred to in sub-section (1) of section 115AC; or

(b) rupee denominated bond of an Indian company; or

([c](#)) derivative; or

([d](#)) such other securities as may be notified by the Central Government in this behalf, made by a non-resident on a recognised stock exchange located in any International Financial Services Centre and where the consideration for such transaction is paid or payable in foreign currency.

Explanation.—For the purposes of this clause,—

(a) "International Financial Services Centre" shall have the meaning assigned to it in clause (q) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005);



(b) "recognised stock exchange" shall have the meaning assigned to it in clause (ii) of Explanation 1 to clause (5) of section 43;

(c) "derivative" shall have the meaning assigned to it in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(d) "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(viiac) any transfer, in a relocation, of a capital asset by the original fund to the resulting fund;

(viiad) any transfer by a shareholder or unit holder or interest holder, in a relocation, of a capital asset being a share or unit or interest held by him in the original fund in consideration for the share or unit or interest in the resultant fund.

Explanation.— For the purposes of clauses (viiac) and (viiad),—

(a) "original fund" means

(A) a fund established or incorporated or registered outside India, which collects funds from its members for investing it for their benefit and fulfils the following conditions, namely:—

(i) the fund is not a person resident in India;

(ii) the fund is a resident of a country or a specified territory with which an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A has been entered into; or is established or incorporated or registered in a country or a specified territory as may be notified by the Central Government in this behalf;

(iii) the fund and its activities are subject to applicable investor protection regulations in the country or specified territory where it is established or incorporated or is a resident; and



(iv)fulfils such other conditions as may be prescribed;

(B) an investment vehicle, in which Abu Dhabi Investment Authority is the direct or indirect sole shareholder or unit holder or beneficiary or interest holder and such investment vehicle is wholly owned and controlled, directly or indirectly, by the Abu Dhabi Investment Authority or the Government of Abu Dhabi: or

(C) a fund notified by the Central Government in the Official Gazette in this behalf subject to such conditions as may be specified;]

(b)"relocation" means transfer of assets of the original fund, or of its wholly owned special purpose vehicle, to a resultant fund on or before the 31st day of March, 2023, where consideration for such transfer is discharged in the form of share or unit or interest in the resulting fund to,—

(i) shareholder or unit holder or interest holder of the original fund, in the same proportion in which the share or unit or interest was held by such shareholder or unit holder or interest holder in such original fund, in lieu of their shares or units or interests in the original fund; or

(ii) the original fund, in the same proportion as referred to in sub-clause (i), in respect of which the share or unit or interest is not issued by resultant fund to its shareholder or unit holder or interest holder;

(c) "resultant fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership, which—

(i) has been granted a certificate of registration as a Category I or Category II or Category III Alternative Investment Fund, and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or



International Financial Services Centres Authority Act, 2019 (50 of 2019); and

(ii) is located in any International Financial Services Centre as referred to in sub-section (1A) of section 80LA;

(vii ae) any transfer of capital asset by India Infrastructure Finance Company Limited to an institution established for financing the infrastructure and development, set up under an Act of Parliament and notified by the Central Government for the purposes of this clause;

(vii af) any transfer of capital asset, under a plan approved by the Central Government, by a public sector company to another public sector company notified by the Central Government for the purposes of this clause or to the Central Government or to a State Government;]

(vii b) any transfer of a capital asset, being a Government Security carrying a periodic payment of interest, made outside India through an intermediary dealing in settlement of securities, by a non-resident to another non-resident.

Explanation.—For the purposes of this clause, "Government Security" shall have the meaning assigned to it in clause (b) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(vii c) any transfer of Sovereign Gold Bond issued by the Reserve Bank of India under the Sovereign Gold Bond Scheme, 2015, by way of redemption, by an assessee being an individual;

(vii d) any transfer of a capital asset, being conversion of gold into Electronic Gold Receipt issued by a Vault Manager, or conversion of Electronic Gold Receipt into gold.

Explanation – For the purpose of this clause, the expressions “Electronic Gold Receipt” and “Vault Manager” shall have the meaning respectively assigned to them in clauses (h) and (i) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India



(Vault Managers) Regulations, 2021 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992).

