

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'SMC' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member**

**I.T.A. No. 1949/KOL/ 2014  
Assessment Year: 2009-2010**

**Shri Arif Husnain,.....Appellant**  
**12, Abdul Halim Lane,**  
**Kolkata-700 016**  
**[PAN : AANPH 3647 R]**

**-Vs.-**

**Income Tax Officer,.....Respondent**  
**Ward-32(1), Kolkata,**  
**10B, Middleton Row,**  
**Kolkata-700 071**

**Appearances by:**

*Shri Vigyaneswar Nath Dutta, Advocate, for the assessee*  
*Shri Tanuj Niyogi, JCIT, Sr. D.R., for the Department*

Nate of concluding the hearing : January 05, 2015  
Date of pronouncing the order : February 10, 2016

**O R D E R**

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 14.08.2014, whereby he upheld the action of the Assessing Officer in brining to tax partly the capital gain arising to the assessee from the sale of property as short-term capital gain instead of long-term capital gain as claimed by the assessee.

2. The assessee in the present case is an individual, who filed his return of income for the year under consideration on 30.03.2010 declaring total income of Rs.3,63,130/-. In the said return, the capital gain arising from the sale of his share of property at 53, Hazra Road, Kolkata was declared by the assessee as long-term capital gain and deduction under section 54 was claimed in respect of such long-term capital gain. During the course of assessment proceedings, it was noticed

by the Assessing Officer that the assessee along with five other persons had purchased the said property from five vendors, who were the co-owners of the said property. It was also noted by the Assessing Officer that one-fifth of the said property belonging to one of the five co-owners namely Shri Braja Ballav Paul was purchased by the assessee and other five owners on 12.06.2006. Since the property was sold on 28.04.2008, the Assessing Officer was of the view that one-fifth of the property sold by the assessee and other five persons was held for less than 36 months and, therefore, capital gain arising to the extent of sale of the said one-fifth portion was chargeable to tax in the hands of the assessee as short-term capital gain, for which deduction under section 54 was also not available to the assessee. When this position was confronted by the Assessing Officer to the assessee, it was submitted by the latter that an agreement was entered into between the assessee and other five persons on 29.06.2004 itself with one Shri Narendra Kumar Dugar, who was holding rights, title and interest in the property as per the agreement for sale entered into with Shri Braja Ballav Paul earlier. It was contended that by virtue of the agreement dated 29.06.2004, Shri Narendra Kumar Dugar assigned all these rights and interest in favour of the assessee as well as other five persons and although the sale agreement was entered into with Shri Braja Ballav Paul on 27.06.2006, the capital gain arising as a result of sale of the property on 28.04.2008 was a long-term capital gain. This contention of the assessee was not found acceptable by the Assessing Officer. According to him, Shri Braja Ballav Paul was the legal owner of one-fifth of the property at 53, Hazra Road, Kolkata and since his share of property was purchased by the assessee and other five persons by a Deed of Conveyance dated 12.06.2006, the capital gain arising as a result of sale of the said share of property as on 28.04.2008 was liable to be taxed in the hands of the assessee as well as other five persons as short-term capital gain. Accordingly, the capital gain arising from the sale of his share of property at 53, Hazra Road, Kolkata to the extent of one-fifth was brought to tax by the Assessing Officer in the

hands of the assessee as short-term capital gain in the assessment completed under section 143(3) vide an order dated 23.12.2011.

3. Against the order passed by the Assessing Officer under section 143(3), an appeal was preferred by the assessee before the Id. CIT(Appeals) and the submissions made before the Assessing Officer were reiterated on behalf of the assessee before the Id. CIT(Appeals) in support of his case that the short-term capital gain assessed by the Assessing Officer was actually long-term capital gain. This submission of the assessee, however, was not found acceptable by the Id. CIT(Appeals) and he upheld the action of the Assessing Officer on this issue for the following reasons given in paragraph no. 6.1 of his impugned order:-

