

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

[Before Hon'ble Shri J.Sudhakar Reddy, AM]

**ITA No.2334/Kol/2017**  
Assessment Year : **2009-10**

I.T.O., Ward-27(2),  
Haldia

-versus-

Shri Sabyasachi Pradhan  
Purba Medinipur  
(PAN: AOYPP 0811 J)  
(Respondent)

(Appellant)

C.O.No.24/Kol/2018  
**ITA No.2334/Kol/2017**  
Assessment Year : **2009-10**

Shri Sabyasachi Pradhan  
Purba Medinipur  
(PAN: AOYPP 0811 J)  
(Appellant)

-versus-

I.T.O., Ward-27(2)  
Haldia

(Respondent)

**ITA No.2335/Kol/2017**  
Assessment Year : **2009-10**

I.T.O., Ward-27(2),  
Haldia

-versus-

Shri Girish Chandra Raut  
Purba Medinipur  
(PAN: AHNPR 5089 A)  
(Respondent)

(Appellant)

**ITA No.2336/Kol/2017**  
Assessment Year : **2009-10**

I.T.O., Ward-27(2),  
Haldia

-versus-

Shri Partha Sarathi Das  
Purba Medinipur  
(PAN: ADSPD 4163 G)  
(Respondent)

(Appellant)

For the Department : Shri Robin Choudhury, Addl. CIT

For the Assessee: Shri A.K.Sarkar, FCA

Date of Hearing : 07.02.2018

Date of Pronouncement : 28.03.2018.

**ORDER**

**PER J.SUDHAKAR REDDY, AM:**

All these appeals are filed by the revenue directed against the orders of the Commissioner of Income Tax-(A)-7, Kolkata relating to A.Y. 2009-10. While the Cross Objection is filed in ITA No..2334/Kol/2017 by the assessee Shri Sabyasachi Pradhan. As the facts and issues in all the appeals are common in all the assessment years as the CIT(A)'s order are identical for the sake of convenience they are heard together and disposed of by this common order.

2. The facts of the case are at page-2 of the Id. CIT(A) which is extracted for ready reference :-

The assessee formed a partnership Firm along with two other persons - Sri Sabyasachi Pradhan and Sri Girish Chandra Rout under the trade name M/s. Hotel Sea Weed' having its PAN: AADFH9221R (i.e., the Seller Firm). They had their own landed properties adjacent to each other which were given to the common asset basket of the Firm. The said Firm thereafter took loans from M/s. Balageria Central Co-Operative Bank Limited (i.e., the Lending Bank) and constructed a hotel building on the aforesaid plots of lands. On being unable to run the hotel business profitably, the loan dues to the lending bank become bad and the lending bank under the direction of the Competent Authority being Assistant Registrar of Co-operative Societies, auctioned the Hotel Building property and the partners of the Seller Firm transferred the said property to another partnership firm bearing the same name - M/s. Hotel Sea Weed but different PAN: AAFFH2335G and different partners - Sri Ashok Sinha and Smt.. Mahua Sinha (i.e. the purchaser firm). The property was sold to the purchaser firm for Rs. 1,35,00,000/- on 04.08.2008, the value of which was ascertained at Rs. 1,60,17,282/- by the Registration Authorities for levy of Stamp Duty. The Seller firm did not file its return of income for the impugned assessment year 2009 - 2010 as its business remained discontinued. The Seller Firm was still not dissolved by executing any Indenture though its business is discontinued. The AO had in his possession the AIR information from ADSR - Ramnagar regarding property transaction for sale of property with the said Registration value of Rs. 1,60,17,282/-. The AO had issued notice u/s. 148 to M/s. Hotel Sea Weed, the purchaser firm (PAN: AAFFH2335G) to re-open the assessment proceedings for charging Capital Gains tax and not to the Seller Firm, M/s. Hotel Sea Weed (PAN: AADFH9221R). The said assessment u/s.147 was made on 31.03.2014 on Nil income. The assessment proceedings of the appellant, Sri Partha Sarathi Das, for the assessment year 2009-2010 was pending before AO. During such assessment proceedings, the appellant was asked to clarify the chargeability of capital gains for sale of the impugned immovable property as per the AIR information and the appellant clarified that he had not sold the property rather the seller firm of which he is a partner had sold such properties. Such assessment u/s. 143(3) was completed on 29.11.2011. Having received such information during

the assessment proceedings of the appellant as well as from the AIR information for property transaction with respect to sale of property, the AO had issued notice u/s. 148 of the Act on 31.01.2012 to the appellant as well as on his co-partners of the partnership firm alleging that such capital gains on sale of the immovable properties has escaped assessment within the meaning of s. 147 of the Act. However, the appellant did not respond. The AO had conceived that the impugned capital gains on account of sale of the immovable properties of the seller firm, M/s. Hotel Sea Weed (PAN: AADFH9221R) was payable by the appellant in his individual capacity as a representative thereof. On such basis, the AO conceived that since the appellant along with his co- partners had executed the Sale Deed for the hotel building property they were liable to capital gains tax in their individual capacity ignoring the fact that all the partners of a firm are required to execute the Sale Deed in case of transfer of any property of the firm. The final show-cause notice dated 24.02.2015 was issued to the appellant which is reproduced hereunder: -

As you have not attended your case, your return of income remains unexplained & unproved. Consequently what transpires are summarized as under.