(viii) any transfer of agricultural land in India effected before the 1st day of March, 1970;

(ix) any transfer of a capital asset, being any work of art, archaeological, scientific or art collection, book, manuscript, drawing, painting, photograph or print, to the Government or a University or the National Museum, National Art Gallery, National Archives or any such other public museum or institution as may be notified by the Central Government in the Official Gazette to be of national importance or to be of renown throughout any State or States.

Explanation.3—For the purposes of this clause, "University" means a University established or incorporated by or under a Central, State or Provincial Act and includes an institution declared under section 3 of the University Grants Commission Act, 1956 (3 of 1956), to be a University for the purposes of that Act;

(x) any transfer by way of conversion of bonds or debentures, debenture-stock or deposit certificates in any form, of a company into shares or debentures of that company;

(xa) any transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of any company;

(xb) any transfer by way of conversion of preference shares of a company into equity shares of that company;

(xi) any transfer made on or before the 31st day of December, 1998 by a person (not being a company) of a capital asset being membership of a recognised stock exchange to a company in exchange of shares allotted by that company to the transferor.

Explanation.—For the purposes of this clause, the expression "membership of a recognised stock exchange"



means the membership of a stock exchange in India which is recognised under the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(xii) any transfer of a capital asset, being land of a sick industrial company, made under a scheme prepared and sanctioned under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) where such sick industrial company is being managed by its workers' co-operative :

Provided that such transfer is made during the period commencing from the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of that Act and ending with the previous year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986);

(xiii) any transfer of a capital asset or intangible asset by a firm to a company as a result of succession of the firm by a company in the business carried on by the firm, or any transfer of a capital asset to a company in the course of demutualisation or corporatisation of a recognised stock exchange in India as a result of which an association of persons or body of individuals is succeeded by such company :

Provided that—

(a) all the assets and liabilities of the firm or of the association of persons or body of individuals relating to the business immediately before the succession become the assets and liabilities of the company;

(b) all the partners of the firm immediately before the succession become the shareholders of



the company in the same proportion in which their capital accounts stood in the books of the firm on the date of the succession;

(c) the partners of the firm do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company; and

(d) the aggregate of the shareholding in the company of the partners of the firm is not less than fifty per cent of the total voting power in the company and their shareholding continues to be as such for a period of five years from the date of the succession;

(e) the demutualisation or corporatisation of a recognised stock exchange in India is carried out in accordance with a scheme for demutualisation or corporatisation which is approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(xiiia) any transfer of a capital asset being a membership right held by a member of a recognised stock exchange in India for acquisition of shares and trading or clearing rights acquired by such member in that recognised stock exchange in accordance with a scheme for demutualisation or corporatisation which is approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(xiiib) any transfer of a capital asset or intangible asset by a private company or unlisted public company (hereafter in this clause referred to as the company) to a limited liability partnership or any transfer of a share or shares held in the company by a shareholder as a result of conversion of the company into a limited liability partnership in accordance with the provisions of section 56



or section 57 of the Limited Liability Partnership Act, 2008 (6 of 2009):

Provided that—

(a) all the assets and liabilities of the company Immediately before the conversion become the assets and liabilities of the limited liability partnership;

(b) all the shareholders of the company immediately before the conversion become the partners of the limited liability partnership and their capital contribution and profit sharing ratio in the limited liability partnership are in the same proportion as their shareholding in the company on the date of conversion;

(c) the shareholders of the company do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of share in profit and capital contribution in the limited liability partnership;

(d) the aggregate of the profit sharing ratio of the shareholders of the company in the limited liability partnership shall not be less than fifty per cent at any time during the period of five years from the date of conversion;

(e) the total sales, turnover or gross receipts in the business of the company in any of the three previous years preceding the previous year in which the conversion takes place does not exceed sixty lakh rupees;

(ea) the total value of the assets as appearing in the books of account of the company in any of the three previous years preceding the previous year in which the conversion takes place does not exceed five crore rupees; and

(f) no amount is paid, either directly or indirectly, to any partner out of balance of accumulated profit standing



in the accounts of the company on the date of conversion for a period of three years from the date of conversion.

