

आयकरअपीलीयअधीकरण, न्यायपीठ-“C”कोलकाता,  
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA  
(समक्ष)Before श्रीजे. सुधाकररेड्डी, लेखासदस्यएवं/andश्रीऐ. टी. वर्की,न्यायीकसदस्य)  
[Before Shri J. Sudhakar Reddy, AM &Shri A. T. Varkey, JM]

**I.T.A. No. 158/Kol/2016**  
**Assessment Year: 2008-09**

Devendra Kumar Shroff (PAN: ALGPS4538J)	Vs.	Income-tax Officer, Ward-7(2), Kolkata
Appellant		Respondent

Date of Hearing	27.12.2019
Date of Pronouncement	26.02.2020
For the Appellant	ShriSubashAgarwal, Advocate
For the Respondent	ShriJayantaKhanra, JCIT, Sr. DR

**ORDER**

**Per ShriA.T.Varkey, JM**

This appeal preferred by the assessee is against the order of the Ld. CIT(A)-11, Kolkata dated 30.12.2015 for AY 2008-09.

2. At the outset, the Ld. Counsel for the assessee prayed before the bench for admission of the following additional grounds of appeal:

*“1. For that on the facts and in the circumstances of the case, the Ld. AO erred in passing of the order u/s. 147/143(3) dated 18.12.2013 without issuing the statutory notice u/s. 143(2), and as such the reassessment order passed by him is bad in law and void ab initio.*

*2. For that the reassessment order dated 18.12.2013 is bad in law and is liable to be quashed in the absence of recording of “reasons to belief”.*”

3. Since we note that the aforesaid additional grounds are purely legal in nature, we admit the same and had directed the department to produce the assessment records of the assessee to adjudicate the legal issue. Today when the assessment records were produced by the department (on the date of hearing), the Ld. AR inspected the assessment records and does not want to press the aforesaid legal issues. So, we dismiss these legal issues raised before us.

4. Coming to the main grievance of the assessee which is against the action of Ld. CIT(A) in confirming the action of AO in making addition of Rs.1,25,42,334/- as Long Term Capital Gain (hereinafter LTCG) from sale of property when, according to assessee, there was diversion of income due to overriding title.

5. Briefly stated facts of the case as emanating from the assessment order passed u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) are that in this case notice u/s. 142(1) was issued calling for submission of return, since the assessee did not file his return of income for this assessment year. The said notice u/s. 142(1) was served upon the assessee on 25.03.2010. In response, the assessee filed the return of income for the AY 2008-09 which was received by the office of the AO on 04.05.2010. In the said return the assessee had shown a total income of Rs.58,974/-. On perusal of the return of income furnished by the assessee it was found by the AO that the assessee has shown income from salary of Rs.1,50,000/- which was received from M/s. Pragati Printers Pvt. Ltd. (hereinafter called as “M/s. PPPL”). Assessee had filed the following computation of income sheet along with the return of income filed, which is reproduced by the AO in the assessment order as under:

Income from salary (net)	Rs. 1,48,680/-
Income from business	(-) Rs.(1,55,46,342.57)
(A)	
LTCG for land at Beraberi:	
Sale consideration of land	Rs.1,65,00,000/-
Less: Cost of acquisition Rs.29,16,175/- x 551/406	<u>Rs. 39,57,666/-</u>
	<u>Rs.1,25,42,334/-</u>
(B)	
LTCG for land at VIP Road:	
Sale Consideration of land	Rs.36,00,000/-
Less Cost of acquisition Rs.8,00,000/-x551/406	<u>Rs.44,08,000/-</u>
	<u>Rs.8,08,000/-</u>
Total of (A) + (B)	Rs.1,17,34,334/-
Income from other sources	Rs.3,285/-
Gross Total Income	Rs.1,48,680/-

6. According to AO, the details filed along with the return of income reflects that the assessee has claimed a bad debt loss of (-) Rs.1,55,46,342.57/-. According to AO, the claim of bad debts loss required further verification as no substantive evidences were filed along with the return of income. The AO also noted that the assessee had claimed wrong indexation in the case of the sale of land at VIP Road, which is inaccurate and incorrect and furnished wrong calculation/computation. According to AO, on perusal of the details filed along with the return of income, the AO had reasons to believe that income has escaped assessment. The reasons for reopening the proceeding and initiating action u/s. 147 of the Act was recorded, which is as under:

*“The indexation done in the sale of land at VIP is inaccurate and incorrect furnishing of particulars which amply brought forward the fact that there were reasons to believe that income has escaped assessment. Assessee has set off the non-existent Bad Debts loss of (-) Rs.1,55,46,342.57 with that of the LTCG of Rs.1,17,34,334/-.”*

7. The AO also recorded the following for initiating the proceedings u/s. 147 of the Act:

*“On perusal of the details filed along with the copy of the return, it is seen that the assessee has no business activity and without any business activity, assessee cannot claim deductions of any bad debts. The copy of statement had no supporting evidences or particulars of having carried any business activity during the year or any previous years. Even after proper perusal it was found that the calculation of indexation in VIP road land is inaccurate. There were enough reasons for reopening.*

*Thus the assessing officer had reasons to believe that the assessee has furnished inaccurate particulars and has reasons to believe that income chargeable to tax has escaped assessment for the AY 20-08-09. It is a fit case for issuance of notice u/s. 148 for proceedings u/s. 147 of the Income Tax Act, 1961.”*

8. Finally, a show cause notice was issued to the assessee and asking him to explain the following:

- i) *What are the business activities that the assessee had carried out in the previous years?*
- ii) *What are the business losses that the assessee had to incur in his own business being the sole proprietor, owner of such business activity?*
- iii) *What are the bad debt losses that the assessee incurred during the year in contention in having conducted any loss as being the owner/proprietor?*

- iv) *The balance sheet of M/s. Pragati Printers Pvt. Ltd. also does not show any accounts that substantiates your claim.*
- v) *You are asked to explain as to why the bad debts loss will be allowed in the hands of the assessee as such loss was not incurred by the assessee himself.*
- vi) *It is seen from the copy of the registered deed dated 16.08.2007 that you have shown sale of land property having Dag no. 244, R. S. Khatian no. 191 area of land 4 cottahs for a consideration of Rs.36,00,000/- to Maple Vincom Pvt. Limited whereas the Stamp Valuation Authority has ascertained the value of the property at Rs.52,00,000/-. You are asked to explain and reconcile why such value ascertained by the stamp valuation authority as per the provisions of section 50C will not be treated as your value of sale of the property and treated accordingly.*
- vii) *It is seen from the copy of the registered deed dated 31.05.2007 that you have shown sale of land property of about 1 Bigha 11 Cottaha 7 Chittacks 16 sq. ft. having JL No. 2, R.S. Khatian no. 1434, CS Dag No. 5479, R.S. Dag No. 3710, for a consideration of Rs.1,65,00,000/- to Svarna Infrastructure & Builders Pvt. Ltd. whereas the Stamp Valuation Authority has ascertained the value of the property at Rs.1,65,00,000/-. You are asked to explain as to why capital gain will not be treated accordingly.”*

9. Pursuant to the aforesaid queries, the assessee replied vide his reply dated 07.08.2013 (which has been reproduced by the AO in the assessment order at pages 8 and 9), the AO conducted enquiry from various authorities and the SBI and since being dissatisfied with the reply of the assessee, the AO computed the income from capital gain from sale of immovable properties at Rs.1,64,40,806/- (LTCG for land at Berabari at Rs.1,25,42,334/- and LTCG for land at VIP road at Rs.38,98,472/- thus total Rs.,1,64,40,806/-) and had computed income from short term capital gain from sale of factory shed as it is a depreciable asset at Rs.24,70,866/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to partially confirm the action of the AO and gave relief of Rs.24,70,866/-. Aggrieved, the assessee is in appeal before us in respect of LTCG in respect of two properties.

10. First we will take up the addition confirmed of the LTCG in respect of land at Berabari. We have heard rival submissions and gone through the facts and circumstances of the case. According to Id.AR the brief facts of the issue before us is that the assessee an

individual who was the owner of the immovable property at Berabarihad mortgaged the same as secured asset (refer page 69-72) with the SBI (lender of loan) since the assessee stood as guarantor for the loan taken by a corporate entity M/s. Pragati Printers Pvt. Ltd. Further, according to Id.AR, when the loan taken by M/s. Pragati printers Ltd. was classified by the lender as a non-performing asset, the lender bank i.e. SBI issued notice dated 04.01.2007 u/s. 13(2) of Securitization & Reconstruction of Finance Asset and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFESI Act" and proceeded to take possession of the assessee's immovable property at Berabari and sealed the same by SBI (refer to page 79 of paper book). Since the assessee had leased the said immovable property to the M/s. Pragati Printers Pvt. Ltd. the same (lease) was surrendered back by M/s. PPPL to assessee on 31.05.2007 (refer pages 74 to 84 of paper book). And according to Id. AR, since the interest rate on the loan given to the M/s. PPPL was rising day by day and the immovable property of assessee at Berabarimortgaged to SBI was taken possession and sealed by the bank after issuing notice u/s. 13(2) of SARFESI Act, the immovable property was sold to M/s. Svarna Infrastructure & Builder (P) Ltd. on 31.05.2007. The Id. AR pointed out that before the said sale, the lender (SBI) agreed to conveyance of property provided the purchaser makes good the outstanding loan and dues of M/s. PPPL are paid in full before transfer of the immovable property. The Id. AR drew our attention to the relevant portion of the SBI letter to purchaser M/s. Svarna Infrastructure & Builder (P) Ltd. is reproduced as under :

 <p>স্বর্ণাভারতীয় স্টেট ব্যাংক भारतीय स्टेट बैंक STATE BANK OF INDIA</p>	 <p>The Director, Svarna Infrastructure &amp; Builders Pvt Ltd., R-606, City Centre Residency, DC Block, Salt Lake, Kolkata-700064</p>	
<p>লক্ষ্মী উদ্যোগ শাখা ভবানীপুর, কোলকাতা ব্রহ্মলতা 39, শেক্সপীয়র সরণী (3য় তল) কোলকাতা - 700 017 ব্রাচ কোড নং: 4833</p>	<p>SS Branch Bhowanipore, Kolkata "Prenlata" 39, Shakespeare Sarani, (2nd Floor) Kolkata- 700 017 Branch Code No. 4833 Tel: (033) 2280-7092 (A.M.) (033) 2280-0095 (Adv.) (033) 2289-3692 (B.F.F.M.) (033) 2289-3171 (A/cnts) (033) 2280-8750 (Forex)</p>	
<p>(033) 2280-7092 (এ.জি.এম.) (033) 2280-0095 (অফিস) (033) 2289-3692 (এম.ই.আর.এম.) (033) 2289-3171 (একাকউন্টস) (033) 2280-8750 (ফোরেক্স)</p>	<p>দূরভাষ : (033) 2280-7092 (এ.জি.এম.) (033) 2280-0095 (অফিস) (033) 2289-3692 (এম.ই.আর.এম.) (033) 2289-3171 (সেবা বিমান) (033) 2280-8750 (ফোরেক্স)</p>	<p>SS Branch Bhowanipore, Kolkata "Prenlata" 39, Shakespeare Sarani, (2nd Floor) Kolkata- 700 017 Branch Code No. 4833 Tel: (033) 2280-7092 (A.M.) (033) 2280-0095 (Adv.) (033) 2289-3692 (B.F.F.M.) (033) 2289-3171 (A/cnts) (033) 2280-8750 (Forex)</p>
<p>(033) 2287-7640 • SBININBB185 (সুইফট) • SBININBB185 (সুইফট) • SBININBB185 (Swift)</p>		

Br/13/242

Dated:26-05-2007

Dear Sir,

**M/S PRAGATI PRINTERS PVT. LTD**  
**SALE OF LAND & OTHER ASSETS**

This has reference to your letter dated 26-05-2007 expressing your interest for purchasing of land and building, belonging to the company (M/S Pragati Printers Pvt Ltd) and its Director(s) offered to us as security for Loan(s) sanctioned by us.

2. With reference to the contents of your letter and to the discussions on date; please be advised as under:-

- i. For the deal as proposed, full value of the transaction to be deposited with us (State Bank of India, SSI Branch, Bhowanipore) before signing of the conveyance deal.
- ii. Bank will not object to the sale of the assets of the company or of its Director(s), provided outstanding of the loan accounts and dues of the company are paid in full before transfer of the assets.
- iii. Bank will not be a party to the sale deed except as a facilitator, whose rights and liabilities would be limited to that of a creditor of the company, who has taken possession of the property for the purpose of realization of its outstandings only. But the deal has to be clinched on or before 31<sup>st</sup> May 2007.
- iv. Bank will provide peaceful possession of the property to the above referred company or its representative or order on repayment of Bank's dues in full.

Yours faithfully,

Asstt. General Manager

Copy: The Managing Director, Pragati Printers Pvt Ltd, for their information and concurrence. This has reference to their letter dated: 18-5-2007.

Asstt. General Manager

11. Thereafter, the Id. AR pointed out that the sale consideration was directly deposited by the purchaser M/s. Svarna Infrastructure & Builder (P) Ltd. (hereinafter 'M/s. Svarna') to the bank by RTGS and the assessee did not receive any consideration from the sale of this immovable property at Berabari (refer to pages 67-68 of paper book). Thus according to Id. AR the assessee did not receive any sale consideration on the transfer of his immovable property at Berabari, which was mortgaged for the loan taken by a legal entity M/s. PPPL. The Id. AR submitted that the aggregate outstanding loan taken from SBI as on 04.01.2007 when the Bank issued notice u/s. 13(2) of SARFESI Act was to the tune of Rs.1,76,46,438/-

and the sale consideration remitted directly by the purchaser (M/s. Svarna) to SBI Bank by RTGS was to the tune of Rs.1,65,00,000/- as on 31.05.2007. (page 68 and 69 of paper book). So according to Id.AR the assessee Shri Devendra Kumar Shroff did not receive any amount as sale consideration for the transfer of said land at Berabari to M/s. Svarna Infrastructure & Builder (P) Ltd., since the entire sale consideration was remitted to the SBI to square up the loan liability of 3<sup>rd</sup> party M/s. PPPL, so the AO/Ld. CIT(A) erred in levying capital gain on the transfer of this mortgaged property of assessee situated at Berabari because in order to attract the charge of tax as capital gains there must be a transfer as a result of which consideration is received by the assessee or accrues to the assessee. For the aforesaid proposition of law the Id. AR relied on the following case laws :

a) In the case of Addl. CIT Vs. Mohanbhai Pamabhai (1997) 165 ITR 166 (SC), affirmed by Hon'ble Supreme Court in Mohanbhai Pamabhai's case (supra), Hon'ble Gujarat High Court have stated the position in the following words:

*"But, section 48 shows that the transfer that is contemplated by section 45 is a transfer as a result of which consideration is received by the assessee or accrues to the assessee. Section 48 provides the mode of computation of capital gains by enacting that the income chargeable to tax as capital gain shall be computed by deducting from the "full value of the consideration received or accruing as a result of the transfer of the capital asset" the following amounts, namely: (i) expenditure incurred wholly and exclusively in connection with such transfer; and (ii) the cost of acquisition of the capital asset and the cost of any improvement thereto. The amounts specified in clauses (i) and (ii) are to be deducted from the "consideration received or accruing as a result of the transfer of the capital asset" for the purpose of determining the profits or gains chargeable to tax. It is, therefore, clear that the transfer of a capital asset, in order to attract the capital gains tax, must be a transfer as a result of which consideration is received by the assessee or accrues to the assessee. If there is no consideration received or accruing to the assessee as a result of the transfer, the machinery section enacted in section 48 would be wholly inapplicable and it would not be possible to compute profits or gains arising from the transfer of the capital asset. The transaction in order to attract the charge of tax as capital gains must, therefore, clearly be such that consideration is received by the assessee or accrues to the assessee as a result of the transfer of the capital asset. Where transfer consists in extinguishment of a right in the capital asset, there must be an element of consideration for such extinguishment, for then only it would be a transfer exigible to capital gains tax. This view is clearly*

*supported by a recent decision given by a Division Bench of this court in Commissioner of Income-tax v. R. M. Amin."*

b) Thereafter, Id. AR cited the decision of the Hon'ble Kerala High Court in the case of CIT Vs. Smt. Thressiamma Abraham (1997) 227 ITR 802 (Ker) which facts according to Id. AR is similar to that of the case of the assessee before us. The Id. AR pointed out that the assessee in that case also stood guarantor and her immovable property was mortgaged to the Kerala Financial Corporation (lender) for the loan given by the Kerala Financial Corporation to a third party, M/s. National Tyre and Rubber Co. India Ltd. The entire sale proceeds of the assessee's property went into the appropriation by the lender i.e. Kerala Financial Corporation and, thus, assessee did not receive a single pie. Thereafter the amount of loan was credited in the books of account of M/s. National Tyre & Rubber Co. India Ltd. in the name of the assessee under the head "unsecured loans". On these facts the Assessing Officer held that in view of the fact that the sale proceeds were credited in the assessee's name in the account of M/s. National Tyre and Rubber Co. India Ltd., the assessee should be deemed to have received the entire sale proceeds. The Assessing Officer, therefore, computed capital gain on sale proceeds of Rs.13,12,414 at Rs. 12,62,414. The Id.CIT(A) held that there was no personal obligation of Smt. Thressiamma Abraham (the assessee) to discharge the liability of M/s. National Tyre & Rubber Co. India Ltd. and there was a constructive receipt of the entire money by the assessee. On assessee's appeal the Tribunal held "*that the assessee's full ownership stood diminished by reason of transfer of interest in the property by way of mortgage and, therefore, there was expenditure incurred for the purpose of transferring the full owner hip right in the property*". Against these findings of the Tribunal the revenue took up the matter in reference to Hon'ble Kerala High Court. The revenue, inter alia, contended that the assessee was not entitled to the deduction of the amount paid to Kerala Financial Corporation for discharge of mortgage as deduction under section 48(1)(a)(z) of the Act from the sale consideration because such deduction was impermissible in the light of earlier Hon'ble Kerala High Court's decision in the case of AmbatEchukuttyMenonVs. CIT (1978) 111 ITR 880 and the Hon'ble Supreme Court decision in the case of CITv. George Henderson & Co. Ltd. [1967] 66 ITR 622. The Hon'ble Kerala High Court observed that the Tribunal appeared to have been proceeding in wholly

unnecessary direction of statutory provisions relating to the deduction from the full value of the consideration by resorting to section 48 of the Act. The Hon'ble High Court held that Kerala Financial Corporation was acting on the basis of the overriding title resulting into assessee receiving not a single pie from the sale proceeds. As to the reliance placed by the revenue on the judgments of the Kerala High Court in the cases of *AmbatEchukuttyMenon* (supra), *SalayMohamad Ibrahim SaitVs. ITO* (1994) 210 ITR 700 and *K. V. Idiculla Vs. CIT* (1995) 214 ITR 386 the Hon'ble Kerala High Court found that the facts in those cases were entirely different as those cases related to the question of deduction from the full value of consideration, the situation in the case of *Smt. ThressiammaAbraham*(supra) was diversion of amounts at source by overriding the title.

c) Thereafter, the ld. AR cited the case of *GopeeNath Paul & Sons Vs. Dy. CIT* (2005) 278 ITR 240 (Cal) and drawn our attention to the facts of the case recorded by the Hon'ble High Court in the following words:

"It appears from the materials on record that there was a suit between the Allahabad Bank and Gobindo Sheet Metal. In the said suit the Allahabad Bank claimed certain amount to the extent of Rs. 25,00,000 approx. on account of Gobindo Sheet Metal's liability towards the-loan obtained from the Allahabad Ban which was sought to be recovered together with a declaration of hypothecation of certain movable goods including stock-in-trade. At the same time, there was another suit in which an arbitration agreement was .sought to be filed on account of dispute including the dispute involved in respect of the dissolution of the two firms, *GopeeNath Paul and Sons* and *Gobindo Sheet Metal Works and Foundry* between the partners of therespective two firms, i.e., the parties who were common. In the latter suit, there was a compromise in which both the firms stood dissolved from the date agreed in the terms of settlement and the receiver was appointed in terms thereof for the purpose of selling these two firms as going concerns. From the subsequent orders, it appears that those firms could not be sold as going concerns on account of the liability of Gobindo Sheet Metal towards the Allahabad Bank.

After having passed several orders, by an order dated April 27, 1989, the court directed to deposit of Rs. 25,00,000 with the Registrar of this court to be kept in fixed deposit with the Allahabad Bank free from lien and all attachments until further orders of this Court. This was done in order to effectuate the transfer of the assets of these two firms after securing payment of the liability towards the Allahabad Bank in respect of one of the firms. It appears that there was but one sale comprising the assets of both the firms and the bid of one Ganesh Prasad at Rs.3,51,00,000 was accepted as the highest bid and that the payment towards the same was made in dribblets from time to time."

12. After considering the arguments of the parties Hon'ble Calcutta High Court delivered their verdict in the following words:

"The decision in S.R. V. Press and Publications (P.) Ltd. [2000] 241 ITR 626 (Ker.), cited by Mr. Som is also distinguishable and would have no manner of application in the present case in view of the fact that the amount was sent in that case after the receipt of the consideration by the liquidator to discharge the liability of the assessee in respect of finance received from the Karala Finance Corporation on the security of the property which was created after acquisition in the course of a winding up proceeding. There was nothing from which it would be held that such payment was absolutely necessary. On the other hand, learned counsel for the assessee in that case had conceded that section 48 of the Act had no application to the facts of the said case. However, the alternative argument of the assessee was that the corporation had overriding title over the property. The amount paid was clearly relatable to title. Thus, it appears that there was no claim that the payment of that amount was an expenditure incurred wholly and exclusively in connection with the transfer here is another distinguishing feature so far as the present case is concerned. Here the entire assets of the business firms as a going concern were sought to be sold but could not be sold without removing the liability towards the Allahabad Bank. The assets included the whole business of the two firms and if the liability was not met before the sale, in that event, in this present case the sale consideration would have been reduced by the liability payable to the

Allahabad Bank. Therefore, the decision cited does not help us in the facts and circumstances of the case to take a different view.

The decision in R.M. Arunachalam [1997] 227 ITR 222 (SC) dealt with the question of cost of acquisition, which is not a case here. It was not related to the perfection of title. Therefore, this decision does not help us in the context in which we are supposed to decide the present case.

Conclusion:

The criteria is the perfection of title in order to effect the sale. In this present case, without removing the liability of the Allahabad Bank, the title of the purchaser could not be perfected. Having regard to the facts and circumstances of this case and the position in law as discussed above, the meeting of the liability of the Allahabad Bank relating to the assets of Gobindo Sheet Metal was an expenditure incurred wholly and exclusively in connection with the transfer."

13. Then the Id.AR submitted that there was diversion of amount at source by overriding title and therefore, no LTCCG should be computed in the hands of the assessee and therefore it should be deleted.

14. Per contra, the Ld. DR vehemently supported the order of the lower authorities and cited the order of the Hon'ble Bombay High Court in CIT Vs. Roshanbabu Mohammad Hussein Merchant 275 ITR 231 and Tribunal (Delhi) order in the case of ACIT Vs. Glad Investment Pvt. Ltd. 8 SOT 612.

14. Rival submission heard. We find that during the re-assessment proceedings, the assessee submitted before the A.O that the land at Beraberi belonging to the assessee, which was hypothecated by M/s Pragati Printers PvtLtd (PPPL) to SBI as a collateral security against loans taken by the said PPPL, was sold. The assessee being a shareholder and a director handed over the title deeds of the land to the said company M/s PPPL and allowed

it to mortgage the land to the SBI. When M/s PPPL was unable to repay the dues being loan and interest accrued thereon, the land was sold by the bank. The Ld AR submitted that the sale proceeds were collected by the bank directly from the buyer and appropriated towards the dues from M/s PPPL, thus, the sale proceeds never reached the hands of the assessee resulting into the real income being diverted at source.

15. We note that in the case of CIT vs Sunil J. Kinariwala, 259 ITR 10 ( SC), it was held that when a third person becomes entitled to receive the amount under an obligation of the assessee, even before the assessee could lay a claim to receive it as his income, there would be a diversion of income by way of overriding title. However, when the same is passed on to a third person in discharge of the obligation of the assessee after the receipt of such amount, it is application of income.

16. We also note that the Hon'ble Apex Court in CIT vs Sitaldas Tirathdas, 41 ITR 367 held that when the money is diverted after such amount becomes the income of the assessee, the same is considered to be application of income of the assessee. This is a case where a portion of the income has been applied to discharge an obligation and not a case where such obligation has been discharged by way of overriding charge. Where the overriding charge existed either upon the property or upon its income, it becomes diversion of income due to overriding charge and the same is not taxable in the hands of the assessee.

17. We also note from the facts in the case of CIT vs Glad Investments (P) Ltd. (2006) 8 SOT 0612 before the Delhi Bench of Tribunal were that the assessee had voluntarily pledged the shares and gave delivery of possession to certain credit institutions as collateral security for loan taken by 'P' & 'S'. The sale proceeds was entirely applied towards repayment of loan and no amount was received by the assessee. It was held that no taxability in the hands of the assessee shall arise as no value of consideration was either received or accrued as a result of transfer of the shares. Moreover, even if notionally any consideration on sale of transfer accrued to the assessee, there was diversion of the entire consideration at source before it became income in the hands of the assessee.

We further note that In Glad Investment, Tribunal has distinguished the case before the Hon'ble Bombay High court in Roshanbabu in following words: "*In the case of Roshanbabu Mohammed Hussein Merchant (supra) the assessee had sought permission from the bank*

*and voluntarily deposited part of the sale proceeds of the plot of land towards discharge of the debt so as to have clear title over the remaining plot of land; whereas in the case of Smt. Thressiamma Abraham (supra) as well as in the case before us the mortgaged property had been sold by the credit institutions. "*

Further, it has been held by the Tribunal-

*"After careful consideration we are of the view that we should follow the judgment of Hon 'ble Calcutta High Court in the case of GopeeNath Paul & Sons (supra) and of Hon 'ble Kerala High Court in the case of Smt. Thressiamma Abraham (supra) in preference to the judgment of Hon 'ble Bombay High Court in the case of Roshanbabu Mohammed Huseein Merchant (supra) for the following reasons: "*

18. We further note that the case laws relied upon by the authorities below and the Ld. DR are distinguishable on facts. In V.S.M.R. Jagdishchandranvs CIT, 227 ITR 240 (SC), it was held that where the mortgage is created by the assessee himself, benefit of cost of acquisition won't apply. Here the mortgage was created for the assessee's own benefit and the issue of diversion of income by overriding title was neither raised nor considered.

19. We also note that in the case of R.M. Arunachalamvs CIT 227 ITR 222 (SC) deals with the case of deductibility of estate duty as cost of acquisition or cost of improvement. And in the case of CIT vs. Attili N Rao, 252 ITR 880 (SC), the Hon 'ble Supreme Court held that since the immovable property belonged to the assessee, the capital gains is to be charged on the entire amount. This case is different from the case at hand as in that case the mortgage had been created to discharge the liability of the assessee himself whereas in the case at hand, the assessee has mortgaged his property to discharge the liability of the third party.

