

Reserved On : 08/07/2026

Pronounced On : 09/10/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 1439 of 2006

With

R/TAX APPEAL NO. 1054 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and

HONOURABLE MR. JUSTICE PRANAV TRIVEDI

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Approved for Reporting	Yes	No
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COMMISSIONER OF INCOME TAX

Versus

SHANTABEN K. PATEL

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Appearance:

AADITYA D BHATT(8580) for the Appellant(s) No. 1

MR SN SOPARKAR, SENIOR ADVOCATE WITH MR BS SOPARKAR WITH

MRS SWATI SOPARKAR(870) for the Opponent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and

HONOURABLE MR. JUSTICE PRANAV TRIVEDI

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Standing Counsel Mr.

Aaditya Bhatt for the appellant and learned Senior Advocate Mr. S.N. Soparkar with learned advocate Mr. B.S. Soparkar for the respondent.

2. Tax Appeal No.1439/2006 is filed by the Revenue under section 260A of the Income Tax Act, 1961 (For short "the Act") against the judgment and order dated 16.06.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "B" (For short "the Tribunal") in ITA No. 421/AHD/2005 for Assessment Year 2001-2002. Tax Appeal No. 1439/2006 is admitted vide order dated 09.07.2007 raising following substantial question of law:

"Whether the Appellate Tribunal has erred in law and on facts in holding that the receipt of Rs. 50 crores being on account of sale price of long term intangible capital asset could be taxed only under the head "long term capital gain" and since the cost of acquisition of these assets in the hands of the assessee

was unascertainable, the receipt in question was not taxable?"

3. Thereafter, after hearing the learned advocates for the parties at length and after assigning reasons, by order dated 02.09.2024 following additional substantial questions of law are framed:

"(1) Whether in the facts and circumstances of the case, the Tribunal has erred in law in holding that the nature and mode of acquisition of intangible assets, namely, tenancy rights, goodwill, trade-marks and trade-names were of the ownership of the assessee, considering the clause-7 of the Dissolution Deed executed on 7.2.1980?

(2) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessee had sold her rights including ownership, tenancy rights, goodwill, trade-marks and trade-names (brands) in favour of the Trust styled as 'SKPFT' or had assigned the user right, in these intangible assets and had continued to be the owner of the same after execution of the clause-7 of the Dissolution Deed executed on 7.2.1980?

(3) Whether in the facts and circumstances of the case, the receipt of Rs.50 Crore in the hands of the assessee was in lieu of royalty or on account of fee receivable in perpetuity and was not taxable as income from other sources and what was the nature of receipt of Rs.50 Crore in the hands of assessee?

(4) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the Arbitration Award dated 24.3.2001 was binding between the parties to the award?"

4. Tax Appeal No.1054/2007 is filed by the Revenue under section 260A of the Income Tax Act, 1961 (For short "the Act") against the judgment and order dated 13.11.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench-A, (For short "the Tribunal") in ITA No. 2003/AHD/2006 for Assessment Year 2001-2002. Tax Appeal No. 1054/2007 is admitted vide order dated 09.07.2007 raising following substantial question of law:

"Whether the Appellate Tribunal is

right in law and on facts in confirming the order passed by the CIT (A) deleting the penalty of Rs.17,55,00,100/- levied u/s.271(1)(c) of the Act?"

5. Since common issue is involved in these tax appeals, Tax Appeal No.1439/2006 is treated as a lead matter.

Facts:

6. Brief facts of the case are that respondent assessee along with Ramjibhai Kodidas Patel had formed a partnership firm in the name of M/s. Nirma Chemical Works with effect from 01.02.1972 as per the partnership deed executed on 18.02.1972 to carry on the business of manufacture and trading of colour chemicals, washing powder, etc. The assessee had 75% shares whereas remaining 25% shares were held by Ramjibhai Kodidas Patel in the Profit and Loss of the business.

7. Thereafter, the partnership deed was altered

on 11.04.1972, 12.11.1974, 26.04.1975, 26.05.1976, 02.04.1979 and 03.01.1980 whereby various persons joined as partners or retired from the partnership firm however, the assessee remained partner continuously till the dissolution of the partnership firm was affected from 04.01.1980 by Deed of Dissolution executed on 07.02.1980.

8.As per clause (8) of the partnership deed dated 11.04.1974 which was made effective from 01.04.1974, the assessee and Ramjibhai Kodidas Patel were given the ownership of intangible assets namely, tenancy rights, goodwill and trade-marks and other three parties who joined as partners were not to have any interest, title or right in these intangible assets.

9.Thereafter, on death of Shri Ramjibhai Kodidas Patel, partnership deed executed on

12.11.1974 stipulated clause (10) by which the assessee was given the sole ownership of tenancy rights, goodwill and trade-marks and no other partners or partnership firm were to have any right or share or interest in these intangible assets.

10. This arrangement continued till the dissolution of the partnership on 07.02.1980 with effect from 04.01.1980. Prior to such dissolution, as per the partnership deed dated 03.01.1980 with effect from 01.01.1980 M/s. Nirma Chemical Works joined the partnership firm and consequently, the assessee SKP Family Trust and M/s. Nirma Chemical Works Private Limited remained the partners for continuing the business of partnership styled as M/s. Nirma Chemical Works.

11. As a result of Dissolution Deed dated

07.02.1980, the running business of the partnership with all its assets and liabilities excluding the assets belonging to the party of the first part i.e. Smt. Shantaben K. Patel - assessee as per clause (9) of the Deed and including the rights and benefits of pending contracts, profits or losses, rights and liabilities that may have accrued to the partnership business between 01.01.1980 to the date of dissolution i.e. upto 04.01.1980 were taken over by the party of the second part to the Dissolution Deed i.e. trust styled as S.K. Patel Family Trust through its trustee Smt. Shantaben K. Patel- assessee.

12. Clause (7) of the Dissolution Deed which is relied upon by the Revenue heavily for invoking the provision of capital gain tax on a consideration for the transfer of ownership of goodwill, trade name, trademarks and

tenancy rights by the assessee as under:

"7. The party of the second part has agreed to pay to the party of the first part in lieu of compensation for title ownership of the tenancy rights of the firm premises, goodwill trade name and trade marks at the rate of 2.5% to be calculated on net profits of the firm every year or Rs. 10,000/- (Rupees ten thousand) whichever is higher. This amount shall be payable during the life time of the party of the first part as well as to the heirs of the first part after her demise. The ownership right for the goodwill, trade name and trade marks as well as those of tenancy rights belongs to and shall remain as the sole proprietor rights of the party of the second part. The said amount shall be paid within three months of the dosing of the account of the trust or a partnership firm, if any constituted by the trust in which the trust is a partner. The party of the Second part shall submit the calculation of amount payable to the party of the first part within three months from the end of the Accounting Year. It shall also submit the said statement duly certified by the Auditor if so desired by the party of the first part. The party of the first part shall give a notice in writing for this purpose to the party of the Second Part."

13. In consequence upon dissolution of the partnership firm styled as M/s. Nirma Chemical Works with effect from 04.01.1980, as per the Dissolution Deed executed on 07.02.1980, the running business of the partnership firm along with all assets and liabilities, except the assets as provided in the aforesaid clause (7) of the Dissolution Deed were taken over by S.K. Patel Family Trust through its trustee Smt. Shantaben K. Patel - assessee who continued the same business and also continued to use the intangible assets i.e. tenancy rights, goodwill, trade-marks and trade-names (Brands) as per the terms of clause (7) of the Dissolution Deed.

14. As per clause (7) of the Dissolution Deed, the assessee started to receive a yearly payment which she offered for taxation in the return of income as income and the

Revenue continued to tax the same as income from Royalty under the Head "Income from other sources".

15. In between, the proprietary business of SKP Family Trust was converted into a partnership firm with six other partners in the name and style of M/s.Nirma Chemical Works which later on was converted under Chapter IX of Companies Act into a Body Corporate Company on 30.01.1994 in the name and style of M/s. Nirma Chemical Works Private Limited which became a deemed Limited Company with effect from 01.07.1997.

16. During the intervening period, i.e. the period when Nirma Chemical Works Limited came into existence, the dispute between the assessee, Nirma Chemical Works Limited, Nirma Limited and Nirma Consumer Care Limited arose as two other companies also got right for

using the trade-marks and brands which were the subject matter of clause (7) of Dissolution Deed dated 07.02.1980 and also of those which had got developed/generated thereafter by Nirma Chemical Works Limited. Nirma Limited was to use the trade-marks for overseas markets as well as for sale and supply to Canteen Stores Department in India, whereas Nirma Consumer Care Limited which was wholly owned subsidiary of Nirma Limited, got the license to use the trade-marks in relation to the production to be manufactured by it or its sub-contractor.

17. Thus, the intangible assets such as, tenancy right, goodwill, trade-marks and brands, etc. which were owned by the assessee as per clause (7) of Dissolution Deed got to be used by Nirma Chemical Works Limited and finally by Nirma Limited and Nirma Consumer Care Limited. The assessee had also shown the

value of intangible assets in Wealth Tax return for the Assessment Year 1982-1983 as per clause (7) of the Dissolution Deed dated 07.02.1980 which was determined by CIT(Appeals) at Rs. 4,20,000/- as the issue was not pressed by the assessee before the Tribunal.

18. In the start of January-2001, the assessee came to know that Nirma Chemical Works Limited was intending to assign/sale the trade-marks along with the trade names(Brands) which were the subject matter of clause (7) of Dissolution Deed dated 07.02.1980 and, hence, the dispute regarding the right of Nirma Chemical Works Limited to assign or sale of those intangible assets, without her consent arose because the assessee claimed herself to be the owner of those assets.

19. To resolve the disputes, the assessee Shantaben K. Patel and Nirma Chemical Works Limited had entered into an agreement on 05.01.2001, whereby both agreed to refer the disputes to the arbitration of sole arbitrator, Hon'ble Mr. Justice B.J. Divan, Retired Chief Justice of High Court of Gujarat who rendered the award on 24.03.2001 holding that the subject brands/trademarks was of the ownership of assessee Smt. Shantaben K. Patel and it was held that she was entitled to assign the same whereas Nirma Chemical Works Limited was granted perpetual user right in such trademarks and interest of the assessee was restricted in the said trademarks to 2.5% of the profits that Nirma Chemical Works Limited would make and the assessee was held to be entitled to 10% of the consideration receivable on assignment of the brands.