Explanation.—For the purposes of this clause, the expressions "private company" and "unlisted public company" shall have the meanings respectively assigned to them in the Limited Liability Partnership Act, 2008 (6 of 2009);

(xiv) where a sole proprietary concern is succeeded by a company in the business carried on by it as a result of which the sole proprietary concern sells or otherwise transfers any capital asset or intangible asset to the company :

Provided that—

(a) all the assets and liabilities of the sole proprietary concern relating to the business immediately before the succession become the assets and liabilities of the company;

(b) the shareholding of the sole proprietor in the company is not less than fifty per cent of the total voting power in the company and his shareholding continues to remain as such for a period of five years from the date of the succession; and

(c) the sole proprietor does not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company;

(xv) any transfer in a scheme for lending of any securities under an agreement or arrangement, which the assessee has entered into with the borrower of such securities and which is subject to the guidelines issued by the Securities and Exchange Board of India, established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Reserve Bank of India constituted under sub-section (1) of section 3 of the



Reserve Bank of India Act, 1934 (2 of 1934), in this regard;

(xvi) any transfer of a capital asset in a transaction of reverse mortgage under a scheme made and notified by the Central Government;

(xvii) any transfer of a capital asset, being share of a special purpose vehicle to a business trust in exchange of units allotted by that trust to the transferor.

Explanation.—For the purposes of this clause, the expression "special purpose vehicle" shall have the meaning assigned to it in the Explanation to clause (23FC) of section 10;

(xviii) any transfer by a unit holder of a capital asset, being a unit or units, held by him in the consolidating scheme of a mutual fund, made in consideration of the allotment to him of a capital asset, being a unit or units, in the consolidated scheme of the mutual fund:

Provided that the consolidation is of two or more schemes of equity oriented fund or of two or more schemes of a fund other than equity oriented fund.

Explanation.—For the purposes of this clause,—
(a)"consolidated scheme" means the scheme with which the consolidating scheme merges or which is formed as a result of such merger;

(b)"consolidating scheme" means the scheme of a mutual fund which merges under the process of consolidation of the schemes of mutual fund in accordance with the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(c)"equity oriented fund" shall have the meaning assigned to it in clause (38) of section 10;

(d)"mutual fund" means a mutual fund specified under clause (23D) of section 10;

(xix)any transfer by a unit holder of a capital asset, being a unit or units, held by him in the consolidating plan of a



mutual fund scheme, made in consideration of the allotment to him of a capital asset, being a unit or units, in the consolidated plan of that scheme of the mutual fund.

Explanation.—For the purposes of this clause,—

(a)"consolidating plan" means the plan within a scheme of a mutual fund which merges under the process of consolidation of the plans within a scheme of mutual fund in accordance with the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(b)"consolidated plan" means the plan with which the consolidating plan merges or which is formed as a result of such merger;

(c)"mutual fund" means a mutual fund specified under clause (23D) of section 10.

[(xx) any transfer of a capital asset, being an interest in a joint venture, held by a public sector company, in exchange of shares of a company incorporated outside India by the Government of a foreign State, in accordance with the laws of that foreign State.

Explanation- For the purpose of this clause, "joint venture" shall mean a business entity, as may be notified by the Central Government in the Official Gazette.]

Section 48.

MODE OF COMPUTATION

The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:-

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto:

Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed



by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilized in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company:

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:

[Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset being bond or debenture other than capital indexed bonds issued by the Government:]

[Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section:]

[Provided also that no deduction shall be allowed in computing the income chargeable under the head "Capital gains" in respect of any sum paid on account of securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004.]

Explanation. - For the purposes of this section,-



- (i) "foreign currency" and "Indian currency" shall have the meanings respectively assigned to them in section 2 of the Foreign Exchange Regulation Act, 1973 ([46 of 1973](#));
- (ii) the conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;
- (iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;
- [\(iv\)](#) "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asset took place;]
- [\(v\)](#) "Cost Inflation Index", in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent. of average rise in the Consumer Price Index for urban non-manual employees for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf.]