You along with other two individuals have sold immovable property in your individual capacity with a sale consideration value of Rs. 1,60,17,282/- as on 04.08.2008.

As per the said deed of transfer it is apparent that the land was sold along with a hotel building standing over it. In absence of any documentary evidences and/or submission, your case remains unexplained and unproven. The primary onus to explain this is upon you that you have failed to discharge. Therefore, the value is considered to be the book value of the hotel as found to have been recorded at Rs. 37,11,512/- (WDV) as on 31.03.2008 in the books of a firm viz. M/s. Hotel Sea Weed to which you are partners.

You have not shown any capital gain as per the provision u/s. 50 of the I. T. Act, 1961 for the said gain of Rs. 1,23,05,770/- (Rs. 1,60,17,282/-) accrued to you by way . of transfer of the said immovable property through your individual capacity.

Whereas no agreement relating to the sharing of the said gain is furnished in support of your claim in your return of income, it is hardly possible to ascertain the veracity of your claim and you are considered to be equal co-sharer of the said gain.

Hence, in the absence of any documentary evidences in support of your claim, your case remain open to be completed to the best of judgment under section 144 of the I.T Act 1961 and Rs.41,01,923/- being one-third of the gain narrated above will not be treated as your income. “

Since the appellant failed to respond, the AO assessed the income of the appellant, along with his two other partners, by resorting to an addition of Rs. 41,01,923/-, being 1/3<sup>rd</sup> of the imaginary capital gain, observing as under :-

"During the year under consideration, the assessee along with his two others has transferred a immovable property for Rs. 1,60,17,282/- on 04.08.2008 and thereby made a gain of Rs.1,23,05,770/- as per the provision u/s 50 of the I. T. Act, 1961 as per above discussion. Therefore, in absence of any defined sharing agreement, one-third of the same calculated to Rs.41,01,923/- as gain made thereof is now being added as short term capital gain made to the income of the assessee. "

3. The assessee carried the matter in appeal. The First Appellate Authority held that the AO had wrongly initiated proceedings u/s 147 of the Income Tax Act, 1961 (Act) for charging the impugned capital gains in the hands of the purchaser firm having PAN:AAFFH2335G and thereafter dropping this proceedings of assessing the said capital gain in the hands of the purchaser firm and thereafter wrongly initiated proceedings to assess the impugned capital gains in the hands of the assessee, in his individual capacity and not in the hands of the "seller firm" having PAN: AADFH 9221R.

4. He held that each assessee shall be assessed only in respect of this income and that a partnership firm is clearly a separate and distinct assessable entity, different from its individual partners and that income of the partnership firm has to be assessed in its hands only. He referred to section 189 of the Act and held, that even if the business of the firm is discontinued, the AO shall have to make the assessment on the firm, as if no discontinuance has taken place. He held that notice issued u/s 148 of the Act to the partners of the firm is non-est and hence he quashed the same as ab-initio void.

5. Assessments framed for all the three partners, who are appellants before him in their individual capacity was quashed. Aggrieved the revenue is in appeal before me on the following grounds :-

*“1. That on the facts and in circumstances of the case the CIT (A) erred in deleting the addition of Rs.41,01,923/- made in the hands of the assessee under the head, 'Capital Gains'*

*2. That on the facts and in circumstances of the case the CIT(A) erred in holding that the assessment of the impugned Capital Gains could only be made u/s.189 on the seller-firm [AADFH9221R] and not on the partners in their individual capacity when there is no material evidence on record to show that the immovable property had been sold by the firm [AADFH9221 R]*

*3. That on the facts and in circumstances of the case the CIT(A) erred in deleting the addition of Rs.41,01,923/- when it is clearly evident from the copy of the sale deed on record that the impugned property was sold by the three partners in their individual capacity and not as partners of the firm.*

*4. The appellant craves leave to add, alter and/or modify anyone or all of the grounds of appeal mentioned above.”*

6. The Id. Departmental Representative submitted that, on examination of sale deed executed by the assessee it is proved that the sale had taken place in their individual capacity and it was not a case of sale of the firm's asset. He relied on the documents and submitted that nowhere was it mentioned in the registered documents that these individuals were selling the property in question on behalf of the firm. He pointed out that the seller partnership firm bearing PAN AADFH 9221R has not filed its return of income nor paid tax on the same. Alternatively he submitted that the tribunal should direct the department to assess the seller firm .