20. We also note that all the above three decisions were considered by the Tribunal in Glad Investments in the following words: *"Both in the cases of R.M Arunachalam (supra) and VS.MR. Jagdishchandran (supra), the Hon 'ble Supreme Court were not considering a situation pertaining to loss of capital asset on account of guarantee for a third party loan. In the case of R.M Arunachalam (supra) the question was whether estate duty paid can be treated as a part of cost of acquisition of asset to the inheritor. In the case of VSMR.Jagdishchandran (supra) and Attili N. Rao (supra) encumbrance was created by the owner of the capital asset for his own benefit and those assesseees had already received*

*value corresponding to mortgage liability. Thus, in none of the cases there was any loss or erosion in the value of capital asset without any benefit whatsoever to the owner.*

21. According to the Ld. Counsel of the assessee the decision of the Hon'ble High Court of Kerala in CIT vs. Smt. Thressiamma Abraham, 227 ITR 802 (Ker) is squarely applicable to the facts of the assessee's case. In this case, we note that the assessee stood as a guarantor (property in question was mortgaged under a deed) for the loan given by 'K' Financial Corporation to 'N' Ltd. On default by 'N' Ltd., 'K' Financial Corporation sold the property mortgaged and its sale proceeds were appropriated towards the loan amount. The entire sale consideration was paid directly to 'K' Financial Corporation by the purchasers and only after that the said property was released. It was held that no taxability in the hands of the assessee shall arise as no value of consideration was received by the assessee.

22. In the light of the aforesaid discussion in the instant case, we need to ascertain the facts as to **firstly** whether the sale of the property has been made directly by the SBI and the sale consideration was appropriated to the loan amount; or **secondly** whether the assessee has got the property sold and the buyer has deposited it directly to the SBI and thereafter the SBI appropriated it to the loan amount. On ascertainment of facts, it is revealed that the assessee's case falls in the second category, then it is application of money of the assessee for repayment of loan and then the question of diversion of fund at the source by overriding title will not apply. However, if the facts of case falls in the first category then it would be case of diversion of fund at the source by over-riding title and the decision of CIT vs. Smt. Thressiamma Abraham (supra) would be applicable. Be that as it may be. It is observed that a vide letter dated 26.05.2007, SBI has written to the buyer of the property M/s. Svarna Infrastructure & Builders Pvt. Ltd (supra) to deposit the full value of the consideration with SBI, SSI Branch, Bhowanipore before signing the conveyance deed. However, the Facts are not clear. It is not clear from the document as to whether the SBI conducted the sale by Public Auction and then consideration money was deposited by the buyer directly with the bank; or the sale of property was carried out by the assessee and the sale consideration was deposited by the buyer in assessee's account as per the SBI's instruction or in the account of M/s. PPPL. From the discussion supra, it is needless to say that if the assessee has got the

sale of property and consequently, if the money was routed through the bank account of the assessee before being finally appropriated towards the dues of M/s. PPPL, there cannot be diversion of income by overriding title and in that fact situation, capital gains tax liability would arise in assessee's hands.

23. In the interest of justice, we, therefore, remand this issue back to the file of the A.O. for the limited purpose to verify the correct facts on the lines stated by us in the preceding para 22. In case after due enquiry, he finds that the assessee's case falls in the first category as discussed in para 22 supra, he shall delete the addition. The A.O. shall also afford reasonable opportunity of hearing to the assessee to explain/ substantiate the correct facts and pass a speaking order.

24. Ground no. 2 is as under:

*“2. For that on the facts and in the circumstances of the case the Ld. CIT(A) has erred in sustaining the computation of Long Term Capital Gain considering the cost of acquisition at Rs.1,122/- instead of Rs.8,30,000/- and that the Long Term Capital Gain was computed considering the date of acquisition to be 25.04.2000 instead of 15.04.1976 and hence, the computation is without justification, arbitrary and liable to recomputation.”*

25. Assailing the order of the Ld. CIT(A), the Ld. AR submitted that the land at VIP Road was acquired by the assessee by way of Deed of Sale dated 15.04.1976, which was evenbefore 01.04.1981 at a cost of Rs.1122/- and drew our attention to the copy of Deed of Conveyance for sale of land to M/s. Maple Vincom(P) Ltd. which is found annexed in pg. no. 85-105 of paper book. It was brought to our notice that Smt. Bakul Rani Bose bought the property by Indenture of Sale on 18.11.1949 from one Smt. Chitralekha Choudhrani (refer page 89 of paper book). Thereafter, the property was sold by Smt. Bakul Rani Bose to the assessee on 15.04.1976, which fact is seen from perusal of page 90 of paper book. The deed of conveyance mentions the fact that the land was purchased by the assessee vide Indenture of sale 15th day of April, 1976 made between Bakul Rani Bose and the assessee and was registered with the Additional District Sub Registration Office, Cossipore Dum Dum and Recorded in Book No. 1, Volume No. 48, pages 78 to 85. According to the Ld. AR, this deed of conveyance was furnished in the office of the AO during the course of assessment proceedings. So, according to Ld. AR, since the land was acquired before

01.04.1981, as per the provisions of the section 55(2) clause (b), the cost of acquisition of the land to the assessee or the fair market value of the land as on 01.04.1981, at the option of the assessee, could be taken to be the cost of acquisition of the land. According to Ld. AR, the Fair market value of the land was determined by the Certified Valuer Rs.8,30,000/- , which was taken to be the cost of acquisition by the assessee in his revised computation of income. It was submitted that the valuation report received from such Valuer was furnished before the AO and is attached herewith in pg. nos. 136-144 of paper book. However, according to Ld. AR, the AO has taken the cost of acquisition of the property at VIP Road as Rs.1,122, without considering the provisions of clause (b) of section 55(2) of the Income Tax Act and has indexed it by taking the indexation base at 406. Such cost inflation index purported to the F.Y. 2000-01. And it was pointed out by the Ld. AR that the AO's contention that - "the assessee has himself shown an amount of Rs.1,122/- as purchase price of the landed property in his balance sheet for the previous year, it would be reasonable to take such price as the actual price of purchase for that landed property on the date of purchase of 25.04.2000." is bad on facts and law.

26. Thus, it was contended by the Ld. AR that the AO went wrong on facts itself, since the property was not purchased on 25.04.2000, as contended by the AO but was purchased on 15.04.1976, which fact is evident from para 3 of pg. 6 (page 90 paper book) of the Deed of Conveyance executed between the assessee and the purchaser. Thus, according to Ld. AR, as per the provisions of the Income Tax Act, where a property is purchased before 01.04.1981, the cost of acquisition of such property could be taken as the FMV of the property at 01.04.1981, and the cost inflation index for the F. Y. 1981-82 would be 100. The assessee had submitted the Valuation Certificate wherein the Fair Market Value of the land as on 01.04.1981 was determined by the Certified Valuer at Rs.8,30,000/- , which was taken to be the cost of acquisition by the assessee in his revised computation of income in consonance with the provision of section 55(2) of the Income Tax Act. Thus, the computation of indexed cost of acquisition by the AO, taking the cost of acquisition at the cost price of 15.04.1976 without considering the provisions of section 55(2) clause (b) and taking the base cost inflation index at 406 is bad in law and facts and, therefore, prayed that Rs. 8 lakhs must be taken as the cost of acquisition instead of Rs.1,122 as done by AO. Per-

contra the Id.DR relied on the orders of the CIT(A)/AO and does not want us to interfere in the order of AO.

27. Heard both the parties. We note that the immovable property which is in issue was initially owned by Smt. Bakul Rani Bose. And we note that Smt. Bakul Rani Bose bought the property by Indenture of Sale on 18.11.1949 from one Smt. ChitralkhaChoudhrani (refer page 89 of paper book). Thereafter, the property was sold by Smt. Bakul Rani Bose to the assessee on 15.04.1976, which fact is seen from perusal of page 90 of paper book. The deed of conveyance mentions the fact that the land was purchased by the assessee vide Indenture of sale 15th day of April, 1976 made between Bakul Rani Bose and the assessee and was registered with the Additional District Sub Registration Office, Cossipore Dum Dum and Recorded in Book No. 1, Volume No. 48, pages 78 to 85, and the AO erred in making a factual finding that the property was purchased on 25.04.2000. And since the land was acquired before 01.04.1981, as per the provisions of the section 55(2) clause (b), the cost of acquisition of the land to the assessee or the fair market value of the land as on 01.04.1981, at the option of the assessee, could be taken to be the cost of acquisition of the land. We note that the Fair market value of the land was determined by the Certified Valuer Rs.8,30,000/- , which was taken to be the cost of acquisition by the assessee in his revised computation of income. It is noted that the valuation report received from such Valuer was furnished before the AO and is attached herewith in pg. nos. 136-144 of paper book. Thus, we are of the opinion that the computation of indexed cost of acquisition by the AO, taking the cost of acquisition at the cost price of 15.04.1976 without considering the provisions of section 55(2) clause (b) and taking the base cost inflation index at 406 is bad in law and we direct that Rs. 8,30,000/- must be taken as the cost of acquisition instead of Rs.1,122/-.. So we order accordingly.

28. In the result, the appeal of the assessee is partly allowed for statistical purposes

Order is pronounced in the open court on 26th February, 2020.

Sd/-  
(J. Sudhakar Reddy)  
Accountant Member

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated : 26<sup>th</sup> February, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant –Assessee/Applicant – Sri Devendra Kumar Shroff, P-16, Sahitya Parishad Street, Kolkata-700 006.
- 2 Respondent –ITO, Ward-7(2), Kolkata
3. CIT(A)-11,Kolkata. (sent through e-mail)
4. CIT, Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Assistant Registrar