20. After passing of the award by the arbitrator, an agreement to sell the trade-marks, brands, etc. was entered into between Nirma Limited, Nirma Chemical Works Limited and Smt. Shantaben K. Patel - assessee on 26.03.2001. According to such agreement, all trademarks, designs, copy rights, registered as well as pending registration mentioned in Annexure-'A' to the agreement were sold to Nirma Limited for a total consideration of Rs.500 Crore out of which an amount of Rs.50 Crore was paid to the owner who as per the agreement was accepted to be Smt. Shantaben K.Patel - the assessee herein and an amount of Rs.450 crores was paid to the licensee, who as per this agreement was Nirma Chemical Works Limited.

21. Thus, as per this agreement dated 26.03.2001, all trade-marks, designs, copy rights and brands registered as well as

pending registration which were subject matter of clause (7) of Dissolution Deed dated 07.02.1980 and also which were generated after the said date were held as licensee by Nirma Chemical Works Limited on 26.03.2001 and were sold for a price of Rs.500 crores to M/s. Nirma Limited and out of sale price of Rs.500 crores, an amount of Rs.50 crores was given to the assessee for her rights in these intangible assets as the owner and balance of Rs.450 crores was given to Nirma Chemical Works Limited for its rights as licensee of the intangible assets which were subject matter of Clause (7) of Dissolution Deed dated 07.02.1980 and for its ownership of other trade-marks, copy rights, brands, etc., if any, generated thereafter and owned by it as on 26.03.2001.

22. The assessee furnished the return of income for Assessment Year 2001-2002 on

31.07.2001 declaring a total income of Rs.2,44,06,408/-. A Note was also appended to the return of income in the following terms:

"The assessee was owner of various trade-marks under the name and style of Nirma and Nima which was self generated assets. During the Assessment Year, the assessee sold the trade-marks to Nirma Industries Ltd. The trade-marks being self generated assets, it is not possible to determine the cost of its acquisition. Accordingly, relying upon the following decision, no capital gains, would arise on sale of the trademarks.

(i) In the case of CITv/s. B.C.Srinivasa Setty 128 ITR 294 (SC)

(ii) In the case of Cadell Weaving Mill Co.(P) Ltd. 166CTR7 (Bombay)"

23. During the assessment proceedings, the Assessing Officer issued notice under section 142(1) of the Act calling for details in relation to the aforesaid Note as follows:

"a. The year from which these self generated assets were utilized/ conceptualized. Expenses incurred if

any, on acquiring these assets from any other party.

b. If these assets were allowed to be used/licensed to any other party during any of the previous years, the terms of agreement for the same along with copy of the original documents be furnished.

c. The terms under which royalty payments were received.

d. Copies of original documents under which the rights were sold along with the valuation report of the valuation of the rights be furnished."

24. Pursuant to the aforesaid notice under section 142(1) of the Act, the assessee submitted its reply dated 06.01.2004 furnishing the details as to how Rs. 50 Crore was received by the assessee in the month of March, 2001 as compensation for sale of her ownership rights in brand name and trademarks 'Nirma' and 'Nima' as per the agreement dated 26.03.2001 and contended that compensation of Rs. 50 Crore was received on transfer of ownership rights of the assessee over the

self-generated brand name and trade mark. Hence, even though same was a capital receipt, no capital gain would be chargeable as the assets under transfer were self-acquired assets for which no cost of acquisition was ascertainable.

25. The Assessing Officer however, proceeded to consider the tripartite agreement of sale of brands dated 26.03.2001 and after considering the same along with Clause (7) of the Dissolution Deed dated 07.02.1980, called upon the assessee to establish the relationship of licensor/licensee between the assessee and Nirma Chemical Works Limited as compensation of Rs. 50 crores received by the assessee was for the renunciation of the rights to receive perpetual compensation as mentioned in clause (7) of the Dissolution Deed and not towards the transfer of the ownership rights. Therefore, the

consideration of Rs. 50 crores received for the renunciation of the rights would be liable to tax as "income from other sources".

26. The assessee by reply dated 25.03.2004 contended that if the transfer had taken place on 07.02.1980, then in that case no event, which leads to any income-tax liability during the year under consideration has taken place and if the assessee does not own the brand and has only the right to receive amount in perpetuity, the cost of such right is again not ascertainable and hence, not liable to tax in view of decision of Hon'ble Supreme Court in case of **B.C. Srinivas Setty** reported in 128 ITR 294.

27. The Assessing Officer after considering the replies of the assessee, passed the assessment order rejecting the contentions of the assessee and held that both the assessee

and Nirma Chemical Works Limited were liable to tax on amount of sale consideration received as per agreement dated 26.03.2001. So far as assessee was concerned, it was held that she was not the owner and the amount realised was amount of commuted annuity and was therefore, taxable as the "income from other sources" and alternatively as "long term capital gain" because of retrospective applicability of amended provision of section 55(2)(a) of the Act.

28. So far as Nirma Chemical Works Limited was concerned, it was held that it was the owner and the assets were not self generated assets and therefore, amount was taxable.

29. Being aggrieved, the assessee preferred an appeal before the CIT(Appeals). CIT (Appeals) in case of Nirma Chemical works Limited held that it should get deduction in

relation to acquisition of assets based on market value as on 01.04.1981.

30. CIT(Appeals) after considering the assessee's submissions, Remand Report as well as the counter comments of the assessee on Remand Report upheld the order of the Assessing Officer taxing the receipt of Rs.50 Crore as "income from other sources". The alternative contention/aspect of the issue that if the receipt was not liable to be taxed as "income from other sources", then could it be taxed as income under the head "long term capital gain", the CIT(Appeals) observed that since the Assessing Officer's action of taxing the receipts of Rs.50 Crore as "income from other sources" has been upheld, the alternative contention would become irrelevant so far as the appeal of the assessee was concerned and therefore, the alternative aspect of the issue taxing the

amount of Rs. 50 Crore as "long term capital gain" was not considered necessary for adjudication.

31. Being aggrieved by the order passed by CIT(Appeals), the assessee preferred ITA NO.421/AHD/2005 before the Tribunal. The Tribunal formulated five issues in paragraph no. 25 of the impugned order which reads as under:

"25. In view of aforesaid facts and circumstances, arguments of the parties and the ground taken by the assessee, we are of the opinion that main issue for our consideration and decision is as to the taxability of the receipt of Rs. 50 crores received by the assessee as per the tripartite agreement dated 23-01-2001 according to which the assessee, as has been claimed, had sold her ownership rights in intangible assets; namely, trade-marks and trade-names(brands) acquired by her on Distribution of assets of a Firm, Nirma Chemical Works, on Dissolution as per Dissolution Deed dated 11-04-1974 (jointly) dated 12-11-1974 and as per subsequent Dissolution Deeds-

last being dated 07-02-1980, on sole owner; i.e. the issue for our consideration and decision is as under:

"Is the receipt of Rs. 50 crores is taxable in assessee's hand as Income from other sources?

25.1 We are further of the opinion that to decide the aforesaid issue, it is necessary to consider and decide the following issues also and, therefore, after specifying the various issues, we shall proceed to consider and decide the main issue.

Other issues to be considered and decided before considering and deciding the aforesaid main issue.

(1) The details, nature and mode of acquisition of intangible assets; namely, tenancy rights, good-will, trade-marks and trade-names(brands) in the hands of the assessee.

(2) What was the sub and substances of clause-7 of Dissolution Deed executed on 07-02-1980 and made effective from 04-01-80; i.e. can it be said on the basis of this clause that assessee had sold all her rights including ownership in tanancy rights, good-will, trade-marks and trade-names (brands) in favour of the Trust styled as SKPFT or had the assessee assigned only the 'user rights' in these intangible assets and had continued to be owner of the same even after execution of clause-7(Supra)

(3) What was the nature of receipt of Rs. 50 crores in the hands of the Assessee?

(4) Was the receipt of Rs. 50 crores royalty for future or on account of fee receivable in perpetuity and was not taxable as 'income from other sources' or as 'capital gain'?

(5) What was the effect of Arbitration Award?"

32. The Tribunal answered the question as to whether the assessee was also the owner of the said asset from the date of sale by considering all facts and arrived at a conclusion that it was the assessee and not Nirma Chemical Works Limited who was the owner of the intangible assets. The Tribunal thereafter proceeded to discuss as to whether the assessee had incurred any cost of acquisition of the intangible assets or was it self-generated assets and came to the conclusion that the cost of acquisition of the assets was not ascertainable and therefore, the consideration of Rs.50 Crore

received by the assessee was not liable to long term capital gain tax. The Tribunal summarised its findings on the grounds raised by the assessee in appeal as under:

"56. In the last, we sum up our findings/decision as per grounds raised by the assessee.

(i) So far as Ground No. 1 is concerned, the same being of general in nature requires no independent adjudication, rather is covered by our decision with respect to issue raised in ground No. 2.

(ii) So far as ground No. 2 is concerned, our decision, on the basis of foregoing discussion/opinion is as under:-

(a) The assessee had not sold ownership rights in intangible assets; namely, tenancy rights, goodwill, trade-marks and trade-names (brands), as per clause-7 of Dissolution Deed dated 7/2/1980 and the assessee had assigned only "user rights to the Trust as licensee who went on to use them the capacity of licensee.

(b) The Receipt in question was also not taxable as "income from other sources" also.

(c) The assessee having acquired

these assets on Distribution of Assets on Dissolution of Firm, the cost of acquisition of these intangible assets in the hands of assessee on the date of acquisition was unascertainable.

(d) The cost of improvement of these intangible assets was also unascertainable.

(e) The yearly payment received by the assessee in consequence upon the transaction involved in clause-7 of Dissolution Deed dated 07-02-1980 was not royalty, rather, was on Revenue account.

(f) The receipt of Rs. 50 crores was on account of sale price of assessee's ownership rights in intangible assets; trade-marks and Trade-names (Brands) only.

(g) Trade-marks and Trade-names; i.e. the Brands, are not part & parcel of the goodwill and, therefore, transaction involved in agreement dated 21-03-2001 was not sale goodwill.

(h) None of the Amendments in Section 55(2)(a) of the Act brought out by Finance Act, 1987 1994 & 2001 which were applicable for Asst. Years 1989-90, 1995-96 & 2002-03 respectively and subsequent Assessment Years, was clarificatory or retrospective and, therefore, not applicable to the present case.