7. The Id. Counsel for the assessee, on the other hand, filed a paper book and pointed out that the AO was very much aware that the asset in question belong to the partnership firm. He filed copies of the reasons recorded for issuing of notice, u/s 148 of the Act to the seller firm M/s. M/s. Hotel Sea Weed and submitted that, it was only during the course of scrutiny proceedings u/s 143(3) of the Act in the case of Shri Partha Sarathi Das for A.Y.2009-10, this information came to light. He also pointed out that the written down value (WDV) of the asset in the books of account of the

assessee firm was taken into consideration while computing capital gains on sale of the asset. He relied on the order of the Id. CIT(A) and supported the same.

8. Heard rival contentions. On a careful consideration of the submissions, papers on record and case law cited, I hold as follows.:-

The issue in this case is whether the house building property in question is the asset of the partnership firm M/s. Hotel Sea Weed with PAN AADFH 9221R the Seller Firm with the address Paschim Sadadharpur, Old Disha, Purba Medinipur, West Bengal-721428 or whether it is the individual property of the assesseees, who are respondents of these appeals.

9. The AO has recorded the following reasons while reopening the assessment of the "purchaser firm" M/s. Hotel Sea Weed with PAN AAFFH 2335 G with address at Hotel Sea Weed, Paschim Sadadharpur, Old Disha, Purba Medinipur, West Bengal-721428.

"During the course of scrutiny proceedings u/s 143(3) in the case of Sri Partha Sarathi Das for the A.Y.2009-10 it was seen that M/s. Hotel Sea Weed had sold its house building property at a price of Rs.1,35,00,000/- on 04.08.2008 and return of income was not filed for the A.Y.2009-10.

It was also noticed from the balance sheet as at 31.03.2008 that w.d.v. of fixed assets as on 31.03.2008 was of Rs.37,11,512/-. So, there must be short term capital gain.

I have therefore reason to believe that the income chargeable to tax has escaped assessment.

Issued notice u/s 148 of the I.T.Act, 1961."

10. Notice u/s 148 of the Act was issued to the purchaser firm M/s. Hotel Sea Weed on 31.07.2012 . Notice was also issued on 31.07.2012u/s 148 of the Act to Shri Girish Chandra Rout, who is the respondent before me and a partner of the seller firm The AO had taken the cost of the asset as the WDV in the books of the seller partnership firm. Thus it is clear that the AO, prior to framing assessments on the purchaser firm and prior to framing assessments on the individual assesseees, who are

respondents in these appeals was fully aware that the asset in question belong to the seller partnership firm and not the individual assesseees. It was the WDV of the asset in the Balance Sheet of the Seller Firm that the AO has taken for the purpose of computation of Capital Gains. Thus the argument of the Id. DR that the AO was misled as to whether the asset belonged to the firm or the individual in view of the recitals in the sale deed is devoid of merit. The notices u/s 148 of the Act were wrongly given as the reasons recorded were against the fact that, the asset belong to the firm which were in the knowledge of the A.O.

11. In the circumstances, I find no infirmity in the order of the First Appellate Authority wherein he held that u/s 189 of the Act, the assessments have to be made on the firm only, even if the business of the firm is discontinued. He rightly held that the capital gain in question could be brought to tax u/s 189 of the Act only in the hands of the seller firm with PAN AADFH 9221R. In view of the above discussion we uphold the order of the First Appellate Authority and dismiss all the three appeals of the revenue.

12. The sole cross objection filed is in support of the order of the First Appellate Authority. It was also submitted that the notice u/s 148 of the Act issued on all these three assesseees were not served on them. I would not go into these matters, as it would be an academic exercise in view of my decision above.

13. In the result the cross objection is dismissed.,

14. In the result the appeals of the revenue and the cross objection of the assessee are dismissed.

**Order pronounced in the Court on 28<sup>th</sup> March, 2018.**

Sd/-  
[ J.Sudhakar Reddy ]  
Accountant Member

Dated : 28.03.2018.  
[RG Sr.PS]

Copy of the order forwarded to:

1. Shri Sabyasachi Pradhan, S/o Satyaranjan Pradhan, Vill-Sibalaya Road, P.O.-Digha Costal Mohana, Purba Medinipur-721428.
2. Shri Girish Chandra Raut, S/o Prasanna Raut, Vill-Maitrapur, P.O.-Alankarpur, Digha Costal Mohana, Purba Medinipur-721428.
3. Shri Partha Sarathi Das, S/o Kanailal Das, Vill & P.O.-Alankarpur, Digha Costal Mohana, Purba Medinipur-721428.
2. I.T.O., Ward-27 (2), Haldia.
3. C.I.T.(A)- 7, Kolkata      4. C.I.T-9, Kolkata
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary  
Head of Office/D.D.O, ITAT Kolkata Benches