Section 49.**COST WITH REFERENCE TO CERTAIN MODES OF ACQUISITION.**

- [\(1\)](#) Where the capital asset became the property of the assessee—
 - [\(i\)](#) on any distribution of assets on the total or partial partition of a Hindu undivided family;
 - [\(ii\)](#) under a gift or will;
 - [\(iii\)](#)
 - [\(a\)](#) by succession, inheritance or devolution, or
 - [\(b\)](#) on any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons,

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where such dissolution had taken place at any time before
the 1st day of April, 1987, or

(c) on any distribution of assets on the liquidation of a company, or

(d) under a transfer to a revocable or an irrevocable trust, or

(e) under any such transfer as is referred to in clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (viab) or clause (vib) or clause (vic) or clause (vica) or clause (vich) or clause (vicc) or [clause (viiac) or clause (viiad) or clause (viiac) or clause (viiad) or clause (viiac) or clause (viiad) or] clause (xiii) or clause (xiiib) or clause (xiv) of section 47;

(iv) such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969,

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

Explanation.—In this sub-section the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) or clause (iv) of this sub-section.

(2) Where the capital asset being a share or shares in an amalgamated company which is an Indian company became the property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the amalgamating company.

(2A) Where the capital asset, being a share or debenture of a company, became the property of the assessee in consideration of a transfer referred to in clause (x) or clause (xa) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit



certificate in relation to which such asset is acquired by the assessee.

[\(2AA\)](#) *Where the capital gain arises from the transfer of specified security or sweat equity shares referred to in sub-clause (vi) of clause (2) of section 17, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account for the purposes of the said sub-clause.*

[\(2AAA\)](#) *Where the capital asset, being rights of a partner referred to in section 42 of the Limited Liability Partnership Act, 2008 (6 of 2009), became the property of the assessee on conversion as referred to in clause (xiiib) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the company immediately before its conversion.*

[\(2AB\)](#) *Where the capital gain arises from the transfer of specified security or sweat equity shares, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account while computing the value of fringe benefits under clause (ba) of sub-section (1) of section 115WC.*

[\(2C\)](#) *The cost of acquisition of the shares in the resulting company shall be the amount which bears to the cost of acquisition of shares held by the assessee in the demerged company the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before such demerger.*

[\(2D\)](#) *The cost of acquisition of the original shares held by the shareholder in the demerged company shall be deemed to have been reduced by the amount as so arrived at under sub-section (2C).*

[\(2E\)](#) *The provisions of sub-section (2), sub-section (2C) and sub-section (2D) shall, as far as may be, also apply in relation to business reorganisation of a co-operative bank as referred to in section 44DB.*

Explanation.—For the purposes of this section, "net worth" shall mean the aggregate of the paid up share capital and general



reserves as appearing in the books of account of the demerged company immediately before the demerger.

(3) Notwithstanding anything contained in sub-section (1), where the capital gain arising from the transfer of a capital asset referred to in clause (iv) or, as the case may be, clause (v) of section 47 is deemed to be income chargeable under the head "Capital gains" by virtue of the provisions contained in section 47A, the cost of acquisition of such asset to the transferee-company shall be the cost for which such asset was acquired by it.

(4) Where the capital gain arises from the transfer of a property, the value of which has been subject to income-tax under clause (vii) or clause (viiia) or clause (x) of sub-section (2) of section 56, the cost of acquisition of such property shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii) or clause (viiia)."

16. Section 47 (iii) of the Act of 1961, specifically lays down that any transfer of a capital asset under a gift or will or an irrevocable trust would not be covered by the provisions of Section 45(1) of the Act of 1961 and taking into consideration the transfer of capital asset cannot be computed in terms of Section 45 of the Act of 1961. Thus, the present transfer of property has to be examined in terms of Section 47 of the Act of 1961 which specifically takes into consideration Section 47(i) of the Act of 1961 as any distribution of capital assets on the total or partial partition of a Hindu undivided family. In the present case, there is a settlement arrived at between the members of the Hindu undivided family (HUF). Accordingly, the cost with reference to the acquisition of property would have to be assessed as per Section 49 (1)(i) of the Act of 1961.