(i) The Receipt of Rs. 50 crores

being on account of sale price of long-term intangible capital assets could be taxed only under the Head "Long Capital Gain" but since the cost of acquisition of these assets in the hands of assessee was unascertainable, the capital receipt in question was not taxable as "Long Term Capital Gain".

(ii) So far as assessee's objection against charging of interest u/s. 234-B & 234-C of the Act is concerned, the same being consequential, we direct the Assessing Officer to give consequential relief, if any.

(iv) As regards, the ground No. 4 whereby the assessee has objected to the initiation of penalty proceedings u/s. 271(1)(c) of the Act, we are of the opinion that this issue cannot be agitated in appeal against the assessment order and is pre-mature. This ground is, therefore, rejected.

(v) So far as issue involved in Ground No. 5 is concerned, the same being of general nature which do not require any independent adjudication."

Submissions on behalf of the appellant:

33. Learned Senior Standing Counsel Mr. Aaditya Bhatt for the Revenue submitted that a bare perusal of clause (7) of Dissolution

Deed dated 07.02.1980 categorically mentions that ownership rights for the goodwill, trade name and trade marks as well as those of tenancy rights belong to and shall remain as the sole proprietary rights of the Second Party i.e. S.K. Patel Family Trust. It was submitted that it is established at the outset that ownership rights and not user rights were transferred by the assessee to S.K. Patel Family Trust which in turn has transferred the business to Nirma Chemical Works Limited.

34. It was submitted that clause (7) does not speak of any licensor/licensee relationship but categorises the transaction as transfer of ownership rights for which consideration amount has been provided in form of annual perpetual payment of 2.5% of Net Profit or Rs.10,000/- every year whichever is higher. It was therefore,

submitted that Nirma Chemical Works Limited became the owner which is established from the license agreement between Nirma Chemical Works Limited, Nirma Limited and Nirma Consumer Care Limited wherein Nirma Chemical Works Limited has been termed as proprietor of intangible rights in the agreement dated 12.09.1997 and all the trademarks were registered in the name of Nirma Chemical Works Limited and in none of the license agreement entered into between the above three companies, the assessee was made a party.

35. It was therefore, submitted that considering both the documents i.e. clause (7) of Dissolution Deed dated 07.02.1980 and license agreement dated 12.09.1997, it becomes clear that what was transferred was ownership rights and not user rights as held by the Tribunal. It was further submitted

that upon perusal of the agreement dated 26.03.2001 entered into between the assessee and Nirma Chemical Works Limited, it categorically provides that amount of Rs. 50 Crore paid to the assessee out of total consideration of Rs. 500 Crore to be received from Nirma Limited is nothing but to absolve Nirma Chemical Works Limited from yearly payments liable to be made by virtue of clause (7) of Dissolution Deed dated 07.02.1980 which unequivocally establish that nature of transaction carried out vide clause (7) of the Dissolution Deed dated 07.02.1980 was transfer of ownership rights itself and cannot be in any way be termed as transfer of user rights.

36. It was submitted that the contention raised on behalf of the assessee that the mode and the payments made over a period of time establishes that the ownership over the

assets remained with the assessee is not correct as it is the quality of the payment which is decisive and not the method of payment over a period of time. It was submitted that the assessee conveyed the ownership over the trade name and trademark in consideration of annuity payable in perpetuity and such annuity payments received by the assessee were revenue receipts liable to tax under section 56(1) of the Act and, therefore the Assessing Officer has rightly made addition of Rs. 50 Crore as income of the assessee for the year under consideration.

37. It was submitted that clause (7) of the Dissolution Deed dated 07.02.1980 is required to be interpreted as transfer of ownership rights by the assessee for consideration of perpetual annuity payment which was commuted in the year 2001 by agreement dated

26.03.2001 being the commutation of future annuity receipts and therefore, the same was rightly taxed under the heading "income from other sources".

38. It was submitted that assessee has utilised the arbitration award only to orchestrate a dispute so as to see that the amount of consideration as per arbitration award to be treated as capital receipt as consideration of intangible assets which were not having any cost of acquisition so as to claim the same as tax free by relying upon the decision of Hon'ble Apex Court in case of **B.C. Srinivas Setty**(supra).

39. It was submitted that having established that conveyance of ownership in intangible rights from assessee to Nirma Chemical Works Limited was carried out vide clause (7) of the Dissolution Deed dated 07.02.1980 in

consideration of annuity payable in perpetuity, it is pertinent to take into consideration that these annuity payments received by the assessee were revenue expenses in the hands of SK Patel Family Trust and in turn by way of succession in hands of Nirma Chemical Works Limited.

40. It was submitted that as no capital expenditure for acquisition, augmentation or improvement have been incurred for the intangible assets in question and all the expenses incurred in the form of revenue nature have already been allowed as deduction under the head "Profit and Gains of Business" in the hands of Nirma Chemical Works Limited as revenue expenditure, cost of acquisition as well as cost of improvement in the hands of Nirma Chemical Works Limited is Nil and therefore, the entire amount of Rs.500 Crore received as per agreement dated 26.03.2001

was taxable as capital gain.

41. It was submitted that the Tribunal has erred in holding that it is the user rights which were transferred by the assessee in favour of SK Patel Family Trust and subsequently, in succession to Nirma Chemical Works Limited, whereas Tribunal ought to have appreciated that agreement dated 26.03.2001 which came to be executed between the assessee and Nirma Chemical Works Limited absolved Nirma Chemical Works Limited from its future liability of paying perpetual annuity as mentioned in the Dissolution Deed dated 07.02.1980. It was pointed out that from the very inception, the nature of transaction was sale of ownership rights of all intangible assets of Nirma Chemical Works Limited in capacity of proprietor which also gets clarified from the license agreement dated 12.09.1997 which was executed between

Nirma Chemical Works Limited, Nirma Limited and Nirma Consumer Care Limited.

42. Learned Senior Standing Counsel Mr. Bhatt therefore, submitted that the proprietary rights of the assessee were transferred as per clause (7) of the Dissolution Deed dated 07.02.1980 and consequent sale transaction of intangible assets between Nirma Chemical Works Limited and Nirma Limited for consideration of Rs. 500 Crore would result in taxability of the entire amount under the head 'capital gains' to be split between the assessee Smt. Shantaben K. Patel for receipt of Rs. 50 Crore and for Rs. 450 Crore in hands of Nirma Chemical Works Limited.

43. In support of his submission, reliance was placed on the judgment of Privy Council in the case of **Maharaj Kumar Gopal Saran**

Narain Singh v. Commissioner of Income-tax
reported in [1935] 3 ITR 237 wherein an annual payment for life to the assessee was not held to be agricultural income and therefore, was not exempted from tax where the annuity arose out of a transfer made by the assessee of a portion of his estate for discharging his debts and for obtaining adequate income for his life, it was held that same was not rent or revenue derived from land but money paid under a contract imposing personal liability on the covenantor the discharge of which was secured by a charge on land.

44. It was submitted that the Tribunal has arrived at a finding of fact that the assessee had acquired the rights in all the intangible assets in two installments. First being rights in the capacity of joint owner along with Mr. Ramjibhai Khodidas Patel with

effect from 01.04.1974 and second being absolute ownership rights as sole owner of the assets with effect from 01.04.1979 which would show that the assessee had solely acquired the intangible rights upon dissolution of the firm and even as per the provisions of section 42 of the Indian Partnership Act, 1932, upon the death of a partner a firm gets dissolved and therefore the assessee had acquired such intangible rights personally as the firm and the assessee as a partner of the firm were two different entities.

45. It was therefore, submitted that the Tribunal after considering the terms and conditions of various partnership deeds, dissolution deeds has arrived at a finding of fact that the assessee had become the partner for the first time with effect from 01.02.1972 with Shri Ramjibhai Khodidas

Patel having 75% shares and assessee having 25% shares, in profit and loss of partnership respectively and therefore, the observations of the Tribunal clearly shows that the partnership between assessee and Ramjibhai K Patel was formed with effect from 01.02.1972 and the partnership-deed was silent on acquisition or purchase of any intangible asset from another entity. It was therefore, submitted that the partnership firm did not have any intangible assets as on 01.02.1972 and all the intangible assets were generated, in the hands of firm after 01.02.1972 and therefore, the assessee was the sole owner of the intangible assets which is reflected in clauses of the subsequent partnership deed from 1974 onwards.

46. It was submitted there cannot be any assignment by partnership deed of the intangible assets but as per clause (7) of

the Dissolution Deed dated 07.02.1980, the assessee had transferred the intangible rights in favour of SK Patel Family Trust which became Nirma Chemicals Work Limited later on.

47. It was submitted that the Tribunal has committed an error in rejecting the findings arrived at by the CIT(Appeals) by ignoring the explicit phrase "shall remain as the sole proprietary rights" in clause (7) of the Dissolution Deed dated 07.02.1980 and the Tribunal has further erred in treating the arbitration award as binding decree and that Revenue had no locus to question more particularly, when the arbitral award was a non-speaking award orchestrated just two days prior to agreement dated 26.03.2001 for sale of intangible assets for a consideration of Rs. 500 Crore between the family entities solely to bifurcate the consideration so as

to evade levy of taxes. It was therefore, submitted that the Tribunal has committed an error in applying the decision of Hon'ble Apex Court in case of **B.C. Srinivasa Setty** (supra) by erroneously holding that the assessee was owner of the intangible assets contrary to the facts and as the intangible assets were self-generated assets, the Tribunal erred in holding that cost was unascertainable causing the computation machinery to fail and thereby arriving at an erroneous conclusion making Rs. 50 Crore receipt entirely tax free.

48. It was submitted that the Tribunal ought to have considered the transfer of tenancy right by virtue of clause (7) of the Dissolution Deed as an outright sale and not a license for giving user rights by the assessee. Reliance was placed on the decision of the Hon'ble Supreme Court in case of

National Cement Mines Industries Ltd. v. CIT reported in 42 ITR 69 where property was conveyed in consideration of what is an annuity, a true nature must be ascertained from the covenants. It was submitted that on interpretation of clause (7) of the Dissolution Deed dated 07.02.1980, the only conclusion which can be arrived at is that the sole proprietary rights of the assessee in intangible assets were transferred to SK Patel Family Trust in exchange of variable perpetual annuity i.e. 2.5% on Net Profit or Rs.10,000/- per year whichever is higher constituting valid sale under the law.

