

आयकर अपीलिय अधिकरण "D" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री जी. मंजुनाथ लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

आयकर अपील सं./ ITA No. 2079/Mum/2016

(निर्धारण वर्ष / Assessment Year 2010-11)

The Dy. Commissioner of Income Tax, Central Circle-8(1), Room No. 656, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	Vs.	M/s Arif Abdul Kadar & Others, 21 st , Floor, Nirmal Building, Nariman Point, Mumbai-400 021
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAAAA0245J		

प्रत्याक्षेप सं./CO No. 293/Mum/2017

(Arising in ITA No. 2079/Mum/2016 for AY 2010-11)

M/s Arif Abdul Kadar & Others, 21 st , Floor, Nirmal Building, Nariman Point, Mumbai-400 021	Vs.	The Dy. Commissioner of Income Tax, Central Circle-8(1), Room No. 656, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

प्रत्यर्थी की ओर से / Respondent by : Shri Ram Tiwari, DR

अपीलार्थी की ओर से / Appellant by : Shri Dr. K Shivaram, DR

सुनवाई की तारीख / Date of hearing:	30-05-2018
घोषणा की तारीख / Date of pronouncement :	08-06-2018



आदेश / ORDER

PER MAHAVIR SINGH, JM:

This Appeal by the Revenue and Cross Objection by the assessee are arising out of the order of Commissioner of Income Tax (Appeals)-50, Mumbai [in short CIT(A)], in appeal No. CIT(A)-50/IT-481/2013-14 dated 30.12.2015. The Assessment was framed by the Asst. Commissioner of Income Tax, Central Circle-44, Mumbai (in short 'ACIT'/ AO) for the A.Y. 2010-11 vide order dated 26.03.2013 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of Revenue is against the order of CIT(A) holding that the shares of the co-owners in the Arif Abdul Kader & Others in an association of persons (AOP) are definite and ascertained. Hence, the AO has erred in assessing the long term capital gain in the hands of the AOP amounting to Rs. 3,58,69,659/-. For this Revenue has raised the following ground No. 1:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that LTCG of Rs. 3,58,69,659/- is not taxable in the hands of the assessee (an AOP) without appreciating the fact that the share of each co-owner was not definite as the ratio of distribution of the benefit of the Abdul Lalit family trust in whose name the ownership of the property was registered was different from the shares of the co-owners in the AOP and the share of the partners in the firm wherein the property has been introduced as capital."



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3. Briefly stated facts are that the Arif Abdul Kader family trust was originally created as per Trust executed on 20-03-1981 with Aishabai Latif as settlor and Abdul Kader Latif and Abdul Gaffer Latif as trustees. The followings were the beneficiaries with definite and specified share in the trust deed as under:-

Name	Org Share	Rev Share
Arif Abdul Kader	10%	12.50%
Irfan Abdul Kader	10%	12.50%
Iqbal Abdul Kader	10%	12.50%
Asif Abdul Kader	10%	12.50%
Yashmin Yunus A. Gaffer	14%	17,50%
Faisal Yunus A. Gaffar	13%	16.25%
Imran Yunus A. Gaffar	13%	16.25%
Aishabai& Haji Abdul Latif Charitable Trust	20%	--

4. The learned Counsel for the assessee drew our attention to Para 4(c) of the Trust deed dated 20.03.1981 and as per this clause the trustees were to hand over the trust property to beneficiaries in their ratio upon expiry of 15 years and the relevant clause reads as under:

“.....c. The trustees shall utilize the Net Income for the benefit of the Beneficiaries for a period of 15(fifteen) years from the date hereof after which they shall hand over the corpus of the Trust fund to the Beneficiaries as their absolute and exclusive property in the same proportion as the Net Income as shown in the clause (b) above to be held



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*by leas mentioned beneficiary towards their corpus.
If any of the beneficiaries die before the expiry of
this period of 15(fifteen) years his or her shares in
the Net Income and corpus shall be distributed to
the other beneficiaries of the same Branch only in
the same proportion. If per chance all the
Beneficiaries of any Branch are not available
because of death or otherwise to receive the income
or the..... ”*

