

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "SMC", MUMBAI  
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
ITA No. 965/Mum/2021 (A.Y. 2012-13)

Anup Shah,  
9/253 Sunny Side Building,  
Prof U U Bhat Marg,  
Matunga, Mumbai-400019.

**PAN: AAFPS0147K**

..... Appellant

Vs.

CIT (Appeals),  
National Faceless Appeal Centre,  
Delhi.

..... Respondent

|                       |   |                          |
|-----------------------|---|--------------------------|
| Appellant by          | : | Sh. Ashok Patil          |
| Respondent by         | : | Sh. Ashish Kumar, Sr. DR |
| Date of hearing       | : | 06/07/2022               |
| Date of pronouncement | : | 16/09/2022               |

ORDER

**PER GAGAN GOYAL, A.M:**

This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi [hereinafter referred to as ('NFAC')] dated 27.04.2021 for the Assessment Year (AY) 2012-13. The assessee has raised the following grounds of appeal:

*1 The Hon'ble CIT (A) erred in confirming addition of Rs.15,65,250/- (Rupees Fifteen Lakhs Sixty Five Thousand Two Hundred Fifty Only) u/s 68 of Income Tax Act, 1961, to the total returned income without enquiring into the facts and*

*circumstances of the case and provisions of the Income Tax Act, 1961 and rules made there under.*

*2. The appellant craves leave to add, amend, alter and/or modify any or all of the pods of appeal stated above on or before the date of bearing.”*

2. Brief facts of the case are that the assessee filed his return of income on 17-07-2012 declaring total income Rs 3,17,952/-. In this case an information received from the DCIT, Central Circle 51 Mumbai that during the course of search and seizure proceedings at the residential premises of Shri Rahul Porwal, it was found that Shri Rahul Porwal along with his wife Dr Shelly Jain held tenancy right for shop no -7, Sita Sadan, S.B. Marg, Elphinston West Mumbai, which was purchase by him jointly from

*i. Shri Vijay Shah*

*ii. Shri Rajendra shah*

*iii. Mrs Kusum Shah*

***iv. Shri Anup Shah***

*v. Mrs Heena Parag Furia and*

*vi. Mrs Alpa Jigar Dedhia.*

All six adults are Indian inhabitants of Mumbai being the landlords of the property. There was an agreement of tenancy under question was made and entered into on 25-01-2012 between these six people and Shri Rahul Porwal jointly. The market value adopted by stamp duties authorities @ Rs. 93,91,500/- and accordingly stamp duty of Rs 4,69,600/- was paid by the tenants. Based on this information assessee's case was reopened and a notice u/s 148 was issued on 07-03-2019. In response to this notice assessee filed the original return as return filed in compliance to sec 148.

3. The assessee's share is  $1/6^{\text{th}}$  of the total ownership in the said property under consideration. The assessee was issued a notice requiring him a show cause erstwhile  $1/6^{\text{th}}$  share of FMV of the property (Rs. 93,91,500/6=15,65,250/-) shouldn't be treated as long term capital gain on sale of tenancy rights. In response to this show cause assessee submitted as under:

*"1. It was not an agreement of sale of an immoveable property nor transfer of tenancy right.*

*2. Market value determined by ready reckoner for stamp duty purposes doesn't mean that the said consideration had been paid by the tenant nor it is received by the landlord.*

*3. That there is neither creation of new tenancy right nor transfer of transfer right"*

4. "In response to assessee's above submission, A.O observed as under:

*"During the year under consideration the assessee has transferred the tenancy right to Shri Rahul Porwal and his wife Mrs Shelly Jain for the consideration of Rs Nil. However, the assessee has denied to receive any consideration. It is fact that the assessee has transferred the capital asset in form of tenancy rights. Furthermore it is very clear that the clause-16 of the agreement that the transfer of tenancy agreement is not in the nature of leave and licence agreement. Clause-16 of the tenancy agreement states as under*

*In the event, the Landlords of the said Sita Sadan Building where the premises is situated desire to develop the said property,(i.e. the said building), the Tenants will extend their co- operation for reconstruction and redevelopment of the said property as per the approved plan which may be sanctioned by the planning authorities and subject to the landlords / developers agreeing to provide permanent alternate accommodation to the tenants free of cost in the proposed new building which will be equivalent area as that of the present accommodation and also agreeing to provide temporary alternative accommodation to the tenants during the period of construction of the new building on the said property. The permanent alternative accommodation of equivalent are in lieu of existing*

*premises in the new constructed building will also be provided to the tenant by the Landlords / developers on the same property"*

5. Assessee further relied on the pronouncement of ITAT in ITA NO 5279 and 5280/ Mum/2018 in the case of Dr Shelly Jain and Mr Rahul Porwal. Assessee submitted a copy of the order of the ITAT in ITA no mentioned supra.