49. It was submitted that the assessee had already alienated the capital asset in form of intangible rights in the year 1980 and therefore, the Assessing Officer was justified in treating the receipt of Rs. 50 Crore, a lump-sum amount paid by Nirma

Limited to extinguish the on-going encumbrance of contractual right to receive a perpetual annuity.

50. Reliance was placed on the decision of Hon'ble Supreme Court in case of **CIT v. Trivikram Narian Singh** reported in 57 ITR 29 to submit that when an owner exchanges a capital asset for a perpetual annuity, the commutation of such an annuity partakes the character of revenue receipt taxable squarely under section 56 of the Act as "income from other sources".

51. It was submitted that arbitration award and subsequent tripartite agreement entered into in the month of March, 2001 were premeditated and colourable device designed to camouflage the transaction.

52. Reliance was placed on the decision of

Hon'ble Apex Court in case of **Keshavji Ravji & Co. v. CIT** reported in 183 ITR 1 wherein it is held that the taxing authority is entitled to determine the true legal relationship resulting from a transaction and unravel devices created to conceal the same. It was submitted that the Tribunal has failed to consider true nature of obtaining Arbitration Award by treating such collusive private award as sacrosanct against the Revenue.

53. It was submitted that even assuming that Rs. 50 Crore received by the assessee as taxable under the head "capital gains" as held by the Tribunal, the Tribunal erred in holding that cost of acquisition was unascertainable because the date of acquisition was crystalised in the year 1974 or in the year of dissolution in 1980, removing the impossibility envisaged by the decision of Hon'ble Supreme Court in case of

B.C. Srinivas Setty(supra).

54. It was submitted that legislature specifically cured the lacuna which was created as per the decision of Hon'ble Apex Court in case of **B.C. Srinivas Setty(supra)** through amendment to section 55(2)(a) of the Act mandating the cost of self-generated goodwill, trademarks and brand names to be taken as Nil and as the trademarks are integral part of business goodwill, the cost was statutorily ascertainable as Nil. Therefore, alternatively, entire amount of Rs. 50 Crore was rightly held to be taxable as capital gains by the assessing officer.

55. It was alternatively, submitted that Rs. 50 Crore received on 26.03.2001 by the assessee is capital receipt for transfer/ extinguishment of the capital asset. It was therefore, submitted that cost of

acquisition, cost of improvement and alternative fair market value as per the provision of section 45 of the Act cannot be said to be unascertainable in view of provisions of section 55(2) read with clause (a) and clause (b) and section 55(3) of the Act.

56. Learned Senior Standing Counsel Mr. Aditya Bhatt submitted that as per section 55(2)(b)(i), fair market value as on 01.04.1981 is to be taken as per the option of the assessee. It was pointed out that the assets were acquired before 01.04.1981 and therefore, the cost to previous owner was to be considered in the hands of the assessee i.e. partnership firm. It was further pointed out that as per section 55(3) of the Act where the cost of the previous owner is not ascertainable, the same is to be deemed to be Fair Market Value on the date the asset

became previous owner's property. It was submitted that for goodwill and tenancy right as per section 55(2)(a) of the Act, the cost is to be deemed as Nil and therefore, Rs. 50 Crore received by the assessee can also be taxed as capital gains with Nil cost.

57. Referring to the Trademark, it was submitted that as per the provisions of section 55(2)(a)(ii), Trademarks were not included upto Assessment Year 2001-2002 and therefore, Fair Market Value as on 01.04.1981 is to be taken and therefore, it cannot be said that cost of acquisition is unascertainable. It was submitted that it is not in dispute that intangible assets were acquired by the assessee on dissolution of the firm and therefore the decision in case of **B.C. Srinivas Setty**(supra) of the Apex Court would not be applicable in the facts of the case.

58. It was therefore, submitted that the Tribunal has arrived at perverse finding of fact by holding that cost of acquisition was unascertainable.

59. Reliance was also placed on the decision of Hon'ble Apex Court in case of **A.R. Krishnamurthy v. CIT** reported in 176 ITR 417(SC), wherein it was held that so far as apportionment of the cost of acquisition was concerned, the same can be determined in terms of money value and best valuation possible must be made so as to apply the provision of section 45 of the Act because merely valuation is not possible, it cannot be a ground for holding that entire consideration would become tax free.

60. It was therefore, submitted that reliance placed by the Tribunal on the

arbitration award dated 24.03.2001 which is nothing but a colorable instrument which misinterpreted clause (7) of the Dissolution Deed holding that the assessee was owner of the intangible rights and assuming for a while that arbitration award would operate as the ownership rights of the assessee for intangible assets, the same was transferred having cost of acquisition liable to capital gain in the alternative. It was therefore, submitted that in the alternative, all cost of acquisition, cost of improvement and Fair Market Value is ascertainable, and computation machinery would survive and Rs. 50 Crore is, therefore, chargeable as "long term capital gains". It was therefore, submitted that on any count, the amount of Rs. 50 Crore received by the assessee cannot be considered as a tax free amount and the questions therefore, may be answered in favour of the Revenue and against the

assessee.

Submissions on behalf of the respondent:

61. Learned Senior Advocate Mr. S. N. Soparkar for the respondent submitted that the core issue arising in this appeal is whether the assessee continued to be the owner of the intangible assets or transferred the same for consideration received when the partnership firm was dissolved in the year 1980 and another issue which arises is if the assessee had transferred the ownership of the intangible assets in the year 1980 whether the capital gain would arise in the year under consideration.

62. It was submitted that case of the Revenue is that the ownership of Goodwill, Trademark, Trade name etc. was transferred by the assessee to SK Patel Family Trust in 1980 itself and the compensation was to be

received as per clause (7) of the Dissolution Deed in perpetuity and hence, amount of Rs.50 Crore received as per the agreement dated 26.03.2001 was for renunciation of right to receive perpetual compensation i.e. accelerated perpetual Royalty to be taxed as 'income from other sources' whereas it is the case of the assessee that she retained the rights of ownership and was entitled to compensation for user rights given to the trust which was later on converted into partnership firm and limited company.

63. It was submitted that if the assets are to be considered as transferred in the March 2001 as per the tripartite agreement, it would be taxable as capital gains at 'Nil' rate as the cost of acquisition of the intangible assets would be unascertainable as the tangible assets were self-generated assets.

64. Learned Senior Advocate Mr. Soparkar further submitted that as per clause (7) of the Dissolution Deed dated 07.02.1980, the assessee continued to be the sole owner of the intangible assets which is reaffirmed by the arbitration award dated 24.03.2001 passed by the sole arbitrator Hon'ble Mr. Justice B.J. Divan, Retired Chief Justice of High Court of Gujarat and based upon the said award, the tripartite agreement dated 26.03.2001 was executed for sale of the intangible assets for implementation of award by payment of 10% of the sale consideration of Rs. 500 Crore to the assessee i.e. Rs.50 Crore by M/s. Nirma Limited.

65. Learned Senior Advocate Mr. Soparkar referred to the partnership deed dated 18.02.1972 to show that there was no reference as to the ownership of trademark,

brand name, goodwill or any intangible assets. It was therefore, submitted that the ownership of the intangible assets would belong to the partners which is referred to in clause (10) of the subsequent partnership deed which stipulates that assessee - Smt. Shantaben K. Patel would be the exclusive owner of the intangible assets had no other partners had any right, title or interest over such intangible assets such as goodwill, tenancy rights, trademark, trade names(brands) etc.

66. It was submitted that even in the partnership deed dated 03.01.1980 Nirma Chemical Works Private Limited was admitted as a partner as per clause (9) of the said deed and assessee Shantaben K. Patel remained the exclusive owner of the intangible assets as that was the last partnership deed executed before dissolution of the

partnership firm by Dissolution Deed dated 07.02.1980 with effect from 04.01.1980. It was submitted that as per clause (7) of the Dissolution Deed, the assessee Smt. Shantaben K. Patel was to get fixed amount of Rs. 10,000/- or 2.5 % of Net Profits of the firm whichever is higher and the same was payable even to the heirs of the assessee after her demise. It was therefore, submitted that only the user rights of the intangible assets were transferred on payment of amount of Rs.10,000/- or 2.5% of Net Profit of the firm whichever is higher and accordingly, the assessee had shown the income of 2.5% of the Profit received every year as income from other sources and the Revenue has taxed the same. It was therefore, submitted that there was only assignment of rights to use intangible assets while the ownership remained with the assessee.

67. In support of his submission, learned Senior Advocate Mr. Soparkar referred to the decision of Hon'ble Supreme Court in case of **Devidas Vithaldas & Co. v. Commissioner of Income-Tax, Bombay City I** reported in (1972) 84 ITR 277 (SC) to submit that the facts of the present case are similar to the facts of the case before the Hon'ble Supreme Court wherein one Mr. Padamsi Haridas carried on his profession as a Chartered Accountant in the name of Devidas Vithaldas and Company and by Deed of Partnership, dated November 30, 1948, one Mr. Amratlal Parikh was admitted as a partner, reserving, however the rights and interests in the goodwill of the business with Mr. Padamsi Haridas. It was pointed out that the said partnership of Devidas Vithaldas and Company was dissolved with effect from December 31, 1950, and as per the Dissolution Deed, Mr. Padamsi Haridas retired on January 2, 1951 and as per Clause

(1) of the said Deed of Dissolution, the business as from the said date was to be carried on in the name of Devidas Vithaldas and Company by Mr. Amratlal Parikh alone whereas Clause (2) of the deed provided that the goodwill of the partnership would belong to Mr. Padamsi Haridas alone and for consideration for and in full satisfaction of the purchase price of the goodwill, amount was to be paid by Mr. Amratlal Parikh to Mr. Padamsi Haridas. It was therefore, submitted that though clause (2) of the deed mentioned the word 'sell', the real essence of the transaction was only to grant a license to use and the issue before the Hon'ble Apex Court was whether the payments in question made in pursuance of the transaction incorporated in the said deed, dated January 2, 1951, were in the nature of revenue or capital expenditure in the hands of the firm.

