The Partition of HUF should be recognized as per the Income Tax Act and not as per the Hindu Law. Section 6 of the Hindu Succession Act would govern the rights of the parties but insofar as income-tax law is concerned, the matter has to be governed by section 171(1) of the Income Tax Act, 1961.The Hindu Law does not require that the property in every case be partitioned by metes and bound or physically into different portions to complete a partition. But the Income Tax Law introduced certain additional conditions of its own to give effect to the partition under section 171. Thus a transaction may be treated as severance of status under Hindu Law but not a partition under 1961 Act as physical division of property is necessary under 1961 Act.

What is the Partition

Partition is the severance of the status of Joint Hindu Family, known as Hindu Undivided Family under tax laws. Under Hindu Law once the status of Hindu Family is put to an end, there is notional division of properties among the members and the joint ownership of property comes to an end. However, for an effective partition, it is not necessary to divide the properties in metes and bounds. But under tax laws for an effective partition division by metes and bounds is necessary.

Partition means-

Case	Partition
Where the property admits of a physical division	a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or
Where the property does not admit of a physical division	then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition.

An HUF can be partitioned both as regards to persons and as regards to property. This partition can be of two types:

[1] Partial partition.

[2] Total or complete partition;

The Partition of HUF can be categorized as under:-

[1] Partial Partition

Partition could be partial also. It may be partial *vis-a-vis* members, where some of the members go out on partition and other members continue to be the members of the family. It may be partial *vis-a-vis* properties where, some of the properties are divided among the members other properties continue to be HUF properties. Partial partition may be partial *vis-a-vis* properties and members both.

Partial partition is not recognized under the Act

Tax Laws do not recognize partial partition of property or/and persons after 30.03.1978 on insertion of sub-section (9) to Section 171 of the Income Tax Act. This restriction was put to avoid creation of multiple HUFs which was a misuse. For instance, say one coparcener is getting certain property in the HUF via setting apart of that asset of HUF on the condition that no further

claim in properties will be made by him, is nothing but a partial partition and not a family arrangement and this situation is not recognized in the Act.

Tax implication of Partial Partition of HUF

Section 171, as originally enacted, applied to total as well as partial partition. However, sub-section (9) inserted by Finance (No 2) Act, 1980 recognises only complete partition. A Partial partition took place after 31.12.1978 is not recognized under the Income Tax Act, 1961 (Section 179(9). Thus partial partition effected after this date is not given effect to by the Assessing Officer even though such partition may be legal as per Hindu Law. Hence, for the purpose of income-tax assessment, the HUF shall be deemed to continue notwithstanding the partial partition and the income from all properties shall continue to be assessed in the hands of erstwhile HUF. Therefore even after the Partial partition, the income of the HUF shall be liable to be assessed under the Income-tax Act as if no partition had taken place.

Treatment in case of partial partition took place after 31.12.1978 [Section 171(9)]

Sub-section (9) of section 171 is an exception to sub-section (1) of section 171. For the applicability of sub-section (9) of section 171, two pre-requisites are essential. Firstly, the partial partition should have taken place after 31.12.1978 and secondly, such partial partition must have taken place in a HUF which hitherto before was assessed as a HUF.

Setting apart of certain assets of HUF in favour of certain coparceners on a condition that no further claim in properties will be made by them, is a partition under Income Tax Act

Setting apart of certain assets of HUF in favor of certain coparceners on the condition that no further claim in properties will be made by them, is nothing but a partial partition and not a family arrangement and not recognized in view of section 171(9) of the Act.

Consequences of Partial Partition

Notwithstanding anything contained in the foregoing provisions of this section, where a partial partition has taken place among the members of an HUF after 31.12.1978, then—

(i) no claim that such partial partition has taken place shall be inquired into under section 171(2);

(ii) no finding regarding partition shall be recorded under section 171(3);

(iii) such family shall continue to be liable to be assessed under this Act as if no such partial partition had taken place;

(iv) each member or group of members of such family immediately before such partial partition and the family shall be jointly and severally liable for any tax, penalty, interest, fine or other sum payable under this Act by the family.

NOTE

Liability of any member or group of members aforesaid shall be computed according to the portion of the joint family property allotted to him or it at such partial partition.

[2] Total or Complete Partition

Assets of HUF are physically divided. In total partition all the members cease to be members of the HUF and all the properties cease to the properties belonging to the said HUF.

Tax Implication of Full Partition of HUF

After the Partition, the assessment of HUF shall be made as per the provisions of Section 171 of the Income Tax Act and order to be passed by the Assessing Officer.

Person entitled to share on partition

Following persons can claim share on partition:

Case	*Persons who can claim share on partition*
Any	Coparceners
Any	A child in the womb of his mother at the time of partition
Partition between sons after the death of father	Mother - gets an equal share to that of son
Wife - gets an equal share to that of a son (apart from that of husband)	Partition between father and sons

NOTE

A child in the womb of his mother is entitled to share of HUF property, on partition.

How a partition can be effected and what is its effect

To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family. What form such, intimation, indication or representation of such interest should take would depend upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons effected by such declaration. A review of the decisions shows that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, indication or intimation must be to members of the joint family likely to be affected by such a declaration.

Modes of Partition

A partition can be made by a definite, unambiguous declaration of intention by any member to separate himself from the family. If this is done it would amount to division of status whatever mode may be used. Partition may be effected:

(a) By institution of suit;
(b) By submitting the dispute as to division of the properties to arbitration;
(c) By agreement to divide the property;
(d) By conduct or by a demand for a share in the properties;
(e) By metes and bounds.

Claim of partition by any coparcener

It is mandatory that any member of the HUF must make a claim of partition at the time of making assessment under section 143/144 of the Income Tax Act, 1961

Distribution of assets at the time of partition of HUF

- On a full partition of the assets of a Hindu Undivided Family (HUF), all the coparceners get their shares in the property.

- After the amendment in 2005, of Section 6 of Hindu Succession Act, 1956, daughters are also made coparceners and their rights are equal to those of the sons and therefore sons and daughters get the same share in the HUF property on partition.
- It is not only all the living members but also the child in the womb which is born subsequently entitled to get share in the HUF property.
- When partition takes place between father and his child, the mother also gets an equal share that of a son. Likewise, on partition of the HUF property after death of the father, mother gets a shares equal to the share of a son/daughter.
- The share of each branch of the family will be per stripe and then it will be distributed between the coparceners of the branch per capital.

For Example :
Suppose Mr. A has an HUF having his wife W and sons B and C as well a married daughter D. Both the sons are married and have two children each. On a partition of the assets of the HUF each one of A, W, B, C and D will get 1/5 share in the HUF assets.
The shares of B and C in the HUF assets will be further shared amongst themselves and their children equally. So each one will get 1/15 share of the HUF assets (1/3 of 1/5 share allotted on the partition).

Rights to be claimed by the coparceners
There is no provision under the Income Tax Act, 1961 regarding the equal or unequal right in share during the partition of HUF. The right of the coparceners in the share during division is governed by Section 6 of the Hindu Succession Act, 1956. Partition can only be claimed by a coparcener. But, when there is a partition of HUF, the following persons are entitled to a share in the assets of the HUF:
(i) All coparceners.
(ii) Mother is entitled to a share equal to the share of a son in case of death of the father.
(iii) Wife gets a share equal to that of a son if a partition takes place between her husband and his sons. She enjoys this share separately even from her husband.
(iv) A son in the womb of the mother at the time of the partition.

Right of minor to claim partition
A minor can claim partition through his guardian.—*[Apoorva Shantilal Shah v. CIT (1983) 141 ITR 558 (SC)]*

Physical division by metes and bounds is necessary
Hindu Law does not require division of joint family property physically or by metes and bounds. However, partition as defined under *Explanation* to Section 171 of the Act means—
(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or
(ii) where the property does not admit of a physical division, then such division as the property admits of but a mere severance of status shall not be deemed to be a partition).

Partition of HUF property can be done either through family settlement or through a partition deed

Partition of HUF property can be done either through family settlement or through a partition deed. Family settlement does not attract stamp duty and is not required to be registered, but partition deed attracts stamp duty and must be registered. To avoid expenses inherent with "Partition deed" family settlement is preferred, but must be ensured that:-

- The family settlement is bona fide, for fair and equitable division of property amongst the members and to resolve family disputes.
- It must be voluntary and without any force, threat, coercion, misrepresentation and fraud.
- Fair and equitable family settlement, though unstamped and unregistered, is final and binding on the family members.

Must have assessed as HUF once

For recognition of a HUF to be partitioned under Section 171 of the Income Tax Act, 1961 it is necessary that the HUF must have once assessed as a HUF. Otherwise, section 171 shall be inapplicable.

Inquiry by the Assessing Officer regarding the partition of HUF

Where, at the time of making an assessment u/s 143 or 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, has taken place among the members of such family, the Assessing Officer shall make an inquiry thereinto after giving notice of the inquiry to all the members of the family.

Satisfaction of Assessing Officer that the total partition has taken place

Where the Assessing Officer is satisfied upon the findings that the total partition of HUF has taken place during the previous year then he shall proceed for the computation of income.

There should be actual partition and not fictional to avoid tax

Partition of a HUF has to be done in such a way that it gives a legal finding to the Assessing Officer that a complete partition has actually been taken place since then only he is authorized to compute the income of the HUF as if the partition has taken in the manner as described under section 171.

Partition of HUF should be recognized as per the Income Tax Act and not as per the Hindu Law

Section 6 of the Hindu Succession Act would govern the rights of the parties but insofar as income-tax law is concerned, the matter has to be governed by section 171(1) of the Income Tax Act, 1961.

Requirement of registered partition

It is not necessary to effect partition by a written partition deed. It can be effected orally and be acted upon. Even a partition of an immovable property can be by an oral agreement. In the case of *Popatlal Devram v. CIT (1970) 77 ITR 1013 (Orissa)* wherein it was held by the Hon'ble orrissa High Court that Law is well settled that a partition of the joint family properties can be effected by an oral agreement irrespective of the value of the property.

Section 17 of the Registration Act, 1908 talks only when immovable property is transferred. Therefore, family settlement without registration is okay if no immovable property is involved. However, in respect of transfer of immovable property separate registered documents only for immovable property can be made.