5. As Aishabai & Haji Abdul Latif Charitable Trust were settled, and the shares of other beneficiaries were increased pro rata. As per declaration / confirmation deed dated 18.08.2005 Abdul Latif family trust entered into an agreement for purchase with M/s Sopariwala Exports the undivided shares of the co-owners in the Neelam Centers Worli, Mumbai. The period of 15 years expired and consequently the beneficiaries collectively called as “Arif Abdul Kader and Others” i.e the assessee trust held the trust property in their respective shares as co-owners. By way of a registered supplement deed dated 18.04.2009 to the partnership deed of firm M/s Sopariwala Exports were transferred the undivided shares of the co-owners in the Neelam Center to the firm M/s Sopariwala Exports. The said deed was modified by registered deed of modification dated 17.02.2010 with regard to the correct value of the premises in the books of the firm. Before the AO, during the course of assessment proceedings for the relevant AY 2010-11, the assessee submitted that the Neelam Center property was introduced by co-owners in the firm Sopariwala Exports and also as per the supplementary deed of partnership and deed of modification as noted above. According to the AO, the AOP has transferred the Neelam Centre property as immovable property to the firm Sopariwala Exports a partnership firm vide deed of modification dated 17.02.2010 for consideration of Rs. 33,01,958/-, whereas the value of the property transferred as per stamp duty valuation of sub registrar is at Rs.



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4,76,38,000/- . According to AO, the AOP to be the owner of the property, it transferred to partnership firm M/s Sopariwala Exports as capital contribution, is giving capital gain amounting to Rs. 3,58,54,586/-. Accordingly, the AO assessed this as long term capital gain for the reason that the shares of the members in AOP are not definite and ascertainable. Therefore, the AO assessed the long term capital gain in the hands of the AOP. Aggrieved, assessee preferred the appeal before CIT(A).

6. The CIT(A) held that the shares are definite and ascertainable and deleted the assessments of capital gain in the hands of the AOP by observing as under:-

“4.2 The aggregate value of property recorded credited in the accounts of the partners towards the value of their shares in the property was Rs. 33,01,958/- In other words, the total value of the property recorded in the books of the firm was Rs. 33,01,958/-. The partnership deed was registered. The value of the property was taken as Rs. 4,76,38,000/- for the purpose of stamp duty. The appellant contended that the share of each of the co-owners in the property was definite and, therefore, as per the provisions of section 26 of the I.T. Act, 1961, they (co-owners) are not to be assessed as an AOP. Therefore, the A/R contended that no capital gain arises in the hand of the AOP. The Assessing Officer contended that the shares of the co-owners are not definite and, therefore, the capital gain do arise in the hand of the AOP. Accordingly, he proceeded to compute capital gain in the hand of the AOP.



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4.4 The second issue disputed is regarding the sale consideration to be adopted for the computation of capital gain u/s 48(2). The appellant contended, without prejudice to its claim that no capital gain arises in its case-, that sale consideration should be the value recorded in the books of the-firm-as per the provisions of section 45(3). The Assessing Officer took the value adopted for the purpose of stamp duty as the sale consideration by invoking provisions of section 50C.

5.1 I shall first take up ground no. 3. In this ground, the appellant objected to inclusion of capital gain in its gross total income. It contested the finding of the Assessing Officer that the shares of the co-owners in the property are not definite. I find that the Assessing Officer did not consider the relevant materials for deciding the issue. In the course of the appeal proceedings, the A/R submitted copies of the assessment order in case of the appellant for A.Ys 2003-04 to 2009-10. It is seen from these orders that the Income Tax Department has been accepting for many years that the share of the individual members in the property as definite. As per the assessment order for AY 2009-10, the shares of the co-owners are as under: -



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S.No.	Name	Share
1	Arif Abdul Kader	12.5%
2	Irfan Abdul Kader	12.5%
3	Iqbal Abdul Kader	12.5%
4	Asif Abdul Kader	12.5%
5	Ms. Yasmin Yunus	17.5%
6	Faizal Yunus	16.25%
7	Imran Yunus	16.25%

5.2 Thus I find that the shares are of the co-owners are definite. Therefore, the capital gains in respect of the transfer of the shares in the property in this case, if any, arose in the hands of the members and not in the case of the AOP. I, therefore, allow this ground of appeal.”

Aggrieved, now Revenue is in appeal before Tribunal.

7. Before us the learned Counsel for the assessee supported the order of CIT(A) whereas the Revenue supported the order of the AO.

8. The above narrated facts are undisputed. We find that Neelam Center property is co-ownership property for the reason that originally this property was held by Abdul Latif Family trust. The Trust was an non-discretionary Trust with shares of each of the beneficiaries determined and specific. After the expiry of 15 years the property was received by each of the beneficiaries as a co-owner in their respective shares as per the Trust but in fact even when the trust existed, the income was assessed in the hands of the beneficiary by holding the trust as specific trust. This view has been held by CIT(A), ITAT and even the AO from AY 1982-83 to 1992-93. The Tribunal in 1982 in ITA No. 305/Bom/1986 vide order dated 03.08.1980 as categorically held vide Para 2 as under: -



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"2. A perusal of the trust deed will show that the beneficiaries are specified and the shares are determinate. The AAO has also held the issue in favour of the assessee after carefully perusing the trust deed. In the circumstances, we do not find any infirmity in the order of the AAO and decide the issue against the Revenue."