68. Learned Senior Advocate Mr. Soparkar submitted that Hon'ble Apex Court in the aforesaid case of **Devidas Vithaldas & Co.** (supra) has held that if the transaction is embodied in a document, the liability to tax the transaction depends upon the meaning and content of the language used in the document in accordance with ordinary rules of construction. It was further submitted that the Hon'ble Apex Court also referred to the decision rendered in case of **Travancore Sugars and Chemicals Ltd. v. Commissioner of Income-tax** reported in (1966) 62 ITR 566 wherein the assessee-company had floated to take over the assets of three undertakings run by the Travancore Government, a sugar manufacturing concern, a distillery and a tincture factory. The first was to be purchased for Rs. 3.25 Lakh, the second on a joint valuation of parties, and the third on

the book value of the assets. Clause (7) of the agreement provided that apart from the cash consideration, the Government would be entitled to 20% of the annual net profits subject to a maximum of Rs. 40,000/- after providing for depreciation and the remuneration payable to the company's treasurers and secretaries. The question was posed for the Hon'ble Supreme Court as to whether a sum of Rs. 42,480/- paid in the previous year in question was a capital or a revenue expenditure. The Hon'ble Supreme Court reversing the decision of Hon'ble High Court who held it to be a capital disbursement, it was held to be a revenue expenditure on the ground that the payment was for an indefinite period and that it was related to annual profits which flowed from the trading activities and it had no relation to the capital value of the assets and that the payment was not related to, nor tied up,

in any way, to any fixed sum agreed between the parties as part of the purchase price of the three undertakings.

69. The Hon'ble Supreme Court in case of **Devidas Vithaldas & Co. (supra)** has further held that the question whether the disbursements in question partake the character of capital or revenue expenditure would depend mainly upon the construction of the document of January 2, 1951 and the true nature of the transaction embodied therein and that Clause (2) though uses expressions, such as "agreed to sell" and "the purchase price of the goodwill", such words which are repeatedly stated in a number of cases might appear to indicate a sale of the goodwill but neither that clause nor any other clause mentions what its purchase price was and no price was expressed at a lump sum, or was made payable by specific installments within

a specified period. Clause (2) in the Dissolution Deed of 1951 clearly did not fix any price nor a lump sum in respect of which annual payments as provided therein are to be made but only prescribed the mode and the quantum of the payment and therefore, the Hon'ble Apex Court relying upon the decision rendered in case of **Travancore Sugars and Chemicals Ltd., (supra)** held that the transaction was of assignment of the user rights and not of sale of goodwill.

70. Learned Senior Advocate Mr. Soparkar therefore, submitted that in facts of the present case, the Tribunal has rightly held that the transaction envisaged in clause (7) of Dissolution Deed dated 07.02.1980 was not in the nature of sale of intangible assets namely, the tenancy rights, goodwill, trademarks etc. but it was for assignment of user rights only and therefore such

intangible assets were the capital assets in the hands of the assessee till the arbitration award was passed on 24.03.2001 and therefore, receipt of Rs. 50 Crore in the hands of the assessee, if at all, was taxable, could be taxed only as income from "long term capital gains" subject to provisions of law relating to capital gains and section 56 of the Act would not be applicable as held by the Assessing Officer and upheld by the CIT(Appeals).

71. It was therefore, submitted that substantial question of law framed by the Court would be directly covered in favour of the assessee in view of judgment of the Hon'ble Supreme Court in case of **Devidas Vitthaldas & Co. (supra)**. It was also submitted that the additional question nos. 1 and 2 would also be covered in favour of the assessee in view of answer to question of

law.

72. Learned Senior Advocate Mr. Soparkar submitted that the case of the assessee right from the stage of assessment was that the transaction in question was a tax free transaction as per the Note appended to the return of the income as the cost of acquisition of the intangible assets was unascertainable and therefore, even if it is considered that receipt of Rs. 50 Crore was liable to long term capital gains, in absence of ascertainable cost of acquisition of the intangible assets, the computation machinery would fail and therefore, there cannot be any tax liability as per the decision of Hon'ble Supreme Court in case of **B.C. Srinivas Setty** (supra).

73. It was therefore, submitted that the basis on which the Assessing Officer has

taxed the entire receipt of Rs. 50 Crore in the hands of the assessee on the ground that same was received as the commuted value of annuity and therefore, taxable as "income of other sources" is not sustainable as rightly held so by the Tribunal. It was submitted that the alternative stand of the Assessing Officer that receipt of Rs. 50 Crore is taxable as long term capital gain and the cost is ascertainable at Nil rate and therefore, entire the amount of Rs. 50 Crore is liable to be taxed as long term capital gain is also not sustainable as rightly held by the Tribunal as the Tribunal considered both the findings of the Assessing Officer as contrary to the facts and settled legal position.

74. It was therefore, submitted that additional substantial question of the law no. 3 as to whether the receipt of Rs.50

Crore in the hands of the assessee was in lieu of royalty or on account of fee receivable in perpetuity and was taxable or not as income from other sources, would not arise from the order of the Tribunal and the same is also not challenged by the appellant revenue.

75. It was therefore, submitted that when there is no appeal against such findings of the Tribunal, this Court would not be able to decide the same and even as per the arguments, typed notes and submissions of the appellant revenue, it is evident that even during the course of hearing, the case of the appellant was not beyond the submission of levy of tax on receipt of Rs. 50 Crore as long-term capital gain only.

76. Learned Senior Advocate Mr. Soparkar submitted that the Tribunal has rightly held

that the amount received by the assessee is not a commuted value of the annuity and therefore, the same cannot be taxed as "income from other sources" and therefore, the substantial question of law raised by the appellant Revenue as to whether receipt of Rs. 50 Crore on account of sale price of intangible asset could be taxed only under the head "long term capital gain" and since the cost of acquisition of such intangible assets in the hands of the assessee was unascertainable, same would be tax free.

77. It was submitted that as per the substantial question of law framed by the Court at the time of admitting the appeal, the Revenue has not raised any question of law on account of sale price of intangible asset and the question of law is itself a self-evident answer and therefore, on plain reading of the substantial question of law,

it is evident that the judgment of Hon'ble Supreme Court in case of **B.C. Srinivas Shetty** (surpa) would be applicable in the facts of the case, as rightly applied by the Tribunal.

78. Learned Senior Advocate Mr. Soparkar further submitted that Clause (7) of the Dissolution Deed provides that in compensation of the ownership of tenancy rights of the firm, goodwill, trade name and trademarks, SK Patel Family Trust would pay to the assessee 2.5% of the Net Profits of the firm or Rs. 10,000/- whichever is higher during the lifetime of the assessee and thereafter to her legal heirs and hence, the fact that the compensation is payable to the assessee and her heirs makes it clear that the assessee retained her ownership rights in the self-generated intangible assets for which she was entitled to receive compensation and such compensation payable by

the trust was to be determined on the basis of profits which the trust would generate using the intangible assets and therefore, the plain reading of clause (7) clearly demonstrates that only the user rights of the intangible assets were transferred for compensation to be paid in perpetuity. It was submitted that had it been the case that the assessee had transferred the ownership rights, the compensation to be received by the assessee would not be over a span of her lifetime and beyond to the legal heirs and it would have been a onetime payment with all the rights transferred to the trust.

79. It was further pointed out that the assessee was getting 2.5 % of the Net Profits earned by the firm using intangible assets from 1980 onwards till 2001 and same was offered to tax. It was also pointed out that as per the partnership deed executed in 1994,

the terms of payment of compensation to the assessee for user rights of the intangible assets assigned as per clause (7) of the Dissolution Deed dated 07.02.1980 continued and the assessee had received such compensation and offered to tax as revenue income and the firm has also claimed the same as revenue expenditure.

80. In support of such submission, learned Senior Advocate Mr. Soparkar placed reliance on the decision of Hon'ble Apex Court in case of **Commissioner of Income-Tax vs Durga Prasad More** reported in [1971] 82 ITR 540 (SC) to submit that the Tribunal is the final fact finding authority and it cannot be said that its finding is not based on any evidence or the same is otherwise vitiated and unless the conclusion or finding of the Tribunal is held to be perverse or is not supported by any evidence or is based on irrelevant evidence,

this Court had no jurisdiction to interfere with the findings of fact recorded by the Tribunal. It was therefore, submitted that in the facts of the present case also, the conclusion reached by the Tribunal is in accordance with the facts of the case and conduct of the parties and after taking into consideration of the same, the Tribunal in consonance and in accordance with the law laid down by the Hon'ble Apex Court in the case of **Devidas Vithaldas & Co. (supra)** has arrived at a conclusion that the payment received by the assessee was for sale consideration of the intangible assets on the basis of arbitration award dated 24.03.2001 and same is liable to be taxed as "long term capital gain" ,however, in view of the fact that cost of such intangible asset was unascertainable, it would be tax free.

81. It was submitted by learned Senior

Advocate Mr. Soparkar that the contention of the Revenue that the assessee Shantaben K Patel ceased to be the owner of the intangible assets and received annuity in return is without any basis and the same cannot be accepted as the amount received by the assessee on an annual basis cannot be said to be annuity as no investment was made by the assessee nor the assessee was receiving any interest or any compensation but same was only in the nature of royalty or compensation for assignment of user rights of the intangible assets which were of the sole ownership of the assessee since 1974 which continued upto year 2001.

82. In support of his submission, reliance was placed on the decision of Hon'ble Apex Court in case of **Commissoner of Wealth-Tax, Gujarat v. Arundhati Balkrishna** reported in 77 ITR 505 wherein it was held that the word

'annuity' as per Halsbury's Laws of England would mean a certain sum of money payable yearly either as a personal obligation of the grantor or out of property not consisting exclusively of land. It was further held that in Jarman on Wills at page 113, that annuity is defined as a right to receive *de anno in annum* a certain sum; that may be given for life, or for a series of years and it may be given during any particular period, or in perpetuity and may be given to a man and his heirs and may go to the heirs as real estate. It was further held that the illustrations of annuity given in section 173 of the Indian Succession Act also shows that it is a right to receive a specified sum and not an aliquot share in the income arising from any fund or property and therefore considering the facts of the present case it was submitted that the business is a property and the assessee was receiving the amount of 2.5% of the Net

Profit from the business carried on by the firm and therefore, such receipt by the assessee cannot be said to be a property. It was therefore submitted that on an analysis of the relevant clauses of the Dissolution Deed dated 07.02.1980, it is clear that the assessee was given a share of the income arising from the Net Profits of the business and hence, the assessee was not entitled to fixed sum of money and therefore, it is not possible to hold that the payments received by the assessee which was entitled under the deed of dissolution can be termed as annuities.

83. Reliance was placed on the decision of Hon'ble Supreme Court in case of **Commissioner of Wealth-Tax, Rajasthan v. Her Highness Maharani Gayatri Devi of Jaipur** reported in 82 ITR 699 to submit that the Hon'ble Apex Court in the said case after examining the

clauses of the deed for creation of a trust held that the intention of the Maharaja was that the assessee should get a half share in the income of the trust fund and neither the trust fund was fixed nor the amount payable to the assessee was fixed whereas only thing certain was that the assessee was entitled to a 15/30 share from the income of the trust fund. In such facts, it was held that what the assessee was entitled to was not an annuity but an aliquot share in the income of the trust fund.

84. It was therefore, submitted that in the facts of the present case also the amount received as per clause (7) of the Dissolution Deed dated 07.02.1980 cannot be considered as annuity which was later on held by the Assessing Officer as commutation of right to receive annuity in perpetuity. It was therefore, submitted that the Tribunal has

rightly held that the assessee was the owner of the intangible assets which were sold in the year 2001 the year under consideration and liable to long term capital gain but the same was held to be tax free as the cost was unascertainable.

85. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of **Commissioner of Wealth-Tax, Lucknow v. P. K. Banerjee** (dec'd., by legal representatives) reported in 125 ITR 641 wherein after considering various judicial decisions of various courts it was held that in order to constitute an annuity, the payment to be made periodically should be a fixed or pre-determined one, and it should not be liable to any variation depending upon or on any ground relating to the general income of the fund or estate which is charged for such payment. The Hon'ble Apex Court placed

reliance on the decision in case of **Her Highness Maharani Gayatri Devi of Jaipur** (supra) to hold that the intention of the settlor, whether he wanted that the assessee should get a pre-determined sum every year or whether the assessee should get the whole net income of the trust fund is material. In the case of **P. K. Banerjee** (supra), the intention of the settlor was indisputably that the assessee should get the whole net income of the trust fund, and therefore, the right of the assessee was held not to be treated as an annuity.

86. Reliance was also placed on the decision of this court in the case of **The Commissioner of Income Tax Ahmedabad-I Versus Zydu Lifesciences Limited** in Tax Appeal No. 1234 of 2007 and allied matters wherein this Court while considering the issue that whether the Tribunal was right in reversing the order of

CIT(Appeals) wherein it was held that the consideration of Rs.29.10 Crore received by the assessee for assignment of trademark/ brand name was liable to tax as capital gain, held that the assignment of trade mark along with goodwill of business prior to amendment in section 55(2)(a) of the Act with effect from 01.04.2002 read with sections 45 and 48 of the Act, establishes that the consideration received on "transfer of trademark along with goodwill", is not chargeable to tax and will not be an "asset" to attract the charging provisions of section 45(1) of the Act, and its assignment/ transfer is not subject to income tax under the head of "capital gains". This Court further held that it is a settled legal position that goodwill has no independent existence, and it cannot subsist by itself, and is attached to a business, and if the business is destroyed the goodwill also

perishes with it, though some elements remain which may perhaps be gathered up and be revived again. It was therefore, submitted that in the facts of the present case, the assessee had only transferred the user rights of the intangible assets consisting of trademark etc. and there was no question of transfer of goodwill which exists.

87. It was submitted by learned Senior Advocate Mr. Soparkar that the burden to prove that whether in the facts and circumstances of the case, the Tribunal was right in holding that the arbitration award dated 24.3.2001 was binding between the parties to the award, lies on the appellant revenue.

88. It was submitted that Section 35 of the Arbitration and Conciliation Act, 1996 provides that an arbitral award shall be

final and binding on the parties and persons claiming under them respectively. It was therefore, submitted that if it is the case of the Revenue that the award is not a valid document, then the burden of proof lies on the Revenue to show and prove the same.

89. In support of his submission, reliance was placed on the decision of Hon'ble Apex Court in the case of **CIT versus Daulat Ram Rawat Mull**, reported in (1973) 87 ITR 349 wherein it was held that onus of proving what was apparent is not real is on the party who claims it to be so. It was submitted that the arbitrator has taken a view which is consistent with that of the assessee and further the award would not prevent the Revenue from making necessary inquiries and in absence of such inquiries, it is upon the Revenue to show that the award is wrong, illegal etc. It was therefore, submitted that

as no steps for inquiry have been taken by the Revenue and only a declaration of the Revenue exists that the award is not binding cannot be a sole ground for considering the award and its findings as not valid. It was therefore, submitted that additional substantial question no.4 is also required to be answered in favour of the assessee and against the Revenue.

90. It was further submitted the case of the Revenue on interpretation of the document would fail and the Tribunal has rightly come to the conclusion that the amount of Rs.50 Crore received by the assessee would be for sale consideration in consonance with the arbitration award passed which is binding between the parties and as the cost of intangible assets sold by the assessee was unascertainable, the entire amount would be tax free. It was therefore, submitted that

all the questions of law raised in these appeals are required to be answered in favour of the assessee and the appeal deserves to be dismissed.

91. It was further submitted that so far as Tax Appeal No. 1054/2007 is concerned, the Tribunal was justified in deleting the penalty levied under section 271(1)(c) of the Act in view of the findings recorded on merits as the very basis on which the penalty under section 271(1)(c) of the Act has been levied, would not exist in view of deletion of addition and therefore, the levy of penalty would not survive. It was therefore, submitted that the question of law may be answered in favour of the assessee and against the Revenue.

Analysis :

92. Considering the submissions made by the

learned advocates for both the sides, the question of law along with additional questions formulated vide order dated 02.09.2024 pertains to the issue whether the receipt of Rs.50 Crore by the respondent assessee on account of the sale price of the intangible assets sold as per the tripartite agreement dated 26.03.2001, would be liable to long term capital gain tax or income from other sources.

93. The Assessing Officer has primarily held the receipt of Rs. 50 Crore as taxable under the head 'income from other sources' on the basis that as per clause (7) of the Dissolution deed dated 07.02.1980, the assessee had transferred her ownership rights in intangible assets to SK Patel Family Trust for consideration of receipt of 2.5% of Net Profit of the firm which was using the said rights or Rs.10,000/- whichever is higher, on

perpetuity basis and on sale of the intangible assets by tripartite agreement dated 26.03.2001 on the basis of arbitration award, according to the Assessing Officer, it resulted into commutation and extinguishment of the right to receive the amount in perpetuity for consideration of sale of the intangible rights as per clause (7) of the Dissolution Deed dated 07.02.1980.

94. Therefore, it would be germane to refer to clause (7) of the Dissolution Deed which is reproduced here-in-above. However, for the sake of convenience it is again reproduced hereunder:

"7. The party of the second part has agreed to pay to the party of the first part in lieu of compensation for title ownership of the tenancy rights of the firm premises, goodwill trade name and trade marks at the rate of 2.5% to be calculated on net profits of the firm every year or Rs. 10,000/- (Rupees ten thousand) whichever is higher. This amount shall be payable during the

life time of the party of the first part as well as to the heirs of the first part after her demise. The ownership right for the goodwill, trade name and trade marks as well as those of tenancy rights belongs to and shall remain as the sole proprietor rights of the party of the second part. The said amount shall be paid within three months of the dosing of the account of the trust or a partnership firm, if any constituted by the trust in which the trust is a partner. The party of the Second part shall submit the calculation of amount payable to the party of the first part within three months from the end of the Accounting Year. It shall also submit the said statement duly certified by the Auditor if so desired by the party of the first part. The party of the first part shall give a notice in writing for this purpose to the party of the Second Part."

95. On perusal of the above clause which is heavily relied upon by the Revenue, the assessee had transferred her sole ownership of intangible assets consisting of tenancy rights of the firm's premises, goodwill, trade name and trademark at the rate of 2.5% to be calculated on Net Profit of the firm

every year or Rs.10,000/- whichever is higher was payable and such amount was payable during the life time of the assessee as well as the heirs after her demise. Clause (7) also stipulates that the ownership rights for the intangible assets belong to and shall remain as the sole proprietor right of the party of the second part i.e. S.K. Patel Family Trust and the beneficiaries of the said trust was the assessee only.

96. The Revenue, therefore, interpreted that the ownership right of the intangible assets have been transferred to SK Patel Family Trust for a consideration to be paid to the assessee by way of 2.5% of the Net Profit of the firm or Rs. 10,000/- whichever is higher in perpetuity.

97. The Revenue, in turn, interpreted the tripartite agreement dated 26.03.2001 as

extinguishment of such right to receive the amount in perpetuity by treating as Royalty or annuity and commutation thereof so as to tax the entire amount of Rs. 50 Crore under the head 'income from other sources'.

98. Alternatively, the Revenue has also considered the contention of the assessee to be the owner of the intangible assets and the amount of Rs.50 Crore received as consideration for transfer of such intangible assets as per the arbitration award to be taxed as long term capital gain taking the cost of acquisition as "Nil" by applying the amended provision of section 55(2)(a) of the Act and tax the entire amount of Rs.50 Crore as long term capital gains.

99. CIT(Appeals) however has upheld the assessment order by considering only the aspect of levy of tax on receipt of Rs. 50

Crore under the head 'income from other sources' and therefore, did not consider the alternative basis for levy of tax as long term capital gain.

100. It is not in dispute that the respondent assessee was the sole owner of the intangible assets after demise of the other partner Ramjibhai K. Patel in the year 1974 and has continued to remain the sole owner till the Dissolution of Deed dated 07.02.1980 was executed. As per clause (7) of the Dissolution Deed, it is apparent that the assessee has assigned the user rights in the intangible assets consisting of tenancy rights, goodwill, trade mark and trade name in favour of SK Patel Family Trust and not the ownership rights in absence of any sale consideration fixed or definite time period for payment of sale consideration if any in instalments.

101. The Hon'ble Apex Court in the case of **Devidas Vithaldas & Co.**(supra) in a converse situation as to whether the payment made by the firm in perpetuity for use of goodwill was in the nature of Royalty to be treated as revenue expenditure or capital has held as under:

"..As has been observed in a number of decisions, it is not always easy to distinguish whether an agreement is for the payment of price in stipulated instalments or for making annual payments in the nature of income, that there is no single test of universal application for a solution of the question, and that therefore the Court has to look not only into the document relating to the transaction, but also the surrounding circumstances to decide its true nature, the name which the parties give to it being of little consequence. This of course, does not mean that the legal character of the transaction which is the source of the receipt in question can be ignored and substituted by what the Taxing Authority considers the substance of the matter. The assessing authority is undoubtedly entitled and is, indeed, bound to determine the true legal relationship resulting from a

transaction. If the parties have chosen to conceal, by a device, the true legal relation, it is open to it to unravel such device and to ascertain the true nature of the relationship. If the transaction is embodied in a document, the liability to tax depends upon the meaning and content of the language used in it in accordance with the ordinary rules of construction."

102. The Hon'ble Apex Court after considering the similar facts in case of **Travancore Sugars and Chemicals Ltd.**(supra) has observed as under:

"A case of a similar nature is also to be found in Travancore Sugars and Chemicals Ltd. V/s. C. I. T., 62 ITR 566 . There the assessee-company was floated to take over the assets of three undertakings run by Travancore Government, a sugar manufacturing concern, a distillery and a tincture factory. The first was to be purchased for Rs. 3.25 lacs, the second on a joint valuation of parties, and the third on the book value of the assets. Clause (7) of the agreement provided that apart from the cash consideration the Government would be entitled to 20 per cent of the annual net profits subject to a maximum of Rs. 40,000 after providing for depreciation and

the remuneration payable to the company's treasurers and secretaries. The question was whether a sum of Rs. 42,480 paid in the previous year in question was a capital or a revenue expenditure. Reversing the High Court's judgment, which held it to be a capital disbursement, this Court held that it was a revenue expenditure and gave for its decision three reasons, namely (a) that the payment was for an indefinite period, (b) that it was related to annual profits which flowed from the trading activities and had no relation to the capital value of the assets, and (c) that the payment was not related to, nor tied up in any way to any fixed sum agreed between the parties as part of the purchase price of the three undertakings. These were also the three considerations applied by Lord Greene. M. R. in Commissioners of Inland Revenue V/s. 36/39 Holdings Ltd., (1944) 25 Tax Cas 173.

The question whether the disbursements in question partake the character of one or the other mainly depends upon the construction of the document of January 2, 1951 and the true nature of the transaction embodied therein. Cl. (2) of the document, no doubt, uses expressions, such as "agreed to sell" and "the purchase price of the goodwill". These expressions, however, are as repeatedly stated in a number of cases, not determinative of the exact nature of the transaction or the relationship

between the parties arising therefrom. Though clause (2) uses expressions which on a superficial view might appear to indicate a sale of the goodwill, neither that nor any other clause mentions what its purchase price was. The documents is not one of those where the price is expressed at a lump sum, and is made payable by specific instalments within a specified period. In some cases, it may even be possible that parties might agree to a lump sum as the price and yet, as in Ramsay's case, (1936) 20 Tax Cas 80 agree that such sum should be payable out of the profits at a certain percentage where the purchaser is not in a position to pay the price at a time or even by instalments, except at a particular rate from out of the profits of the business taken over by him. But in such a case the payment, even if out of the profits, is tied up with a lump sum, that is, with the purchase price agreed to between the parties and which assumes the character of a fixed debt, cl. (2) clearly does not fix such a price nor mentions a lump sum in respect of which annual payments as provided therein are to be made.

The clause, no doubt, prescribes the mode and the quantum of the payment, that is, a share of five annas four pies in the rupee in the net profits of the business, payable during the lifetime of Padamsi and after him during the lifetime of his wife Bai Premlata if she were to survive him, and then to their son during his

lifetime. Two things, however, may at once be observed, firstly, that the duration of payment is indefinite, unlike Ramsay's case, (1936) 20 Tax Cas 80 and secondly, the amount is indefinite, depending as it does upon the rise and fall in the profits of the business. Obviously, the payment is not related to any lump sum fixed as the purchase price. On the contrary, it is directly related to and dependent upon whether at all and what profits are made. Further, the document is totally silent as to what is to happen to the goodwill if Amratlal Parikh or his partners, if he were to enter into a partnership, cease to carry on the business in the name of Devidas Vithaldas & Co. or at all. It is silent as to whether the goodwill would remain with him and/or his partners or whether it would revert to Padamsi or his heirs. The transaction thus contains all the grounds given in the case of Travancore Sugars and Chemicals Ltd., 62 ITR 566 upon which this Court concluded there that such payments could not be treated as capital disbursements, namely, an indefinite period, absence of any expressed lump sum, and payment relating to profits and not being tied up with any fixed sum agreed to as the purchase price of a capital asset."

103. Applying the above test to the facts of the case, to consider the transaction to be

of sale, following criteria is required to be satisfied:

(i) The transaction must refer to a specific lump sum sale price paid or payable in future in one go or in installments or in cash or in kind.

(ii) The duration of the period for which the assets are to be used, which are subject matter of the transactions is definite.

(iii) The quantum of any payment, if any, payable in consequence upon such transaction, monthly or any other periodically, is also definite.

(iv) The Transaction must speak about the fate of the assets in case

the so-called buyer ceases to carry on the business.

104. Applying the above criteria to the facts of the case, it is not in dispute that there is no specified lump-sum sale price received or receivable in future or in installment or in cash or in kind inasmuch as the duration of the period for which the assets which are the subject matter of transaction i.e. intangible assets are to be used by the so-called buyer is indefinite, even the amount payable to the owner of the assets in consequence upon such transaction is also indefinite and the entire clause (7) of the Dissolution Deed dated 07.02.1980 is silent as to what would happen to the assets in case of so-called buyer was to cease to carry on the business. Therefore, the Tribunal was justified in holding that transaction cannot be considered as a sale transaction but the

same was rightly held to be an assignment of user rights by the assessee in favour of the trust.

105. The contention raised on behalf of the Revenue that in facts of the case, there was sale of intangible assets by the assessee in the year 1980 and what was received in the year 2001 was extinguishment of the right to receive amount in perpetuity by the assessee, is also not tenable inasmuch as the assessee received Rs. 50 Crore in consonance with the arbitration award of Hon'ble Mr. Justice B.J. Divan, Retired Chief Justice of High Court of Gujarat being 10% of the sale consideration towards the ownership rights as the intangible assets were sold for Rs. 500 Crore by M/s. Nirma Chemical Works Private Limited to Nirma Limited by virtue of tripartite agreement dated 26.03.2001.

106. Reliance placed on behalf of the assessee on the decision in case of **P. K. Banerjee**(supra) and decision in case of **Her Highness Maharani Gayatri Devi of Jaipur** (supra) would also be applicable as the amount received by the assessee being 2.5% of the Net Profit of the firm who used the intangible asset or Rs.10,000/- whichever is higher would not constitute "annuity" as the amount of annuity would be a fixed or predetermined amount and it would not be liable to any variation depending upon or any ground relating to the general income to the fund or estate which is charged for such payment.

107. In case of **Arundhati Balkrishnan** (supra), the Hon'ble Apex Court has held that under Section 173 of the Indian Succession Act, an 'annuity' is a right to receive a specified sum and not a aliquot share in the

income arising from any fund or property. Ordinarily an annuity is a money payment of a fixed sum annually made and is a charge personally on the grantor. In facts of the case, the assessee was not receiving any fixed sum which can be termed as 'annuity' because as per the terms of clause (7) of the Dissolution Deed, the assessee was to receive variable amount of 2.5% of the Net Profit or Rs.10,000/- whichever is higher and as per the details available on record, the assessee had received 2.5% of the Net Profit which was always higher than Rs.10,000/- for the year from 1980 to 2001 which was offered to tax by the assessee as the income from other sources and the payment was claimed by the firm as revenue expenditure. Therefore, considering the findings of fact recorded by the Tribunal which are reproduced here-in-above, would lead to the only conclusion that the assessee received Rs. 50 Crore as per the agreement

dated 26.03.2001 as owner of the intangible asset.

108. The Tribunal has therefore rightly formed an opinion that the amount received by the assessee and having been taxed by the Revenue was not an 'annuity' but was license fees in perpetuity and receipt of Rs. 50 Crore was not on account of Royalty but in fact, it was on account of sale of intangible assets i.e. Trademark and Trade Brands and therefore, the same was not taxable under the head 'income from other sources'.

109. Therefore, the question would arise that whether such receipts would be liable to tax as 'long term capital gain' or not.

110. It is not in dispute that amount of Rs. 50 Crore received by the assessee for sale of intangible assets namely, Trademark and Trade

Brand etc. admittedly, was capital receipt for sale of such capital asset and therefore, the assessee was liable to tax on such receipt as income as 'long term capital gains' subject to the provisions of the Act.

111. Admittedly, the sale was affected on 26.03.2001 as per the arbitration award dated 24.03.2001. It is also not in dispute that the Revenue had no jurisdiction to doubt the genuineness of the award in absence of any evidence to doubt the basis of attribution of motives.

112. Considering the provisions of the Arbitration and Conciliation Act, 1996 and as per the settled legal position with respect to the genuineness of the binding award of the arbitrator, it is only a party to the arbitration who has the right to object or challenge the validity or genuineness of such

award before a Court on the limited ground of *mala fide* whereas so far as the third party like the appellant Revenue has no *locus standi* to dispute the genuineness of an award of the arbitrator, more particularly, when the award was given by Hon'ble Mr. Justice B.J. Divan, Retired Chief Justice of High Court of Gujarat who had no interest in any business activity or of the assessee or any other party and only being a member of the charitable trust run by M/s. Nirma Chemical Works Private Limited cannot be interpreted so as to attribute any motive by the Revenue without there being any evidence on record. It is true that the Revenue is not bound by the arbitration award being a third party, however, without any investigation or verification of the genuineness of the same, the Revenue could not have raised any doubt about such award and such an effort on behalf of the Revenue is rightly deprecated by the

Tribunal. In absence of any evidence to doubt the genuineness of the award which was binding on the parties to the arbitration and as such, the assessee was rightly held to be owner of the intangible assets namely Trademark and Trade Brand and assessee's interest in the said Trademark and Trade Brand was only to the extent of 2.5% of the profits to be made by M/s. Nirma Chemical Works Private Limited, subject to 10% of the consideration received on assignment of Trademark and Trade Brand as per the arbitration award.

113. Therefore, the Tribunal has considered the issue as to whether the receipt of Rs.50 Crore is liable to be taxed under the head capital gain as long term capital gain or not and for that the Tribunal has analysed the provisions of section 49 read with section 55(2)(a) of the Act to determine the cost of

acquisition of the assets.