Concept of notional partition is non-existent under the Income-tax Act

The concept of notional partition is non-existent under the Income-tax Act. The Income-tax Act recognizes only an actual partition and not the notional partition.

Income-tax Act recognizes only an actual partition and not the notional partition

When a Hindu male dies on or after 17.06.1956 having at the time of his death an interest in coparcenary property, leaving behind a female heir of the class one category, then his interest in the coparcenary property shall devolve by succession and not by survivorship. The interest of the deceased will be carved out over devolution, though there is no actual partition. Such an act is considered as a notional partition under the Hindu Law. The concept of notional partition is non-existent under the Income-tax Act. The Income-tax Act recognizes only an actual partition and not the notional partition.

What is notional partition

When a Hindu male dies on or after 17.06.1956 having at the time of his death an interest in coparcenary property, leaving behind a female heir of the class one category, then his interest in the coparcenary property shall devolve by succession and not by survivorship. The interest of the deceased will be carved out over devolution, though there is no actual partition. Such an act is considered as a notional partition under the Hindu Law.

Physical division of property by way of book entries not permissible

Where a property is capable of physical division, the partition must be made by physical division only. If the property of the HUF does not admit of physical division, the property must be so physically divided as much permits. For example, it is not expected that the utility of the property is lost by compelling a physical partition and in such a case, the property may be divided physically to the extent possible.

Entries showing division of the property in books of account may be good evidence of a partition more particularly in cases where the property may not be capable of physical division.

Therefore, where credit balances in capital account in books of firm in which assessee HUF was a partner is partitioned, it was held that there was a valid partition.—*[Motilal Shyam Sunder v. CIT (1972) 849 ITR 186(All.)]*

An asset which is not capable of physical division can be partitioned by making entries in books.

It was held that an asset which is not capable of physical division can be partitioned by making entries in books. Here, entries relating to partition were passed in books of HUF and not the partnership firm where HUF was a partner and that would be satisfactory evidence of the partition of such an asset. The partition was held valid.—*[CIT v. K. G. Ramakrishnier (1963) 49 ITR 608 (Mad)]*

Allotment of share on partition

On a partition between the members of a joint family, the shares are allotted as under:—

S. No.	*Particulars*	*Allotment of share on partition*
(i)	On a partition in an HUF which includes father, mother and sons,	mother has no right to claim partition but when a partition is actually effected she takes a share equal to the sons.
(ii)	On a partition between a father and his sons where mother is not living,	each son takes a share equal to that of the father. Suppose there are four sons, each son will take 1/5 share of the property.
(iii)	If joint family consists of brothers	they take equal shares on a partition.
(iv)	Each branch takes per stripe as regards every other branch	but members of each branch take per capita as regards each other.
(v)	The daughter whether married or unmarried	With effect from 09.09.2005, daughter whether married or unmarried shall also be entitled to equal share on partition as she has also been treated as coparcener like son.

Partition of property under Hindu law and under Income tax Act are different on two accounts:-

(a) For partition under Hindu law division of the property by metes and bounds is not necessary, but for partition recognized under Income tax Act, division of property by metes and bounds is necessary.

(b) Partial partition of HUF property, either property specific or member specific is valid under Hindu law, but under Income tax Act, 1961 it is not recognized.

Difference between partition under the Hindu Law and that under the Income-tax Act

There is a difference between a partition under Hindu Law and a partition recognised under the Income-tax Act. Though the concept of partition is the same under Hindu law and tax laws, in two respects, recognition of partition under tax laws differs from that under Hindu Law.

S. No.	*Partition under Hindu Law*	*Partition under section 171 of Income Tax Act, 1961*
1.	Partition is a process by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of sharers had an antecedent title and therefore no conveyance is required. *CED v. Kantilal Trikamlal (1976) 105 ITR 92 (SC).*	Section 171 raises a legal fiction that an HUF, once assessed shall be deemed to continue unless a finding of partition has been given under this section. Consequently, unless a finding is recorded under section 171 that a partition has taken place, the income from the properties would be included in the total income of the family by virtue of sub-section (1) of section 171. *(Kaloomal Tapeshwari Prasad v. CIT (1982) 133 ITR 690 (SC))*

2.	FOR RECOGNITION OF PARTITION UNDER HINDU LAW DIVISION OF PROPERTIES BY METES AND BOUNDS NOT IS NECESSARY The Hindu Law does not require that the property in every case be partitioned by metes and bounds or physically into different portions to complete a partition. In other words, for recognition of partition under Hindu Law division of properties by metes and bounds is not necessary. Once shares of each share holder are defined, the partition is complete. It is not necessary that it should be by metes and bounds.	HOWEVER, FOR RECOGNITION OF PARTITION UNDER TAX LAWS, DIVISION OF PROPERTIES BY METES AND BOUNDS IS NECESSARY The Income Tax Law introduced certain additional conditions of its own to give effect to the partition under section 171. For recognition of partition under tax laws, division of properties by metes and bounds is necessary. It was held that where the assets were not divided by metes and bounds, the partition could not be recognised for the purposes of the Income-tax Act. *[CIT v. Venugopal Inani (1999) 239 ITR 514(SC)]*
3.	Even a single coparcener can separate himself from rest of the family.	It is to be noted that section 171 applies to those HUFs which have been assessed under the Act. So, in my opinion, partial partition can still take place where HUF has not been assessed without invoking this section.
4.	UNDER HINDU LAW PARTIAL PARTITION IS RECOGNISED Partition under Hindu Law, can be total or partial. In total partition all the members cease to be members of the HUF and all the properties cease to be properties belonging to the said HUF. For example, joint family business could be divided while retaining other properties as joint property.	However, in view of provisions of Section 171(9) of Income-tax Act, 1961, partial partitions will not be recognised for tax purposes. Section 171, as applicable from assessment year 1980-81, recognises only complete partition. Explanation to this section recognizes only partition by metes and bounds i.e. the physical division of property is condition precedent. So, there is a departure from Hindu law. Even a decree of court would not be sufficient or binding on Assessing Officer unless physical division takes place. *ITO v. N K Sarada Thamptty (1991) 187 ITR 696 (SC); Narender Modi v. CIT (1976) 105 ITR 109 (SC).*

5.	Where there is partition between different branches, the respective branches continue to remain in joint	Partition can be effected on demand of coparceners or *suo moto* by the father in his superior power even without the consent of sons. Such right can also be exercised even where sons are minors. *Apoorva Shantilal Shah (HUF) Seth Gopaldas (HUF) v. CIT (1983) 141 ITR 558 (SC).*
6.	Since partition can be effected between coparceners only, a family with sole coparcener is not amenable to partition. V. V. *S. Natarajan v. CIT 111 ITR 539 (Mad); CIT v. Satpal Bansal 162 ITR 582 (P&H)(FB)*	In case of CIT v. Maharani Rajlaxmi Devi 224 *ITR 582 SC, the court has held that recording* of partition under section 171 is necessary even in case is falling under section 6 of the Hindu Succession Act. It observed: "it must be held that though for the purpose of HUF, section 6 of the Hindu Succession Act, would govern the rights of the parties but insofar as income-tax law is concerned, the matter has to be governed by section 171(1)."
7.		It is mandatory that assessee must make a claim of partition at the time of making assessment under section 143/144. If such claim is made, the Assessing Officer is required to make an enquiry into such claim after giving notice to all the members. After making enquiry, Assessing Officer is required to record a finding accepting/ rejecting the claim.

As per *Kalwa Devadattam v. UOI,* even where there is complete partition by metes and bounds the family will be deemed to continue (i) if no claim of partition is made by the members at the time of the assessment; or (ii) if a claim is made but no finding is given by the officer recording the partition.—*[Kalwa Devadattam v. UOI (1963) 49 ITR 165 (SC)]*

Applicability of Capital gain taxation

In a judgement by Karnataka High Court in the case of *CIT v. R. Nagaraja Rao,* wherein it was held that the word 'transfer' does not include partition or family settlement as defined under the Act. It is well-settled that a partition is not a transfer, What is recorded in a family settlement is nothing but a partition. Every member has an anterior title to the property which is the subject-matter of a transaction, that is, partition or a family arrangement. So there is a adjustment of shares, crystallization of the respective rights in the family properties and therefore it cannot be construed as a transfer in the eye of law. When there is no transfer there is no capital gain and consequently no tax on capital gain is liability to be paid.

In course of appellate proceedings, Tribunal recorded a finding that there was no transfer of assets and amount received by assessee was a part of family arrangement which did not give rise to liability of capital gain tax, said finding being a finding of fact, no substantial question of law arose therefrom

The questions of law raised by the Revenue in this appeal reads thus:

(i) Whether the consideration received under the family settlement on transfer of right, title and interest in the family property is a transfer under Section 2(47) of the I.T. Act and liable to be taxed as Capital Gain under Section 45 of Income Tax Act?

(ii) Whether on the facts and circumstances of the case and on true and proper interpretation of the family settlement dated 15th October, 2003 the consideration of Rs. 2,25,00,000/- received by the assessee on transfer of his right, title and interest in the family property to the party of the second part under family settlement is a Capital Gain liable to be taxed under section 45 of Income Tax Act?"

The ITAT in para 19 of its order has recorded thus:

"19. We find that in the instant case there has been a genuine dispute among the family members and several suits were filed and judgements were pronounced. Finally the parties to the suits decided to come to a settlement and the family arrangement was reached and a Consent Decree was passed by the Bombay High Court in Suit No. 4616 of 1998 on 16th October, 2003. The Royalty paid by the Court Receiver was only an interim relief of their share of income from the properties of G.D. Ambulkar, which right arose on account of their preexisting right in the properties as per Will of G.D. Ambulkar. Family arrangement is a device by which dispute between family members as to their respective property rights were settled. Such settlement may involve division of the property as between them and consequently a release of rights by one or the other in favour of the allottees. Conflicting legal claims get so settled. Since the settlement only defines a pre-existing joint interest as separate interests, there is no conveyance, if the arrangement is bonafide. Since there is no conveyance, there is no need for registration of such arrangements, when orally made, even if later reduced to writing."