17. From the perusal of the aforesaid, it is apparent that a capital asset can be treated to be transferred where there is a consideration involved and would also include sale, exchange or relinquishment of an asset, or where



a right of any person is extinguished. However, if there is any transfer of a capital asset like property by way of a gift or a Will or an irrevocable trust, provisions of Section 45 of the Act of 1961 would have no application. Sections 48 and 49 of the Act of 1961 provide the method and manner of computation of income chargeable under the head of capital gains.

18. For assessing the cost with reference to certain modes of acquisition has been now treated as per the Explanation (iii) to Section 48 of the Act of 1961, to be the First day of April, 1981 or the cost of acquisition for the year in which the asset is transferred to the same proportion as cost of first year in which the asset held by the assessee, whichever is later.

19. However, where the capital asset becomes the property of the assessee by way of any distribution of assets on the total or partial partition of HUF, then the cost of acquisition on the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

20. The Hon'ble Supreme Court in the case of **Ram Charan Das** Vs. **Girja Nandini Devi and others**; 1965(3) SCR 841 held as under:-

"11. The final contention of Mr. Sinha is based upon s. 37(a) of the U.P. Court of Wards Act, 1912. The relevant portion of this provision runs thus:

"A ward shall not be competent-

(a) to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court of Wards, or to enter into any contract which may involve him in pecuniary liability; "



Here the transaction in question is a family settlement entered into by the parties bona fide for the purpose of putting an end to the dispute among family members. Could it be said that this amounts to a transfer of or creation of an interest in property? For, unless it does, the action of Kadma Kuar would not fall within the purview of the aforesaid clause of Section 37. In Mt. Hiran Bibi v. Mst. Sohan Bibi, AIR 1914 Privy Council 44, approving the earlier decision in Khunni Lal v. Govind Krishna Narain, ILR 33 All 356 (PC), the Privy Council held that a compromise by way of family settlement is in no sense an alienation by a limited owner of family property. This case, therefore, would support the conclusion that the transaction does not amount to a transfer. Mr. Sinha, however, contends that the transaction amounts to creation of an interest by the ward in property which was under the superintendence of the Court of Wards and in support of his contention relies on Man Singh v Nowlakhbati, 53 Ind App 11. In the first place once it is held that the transaction being a family settlement is not an alienation, it cannot amount to the creation of an interest. For, as the Privy Council pointed out in Mst. Hiran Bibi's case, AIR 1914 Privy Council in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other parties. It is not necessary, as would appear from the decision in Rangasami Gounden v. Nachiappa Gounden, 46 Ind. App 72, that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say, affection. In the second place, in the case relied upon by Mr. Sinha there was no question of the transaction being a family settlement. It was sought to be supported upon the ground that it was a surrender. The Privy Council, however, held that it was not a bona fide surrender evidently because the widow was to get a very substantial amount for maintenance from the reversioners in*



whose favour she had purported to surrender the estate and also held that there was in fact no necessity for a surrender of interest of the widow. Since it was not a bona fide surrender it was regarded as one creating only an interest in the property which was under the superintendence of the Court of Wards. Had' it been a bona fide surrender Section 60 of the Bihar Court of Wards Act upon which reliance was placed in that case would not have been attracted. Indeed, reliance was placed before the Privy Council on the decision in Sureshwar Misser v. Maheshrani Misrain, 47 Ind App 233, in support of the appellant's contention that the transaction was valid. While distinguishing this case the Privy Council observed:

"In that case there were serious disputes in the family as to title, and the next reversioners to the son sued the widow and her daughters to set aside the will of her husband under which the daughters were entitled to succeed to the immovable property on the death of the son without issue. A family compromise was agreed to, and in performance of it the widow surrendered all her rights of succession to the immovable property, and the plaintiff the next reversioner and her daughters gave her for her life a small portion of the land for her maintenance. The Board held that the compromise was a bona fide surrender of the estate and not a device to divide it with the next reversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and' consequently that the transaction was valid under the principles laid down by the board 46 Ind App 72.

We may further point out that this decision does not refer to their decisions in AIR 1914 Privy Council 44 and ILR 33 All 356(PC), and it cannot be assumed that they intended to depart from their earlier view."

21. Thus, in the present case, since there was admittedly a family settlement whereafter, it has been held by the ITAT that the assessee became the owner/title holder of the capital asset, then his case has to be examined in terms of Section 49(i) of the Act of 1961. Thus, the said family settlement cannot be treated as transfer of property.



22. In the case of Sahu Madho Das Vs. Mukand Ram; AIR 1955

Supreme Court 481 the Supreme Court has held as under:-

“It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. XXXX XXXX XXXXX

23. In another judgment Commissioner of Income Tax Vs Manjula (2012) 249 CTR 270, cited by learned counsel for the appellant, the Bombay High Court has succinctly examined the provisions relating to the property which became a capital asset by way of gift of the assessee. Relevant extract of the judgment is as under:-

“17. We see no merit in the above contention. As rightly contended by Mr. Rai, learned counsel for the assessee, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the capital asset was 'held by the assessee'. Since the expression 'held by the assessee' is not defined under s. 48 of the Act, that expression has to be understood as defined under s. 2 of the Act. Explanation 1(i)(b) to s. 2(42A) of the Act provides that in determining the period for which an asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included. As the previous owner held the capital asset from 29th Jan., 1993, as per Expln. 1(i) (b) to s. 2(42A) of the Act, the assessee is deemed to have held the capital asset from 29th Jan., 1993. By reason of the deemed holding of the asset from 29th Jan., 1993, the assessee is deemed to have held the asset as a long-term capital asset. If the long-term capital gains liability has to be computed under s. 48 of the Act



by treating that the assessee held the capital asset from 29th Jan., 1993, then, naturally in determining the indexed cost of acquisition under s. 48 of the Act, the assessee must be treated to have held the asset from 29th Jan., 1993 and accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition."

24. In **Arun Shungloo Trust Vs Commissioner of Income Tax** (2012) 205 Taxman 456, the Division Bench of Delhi High Court speaking through Sanjiv Khanna J. (as his Lordship then was) held as under:-

"14. If the contention of the Revenue is accepted, then benefit of indexed cost of acquisition, will not be available to an assessee in a case covered by s. 49 from the date on which the asset was held by the previous owner but only from the date the capital asset was transferred to the assessee. This will lead to a disconnect and contradiction between "indexed cost of acquisition" and "Indexed cost of improvement" in the case of capital assets where s. 49 applies. This cannot be the intention behind the enactment of s. 49 and its 3 Explanation to s. 487 here is no reason or ground why the legislative would want to deny or deprive an assessee benefit/advantage of the previous holding for computing "Indexed cost of acquisition" while allowing, the said benefit for computing "Indexed cost of improvement".

15. Normally literal rule of construction is applied and the words of the statute are to be understood in their ordinary and popular sense, but this is subject to the rider that this should not lead to absurdity, contradiction or stultification of the statutory objective. Literal construction should be avoided, if it leads to unwarranted repugnances or inconsistencies. In such circumstances the expressions/words can be interpreted by the Courts to avoid absurdities and inconsistencies between the provisions. In the present case, as noticed above, the construction placed by the Revenue will lead to inconsistency and incongruities, when we refer to s. 49 and cl. (iv) of Expln.



(1) to s. 48. This will result in absurdities because the holding of predecessor has to be accounted for the purpose of computing the cost of acquisition, cost of improvement and indexed cost of improvement but as per the Revenue not for the purpose of indexed cost of acquisition. As noticed below, even for the purpose of deciding whether the transaction is a short-term capital gain or gain, the holding by the predecessor is to be taken into consideration.

16. Benefit of indexed cost of inflation is tax on the "real" or actual "gain" and not on the increase in the capital value of the property due to inflation. This is the object or purpose in allowing benefit of indexed cost of Improvement, even if the improvement was by the previous owner in cases covered by s. 49. Accordingly there is no justification or reason to not allow the benefit of indexation to the cost of acquisition in cases covered by s. 49. This is not the legislative intent behind cl. (iii) of Explanation to s. 48 of the Act."

25. The Division Bench of Gujarat High Court has also taken a similar view in Tax Appeal No. 13 of 2013 – **Commissioner of Income Tax-1 vs Rajesh Vitthalbhai Patel**, decided on 17.04.2013, Per. Akil Kureshi, J. (as his Lordship then was), in which it has been held as under:-

"7. Under section 48 of the Act, thus capital gain is computed by deducting from the full value of the consideration received or accruing as a result of the transfer, the amounts of expenditure incurred wholly and exclusively in connection with such transfer, the cost of acquisition of the asset and the cost of any improvement thereto. Term "cost of acquisition of the asset" is explained in explanation (iii) to section 48. In terms of such explanation, indexed cost of acquisition would be an amount which bears to the cost of acquisition the same proportion as the Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later. In simple words,



therefore for an asset acquired prior to 1.4.1981 the indexed cost of acquisition would be the cost of acquisition multiplied by the ratio of the Cost Inflation Index in the year in which assessee's asset is transferred to the Cost of Inflation Index for the year beginning on 1.4.1981. It was therefore, that the Tribunal in our opinion correctly held that the indexed cost of acquisition shall have to be worked out with reference to 1.4.1981 since in the present case the asset was acquired by the previous owner of the property. Learned counsel for the Revenue however, submitted that such interpretation would fail to take into account the expression "Cost Inflation Index for the first year in which the asset was held by the assessee". In his opinion the "assessee" referred to under such expression would be the present assessee previous owner. In our and not opinion, the such interpretation cannot be accepted. We say so for the following reasons. Firstly, by virtue of a deeming fiction provided in sub-section (1) of section 49, cost of acquisition in hands of the assessee would be the cost for which the previous owner of the property acquired it. It is for this purpose that we need to fall back on computation provision of section 48. When we do so, we work out the cost of acquisition of the asset in the hands of previous owner. While doing so, cannot transpose the we assessee in explanation (111) of section 48. Doing so, would amount to falling short of giving full effect to the deeming fiction contained in sub-section (1) of section 49. To our opinion such deeming fiction must be allowed to have its full play. As is often stated, a deeming fiction must be allowed its full application and should not be allowed to boggle.

8. Additionally, we notice that in sub-section (1) of section 49, the legislature has provided that cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired, as increased by any cost of improvement of the assets incurred or borne by the previous owner or the assensee as the case may be. If the interpretation of the counsel for the Revenue was correct, this later reference to the cost of improvement borne by the assessee would not have



been necessary since section 48 itself would take care of any improvement on the capital asset to be included for the cost of acquisition. It is precisely because such improvement referred to in section 48 would have reference only to that made by the previous owner that the additional provision had to be made in the deeming fiction provided in sub-clause (1) of section 49. Further the interpretation sought to be given by the Revenue would be unacceptable because there is no provision under which the cost of acquisition in the hands of the assessee in cases such as gift on the date of acquisition of the property can be made and found in the Act. A Serious road-block would be created if such property is acquired through Will and would therefore have no reference to its actual cost on the date of operation of the Will.”

26. The High Court of Karnataka in **Commissioner of Income Tax** Vs **Smt. Kaveri Thimmaiah** ; (2015) 116 DTR (Kar) 365 has also taken a similar view.

27. The question as to whether the family settlement is required to be compulsorily registered is no longer *res integra*.

28. In **Kale and others** Vs **Deputy Director of Consolidation and others** (1976) 3 SCC 119, the Supreme Court held as under:-

“10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(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;

(3) The family arrangement may be even oral in which case no registration is necessary;



(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

11. The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently.

29. The law was already settled by the Supreme Court in **Sahu** **Madho Das's** case (supra). Thus, if the family arrangements records a



previous settlement already arrived at between the parties which they are adhering to, the same would not require registration.