6. We have gone through the order of A.O, order of Ld CIT(A) , submissions of the assessee before the lower authorities and the order of ITAT as mentioned supra. In view of the above facts and the facts emanated from orders of authorities below and considering the orders of ITAT mentioned supra we observe that true nature of transaction entered into by the assessee has not been ascertained. There are so many conflicting facts are emerging out of the documents relied upon by us as mentioned supra.

7. The findings of ITAT orders mentioned above is not relevant here and distinguishable. As the same is dealing with a matter of search assessment, which doesn't have any bearing on the present appeal hence we are not considering that for the purposes of adjudication in the present appeal.

8. Now we are listing out the facts relevant in the present appeal emerged out of the orders of the authorities below and submissions of the assessee as under:

*i. Assessee is claiming this transaction as lease and licence agreement at a meagre amount of Rs 225 p.m.*

*ii. There is no evidence with the department of cash changed the hands*

*iii. for the same transaction on the one hand the other party is paying Rs 225 p.m. as rent on the other hand they are paying Rs 4,69,600/- as stamp duty on stamp value adopted by state stamp duty authorities at Rs 93,91,500/-*

*iv. Ld CIT(A) dealt with the facts of the case and also relied upon certain case laws as under :*

- a. Summati Dayal Vs CIT 2014 ITR 801(S.C)*
- b. CIT Vs Durga Prasad More 82 ITR 540(S.C)*
- c. Bank Of Cheetinad Ltd Vs CIT*
- d. Jiyajeerao cotton mills Ltd Vs CIT*
- e. CIT Vs Sakarlal Balabhai (Guj High Court)*
- f. Mc Dowell and Co Ltd Vs CTO*

9. In our view the taxing authorities are entitled and indeed bound to true legal relationship resulting from a transaction. On the other hand tax payers are entitled to arrange their affairs to minimise their tax burden but within the legal framework and devices. In this case on the one hand assessee is not able to prove that why against such a small amount of rent, tenants have paid a hefty amount of stamp duty based on market value of the property as determined by state stamp duty authorities. On the other hand A.O wants to tax the transaction under the head capital gains but nowhere in his order and in the findings of Ld CIT(A) it is emanated before us that this transaction of lease is in the nature of **'perpetual lease'**. AO during enquiry has not preferred to bring on record lease agreement to arrive at the correct conclusion. We are of the considered view that without lease agreement, it is difficult to decide the issue in question.

10. Even if it is assumed that proceedings of A.O are in correct direction still he has to establish the character of asset being transferred. In this case A.O has not carried out necessary exercise to cover the transactions under the head capital gains. Simply by establishing the conditions of sec 2(14), 45, 48, 49 and 55 A.O has not established on record that what exactly is the asset which has been transferred over which he wants to charge capital gain.

11. In view of the above it will be just unfair to restore the matter back to the file of A.O with a direction to narrate the true character of the transaction keeping in view the lease agreement and getting clarity from the state stamp duty authorities about the nature of transaction with reference to adoption of fair market value and charging of heavy stamp duty on the same. We further direct the A.O to give proper opportunity to the assessee concerned and appreciate the matter in the light of our observation supra i.e. whether this transaction is in the nature of perpetual lease or not. We further direct that if the A.O is able to establish the transaction in the category of perpetual lease as per state laws then assessee is liable to capital gains otherwise A.O is directed to accept the returned income of the assessee.

12. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 16<sup>th</sup> day of September, 2022.

Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER

Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 16/09/2022

SK, Sr.PS

**Copy of the Order forwarded to:**

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)  
ITAT, Mumbai