The ITAT following the decision of the Apex Court in the case of *Maturi Pullaiah* v. *Maturi Narasinham* AIR 1966 SC 1836, held that there is no transfer of assets in the family arrangement and the amount received by the assessee is part of the family arrangement and not towards the transfer of any capital assets and hence no Capital Gains Tax liability arises. In our opinion, the decision of the ITAT is based on finding of facts, hence no question of law arises. Accordingly, the appeal is dismissed. – *[CIT v. Sachin P. Ambulkar (2014) 221 Taxman 67 : 42 taxmann.com 22 (Bom.)]*

Family members of assessee were holding shares in different business concerns and assessee under a family arrangement had transferred his share held in a firm in favour of a family member, there was no transfer in instant case

Family members of assessee were holding apart from personal properties, family properties and shares in different business concerns. Disputes arose between assessee and other family members. Thereupon a family arrangement was made between assessee and other family members, whereby assessee had resigned from a partnership firm and transferred his share of profit and loss in said firm to a family member for a consideration of Rs. 35,000 being capital balance of firm. Assessee claimed that in instant case there was no transfer, which gave rise to any capital gain. Assessing Officer held that there was a transfer in instant case and consequently there was a capital gain in hands of assessee. Since (i) it is well-settled that a partition is not a transfer, and (ii) what is recorded in a family arrangement is nothing but a partition, there was no transfer in instant case. Therefore, there was no liability of assessee to pay capital gain tax' [In

favour of assessee] (Related Assessment year : 1993-94) – *[CIT v. R. Nagaraja Rao (2013) 352 ITR 565 : (2012) 207 Taxman 236 : 21 taxmann.com 101 (Karn.)]*

Applicability of Stamp Duty

There is no any specific exemption in the Stamp Duty Acts for levy or exemption upon family settlement. Stamp duty is levied on instrument. So, upon any agreement there may be levy of stamp duty and therefore amount involved in the agreement is very important. Therefore, the stamp duty of the agreement for transfer of immovable property shall be applicable as per law.

Family business can be partitioned by making necessary entries of division of capital of the family

The family business can be partitioned by making necessary entries of division of capital of the family. Such division must, of course, be effective so as to bind the members. For an asset like family business or share in partnership, there cannot be said to be any other mode of partition open to the parties if they wish to retain the property and yet hold it not jointly but in severalty and the law does not contemplate that a person should do the impossible.—[*Chandas Haridas and another v. CIT (1960) 39 ITR 202 (SC)*]

It is also open to parties to allot whole house to one member on his undertaking to pay money value of the shares due to other members and the amount paid to other coparcenes will be available to the members in addition to his cost of his share if the house is later sold.—[*Lalitaben Hariprasad v. CIT (2009) 180 Taxman 213 : 224 CTR 306, 320 ITR 698(Guj)*.

Validity of partition between widow-mother and sole surviving coparcener-son

A wife or mother has no right to claim partition, but if a partition is effected a mother or the wife gets a share equal to that of the son.

The property which devolves on a Hindu under section 8 of the Hindu Succession Act would be individual property. Thus individual property shall continue to be individual property on inheritance and HUF property on partition shall be that of the joint Hindu family subject to the existence of family during the relevant assessment year (Refer *CWT v. Chander Sen (1986) 161 ITR 370(SC)*

Ownership of Property received by a member on a total partition of HUF

The property received by male member on total partition will retain its character as a joint family property. If he is single, it will be HUF property on the marriage.—*[CIT v. Arun Kumar Jhunjhunwala and Sons (1997) 223 ITR 45 (Gau)]*

Partition on death of coparcener

A partition is an act effected *inter vivos* between the parties agreeing to the partition. A death of partner cannot bring about an automatic partition and on such a death, the other surviving members continue to remain joint. However, under the provisions of Hindu Succession Act, 1956, there is a deemed partition for a limited purpose of determining the share of the deceased coparcener for the purpose of succession under the Act.

Procedures for recognition of partition

The procedure by which the partition gets its recognition are as follows:—

(a) The HUF, which has been hitherto assessed, must make a claim to the assessing officer that the Hindu undivided family (HUF) properties have been subjected to total partition.
(b) Then, the Assessing Officer will make an inquiry into the claim after giving notice to all members of the HUF; and
(c) if he is satisfied that the claim is correct, then, he will record a finding that there was a total partition of the HUF, and he will also mention the date on which it has taken place.

No necessity of other coparceners to agree in order to entitle a coparcener to claim for a partition
It is not necessary that other coparceners should agree to the partition sought by one of the coparceners.

What shall be the nature of the property received on partition?
The nature of the joint family property on partition shall be as that of joint family property as and when the recipient person is married. Hence the character of the property shall remain that of the joint family property. Such property shall be assessed as individual property, as long as the recipient is unmarried or is reduced to a single person.

A complete partition with unequal shares as may be agreed between the parties is not illegal and can be final. However, an unequal partition between karta as the sole adult member and the minor children may be challenged at the instance of the minor children on attaining majority or having a partition reopened by the Court. Such a reopening however, will only be permitted if the division is unjust and unfair.

NOTE
In the light of the said law, it can be a sound tool of tax planning by giving larger share to the less financially sound coparcener and lesser share to the affluent.
Partition is not a transfer
Distribution of the assets of an HUF in the course of partition, would not attract any capital gains tax liability as it does not involve a transfer. There would be no clubbing of incomes under section 64 as it would not involve any direct or indirect transfer.
Partition does not give a coparcener a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his formal co-shares .—*[Girija Bhai v. Sadha Shiv Dund Raj AIR 1916 (PC) 104]*
In view of the unit of ownership and community of interest of all coparceners in a joint Hindu family business the position on partition of the joint Hindu family business, whether it be partial or complete, is very similar in law to the position on dissolution of a partnership firm. On partition the shares of the coparceners in the joint family business become defined and their community of interests is separated. Division of assets is a matter of mutual adjustment of accounts as in the case of a dissolved partnership firm. The property which so comes to the share of the coparcener, therefore, cannot be considered as transfer by the joint family to a coparcener or the extinguishment of the right of the joint family in that property, the joint family not having its own separate interest in that property which can be transferred.—*[CIT v. S. Balasubramanian (1988) 230 ITR 934 (SC)]*

An order under section 171 is not required when an HUF has not been hitherto assessed

Section 171(1) of the Act starts with the expression "a Hindu Family hitherto assessed as undivided". Hence, if an HUF has not been assessed to tax, section 171 shall be inapplicable. Section 171 of the Income Tax Act, 1961, has no application to a case of a Hindu undivided family which has never been assessed before as a joint family i.e. as a unit of assessment. In other words, this section has application to a Hindu undivided family which has been assessed before as a joint family and if the Hindu undivided family has never been assessed to tax, this section has no application.

It was held that the term "hitherto assessed as undivided" will mean as assessment made by the ITO meaning "actually assessed". The Supreme Court further held that it will not include a case in which return has been filed and the proceedings for the assessment are pending.—*[Roshan Di Hatti v. CIT (1968) 68 ITR 177 (SC)]*

Responsibility to pay Tax After partition of an HUF up to the date of partition

As per section 171(6), every member of the HUF before partition shall be jointly and severally liable for the tax on the income assessed of the HUF. The same section empowers the assessing officer to recover the tax due on completion of the assessment on the disrupted HUF from every person who was member of the HUF before partition. Further, as per section 171(7), the several liability of the member shall be computed according to the portion of the joint family allotted to him at the time of the partition.

It may however be noted that joint liability of the member is personal and distinct from the personal and several liability as found by the Supreme Court in the case of *Govinddas v. ITO (1976) 103 ITR 123 (SC).* As such a member of an HUF before partition is not personally liable, after partition in respect the liability of HUF, ex-members liability is personal.

Also, unlike the several liability, the joint liability is not limited to the asset received by the member on partition as noticed by the Supreme Court in the case of *Addl. ITO v. A.S. Thinmaya (1965) 55 ITR 666 (SC)*.

Validity of Penalty on HUF after a total partition

The provisions of section 171(8) give the mandate to an assessing officer to levy penalty on an HUF disrupted after partition. The levy of such penalty has also been upheld by the Allahabad High Court in the case of *CIT v. Raghuram Prasad (1983) 143 ITR 212 (All)*.

Assessee legal heir of late A, inherited land and received a part of it as per oral partition, since during lifetime of late A, family was never assessed as a HUF, section 171 would not apply even when there was a division/partition of property as such partition would not answer to definition of 'partition' in Explanation to section 171

Assessee was one of surviving legal heirs of late A who inherited agricultural land. Said land was divided as per oral partition among legal heirs and sale proceeds from sale of parcel of said land was received by assessee in proportion with his respective share in land. Assessee claimed deduction under section 54F which was allowed by Assessing Officer. Commissioner disallowed said exemption in hands of assessee on ground that aforesaid division of income and property was without physical division of property and would not amount to partition under section 171 and therefore, capital gains should have been assessed in hands of estate of HUF. Since during lifetime of late A, family was never assessed as a HUF, section 171 would not apply even when

there was a division or partition of property as such partition would not answer to definition of 'partition' in Explanation to section 171. [In favour of assessee] (Related Assessment year : 2008-09) – [*A.P. Oree v. ITO (2021) 436 ITR 3 : 282 Taxman 57 : 127 taxmann.com 740 (Mad.)]*

SLP dismissed against ruling that where assessee-company waived off its right to receive sale consideration of a property jointly held by its director with other family members in order to avoid deadlock in management of company on account of any disputes arising between family members who were also its shareholders, in view of fact that an order to that effect was passed under section 171 and, moreover, amount was duly written off in books of account, assessee's claim for deduction of said amount as bad debts was to be allowed