9. Similarly, in AY 1987-88 in ITA No. 8299/Bom/90 vide order dated 07.05.97 the same was affirmed. The AO for AY 2000-01 to 2009-10 has assessed the rental income from the Neelam Center in the hands of co-owner and not in the hands of the AOP. The relevant assessment order of AOP as well as the beneficiaries are enclosed in assessee's paper book as under: -

AY	DATE OF ASST ORDER	PG NO
09-10	u/s 143(3) r.w.153A dtd 31.12.2010	144-146
08-09	u/s 143(3) r.w.153A dtd 31.12.2010	141-143
07-08	u/s 143(3) r.w.153A dtd 31.12.2010	138-140
06-07	u/s 143(3) r.w.153A dtd 31.12.2010	135-137
05-06	u/s 143(3) r.w.153A dtd 31.12.2010	132-134
04-05	u/s 143(3) r.w.153A dtd 31.12.2010	129-131
03-04	u/s 143(3) r.w.153A dtd 31.12.2010	126-128
02-03	u/s 143(3) dtd 29/9/2004	121-125
00-01	Certificate from ITO dated 20.8.2002	148
99-00	Certificate from ITO dated 25.6.2001	147



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10. We find that the AO while framing the assessment under section 143(3) read with section 143A of the Act for each of the co-owners from AY 2003-04 to 2009-10 as assessed income from Neelam Centre as income from House property in their individual hand in the following ratio:-

<i>“(1) Mr. Arif Abdul Kader</i>	<i>: 12.5%</i>
<i>(2) Mr. Irfan Abdul Kader</i>	<i>: 12.5%</i>
<i>(3) Mr. Iqbal Abdul Kader</i>	<i>“ 12.5%</i>
<i>(4) Mr. Asif Abdul Kader</i>	<i>: 12.5%</i>
<i>(5) Mr. Faisal Yunus A. Gaffar</i>	<i>:16.25%</i>
<i>(6) Mr. Imran Yunus A. Gaffer</i>	<i>:16.25%</i>
<i>(7) Mr. Nadeem Fazlani</i>	<i>:17.5%”</i>

11. In view of the above, if view taken by department consistently and accepted by the appellate authorities that the income from Neelam Centre is to be assessed as income from house property in the hands of the co-owners, now in the same circumstance, the department cannot change its stand that the capital account is to be assessed in the hands of the AOP. Even more so, the AO has wrongly computed capital gain on the value as per registration authority without considering the provisions of section 26 of the Act as applicable to co-owners who's shares are definite and ascertainable and the provisions of section 45(3) of the Act are to be applied where persons introduced their shares in immovable property as capital contribution. The comparative chart of the partnership firm and in the AOP reads as under:-



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Sr. No.	Percentage of Shares ownership as per b/s as on 31/03/2010 of the AOP		Sr.No.	Percentage of share in AOP on the date of introduction of property in the partnership	
1	Arif Abdul Kader	12.50%	1	Arif Abdul Kader	10%
2	Irfan Abdul Kader	12.50%	2	Irfan Abdul Kader	10%
3	Iqbal Abdul Kader	12.50%	3	Iqbal Abdul Kader	10%
4	Asif Abdul Kader	12.50%	4	Asif Abdul Kader	10%
5	Yasmin Banu Yunus	17.50%	5	Yasmin Banu Yunus	17.50%
6	Faisal Yunus	16.25%	6	Faisal Yunus	16.25%
7	Imran Yunus	16.25%	7	Imran Yunus	16.25%

12. In view of the above facts and circumstances, we are of the view that no assessment can take place in the hands of the AOP because the shares of the beneficiary are definite and ascertained accordingly, the assessment framed in the hands of the assessee AOP has long term capital gain is rightly deleted by CIT(A), and we confirm the same.

13. As we confirmed the action of the CIT(A) in quashing the assessment of long term capital gain, hence, we need not to adjudicate the issue raised in the Cross objection of the assessee.

14. In the result, the appeal Revenue is dismissed and that of the CO of the assessee is also dismissed.

Order pronounced in the open court on 08-06-2018.

आदेश की घोषणा खुले मे दिनांक 08.06.2018 को की गई ।

Sd/-

(जी. मंजुनाथ /G MANJUNATHA)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

Mumbai, Dated: 08-06-2018
Sudip Sarkar /Sr.PS



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Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI