IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1731 OF 2014

Kantilal G. Kotecha .... Appellant
Vs.
ITO – 8 (2) (4), Mumbai .... Respondent

WITH
NOTICE OF MOTION NO.136 OF 2015
IN
INCOME TAX APPEAL NO.1731 OF 2014

Kantilal G. Kotecha .... Applicant
In the matter between
Kantilal G. Kotecha .... Appellant
Vs.
ITO - 8 (2) (4), Mumbai .... Respondent

Mr. Ruchir Tolat i/by M/s. L.C. Tolat & Co. for the Appellant/Applicant.
Mr. P.A. Narayanan i/by Mr. Arvind Pinto for the Respondent.

CORAM: S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

**DATE : ** JULY 18, 2016

P.C:

1. We have heard Mr. Tolat, appearing on behalf of the appellant.

2. Mr. Tolat submits that this appeal raises substantial questions of law and these questions of law are formulated at page 7 of the paper-book.

3. He submits that these questions squarely arise out of the order passed by the Tribunal, dated 6-6-2014.

4. Mr. Tolat has invited our attention to Section 47 (xiv) of the Income Tax Act, 1961. Mr. Tolat submits that computation of income from capital gains and in relation to transactions not regarded as transfer is contemplated by Section 47. In the present case, all pre-conditions for applicability of the above Clause (xiv) have been fulfilled. Yet, the Tribunal erroneously confirms the view taken by the Assessing Officer and the Commissioner of Income Tax (Appeals). A goodwill has been generated as the running business of the sole proprietary concern has been taken over by a Private Limited Company. It is in these circumstances, all the assets and liabilities of the sole proprietary concern, relating to the business immediately before the succession, have become the assets and liabilities of the

Private Limited Company. Therefore, the view taken by the Tribunal requires consideration.

5. We are unable to agree with Mr. Tolat for more than one reason. The questions arise from ground No.1 in the Tribunal's order. The Tribunal had before it an appeal of the assessee directed against the order of the Commissioner of Income Tax (Appeals), dated 4-10-2012. The Assessment Year in question is 2009-10. The assessee individual was proprietor of M/s. Overseas Plastic Moulders. During the year this sole proprietorship business was converted into a Private Limited Company. M/s. Overseas Plastic Moulders India Private Limited took over the business of the sole proprietorship. The assessee issued equity shares. During the assessment proceedings, the Assessing Officer found that the balance-sheet of the sole proprietorship concern, just before the takeover, reflected a particular sum. The assessee's Capital Account had the credit balance of Rs.1,16,05,939/-. The Private Limited Company allotted to the assessee 33,59,064/- of equity shares of Rs.10/- each. Since the credit balance of

Rs.1,16,05,939/- was there in the Capital Account of the assessee, in order to comply with the accounting entries, a goodwill of Rs.2,29,89,701/- was created in the books of the Private Limited Company and an equal amount was credited to the Capital Account of the assessee in his personal balance-sheet. According to the assessee, the excess credit balance, namely, the difference between the agreed consideration and the capital balance was accounted as goodwill in the books of the Private Limited Company. Such goodwill is arising on succession. The Assessing Officer found that the goodwill was never created in the books of the proprietary concern and therefore it never became an asset of the sole proprietary concern which was taken over on such succession. It was, therefore, not covered by Section 47(xiv). That is how the Assessing Officer held that the assessee was liable to pay Capital Gain Tax on the short-term capital gain. That is how Section 45 was attracted. This finding of the Assessing Officer was confirmed in appeal by the First Appellate Authority. The Tribunal confirmed the view of the First Appellate Authority on facts and by assigning cogent and satisfactory reasons. In para 31 of the order under challenge, the Tribunal, at pages 19 and 20, has held thus:-

> *"3.1 Having heard both the sides and perused the material on record it is not disputed that the assessee was a proprietor of OPM and then he converted the same into a private limited company. Also it is not disputed that the good will generated has no mention in the books of OPM and is not a part of the assets and liabilities of the sole proprietary concern which has been succeeded by OPMIL. With the given factual background, it is relevant to mention that in para 9 at page 5 of the deed of assignment dated 17th September 2008 between M/s. OPM Ltd and OPMIL, it is stated that:-*
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> > *"Negotiations were held between the assignor and assignees for the assignment of the assignor's right title interest, claim and demand in the said business including its business assets and liabilities written and business rights quota allotments rights registration and intangibles including good will technical know how drawing designs etc. by the assignee and peruse terms and conditions in the said assignment were mutually agreed upon."*
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> *However, the perusal of the first & second schedules at pages 14-15 of the said agreement which specifically deals with the particulars of immovable and movable assets to which the assignor is entitled does not contain any detail as to the valuation of the good will possessed by the assignor while arriving at a total*

value of Rs.3,35,90,640/- for which the allotment of 3,35,90,64/- shares of Rs.10 each paid in share capital of the assignee. Though the general wordings contained in the recitals of the said agreement in para 5 as reproduced above covers 'good will' for the transfer of which negotiation has taken place between the assignor and assignee, the assignment deed does not evidence that a good will, valued at Rs.2,29,89,701/- is transferred to the assignee. Moreover, it is not disputed that the alleged good will has never been created in the books of the propriety concern of the assessee. Therefore, the allotment of shares worth exceeding Rs.1,16,05,939/- is in the form of excess assets over the assets and liabilities of the assignor. In the light of the aforementioned discussions, after considering that the assessee's capital account in the OPM had the credit balance of Rs.1,16,05,939/- only and the assessee has been allotted fully paid up share capital worth Rs.3,35,90,640/-, we are of the considered opinion that the assessee has got the additional share capital allotment of Rs.2,29,84,701/- without bringing anything to the assignee. Therefore, the pre-requisite laid down in section 47(xiv) has not been complied with. It is also pertinent to mention that the cases laws relied on by Ld.AR to justify the case of the assessee are distinguishable on facts as in the cases relied by the Ld.AR, a proper valuation of good will has been done prior to the transfer of assets. In view of that matter, we do not find any justifiable reason to interfere with the order of the Ld.CIT(A) confirming the addition/disallowance made by the AO on this count. ***Ground No.1 is dismissed****."*

6. We do not think that the Tribunal's view and in the backdrop of the peculiar facts can be termed as perverse or

vitiated by any error of law apparent on the face of the record. We do not think any question, much less of interpretation of Section 47(xiv) arises in this appeal.

7. As a result of the above discussion, there is no merit in the appeal and it is dismissed.

8. In view of dismissal of the appeal, Notice of Motion No.136 of 2015 does not survive and it accordingly stands disposed of.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (S.C. DHARMADHIKARI, J.)