Assessee was a private limited company consisting of two directors. Even though there was a partition effected between brothers of one of directors, other brothers were demanding a share in properties. One of such properties, standing in name of director was purchased by assessee-company. Entire property was divided into three blocks. First two blocks were reserved for sale to outsiders, whereas third block was sold to members of Hindu Undivided Family (HUF) of director. Subsequently, a family settlement arrangement was arrived between members of HUF and company and it was decided therein that assessee would waive right to recover dues of sale consideration. According to assessee, said decision was taken in order to avoid future deadlock in management of company on account of any disputes arising between family members who were also its shareholders. An order was also passed under section 171. Assessee filed its return claiming sale consideration waived off as bad debt. Assessing Officer opined that mere possibility that there could be future disputes/quarrels/differences between members of HUF, could not constitute a ground to hold that amount in question was bad debts. He, thus, rejected assessee's claim. Tribunal, however, allowed claim raised by assessee. High Court by impugned order held that, on facts, revenue could not contest assessee's claim even after passing of order under section 171 and, further, even otherwise, since only requirement of law was that amount should have been written off in books of account of assessee which was admittedly done, Tribunal was justified in allowing assessee's claim. Special Leave Petition filed against impugned order was to be dismissed. [In favour of assessee] (Related Assessment years : 2003-04 and 2004-05) – *[CIT v. Millennia Developers (P) Ltd. (2019) 266 Taxman 186 : 109 taxmann.com 94 (SC)]*

Finding of Tribunal in search case of assessee-Karta of his HUF in respect of change of his status from Karta to individual on partition of his HUF, could not be a finding necessary for change of status in case of coparceners from individual to Karta of their respective HUFs

The business of money lending was being carried out by the assessee as Karta of HUF. A search operation was carried out under section 132 against the assessee-karta. Tribunal found that in partition of assessee's HUF business years back his wife and sons were given equal shares and HUF business came to an end. According to Tribunal, after partition, status of assessee-Karta became sole surviving coparcener in his HUF and, thus, converted into an individual while on receipt of property, his sons who were married having wife and children, acquired status of HUF. Since assessee wrongly continued to file return in status of HUF and his sons in status of individuals, Tribunal directed Assessing Officer to make their assessment in new status for past years. It was found that direction of Tribunal would have effect of lifting bar of limitation

prescribed for reopening assessment/completing assessment - Further, Apex Court has held that a finding necessary for disposal of a particular case, i.e., in respect of a particular assessee and in relation to particular assessment year is not a finding necessary for disposal of case pertaining to others. Since direction given by Tribunal was clearly contrary to law, it deserved to be quashed. [In favour of assessee] – *[CIT v. Harnarayan Bhagat (HUF) (2019) 111 taxmann.com 514 (MP)]*

No co-coparcener (son) has a right to challenge the sale made by the Karta of his family

Once the factum of existence of legal necessity stood proved, then, in our view, no co-coparcener (son) has a right to challenge the sale made by the Karta of his family. The plaintiff being a son was one of the co-coparceners along with his father-Pritam Singh. He had no right to challenge such sale in the light of findings of legal necessity being recorded against him. It was more so when the plaintiff failed to prove by any evidence that there was no legal necessity for sale of the suit land or that the evidence adduced by the defendants to prove the factum of existence of legal necessity was either insufficient or irrelevant or no evidence at all. - *[Kehar Singh (D) Thr. L.Rs. & Ors. v. Nachittar Kaur & Ors. - Date of Judgement : 20.08.2018 (SC)]*

Asset was disposed in favour of six minor daughters of Karta in form of fixed deposits, interest thereafter could not be treated as part of wealth of assessee-HUF and would not be taxable in hands of HUF

Family arrangement of assessee-HUF provided for allotment of a sum to each of six minor daughters of Karta in form of fixed deposits. Assessee claimed deduction of interest that accrued on fixed deposits receipts. Assessing Officer held that document did not amount to partial partition and though it was a family arrangement, it did not have effect of taking away corresponding wealth from purview of HUF, and, accordingly, he treated interest as income of HUF. Once HUF had settled a sum in favour of six minor daughters of karta, corresponding amount ceased to be wealth or assets of HUF. Amount could not be treated as part of wealth of HUF. [In favour of assessee] (Related Assessment years : 1991-92 to 1996-97) – *[P. Shankaraiah Yadav (HUF) v. ITO (2015) 371 ITR 386 : 232 Taxamann 757 : 59 taxmann.com 263 (Andhra Pradesh and Telangana)]*

Before section 171 can be invoked so as to assess property of Hindu undivided family even after partition, as a Hindu undivided family, it should have been assessed as a Hindu undivided family before such partition

The assessee was a Hindu undivided family (HUF). According to it, a partial partition had taken place on 30.04.1978 whereby the assets of the HUF, both movable and immovable, had been divided among the coparceners. Thereafter, the property in question was sold and proceeds were invested in fixed deposits. On maturity of the fixed deposits on 08.09.1996, the monetary shares were apportioned among the members of the HUF. For the relevant assessment year, the Assessing Officer made assessment of the assessee in the status of HUF by invoking section 171. On appeal, the assessee contended that the original property in the hands of the HUF, after partial partition thereof on 30.04.1978, could not be assessed to tax under section 171. In the alternative, the assessee contended that since it never hitherto before (i.e., prior to the assessment year 1997-98) had been assessed as an HUF, there was no question of it being assessed as an HUF. The Commissioner (Appeals) allowed the assessee's appeal holding that it could not be assessed as an HUF under section 171. On the revenue's appeal, the Tribunal held that the property was

liable to be assessed in the hands of the assessee as an HUF under section 171(9). On appeal to the
High Court :

Held : At some point of time the assessee was a HUF, but there was no dispute whatsoever that it had not been assessed as a HUF prior to the assessment year 1997-98. Section 171 caters to a situation where a HUF has been partitioned. It deals with assessment after the division of the HUF. Thus, before section 171 can be invoked, so as to assess the property of the HUF even after partition, as a HUF, it should have been assessed as a HUF before such partition.

Sub-section (9) of section 171 is an exception to sub-section (1) of section 171. For the applicability of sub-section (9) of section 171, two pre-requisites are essential. Firstly, the partial partition should have taken place after 31.12.1978 and secondly, such partial partition must have taken place in a HUF which hitherto before was assessed as a HUF. In the instant case, the assessee had not been assessed as a HUF ever before the assessment year 1997-98. Therefore, the second essential ingredient for the applicability of sub-section (9) of section 171 could not be treated to have been fulfilled in the facts and circumstances of the instant case. Therefore, sub-section (9) of section 171 would be clearly inapplicable to the facts of the instant case. In view of the above, the order passed by the Tribunal was to be set aside and the assessee's appeal was to be allowed. [In favour of assessee] (Related Assessment year : 1997-98) – *[Tirlochan Singh v. CIT (2010) 228 CTR 390 : (2009) 180 Taxman 640 (P&H)]*

Order under section 171 not required where an HUF has not been assessed to tax
The wordings of section 171 show that the section has no application to an HUF, which has not been hitherto assessed. – *[CIT v. Hari Krishnan Gupta (2001) 117 Taxman 214 (Del.)]*

Where properties (investments and monies deposited with bankers) which are capable of division are not actually divided, partial partition cannot be recognised
The assessee-HUF claimed that partial partition in terms of section 171 had been effected in respect of certain properties of the family comprising of cash in hand, shares and various deposits, etc. It further claimed that though these properties were not divided by metes and bounds but only visionally, it was permissible to do so under the law in respect of partial partition of properties invested in business, in the case of continuing business. The claim was rejected by the Tribunal but the High Court allowed the assessee's claim, holding that the said assets being employed in business were not capable of division and, therefore, it was possible for the family to have partial partition with regard to them without physically dividing them. On appeal :

The members of a HUF may continue doing the business and at the same time notionally divided the properties among the various constituents of the family. As a proposition of law, the contention may be correct but turning to the facts of the case, it was found that each of the items of properties was capable of physical partition. This was not a case where the HUF itself was carrying on its business before partial partition with these assets. There was no reason why the parties could not divide these assets by metes and bounds.

Although mere severance of the status of the family may tantamount to partition under the Hindu law of Joint family, the requirement of the Income-tax Act is a little more. A partition to be recognised under the Act must lead to physical division of the joint properties. The decision of the High Court was erroneous. If the properties belonging to a HUF are not partitioned at all by dividing them among the members, even though capable of division, then the members of the family cannot say that so far as those properties are concerned they stand divided. In the case of Kalloomal Tapeswari Prasad (HUF) v. CIT [1982] 133 ITR 690/ 8 Taxman 5 (SC), a partial partition was effected in respect of properties which were not physically divided. The ITO declined to record the partition. It was held by the court that mere severence in status was not sufficient to establish partition. The requirement of the Hindu law and the requirement of the Income-tax Act are different in this regard. The basic principle appearing from the section itself is that in order to claim partition in respect of any property, division of the property is a pre-requisite. The HUF cannot say that it stands divided in respect of the property and at the same time enjoy the property jointly. Whatever may be the position under the Hindu law, section 171 of the Income-tax Act is quite clear in this regard. In that view of the matter these appeals were allowed. The judgment under appeal was to be set aside. – *[CIT v. Venugopal Inani (1999) 107 Taxman 258 (SC)]*

Groupwise division is permissible

When partial partition qua the persons is permissible under the law, the members of the HUF can divide themselves groupwise and it is not necessary to define the share of each member of each group. When a property is held by two groups and if the share of each group is well defined, the requirement of partial partition will stand fulfilled. From the memorandum of partition, it was manifest that the share of each group of the two was well defined and thus the legal requirement was fully satisfied. For the above reasons, the view taken by the Commissioner in his order under section 263(1) did not commend to be accepted. The Tribunal was correct in holding that a valid partition had been made between the members of the HUF, who divided themselves in two groups defining the share of each group in regard to the HUF's interest in the firm. [In favour of the assessee] (Related Assessment year : 1972-73) – *[CIT v. Shrawan Kumar Swarup & Sons (1998) 232 ITR 123 : 147 CTR 305 (All.)]*

Partition of HUF under Income Tax Act, 1961 and its assessment after Partition - Finding is necessary even in deemed partition - Even in cases of deemed partition under section 6 of Hindu Succession Act, 1956 in absence of claim and finding of partition in terms of section 171(1), no part of income of HUF should be excluded from assessment