*"6.1. From the documents on record it further appeared that Sri Ajit Kumar Das, one of the original Co-owners did not sell his 1/5th share in the property at 53, Hazra Road, Kolkata when the remaining 4 Co-owners sold their respective shares to the appellant and 5 others in the months of June & August, 2004. On the contrary, Sri Ajit Kumar Das, who had a definite 1/5th share; right and interest in the property, sold his 1/5th ownership rights to Sri Braja Ballav Paul through a Registered Indenture dated 08.12.2004 for a separate consideration of Rs.5 lakhs. The assessee and 5 others who acquired 4/5th or 80% ownership rights & interest in the property at 53, Hazra Road, Kolkata thereafter negotiated with Sri B. B. Paul for purchase of his 1/5th share and accordingly by a separate Registered Indenture of Sale dated 12.6.2006 the said 1/5th share in the property was acquired by the assessee and 5 others for a separate consideration of Rs.6 lakhs. By a Registered Indenture dated 28th April 2008 the assessee and 5 Co-owners transferred their entire ownership rights, title & interest in the property at 53, Hazra Road, Kolkata at and for aggregate consideration of Rs.5 crores. From the facts set out in the foregoing therefore it is quite apparent that the property in question was acquired by the assessee in different stages. The 5 persons from whom the appellant acquired the ownership rights in property owned & held defined but proportionate undivided share or interest in the property. However, each owner had specific and definite interest in the property which each of them transferred for separate and defined consideration at different points in time. The documents on record show that 4/5th of the ownership rights & interest in the said property was acquired by the appellant and 5 others in 2004, whereas 1/5th undivided share or interest was acquired in the year 2006. As such, it was only in the year 2006 the appellant came to own & hold*

*100% legal ownership rights in the property which in its entirety was transferred in 2008, On the basis of these facts therefore, I have no hesitation in holding that 20% ownership rights in the property at 53, Hazra Road, Kolkata was not owned by the assessee for period more than 3 years. I therefore find that the AO was well justified in assessing 1/5th of the capital gains arising on sale of the property at 53, Hazra Road, Kolkata as and by way of short term capital gains as it was attributable to transfer of 1/5th ownership rights in the property which the appellant acquired from B.B. Paul only on 12th June 2006. I also do not find merit in the submissions of the A/R that the transaction between Ajit Kumar Das and Braja Ballav Paul was illegal and ab initio void so as to hold that the appellant became owner of the entire property since 2004 as claimed. It is apparent from the facts set out by the AR himself that Sri B. B. Paul had acquired 1/5th ownership interest in the property from Sri Ajit Kumar Das on payment of the specified consideration & the said sale was evidenced by a Registered Indenture of Sale. It is only because the assessee and his associates were satisfied about the ownership rights of Sri B. B. Paul in the said property, by another Registered Indenture of sale dated 12<sup>th</sup> June, 2006 and by paying valuable consideration of Rs.6 lakhs; his 1/5th share in the property was acquired by the assessee & other co-owners. In the light of these documentary evidences to which the appellant himself was a party, it could not be said that the transaction between Ajit Kumar Das and Braja Ballav Paul was illegal. For the reasons discussed in the foregoing, therefore, Ground Nos. 3 & 4 are dismissed and the AO's order assessing 1/5th of the capital gains as short term capital gains is upheld".*

Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. The Id. Counsel for the assessee reiterated before me the submissions made before the authorities below in support of the assessee's case on the issue under consideration. He also invited my attention to a copy of receipt placed at page 1 of his paper book to point out that Shri Narendra Kumar Dugar had created his rights and interest in the property in question by making a payment of Rs.10,000/-, *inter alia*, to Shri Ajit Kumar Das, who was the original owner of the said property. He submitted that this right and interest created in favour of Shri Narendra Kumar Dugar by way of the said receipt as well as the subsequent agreement to sale were assigned by him to the assessee as

well as other five persons by way of agreement entered into on 29.06.2004 and, therefore, there was a transfer of property by that Deed itself in favour of the assessee and other five persons, which ultimately was sold on 28.04.2008 giving rise to long-term capital gain. In support of this contention, he relied on the decision of the Hon'ble Supreme Court in the case of Sanjeev Lal -vs.- CIT & Another reported in 365 ITR 389 and that of the Hon'ble Punjab & Haryana High Court in the case of Mrs. Madhu Kaul -vs.- CIT & Another reported in 363 ITR 54.

5. The ld. D.R., on the other hand, strongly relied on the orders of the authorities below in support of the revenue's case on this issue. He contended that although four-fifth share of the property was purchased by the assessee and other five persons from the four co-owners in the year 2004 itself, the remaining one-fifth portion of the property from fifth co-owner was purchased only in the year 2006. He contended that the said share purchased by the assessee from Shri Braja Ballav Paul had been acquired by him only on 08.12.2004 by a Deed of Conveyance from the earlier owner Shri Ajit Kumar Das, as found by the Assessing Officer from the relevant land record and there was no evidence brought on record to conclusively establish that there was transfer of the said property in favour of the assessee and other five persons prior to 27.06.2006 when the sale agreement was entered into between them and Shri Braja Ballav Paul.

6. I have considered the rival submissions and also perused the relevant material available on record. As rightly pointed out by the ld. D.R. from the relevant portion of the assessment order that one-fifth of the property at 53, Hazra Road, Kolkata was earlier owned by one Shri Ajit Kumar Das and the same was transferred to Shri Braja Ballav Paul by a Deed of Conveyance executed on 08.12.2004 as found by the Assessing Officer from the relevant land record. Since the said Shri Braja Ballav Paul, who became owner of the property only on 08.12.2004 and transferred the same to the assessee and other five persons by way of

sale agreement only on 27.06.2006, there was a transfer of property in favour of the assessee and other five owners only on 27.06.2006 and the creation of some right or interest by the earlier owner Shri Ajit Kumar Das in favour of Shri Narendra Kumar Dugar and assignment of the said right by Shri Narendra Kumar Dugar to the assessee and other five persons cannot be regarded as transfer of property within the meaning of section 2(47) as rightly held by the authorities below. In the case of Sanjeev Lal (supra) cited by the Id. Counsel for the assessee, the facts involved were entirely different from the facts of the assessee's case, inasmuch as, an agreement to sale in respect of capital asset in that case had been executed on December 27, 2002 for transferring the residential house and although a sum of Rs.15 lakhs was also paid by way of earnest money, the sale deed could not be executed because of pendency of the litigation. In these facts and circumstances, which were beyond the control of the assessee, the Sale Deed could not be executed and taking note of the same, it was held by the Hon'ble Supreme Court that there was transfer of some rights in respect of capital asset. Similarly in the case of Mrs. Madhu Kaul (supra) cited by the Id. Counsel for the assessee, the flat was allotted to the assessee on June 07, 1986 by a letter conveyed to the assessee on June 13, 1986. The assessee also paid the first instalment on July 4, 1986, thereby conferring right upon the assessee to hold a flat, which was later identified, and possession was delivered on the later date. In these facts and circumstances of that case, it was held by the Hon'ble Punjab & Haryana High Court that the mere fact that possession was delivered later did not detract from the fact that the allottee was conferred a right to hold the property on issuance of an allotment letter and the transfer thus related back to and arose from the rights conferred by the allotment letter. The case laws, relied upon by the Id. Counsel for the assessee, therefore, are distinguishable on facts and the same cannot be any help to the assessee in the present case. As already noted, one-fifth share in the property at 53, Hazra Road, Kolkata, which was sold by the assessee and other five persons during the year under consideration had been acquired by them from Shri Braja Ballav Paul by way of a sale

agreement entered into only on 27.06.2006 and, therefore, the capital gain arising from sale thereof on 28.04.2008 gave rise to a long-term capital gain. I, therefore, find no infirmity in the impugned order of the Id. CIT(Appeals) upholding the order of the Assessing Officer on this issue and dismiss this appeal filed by the assessee.

**7. In the result, the appeal of the assessee is dismissed.**

Order pronounced in the open Court on February 10, 2016.

**Sd/-  
(P.M. Jagtap)  
Accountant Member**

***Kolkata, the 10<sup>th</sup> day of February, 2016***

*Copies to :* (1) ***Shri Arif Husnain,  
12, Abdul Halim Lane,  
Kolkata-700 016***

(2) ***Income Tax Officer,  
Ward-32(1), Kolkata,  
10B, Middleton Row,  
Kolkata-700 071***

(3) *Commissioner of Income-tax (Appeals)-XIX, Kolkata*

(4) *Commissioner of Income Tax, Kolkata*

(5) *The Departmental Representative*

(6) *Guard File*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***