30. The Delhi High Court while deciding Execution Petition bearing Ex. P. No. 26 of 2019 **Himani Walia vs Hemant Walia and others**, decided on 23.03.2022, held as under:-

“10. Thus, it is clear that family settlements are not required to be compulsorily registered, and stamp duty is not required to be compulsorily paid in respect of the same, when the settlement has been arrived at initially as an oral partition and is thereafter put into writing for the purpose of information. Considering the said position, it is clarified that there is no requirement of valuation of the suit properties in the present case. The payment of stamp duty by the legal heirs of Late Sh. S.S. Walia and Dr. Urmila Walia shall stand waived. Notices issued by the various authorities shall also stand cancelled and withdrawn, without any further orders.”

31. This Court also held a decree to be valid which was based on a family settlement, which had not been compulsorily registered as has been held/observed in the case of **Jagdish Vs Rama Karan** ; 2003 (1) RCR (Civil) 657.

32. From the above discussion of law, we find that the family settlement arrived at between the parties, which was duly available on record, which recorded the earlier settlement already arrived at between the parties was, therefore, a valid family settlement to be noticed for the purpose of computation and computation of capital gains in terms of Section 49(1)(i) of the 1961 Act. The cost inflation index is to be calculated with reference to the



year 01.04.1981 by treating the acquisition of the property as purchased by the father of the petitioner Permanand Mehra on 01.04.1963 through registered-deed dated 06.06.1963.

33. Thus, we find that a family settlement is not required to be compulsorily registered.

34. On similar grounds, we find that the High Court of Judicature of Bombay in the case of **Rohan Developers Pvt. Ltd. Vs Income Tax Officer (International Taxation)-3 and others**, in CWP-339 of 2011, decided on 03.02.2022 also held as under:-

“13. Therefore, the cost of acquisition of the said property in the hands of seller is deemed to be the cost for which the said property was acquired by late Mrs. Dolly Jehangir Gazdar and the period of holding of late Mrs. Dolly Jehangir Gazdar, Mrs. Rhoda Rustom Framjee and Mr. Rustom Framjee are also to be included in the period of holding of seller for ascertain the period for which the property was held by the seller. Based on the Scheme of the Act, as provided in Section 49(1)(ii), clauses (29A) and (42A) of Section 2 and Section 55(2)(b)(ii) of the Act, indexation of the cost of acquisition under the second proviso to Section 48 should be available from the financial year 1981-1982. Therefore, on this ground alone, we will have to grant prayer clause (a) as quoted earlier.”

35. In the case of **C.A. Natrajan Vs. CIT**, 92 ITR 347 (Mad), it was held that a primary condition must be satisfied before a tax is levied on a capital gain. A family arrangement, in the interest of settlement, may involve movement of property or payment of money from one person to another. Several judgments have held that there is no “transfer” involved in a family arrangement. Therefore, there is no question of capital gains tax **index** under a family arrangement.



36. Thus, even though the documents relating to Will may not have been accepted by the ITAT, still the calculation has to be done treating the indexation as on 01.04.1981 and merely because the family settlement was arrived in the year 2003 would not make any difference, and the order passed by the CIT (A), is therefore, found to be correct although the CIT (A) has applied Section 49(i) (ii) of the Act of 1961.

37. We, therefore, agree with the submissions of the senior learned counsel for the Appellant-Assessee that even if the existence of the Will may be ignored, so far as the Appellant-Assessee is concerned, he has become the holder of the property on the basis of a family settlement and the cost of acquisition shall be with reference to 01.04.1981 alone. The calculation, therefore, has to be done accordingly and the order passed by the CIT (A) was not required to be interfered with.

38. In view of the aforesaid, we answer question No. (ii) in favour of the Appellant-Assessee.

39. Accordingly, this Appeal is allowed, order dated 30.03.2013 passed by the ITAT is set aside and order dated 01.09.2011 passed by the CIT (A) is restored.

40. All pending applications filed in this case shall stand disposed of accordingly.

[SANJEEV PRAKASH SHARMA]
JUDGE

October 23, 2024
Ess Kay

[SANJAY VASHISTH]
JUDGE

Whether speaking / reasoned	:	Yes
Whether Reportable	:	Yes