Maharaja P. P. Singh of Balrampur was being assessed as an individual up to and including the assessment year 1964-65. He had no issue of his own. On 28.12.1963, he adopted Mahraja Dharmendra Pratap Singh, who was a minor, as his son. After the said adoption, the status of Maharaja P.P. Singh was taken as that of HUF. Maharaja P.P. Singh died on 20.06.1964. Thereafter his wife, Maharani Raj Laxmi Devi, became the karta of the HUF consisting of herself and the aforesaid minor son, Maharaja Dharmendra Pratap Singh. For the assessment year 1966-67, the assessee filed a return declaring the total income of the HUF as Rs. 28,935. Subsequently she filed another return showing the total income as Rs. 25,288. The difference between the original and revised returns was explained on the basis that the revised return had been filed by the HUF after excluding one-sixth share belonging to the minor son, Maharaja Dharmendra Pratap Singh, as an individual, because according to section 6 of the Hindu

Succession Act, 1956, one-third share of Late Maharaja P.P. Singh in the HUF property devolved on his two heirs Maharaja Dharmendra Pratap Singh (minor son) and Maharani Raj Laxmi Devi (wife). The ITO held that the Act is a separate, distinct and complete statute in itself and under the Act a change in the HUF status can be effected only by claiming partition either partial or complete and that such partition could become operative if a claim of partition has been preferred and after examining the evidence produced, an order under section 171 of the Act accepting the claim of partition has been accepted by the ITO, and that in the case of the assessee both the elements were missing. He, therefore, held that the assessee-HUF continued to be as it was before. The said view was followed by the ITO in the assessments for the subsequent assessment years 1967-68 to 1970-71. The said view of the ITO was upheld in appeal by the AAC. On further appeal, the Tribunal reversed the said view and held that the case of the assessee was not of a partition contemplated in section 171 and, therefore, no claim was necessary and absence of an order under section 171 does not mean that the whole estate should be deemed to belong to the assessee-HUF. The Tribunal, following the decision of the Allahabad High Court in the case of Kalloomal Tapeswari Prasad (HUF) v. CIT, further held that assuming the assessee's case came under section 171 the estate of the assessee-HUF having been diminished in terms of section 6 of the Hindu Succession Act, 1956 but with regard to which an order accepting the claim for partial partition has not been made, the income from such property could not be included in the computation of the income of the HUF. The Tribunal referred the question above-mentioned to the High Court for its opinion and the said question was answered by the High Court in favour of the assessee and against the revenue. On reference, the High Court upheld the view of the Tribunal. On appeal to Supreme Court:

Though for the purpose of HUF, section 6 of the Hindu Succession Act would govern the rights of the parties but insofar as income-tax law is concerned, the matter has to be governed by section 171(1). Therefore, in the instant case, one-sixth income from the computation of income of the assessee-HUF could not be excluded. - *[In favour of revenue] (Related Assessment years : 1966-67 to 1970-71) - [Addl. CIT v. Maharani Raj Laxmi Devi (1997) 224 ITR 582 : 139 CTR 487 : 91 Taxman 20 (SC)]*

It is obligatory for Assessing Officer to make an enquiry after giving notice of inquiry to all members of HUF and record a finding as to whether there was or was not a total or partial partition of Joint family property and date of partition, if any – The assessing authority can reject the claim for partition only after holding an inquiry as envisaged by the law, and recording the finding about non-existence of the partition - A finding without such inquiry is no finding in eye of law

The assessee was being assessed as HUF. During the relevant assessment years, the assessee claimed the benefit under section 171. It was asserted that there was a partial partition in the family by which a coparcener had separated from the family by taking a house and another house was given to the wife of the karta of the aforesaid family. This claim was based on the deeds of relinquishment without consideration. It was held that these deeds did not constitute partial partition and manifested mere severance of status. The Tribunal, therefore, rejected the assessee's claim under section 171. On reference :

Partition is not a transfer but total severance of status brought about by physical division of property. In a joint Hindu family property, each coparcener has an antecedent title. On partition,

this antecedent, i.e., joint title is transformed into separate titles of individual coparceners. The nature of the transaction is not a transfer, but creates a division of jointness into separation.

In terms of section 171, the Assessing Officer was required to make an inquiry and record a finding as to whether there had been a total or partial partition of the joint family property, and if so, the date on which it had taken place. The provision of law thus obligates the Assessing Officer to make an inquiry after giving notice of inquiry to all members of the family. The expression used in this provision is that the Assessing Officer shall make an inquiry. Indisputably, no such inquiry was made in the instant case before recording the finding that there was no partition. A finding without the inquiry is no finding in the eye of law. In these circumstances, it could not be said that the ITO rightly rejected the assessee's claim under section 171. It was, therefore, necessary that the appropriate authority should hold an inquiry into the claim as set up in terms of the aforesaid provision and then record the finding whether or not there was partition and if so whether the properties were required to be included in the assets of the HUF for the purposes of wealth-tax. [In favour of assessee] (Related Assessment year : 1976-77) – *[Ramchandra Gopalji Sugandhi v. CIT (1996) 217 ITR 647 (MP)]*

Order is binding on all parties - An order under section 171 is a judicial order to be passed after full detailed enquiry, and is to be binding between the parties till the same is set aside in accordance with law

As regards the petitioner’s contention that an order under section 171 having been passed by the ITO recognizing the partition, it was not permissible for him to ignore the same subsequently and assess the family as undivided without setting aside that order. It was contended by the revenue that this order was passed on insufficient grounds and the correct facts were not disclosed. The only important fact relied upon by the respondent was that in the account books of the firm the capital continued to stand in the name of the petitioner and no partition was effected in the books of that firm. As this fact had been brought to the notice of the ITO concerned, this contention was not accepted to be true. The order dated 27.11.1971 mentioned the manner of partition stating that this had been effected by dividing the amount in the personal set of account books of HUF, meaning thereby that the ITO knew that in the books of the firm the capital remained as it was or he could have with reasonable efforts found out the same. The order was passed in the assessment proceedings of the petitioner-individual and the partition was recognised year after year till the impugned notice was issued. Further, the provision in sub-sections (2), (3) and (4) of section 171 indicate that an order under section 171 is a judicial order to be passed after full and detailed enquiry and is to be binding between the parties till the same is set aside in accordance with law. Admittedly, in the instant case, the order dated 27.11.1971 had not been set aside and, therefore, as long as that order was effective, the ITO could not take any steps to assess the erstwhile HUF by ignoring the said order.

The contention of the revenue that the sons of the petitioner were minors and, therefore, he could not effect a partition was not tenable because the Supreme Court in its decision in *Apoorva Shantilal Shah v. CIT (1983) 141 ITR 558 (SC)* had upheld the authority of a father to effect even partial partition of some of the family properties and consent of the sons was not held to be necessary. In the instant case, however, the partition effected by the petitioner of the property received on the partition of the bigger HUF was a complete partition and not a partial partition and the same could not be challenged on the ground of lack of authority of the karta. For the

above reasons, the writ petition was allowed and the impugned notice dated 30.03.1980 issued to the petitioner by the respondent under section 148 for the assessment year 1971-72 was to be quashed. [In favour of assessee]– *[Gokul Chand v. ITO (1995) 211 ITR 738 : 175 CTR 146 : (1994) 77 Taxman 320 (All.)]*

Respondent formed assessee - HUF with his wife and sons - He inherited share in properties of his deceased father which had been allotted to him on partition of HUF in which respondent was also a member - Income from properties inherited by respondent was not assessable as income of assessee - HUF

There was one 'P' who, along with his wife, 'A', their son, 'K' and their daughter-in-law, constituted a HUF. There was a partition in this family on 22.03.1954, under which 'P' was allotted certain properties as and for his share and he got separated. Thereafter 'K', son of 'P', and his wife and their subsequently born sons and daughter constituted a HUF.

'P' died on 09.09.1963 leaving behind his widow and 'K', this son, who was also the karta of the assessee-HUF as his legal heirs. These two persons succeeded to the properties left by 'P' under section 8 of the Hindu Succession Act, 1956 and divided the same between themselves.

In the assessment made on the assessee - HUF, the ITO included in the computation of the total income, the income received from the properties inherited by 'K' from his father. The AAC affirmed the order of ITO. The Tribunal, however, held that properties inherited by 'K' did not form part of joint family properties so that income therefrom could not be assessed in the hands of assessee - HUF. The High Court upheld the order passed by the Tribunal. On appeal to the Supreme Court:

Held : In view of decision of this Court in *CWT v. Chander Sen (1986) 161 ITR 370*, it was to be held that the income from the properties in question was not assessable in the hands of the assessee - HUF. [In favour of the assessee] (Related Assessment year : 1977-78) - *[CIT v. P. L. Karuppan Chettiar (1992) 197 ITR 646 (SC)]*.

Provisions of section 171 has no application to a case of a Hindu Undivided Family which has never been assessed before as a joint family, i.e., as a unit of assessment

A HUF, consisting of two coparceners, one of whom was KA underwent partial partition on 30.03.1970. Lands were allotted to KA, the Karta, his wife and two minor sons, which, thus, became properties of the KA-HUF being the assessee-HUF. Under Government Notification under section 4 of Land Acquisition Act, dated 15.01.1970 abovesaid lands were acquired for Gujarat Housing Board. After partial partition, the assessee-HUF entered into an agreement with the said Board on 05.05.1970 for the transfer of the abovesaid lands at the rate of Rs. 17.75 per Sq. Yd. On 14.09.1970, there was partial partition of the properties of the assessee under which lands were divided amongst the members of the assessee-HUF.

The assessee-HUF, after said partial partition, did not file return of income for the assessment year 1971-72 as, according to it, it had not earned taxable income. However, the ITO held that it had earned income by way of capital gain on acquisition of land. Therefore, it was liable to make return under section 139 and consequently issued notice under section 148, read with section 147(a). The assessee-HUF filed a return showing income of Rs. 99 on 22.04.1974, pointing that partial partition had taken place on 14.09.1970, and lands were divided amongst the HUF's

members and it was after partial partition that the land was transferred to Gujarat Housing Board. The ITO, however, held that since the partial partition was not by metes and bounds, it was an afterthought. According to the ITO, the partition was contrary to section 171 and, hence the partial partition was not genuine. He determined the value of land as on 01.01.1964 at Rs. 3 per Sq. Yd. and accordingly worked out the capital gains. Relying upon his assessment order passed under section 143(2), read with section 147(a), for the assessment year 1971-72, he held that since the partial partition was not valid, the interest income earned on account of compensation paid to the members of the assessee was taxable in the hands of assessee-HUF in the assessment years 1972-73 to 1975-76.

KA had invested his share of compensation in firm KTB and became a partner in this firm. According to the ITO that amount which KA had invested in the firm, was not his individual money, but money belonging to HUF and, therefore, share of profits received from the said firm was also assessable in the hands of a HUF. On appeal, the AAC held that as the assessee-HUF was not assessed to income-tax any time prior to 1971-72, the provisions of section 171 were not applicable and the entire proceeding was misconceived. He determined the value of land as on 01.01.1984 and directed the ITO to work out capital gains on that basis. On appeal by the revenue, the Tribunal held that since the assessee-HUF was not previously assessed, section 171 had no application. The partial partition was genuine and there was no material on record to show that partial partition was a sham and the revenue had not challenged the partial partition on any ground other than the legal ground, namely that it had to be invalid under section 171. It held that it was not necessary for it to enter into the question of the value of the land as on 1-1-1984. The Tribunal, relying on its earlier decision, was of the view that the question of the value of land as on 01.01.1984 was required to be re-examined and, therefore, for statistical purposes it allowed the cross-objections of the revenue. On reference:

Held : Section 171 has no application to a case of Hindu family which has never had been assessed before as joint family. In the instant case, since HUF-KA was never assessed to income-tax in the past, section 171 had no application at all to the facts of the instant case.

Genuineness of the partial partition had not been challenged on any ground other than the legal ground of section 171. Therefore, the partial partition was valid and, thus, the capital gains was not assessable in the hands of HUF-KA. It followed as a necessary corollary that income earned on the compensation amount received by the members of the HUF would not be taxable in the hands of HUF-KA. Again KA admittedly invested his share of the compensation amount in the firm KTB and became a partner therein. The amount invested by KA did not belong to HUF and, therefore, share income earned from the firm of KTB was not assessable in the hands of HUF-KA (the assessee). Hence, the Tribunal's decision was to be upheld. (Related Assessment years : 1972-73 to 1975-76) - *[CIT v. Kantilal Ambalal (HUF) (1991) 192 ITR 376 : 98 CTR 105 : 59 Taxman 232 (Guj.)]*

Section 171 does not recognise a partition even if it was effected by a decree of court unless there is a physical division of properties by metes and bounds

The definition of partition given in Explanation to section 171 does not recognise a partition even if it is effected by a decree of court unless there is a physical division of the property and if the property is not capable of being physically divided then there should be division of the

property to the extent it is possible. Otherwise the severance of status will not amount to partition. In considering the factum of partition for the purposes of assessment it is not permissible to ignore the special meaning assigned to partition under the Explanation, even if the partition is effected through a decree of the Court. Ordinarily decree of a civil court in a partition suit is good evidence in proof of partition but under section 171 a legal fiction has been introduced according to which a preliminary decree of partition is not enough, instead there should be actual physical division of the property pursuant to final decree, by metes and bounds. The Legislature has assigned special meaning to partition under the aforesaid Explanation with a view to safeguard the interest of the revenue. Any assessee claiming partition of a HUF must prove the disruption of the status of a HUF in accordance with the provisions of section 171 having special regard to the Explanation. The assessee must prove that a partition effected by agreement or through court's decree, was followed by actual physical division of the property. In the absence of such proof partition is not sufficient to disrupt the status of a HUF for the purpose of assessment of tax.

Under the Hindu law members of a joint family may agree to partition of the joint family property by private settlement, agreement, arbitration or through court's decree. Members of the family may also agree to share the income from the property according to their respective share. In all such eventualities joint status of family may be disrupted but such disruption of family status is not recognised by the Legislature for purposes of income-tax. Section 171 and the Explanation to it, prescribes a special meaning to partition which is different from the general principles of Hindu law. It contains a deeming provision under which partition of the property of a HUF is accepted only if there has been actual physical division of the property. In the absence of any such proof, the HUF shall be deemed to continue for the purpose of assessment of tax. Any agreement between the members of the joint family effecting partition, or a decree of the Court for partition cannot terminate the status of HUF unless it is shown that the joint family property was physically divided in accordance with the agreement or decree of the Court.
In the instant case, there was no dispute that prior to the assessment year 1967-68 the assessment was made against the HUF of which the respondent was a member. The assessee for the first time raised the plea of partition and disruption of HUF in the proceedings for the assessment years 1967-68 to 1969-70. There was no dispute before the ITO that there had been no physical division of the properties by metes and bounds. Therefore, the ITO was justified in holding that the status of a HUF had not been disrupted and the income derived from the properties for the purposes of assessment continued to be impressed with the HUF character. The High Court committed an error in quashing the order of the ITO. In the result, the order of the High Court was set aside. Decision of Kerala High Court reversed. – *[ITO v. Smt. N.K. Sarada Thampatty (1991) 187 ITR 696 (SC)]*

Section 171 recognises that income which ceases to be HUF's income cannot be assessed in HUF's hands
The income which does not belong to the HUF cannot be taxed in the assessment of the HUF if in fact the income has ceased to be the income of the HUF and this has been verified by the ITO – *[M.V. Valliappan v. ITO (1988) 170 ITR 238 (Mad.)]*

HUF must have earlier been assessed to tax - If a HUF was not subjected to tax, the provisions of section 171(1) will have no application

S carried on business of plying buses. After his death, his second wife D claimed that the business was the individual business of S and that under a will executed by S, she was entitled to carry on the business in her own right. On a contrary claim set up by the first wife of S and also his brothers, the Supreme Court held that the business was that of the joint family of which S was the karta and that D had no interest whatsoever in the business. However, in a civil suit filed in the Court of the subordinate judge for partition of HUP, there was a preliminary decree on 27.03.1950. For the assessment years 1962-63 to 1968-69 proceedings were initiated for assessment of the income from plying of the buses in the hands of the joint family and the assessments were completed accordingly. The assessee urged before the Tribunal that the joint family became extinct on the filing of a suit in 1947 or, in any event on 27.03.1950 when the subordinate judge passed a preliminary decree for partition and, thus, no assessment could be made against a joint family which was not in existence in the previous years relevant for the assessment years 1962-63 to 1968-69. The Tribunal accepted the above contention and quashed the assessments made on the joint family as not maintainable. On reference, the revenue contended that though there was a preliminary decree in March 1950, but for the purposes of tax law, the joint family must be deemed to be in existence as no joint family properties were partitioned in definite portions and no order was recorded under section 171(1).

Held : The expression 'hitherto assessed' occurring in section 171(1) puts beyond any controversy that only a HUF which has suffered tax assessment in the past can be deemed to continue to be a HUF till an order of partition under section 171(1) is recorded. If a HUF was not subjected to tax, the provisions of section 171(1) will have no application. The fiction that a joint family shall be deemed to continue, enunciated in section 171(1), is for the limited purpose of roping in cases of joint families which had hitherto been assessed. It is not possible to extend that fiction beyond the field legitimately intended by the statute. The fiction in section 171(1) must necessarily be confined to the purpose for which it was specified in that section, and for no other purpose. In the present case, a suit for partition of the HUF had been filed in 1947 and a preliminary decree had been passed in 1950. These steps had the necessary consequence of rendering the joint family non-existent in law and that position prevailed for income-tax purposes also as the matter was not saved by the provisions of section 171. In the circumstances, assessment could not be made on the HUF in respect of the income derived from the business in plying motor buses for the assessment years 1962-63 to 1968-69. [In favour of the assessee] – *[Addl. CIT v. P. Durgamma (1987) 166 ITR 776 (AP)]*

Death of a coparcener cannot bring about an automatic partition and on such a death, the other surviving members continue to remain joint

A partition is an act effected inter vivos between the parties agreeing to the partition. A death of a coparcener cannot bring about an automatic partition and on such a death, the other surviving members continue to remain joint. However, under the provisions of section 6 of the Hindu Succession Act, there is a deemed partition for a limited purpose of determining the share of the deceased coparcener for the purpose of succession under the Act. The right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs. The female heir shall have the option to separate herself or to

continue in the family as long as she wishes as its member though she has acquired an indefeasible interest in a specific share of the family property which would remain undiminished whatever may be the subsequent changes in the composition of the membership of the family. - *[State of Maharashtra v. Narayan Rao Sham Rao Deshmukh (1987) 163 ITR 31(SC)]*

Before levying penalty on assessee-HUF for concealment of income, ITO passed order accepting its claim for partition - In view of section 171(8), ITO could levy and collect penalty up to date of partition from assessee-HUF as if no partition had taken place and assessee-HUF was still in existence

On a combined reading of the provisions of sub-sections (1) and (4) of section 171, it is clear- that in a case where an order has been made recording the partition of joint family property, the total income of the joint family has to be computed up to the date of partition and the tax payable by the joint family has to be determined as such, as if no partition had taken place and as if the joint family was still in existence. Again, on going through the provisions of section 171(8), it becomes clear that this sub-section expressly enacts that the provisions of the section in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of total or partial partition of a HUF apply as they apply in relation to the levy and collection of tax. In other words, with regard to the levy and collection of penalty relating to assessment up to the date of partition, one has to proceed on the basis as if no partition had taken place and also that the joint family was still in existence. Hence, the fact that in the instant case the order recording partition was passed prior to the order levying penalty would be of no consequence as the provisions of section 171(8) read with section 171(4)(a) give express authority for the levy and collection of penalty in respect of period up to the date of partition where the HUF had been disrupted.

It is well settled law that reference to the provisions of the Act in support of the stand taken could not be equated with the raising of a new question of law or of fact which had not been canvassed earlier and may not be permitted to be raised for the first time before the Tribunal.

