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

NOTICE OF MOTION NO. 2662 OF 2016
IN
REVIEW PETITION (L) NO. 36 OF 2016
IN
INCOME TAX APPEAL NO. 1731 OF 2014

WITH
REVIEW PETITION (L) NO. 36 OF 2016
IN
INCOME TAX APPEAL NO. 1731 OF 2014
(In Chamber)

Kantilal G. Kotecha	}	Petitioner
versus		
ITO – 8(2) (4)	}	Respondent

Mr. Porus Kaka – Senior Advocate with
Mr. Manish and Mr. Burzin Somandy i/b.
M/s. L. C. Tolat and Co. for the petitioner.

Mr. Arvind Pinto for the respondent.

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

DATED :- FEBRUARY 9, 2017

P.C. :-

1. Heard both sides and perused the affidavit in support of the notice of motion for condonation of delay in filing the review petition. For the reasons set out therein, the notice of motion is made absolute. The delay in filing the review petition is condoned and the review petition is taken up for hearing forthwith.

2. This review petition seeks a review of the order passed by this court in Income Tax Appeal No. 1731 of 2014. By that order dated 18th July, 2016, we dismissed the review petitioner's appeal, which was directed against the order of the tribunal dated 6th June, 2014.

3. The assessment year in this case is 2009-10. The tribunal concurred with the Commissioner of Income Tax (Appeals).

4. Mr. Kaka learned senior counsel appearing for the review petitioner-original appellant would submit that there are errors apparent on the face of the record for this court did not refer, in addition to clause (xiv) of section 47, two important sections of the Income Tax Act, 1961, namely, section 55(2) as also another provision on which he placed reliance, namely, sections 48 and 49. Therefore, he would submit that for the purpose of sections 48 and 49, the law is as set out by sub-section (2) of section 55. The cost of acquisition and for cases falling in sections 48 and 49 in relation to capital assets, being goodwill of a business or a trademark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, in case of such acquisition by the company by purchase from a previous owner, means the amount of the purchase price and in any other case not being a

case falling under sub-clauses (i) to (iv) of sub-section (1) of section 49 it shall be taken to 'nil'. Relying upon a judgment of the Hon'ble Supreme Court of India in the case of *Commissioner of Income Tax vs. Smifs Securities Ltd.*[1], it is submitted that this court was not shown the principle of law that the difference between the cost of an asset and the amount paid by the assessee constituted goodwill and that the assessee in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee stood increased. This was not, therefore, the position in the sense such a goodwill as generated by the taking over of the sole proprietary concern by a private limited company cannot be reflected, in the manner understood by the tribunal and this court, in the books of Account of the proprietary concern. Mr. Kaka also relied upon the principles and standards of accounting, which have been now set out in "Accounting Standard (AS) 26", paragraph 35. That is titled as "Internally Generated Goodwill". For these reasons, he would submit that this is a fit case to review the order passed on the appeal.

5. On the other hand, Mr. Pinto learned counsel appearing for the respondent would submit that there was a finding of fact rendered by the tribunal and that finding of fact has not been held

1 **(2012) 348 ITR 302 (SC)**

to be perverse or vitiated by any error of law apparent on the face of the record. Section 47(xiv) was projected and if that was asserted to be an applicable provision and its applicability was in issue, then, the tribunal took a definite view on facts. That has been upheld. There is no substantial question of law is the finding of this court and that is why the appeal was dismissed. The order of this court was challenged before the Hon'ble Supreme Court of India and even that appeal is dismissed. Hence, this review petition be also rejected.

6. After having noted the rival contentions, we are of the view that this court was approached against the tribunal's order and during the course of the arguments, what was pressed was a relevant fact relating to assessment year 2009-10. Once M/s. Overseas Plastic Moulders was converted into a private limited company in the name and style as M/s. Overseas Plastic Moulders India Private Limited, the business of the appellant was transferred. The appellant received the entire consideration of transfer by way of fully paid up shares of the private limited company. No monetary consideration for transfer of this proprietary business with goodwill was received. That is why section 47(xiv) enabled the appellant to claim a benefit of the goodwill of Rs.2,29,89,701/-, which was generated as a result of

the proprietary business carried out was the plea raised. It is in relation to these facts that the tribunal concurred with the Commissioner of Income Tax (Appeals). It has also referred to the deed of assignment dated 17th September, 2008. It also perused the first and the second Schedule to the agreement, which set out the details and particulars of the immovable and movable assets, to which the assignor is entitled. That did not contain any details as to the valuation of goodwill while arriving at a total value of Rs.3,35,90,640/-, for which the allotment of 3359064 shares of Rs.10/- each in the share capital of the assignee was obtained. The general wording in the recitals may cover goodwill, but the assignment deed did not evidence that a goodwill valued at certain figure is transferred. The alleged goodwill was not created in the books of the propriety concern is thus one of the findings. The tribunal holds that the allotment of shares exceeding Rs.1,16,05,939/- is in the form of excess asset over and above the assets and liabilities of the assignor. That is why it referred to the figures in the books of Account and rendered an opinion that the assessee derived an additional share capital allotment of Rs.2,29,84,701/- without bringing in anything to the assignee. It is in these circumstances that the pre-requisite in section 47 has not been complied with. The tribunal distinguished the judgments relied upon by holding that in those cases, facts denote that a proper valuation of the goodwill has been done prior to the transfer of the assets (see para 3.1 at page 19 of the paper book).

7. In these circumstances, we do not think that by going behind the order again, we can test whether other provisions and the pre-requisite necessary to attract them are present and therefore we must rely on the Hon'ble Supreme Court judgment and the accounting standards. This is a course impermissible in review jurisdiction. More so, for the above reasons. We find no merit in the review petition and it is dismissed.

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