114. It is the contention of the Revenue that the assessee was the sole owner of the intangible assets and the assessee has also shown the value of the assets in the wealth tax returns, however, on consideration of the provisions of section 49 read with section 55(2)(a) of the Act, the Tribunal has arrived at findings of fact that the assets being intangible in the nature and no date of acquisition is available as such assets are self-generated assets nor any expenditure has been incurred either by the trust or the firm in the later years for acquisition of the same and therefore, the Tribunal has rightly considered the assets as self-generated assets whose cost is not ascertainable.

115. The Tribunal has recorded the findings of fact that cost of intangible assets

namely, tenancy rights, goodwill, Trademark and Trade Brand in the hands of the firm was not ascertainable and that being the legal and factual position, cost of acquisition in the hands of Ramjibhai K. Patel to the extent of his share as well as in the hands of assessee by virtue of provisions of section 49(1)(b) of the Act was also not ascertainable as they were previous owner of the intangible assets. In view of findings of the Tribunal that the assessee was joint owner as well and on acquisition of ownership of the intangible asset later on as sole owner, such assets would remain as self-generated assets having no cost of acquisition. Therefore, the contention raised on behalf of the Revenue that cost of such assets would have to be determined on dissolution of the firm where the assessee was joint owner of such assets, however on perusal of the record, it is not in dispute

that the assessee became sole owner on demise of Shri Ramjibhai K. Patel in the year 1974 and at that point of time also the cost was unascertainable as there was no cost of self-generated asset which was jointly owned by assessee with late Shri Ramjibhai K. Patel.

116. The contention raised on behalf of the revenue that the sale of Trademark and Trade Brand by the agreement dated 26.03.2001 was to be considered as part and parcel of the 'goodwill' as a result of amendment in sections 52 and 55(2)(a) as the cost of acquisition of the intangible assets in hands of assessee cannot be considered as Nil rate which was brought on statute to overcome the decision of Hon'ble Supreme Court in case of **B.C. Srinivas Shetty** (surpa) wherein Hon'ble Apex Court after closely analysing the provisions of the then existing provisions of the Act for computation of capital gain came

to the conclusion that since the cost of acquisition of goodwill of a business was not possible of being determined because of gradual accretion with no definite date when it can be said to have come into existence, and therefore, it cannot be subjected to tax under the heading "Income from capital gains". In order to overcome the decision in case of **B.C. Srinivas Shetty** (surpa), the amendment in section 55(2)(a) of the Act was made providing that cost of acquisition in case of self-generated goodwill will be taken to be Nil. However, in facts of the case, goodwill is not sold by the agreement dated 26.03.2001 but only the intangible assets comprising of Trademark, tenancy rights and Trade Brand are sold for consideration of Rs. 500 Crore of which 10% is paid to the assessee as per the arbitration award. The Tribunal has therefore, rightly come to the conclusion that goodwill being not part of

the assets which are sold, amended provision of section 55(2)(a) which has been subsequently also amended by the Finance Act, 2001 with effect from 01.04.2002 whereby the words 'trademark' and 'brand name' 'associated business' are inserted also would not be applicable retrospectively and therefore, the amount received by the assessee as per the arbitration award on sale of intangible assets comprising of Trademark and Trade Brand would not be valued at 'Nil' rate so as to tax the entire receipt under the head 'income from capital gains'.

117. The Tribunal, therefore, has rightly come to the conclusion that none of the amendments brought out in section 55(2)(a) by Finance Act, 1987 1994 and 2001 was clarificatory or retrospective in nature and, therefore, the sale proceeds of Trademarks and Trade Brands received by the assessee in

March, 2001 cannot be made exigible to capital gain tax because of unascertainable cost of acquisition.

118. The Tribunal has also considered the contention raised on behalf of the Revenue that entire transaction was colourable exercise and colourable device to bring the applicability of decision in case of **McDowell & Co.**(supra), however transaction in question was held to be not dubious or colourable device in absence of any specific instance brought on record to prove existence of colourable device or dubious method or subterfuge as tried to be contended on behalf of the Revenue. The Tribunal after considering the facts and the amendments made in section 55(2)(a) of the Act read with section 49(1)(iii)(b) of the Act has rightly held that the assessee had acquired the ownership right in intangible assets namely,

tenancy rights, goodwill, trademarks and trade names on distribution of assets on dissolution of firm, and cost of acquisition in the hands of the assessee is unascertainable and hence there is no question of taking the cost of acquisition of these assets as Nil or at Rs. 4,20,000/- as disclosed by the assessee in the wealth tax return.

119. In view of the foregoing reasons, we are of the opinion that the Tribunal was right in recording the findings of fact that the yearly amount received by the assessee was not royalty but was license fee and receipt of Rs. 50 Crore was sale price and not Royalty or license fee in perpetuity and the same was not taxable as 'income from other sources' but the same was liable to be taxed under the head "income from capital gains" and as the cost of acquisition was

unascertainable, same cannot be taken as 'Nil' by applying the provisions of section 55(2)(a)(i) or section 55(2)(b) of the Act as the sale of intangible assets was only for Trade Mark and Trade name and not sale of tenancy rights or goodwill as per agreement dated 26.03.2001 and therefore, the question as to who is the owner of those assets is of no relevance.

120. The Tribunal has therefore rightly summed up the issue raised by the Revenue in para no.56 which is reproduced again here—in-after:

"56. In the last, we sum up our findings/decision as per grounds raised by the assessee.

(i) So far as Ground No. 1 is concerned, the same being of general in nature requires no independent adjudication, rather is covered by our decision with respect to issue raised in ground No. 2.

(ii) So far as ground No. 2 is concerned, our decision, on the basis of foregoing discussion/opinion is as under:-

(a) The assessee had not sold ownership rights in intangible assets; namely, tenancy rights, goodwill, trade-marks and trade-names (brands), as per clause-7 of Dissolution Deed dated 7/2/1980 and the assessee had assigned only "user rights to the Trust as licensee who went on to use them the capacity of licensee.

(b) The Receipt in question was also not taxable as "income from other sources" also.

(c) The assessee having acquired these assets on Distribution of Assets on Dissolution of Firm, the cost of acquisition of these intangible assets in the hands of assessee on the date of acquisition was unascertainable.

(d) The cost of improvement of these intangible assets was also unascertainable.

(e) The yearly payment received by the assessee in consequence upon the transaction involved in clause-7 of Dissolution Deed dated 07-02-1980 was not royalty, rather, was on Revenue account.

(f) The receipt of Rs. 50 crores was on account of sale price of assessee's ownership rights in intangible assets; trade-marks and Trade-names (Brands) only.

(g) Trade-marks and Trade-names; i.e. the Brands, are not part & parcel of the goodwill and, therefore, transaction involved in agreement dated 21-03-2001 was not sale goodwill.

(h) None of the Amendments in Section 55(2)(a) of the Act brought out by Finance Act, 1987 1994 & 2001 which were applicable for Asst. Years 1989-90, 1995-96 & 2002-03 respectively and subsequent Assessment Years, was clarificatory or retrospective and, therefore, not applicable to the present case.

(i) The Receipt of Rs. 50 crores being on account of sale price of long-term intangible capital assets could be taxed only under the Head "Long Capital Gain" but since the cost of acquisition of these assets in the hands of assessee was unascertainable, the capital receipt in question was not taxable as "Long Term Capital Gain".

(ii) So far as assessee's

objection against charging of interest u/s. 234-B & 234-C of the Act is concerned, the same being consequential, we direct the Assessing Officer to give consequential relief, if any.

(iv) As regards, the ground No. 4 whereby the assessee has objected to the initiation of penalty proceedings u/s. 271(1)(c) of the Act, we are of the opinion that this issue cannot be agitated in appeal against the assessment order and is pre-mature. This ground is, therefore, rejected.

(v) So far as issue involved in Ground No. 5 is concerned, the same being of general nature which do not require any independent adjudication."

121. We are in complete agreement with the findings recorded by the Tribunal and therefore, the questions of law framed for consideration are answered in favour of the assessee and against the Revenue holding that the Tribunal was right in holding that the receipt of Rs. 50 Crore being the sale price

of intangible assets could be taxed only under the head "long term capital gain" and since the cost of acquisition of these assets in the hands of the assessee was unascertainable, the receipt in question was not taxable.

122. So far as the additional questions are concerned, in view of answer to the question of law which was framed at the time of admission of appeal in favour of the assessee, additional question nos. 1 and 2 are also answered in favour of the assessee as the Tribunal was right in holding that the nature and mode of acquisition of intangible assets were of the ownership of the assessee, considering the clauses of the Dissolution Deed executed on 7.2.1980 and the assessee had not sold the ownership rights but had only assigned the user rights, of the intangible assets as per clause (7) of the

Dissolution Deed executed on 7.2.1980.

123. The additional question nos.3 and 4 are also answered in favour of the assessee as the receipt of Rs.50 Crore cannot be considered as receipt in lieu of Royalty or on account of fee receivable in perpetuity and was therefore, rightly not taxed as income from other sources. The Tribunal was also justified in holding that the arbitration award dated 24.3.2001 was binding between the parties to the award. Therefore, the additional questions are also answered in favour of the assessee and against the Revenue.

124. Therefore, Tax Appeal No.1439/2006 is accordingly dismissed.

125. So far as Tax Appeal No. 1054/2007 is concerned, for question of levy of penalty

under section 271(1)(c) of the Act, it is pertinent to note that both the CIT(Appeals) and the Tribunal have recorded that when the quantum appeal of the assessee is allowed by deleting the addition of Rs. 50 Crore by holding that such receipt of Rs. 50 Crore was not liable to tax in view of the fact that cost of acquisition was unascertainable, the very basis of the penalty is not in existence and therefore, the same is rightly deleted by the Tribunal in view of deletion of addition in accordance with the order of the Tribunal in assessee's own case in quantum proceedings. Moreover, the Tax Appeal being Tax Appeal No. 1439 of 2006 arising from the order of the Tribunal deleting addition is also dismissed by this judgment and order, We therefore, answer the question in favour of the assessee and against the Revenue and hold that the penalty under section 271(1)(c) of the Act would not be leviable in view of

deletion of addition.

126. Tax Appeal No.1054/2007 is accordingly
dismissed.

(BHARGAV D. KARIA, J)

(PRANAV TRIVEDI,J)

RAGHUNATH R NAIR