In the instant case, it was apparent that the stand taken by the department throughout was that it was competent for the ITO to impose penalty in respect of the period up to the date of partition. The mere fact that reference was not made to the provision of the Act which empowered the ITO to levy penalty could not debar the revenue from referring to the relevant provisions of the Act for the first time at the stage of the application under section 256(1). In the application under section 256(1), the department did not take any new stand but only brought to the notice of the Tribunal the relevant provisions of the Act which justified its action. Accordingly, the department was justified in law in raising the question of applicability of section 171(8) in application filed under section 256(1). *– [CIT v. Raghuram Prasad (1983) 143 ITR 212 : 12 Taxman 50 (All.)]*

On partition of bigger HUF, two pieces of land were apportioned to smaller HUF, comprising of G and other five members, which agreed to sell the same to P - By a partition deed, smaller HUF decided to allot land to G (karta) on his agreeing to pay five-sixth share of its sale proceeds to other five members who were paid eventually - There was a valid partition in terms of section 171

The bigger-HUF, consisting of M, G and V, was partitioned on 06.04.1950 when two pieces of land were apportioned to a smaller HUF, consisting of G and his four sons and wife. By a

registered partition dated 12.09.1966, the members of smaller HUF decided to allot the land to G who had agreed to pay five-sixth share of its sale proceeds to the other five members. For the assessment years 1967-68 and 1968-69, the ITO rejected G's application under section 171 for recording a finding of partial partition on the grounds (i) that five-sixth share of the sale proceeds was, in fact, not paid to the members as mentioned in the partition deed ; and (ii)that there was no partition as required by the Explanation to section 171. Accordingly, he assessed the capital gains arising out of the sale of land in the hands of smaller HUF. The AAC sustained the ITO's order. On second appeal, the Tribunal held (i) that there was a valid partition effected in respect of the impugned land ; and (ii) that the sale proceeds were, in lact, apportioned and paid to the respective members. On reference, the revenue contended, inter alia, that the impugned transaction was, in effect and substance, a sale by the smaller HUF to G.

Held : The term “sale” mean transfer of property for a price. Partition is, on principle and authority, not a transfer of the property but is merely a change in the mode of enjoyment. Partition of joint Hindu family consists in ascertaining and defining the shares of its coparceners in the joint property. Its actual division by metes and bounds is not immediately necessary and such a division may take place subsequently. Partition may be effected, inter alia, by agreement or conduct which evidences an intention to sever the joint family status. The real test of an instrument of partition is whether there was any property co-owned by the parties which is divided by that deed in severality. The courts are only concerned with the construction of its terms and not with legality of the claim set up by one or the other.

In the instant case, the parties to the instrument dated 12.09.1966 were co-owners of the impugned land which was agreed to be divided in severality. Their shares were ascertainable. In anticipation of the realisation of the sale proceeds, G executed promissory notes of the respective amounts falling to the shares of other family members who were subsequently paid accordingly. It could not be said that there was any transfer of property in the sense of the transactions being sale. It was for all intents and purposes a change in the mode of enjoyment. Therefore, there was a valid partition and the ITO was bound to recognise and record it. Accordingly, capital gains arising out of the sale transactions in question were not taxable in the hands of the assessee. [In favour of the assessee] – *[CIT v. Govindlal Mathurbhai Oza (1982) 138 ITR 711 : (1981) 22 CTR 165 : 6 Taxman 253 (Guj.)]*

When HUF is reduced to a single individual, section 171(1) will not apply

Section 171(1) will not apply where a HUF has disappeared because of being reduced to a single individual – *[Seethamma v. CIT (1982) 136 ITR 238 (Mad.)]*

Partition in the case of HUF can be effected orally and entries in the books is the evidence of partition

In CIT v. Shiolingappa Shankarappa Mendse and Bros. had occasion to deal with a case where there was a partition of HUF and subsequent formation of a partnership firm by the erstwhile members of the HUF. Transaction of partition was evidenced by book entries. Partnership was held valid. The fact of partition specifically stated in the partnership deed, but the partnership deed refers to the document of partition and the relevant entries in the books of the HUF were produced before the Commissioner. Having regard to the principles of Hindu law, it is clear that the Tribunal was justified in taking the view that the joint family of the three brothers had

disrupted and they had formed a partnership firm which was entitled to registration under the Act. [In favour of assessee] - *[CIT v. Shio Lingappa Shankarappa and Brothers (1982) 135 ITR 375 (Bom.)]*

A transaction can be recorded as a partition under section 171 only if, where the property admits of a physical division and not the notional partition, such division has actually taken place

A transaction can be recognised as a partition under section 171 only if, where the property admits of a physical division, a physical division of the property has taken place. In such a case, mere physical division of the income without a physical division of the property producing income cannot be treated as a partition. Even where the property does not admit of a physical division, then such division, as the property admits of should take place to satisfy the test of a partition under section 171. Mere proof of severance of status under the Hindu law is not sufficient to treat such a transaction as a partition. If a transaction does not satisfy the above additional conditions, it cannot be treated as a partition under the Act even though under the Hindu law there has been a partition total or partial. The consequence will be that the undivided family will be continued to be assessed as such by reason of section 171(1).

It cannot be gainsaid that the fiction in section 171(1) does not operate in the case of partial partitions as regards property where the composition of the family has remained unchanged.

It is common knowledge that in every partition under the Hindu law unless the parties agree to enjoy the properties as tenants-in-common, the need for division of the family properties by metes and bounds arises and in that process physical division of several items of property which admit of such physical division does take place. It is not necessary to divide each item into the number of shares to be allotted at a partition. If a large number of items of property are there, they are usually apportioned on an equitable basis having regard to all relevant factors and if necessary by asking the parties to make payments of money to equalise the shares. Such apportionment is also a kind of physical division of the properties contemplated in the Explanation to section 171. Any other view will be one divorced from the realities of life. The instant case was not a case where it was impossible to make such a division. Nor was it shown that the members were not capable of making payment of any amount for equalisation of shares. In fact, there was no material in the instant case showing that the assessee ever seriously attempted to make a physical division of the property as required by law. All that was attempted was to rely upon the arbitrator's award which were insufficient to uphold the claim of the assessee. Accordingly the impugned properties were capable of physical division.

Section 171 applies to all partitions total and partial, and that unless a finding is recorded under section 171 that a partial partition has taken place, the income from the properties should be included in the total income of the family by virtue of sub-section (1) of section 171. In the instant case, no order under saction 171 had been passed and, accordingly, the income from said properties was assessable in the assessee's hands. - *[Kalloomal Tapeshwari Prasad (HUF) v. CIT (1982) 133 ITR 690 : 26 CTR 415:* 8 Taxman 5 *(SC)]*

Assessing Officer bound to take decision on application for partition and must mandatorily hold inquiry and record a finding - Assessing Officer cannot continue to make assessment on HUF without disposal of the application made for partition. If such assessment is done,

it shall not be valid and it has to be set aside so that assessment can be made in conformity with the order under section 171 which the Assessing Officer is bound to pass in accordance with law

Section 25A of the Indian Income-tax Act, 1922 (Corresponding to section 171 of the income-tax Act, 1961) - Assessment order passed by ITO in case of a HUF without holding an inquiry into validity of claim of partition made within a reasonable time by a member of HUF - Such assessment liable to be cancelled. Tribunal dealing with such question in appeal can not merely cancel ITO's order without a further direction to assessing authority either to modify assessment suitably or to pass a fresh order of assessment in accordance with law

From a fair reading of section 25A, it appears that the ITO is bound to hold an inquiry into the claim of partition if it is made by or on behalf of any member of the HUF which is being assessed hitherto as such and record a finding thereon. When a claim is made in time and the assessment is made on the HUF without holding an inquiry as contemplated by section 25A(1), the assessment is liable to be set aside in appeal as it is in clear violation of the procedure prescribed for the purpose. Admittedly, in the instant case the claim for partition was not only made but was made well before the impugned assessments. The Tribunal was, therefore, right in holding that the impugned assessments were liable to be set aside as there was no compliance with section 25A(1).

It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute. The statute does not say that such a direction cannot be issued by the appellate authority in a case of this nature. In interpreting section 25A(1), one cannot also be oblivious to cases where there is a possibility of claims of partition being made almost at the end of the period within which assessments can be completed making it impossible for the ITO to hold an inquiry as required by section 25A(1) by following the procedure prescribed therefore.

In the instant case, however, since it was not established that the claim was a belated one, the proper order to be passed was to set aside the assessments and to direct the ITO to make fresh assessments in accordance with the procedure prescribed by law. We do not, however, agree with the orders made by the High Court by which it upheld the assessments and directed the ITO to make appropriate modifications. Such an order is clearly unwarranted in the circumstances of this case. The order of the High Court is, therefore, set aside. The question referred by the Tribunal to the High Court does not appear to be comprehensive enough to decide the matter satisfactorily. The question may have to be read as including a further question regarding the nature of the orders to be passed by the Tribunal, if the orders of assessments are held to be contrary to law. In the light of the above, we hold that the orders of assessments are liable to be set aside but the Tribunal should direct the ITO to make fresh assessments in accordance with law. – *[Kapurchand Shrimal v. CIT (1981) 131 ITR 451 (SC)]*

Partition must be by metes and bounds if female member is allotted a share

One ‘S’, his wife, ‘K’, and their sons ‘G’ (major) and ‘B’ (minor) constituted a joint Hindu family owing, inter alia, a business. By a release deed dated 10.11.1956, ‘G’ relinquished his interest in family business. ‘S’ died on 01.09.1961. He had executed a will on 22.02.1960 bequeathing his one-third interest in family including business, to his wife and two sons equally. ‘G’ released his interest in business which he got under will in favour of other two legatees by document dated 11.09.1961. It was also recited there in that there was partial partition between ‘K’ and her son ‘B’ of business and thereafter they became partners in said business. Assessee-Hindu undivided family contended that there was a partial partition of joint family business and, therefore, income from business should not be assessed in hands of HUF. A Hindu female has no right under Hindu law to demand a partition by metes and bounds. Therefore, it was not open to ‘K’ in her capacity as guardian of her minor son ‘B’ to effect a partition between herself and B’. Therefore, by release deed dated 11.09.1961, no valid partition between mother and minor son was effected. Therefore, after 11.09.1961, Hindu undivided family consisting of 'K' and 'B' continued to have two-thirds interest in joint family business and by virtue of release effected by ‘G’ in their favour on 11.09.1961, each of them individually was entitled to one-sixth share in remaining income of business. [In favour of revenue] (Related Assessment years : 1963-64 and 1964-65) - *[CIT v. Shantikumar Jagabhai (1976) 105 ITR 795 (Guj.)]*

Specific claim is necessary before ITO initiates inquiry - Mere knowledge on the part of the ITO is neither material nor relevant. It is evident that the ITO is called upon to make an inquiry and record an order only when and if a claim to that effect is made by or on behalf of any member of such family

Section 160 read with section 171 of the Income-tax Act, 1961 (Corresponding to section 41(1) read with section 25A(3) of the Indian Income-tax Act, 1922) - The assessee was a HUF. One of the members of the HUF instituted a suit for partition and a preliminary decree came to be passed in 1931 partitioning the family property into five branches and on passing of final decree in 1939 family properties and assets were divided into five lots.

Mere knowledge on the part of the ITO is neither material nor relevant. Section 25A(1) of the 1922 Act provided that where at the time of making an assessment under section 23, it was claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition had taken place among the members of such family, the ITO should make such inquiry there into as he might think fit, and, if he was satisfied that the joint family property had been partitioned among the various members or groups of members in definite portions, he should record an order to that effect. It is evident that the ITO is called upon to make an enquiry and record an order only when and if a claim to that effect is made by or on behalf of any member of such family. Where no such claim has been made there was no question of an order being passed simply because the ITO had knowledge of the pendency of the partition suit. In the absence of an order under section 25A(1), the Hindu family is by force of sub-section (3) to be statutorily deemed to continue to be a Hindu undivided family. [In favour of assessee] (Related Assessment years : 1941-42 to 1950-51) - *[Pratap Chandra v. ITO (1975) 100 ITR 551 (All.)]*

There can be an unequal partition

It is at the sweet will of the co-parceners and members as to whether to allot on partition in accordance with the share specified under the Hindu Succession Act or to allot lower or more to anyone or more persons. The partition in the family could not be considered to be a disposition

conveyance, assignment, settlement, delivery, payment or other alienation of property. A member of a Hindu undivided family has no definite share in the family property before division and he cannot be said to diminish directly or indirectly the value of his property or to increase the value of the property of any other coparcener by agreeing to take a share lesser than what he would have got if he would have gone to a court to enforce his claim. - *[CGT v. N. S. Getti Chettiar (1971) 82 ITR 599 (SC)]*

Law is well settled that a partition of the joint family properties can be effected by an oral agreement, irrespective of the value of the property - A **memorandum recording factum of partition, evidencing previous oral partition does not create any new jural relationship amongst parties and, hence, it is not hit by section 17(1) of Indian Registration Act, 1908 – Therefore, such a memorandum of partition was admissible in law even without registration under 1908 Act**

The assessee-HUF effected an oral partition on 01.04.1957, and the regular memorandum evidencing oral partition was drawn up on 01.05.1957. The memorandum indicated that both movable and immovable properties were divided. The share capital in two firms was also partitioned. It filed an application under section 25A of the 1922 Act and an order was sought to the effect that the joint family property had been partitioned among the various members in definite portions as required under section 25A, sub-section (1). The Income-tax Officer rejected this claim holding that the memorandum was compulsorily registerable and that the properties which initially belonged to the karta should have been transferred by another registered document to the other members. The order of the Income-tax Officer was confirmed in appeal by the Appellate Assistant Commissioner. On second appeal, the Tribunal affirmed the order of the Appellate Assistant Commissioner. On reference:

In the instant case, the disruption of the joint family with partition by metes and bounds in respect of properties covered by the memorandum dated 01.05.1957, took place on 01.04.1957. Since, then, the joint ownership was converted into individual ownership and the memorandum was merely evidence of that fact. The memorandum by itself did not create any new jural relationship amongst the parties. It merely recorded the factum of partition which had already taken place. It is not hit by section 17(1) of the Indian Registration Act. Therefore, the memorandum of partition dated 01.05.1957, evidencing previous oral partition on 01.04.1957, was admissible in law and did not require registration under the Indian Registration Act. - [In favour of the assessee] (Related Assessment year : 1959-60) – *[Popatlal Devram v. CIT (1970) 77 ITR 1013 (Orissa)]*

Provision applies to both schools of Hindu law

Section 171 applies to families governed by the Dayabhaga School of Hindu Law as well as to the Mitakshara School of Hindu Law. The interpretation that the expression 'group of members' is intended to refer to a group consisting of a head of a branch and his sons who remain undivided, cannot be accepted since such an interpretation will be meaningless in relation to a Hindu family governed by the Dayabhaga School – *[Joint Family of Udayan Chinubhai v. CIT (1967) 63 ITR 416 (SC)]*

Failure to make an order on the claim for partition made does not affect the jurisdiction of the ITO to make an assessment of the HUF which has hitherto been assessed as undivided

In the instant case no orders were recorded by the ITO at the time of making assessments in respect of the five years, and therefore, no personal liability of the members of the family arose under the proviso to sub-section (2). The ITO did not seek to reach in the hands 'T' and 'V' the property which was once the property of the HUF he seeks to reach the personal income of the two respondents. That the ITO could do only if by virtue of the proviso to sub-section (2) a personal liability has arisen against them. In the absence of an order under sub-section (1), however, such a liability did not arise against the members of the HUF even if the family is disrupted. The remedy of the income-tax authorities, in the circumstances of the case, was to proceed against the property, if any of the HUF. That admittedly they have not done. The appeals were dismissed accordingly. (Related Assessment years : 1941-42 to 1946-47) – *[Addl. ITO v. A. Thimmayya (1965) 55 ITR 666 (SC)]*

Partition is not a transfer

Each coparcener has an antecedent title to the joint Hindu family property. Though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners had subsisting title to the totality of the property of the family jointly, that joint title is transformed by partition into separate title of the individual coparceners in respect of several items of properties allotted to them respectively. As this is the true nature of a partition, the contention that partition of an undivided Hindu family property necessarily means transfer of the property to the individual coparceners cannot be accepted. - *[Ajit Kumar Poplai and Another AIR 1965 (SC) 432]*

Partition will not be invalid if minor is not represented by natural guardian

So long as the adult members make a division which is fair and which is not unequal or prejudicial to the minor's interest, the division would be binding, and if the minor after attaining majority thinks that it was unfair or prejudicial, it would be open to him to attack the partition by appropriate proceedings. So long as the interests of the minor have not suffered, it is open even to a person other than the natural guardian to represent the minor in the partition. Thus, a partition is not invalid on ground that minor was not represented by his natural guardian. – *[Jakka Devayya & Sons v. CIT (1952) 22 ITR 264 (Mad.)]*

Claim for partition can be made at any time before assessment

Section 171 of the Income-tax Act, 1961 [Corresponding to section 25A of the Indian Income-tax Act, 1922] – Section 25A of the Indian Income-tax Act, 1922 requires a physical division of property before an ITO can pass an order that joint Hindu family property has been partitioned among various members or group of members in definite portions. The expression 'at the time of making an assessment' *stated in section 25A* of the Indian Income-tax Act, 1922 means in the course of the process of assessment. Expression at time of making an assessment as stated in section 25A is not restricted to time of making final order determining assessment and, therefore, power of ITO to pass an order under section 25A(1) arises when at time of making an assessment under section 23 of the Indian Income-tax Act, 1922 a claim is made by member that a partition has taken place but not necessarily during accounting year. A partition after close of accounting year may be put forward and is bound to be enquired into by ITO. Hence, even when a claim for partition is made after the expiry of the accounting period but before the assessment, it should be entertained by the ITO. (Related Assessment year : 1943-44) – *[Rajmal Paharchand v. CIT (1950) 18 ITR 1 (Punjab)]*

SPECIMEN OF DEED OF PARTITION

This DEED OF PARTITION executed at Chennai, this ..... day of..... 2019 between:
1. ..... S/o Shri ..... residing at .....
2. ..... S/o Shri ..... residing at .....

Which term shall mean and include their respective heirs, legal representatives, executors, administrators, assigns etc.

WHEREAS the property more fully set out in the Schedule A hereunder are the properties of the late Shri..... who died intestate at ..... on ..... leaving the parties herein as Class I legal heirs to succeed the said property;

WHEREAS the parties herein have been enjoying the property more fully described in the Schedule A hereunder-in common.

WHEREAS certain misunderstanding arose between the parties herein and in order to avoid the same and to preserve the dignity of the family and its members, it has been decided to settle the issue in a fair and cheerful manner;

NOW THIS DEED OF PARTITION WITNESSETH:

THAT in pursuance of the above, the Parties herein mutually agree as follows:

1. THAT Party of the First Part is allotted the property more fully described in the Schedule B hereunder and the said Party of First Part shall henceforth be separate and exclusive owner of the said property allotted to her.
2. THAT Party of the Second Part is allotted the property more fully described in the Schedule C hereunder and the said Party of First Part shall henceforth be separate and exclusive owner of the said property allotted to her.
3. Each of the Parties herein shall hereafter hold and enjoy the property so allotted in severalty and freed and discharged from all claims and demands of the other thereto subject however to the terms and conditions hereinafter set forth.
4. Each of the Parties herein releases has no manner of any right and interest in property allotted to others so much so that each of the parties hereto is the sole and absolute owner in his/her right of the properties allotted to him/her in the relevant Schedules.
5. There are no encumbrances or charges on the properties hereby partitioned.
6. The property hereby allotted to each party has been entered upon this day and henceforth be held in severalty by such party without any interruption or disturbance by the other or any one claiming through or under him/her.
7. Each of the parties herein shall meet all the liabilities in respect of the public charges, taxes, including urban land tax and other taxes attributable to the ownership of the respective property allotted to each of them herein from this day onwards.
8. Each of the parties hereto shall at the cost of the other so requiring the same do every such act or thing as may reasonably be required for further and more particularly assuring the property hereby allotted to such party.

Schedule A
(Total Property Partitioned)

Market Value of the property

Schedule B

(Property allotted to the First Party)

Market value of the property

Schedule C

(Property allotted to the Second Party)

Market value of the property

In **Witness whereof** the parties hereto have signed on the day, month and year first above written in the presence of

WITNESSES:

First Party

Second Party