

**IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JUDICIAL MEMBER**

ITA No. 5768/Mum/2017

(A.Y. 2012-13)

Kunal R. Gupta, 110B, Shreyas Industrial Estate, Oppo Western Express Highway, Goregaon East, Mumbai-400 063	Vs.	Income Tax Officer 31(2)(2) R.No. 709, Pratyakshkar Bhavan, Mumbai
Appellant	..	Respondent
PAN No. AEFPG2409E		

Assessee by : Dr. K. Shivaram, AR &
Neelam C Jadhav, AR

Revenue by : N. Hemalatha, DR

Date of hearing: 27-12-2017 **Date of pronouncement :** 28-02-2018

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of Commissioner of Income Tax (Appeals)-42, Mumbai, [in short CIT(A)] in appeal No. CIT(A)-42/IT-99/14-15 dated 30-06-2017. The Assessment was framed by the Income Tax Officer, ward 31(2)(2), Mumbai (in short ITO) for the assessment year 2012-13 vide order dated 27-03-2015 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The only issue remains for adjudication in this appeal of assessee is whether the property acquired by assessee through memorandum of family arrangement cum compromise deed dated 03-6-2004 is to be



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accepted as genuine, so as to adopt the cost of acquisition as on 01-04-1981 for the purpose of computation of long term capital gain and consequently the income is to be assessed under long term capital gain or to be taxed under the head of income from other sources. The assessee has revised the grounds and following ground Nos. 2, 3 and 4 reads as under: -

“II. Disallowing of Index Cost of Rs.37,91,550/- for calculating Long Term capital Gains.

2. The Learned CIT(A) erred in confirming the disallowance of Index cost of Rs,37,91,550/- on the basis of acquisition cost as on 1/4/1981 at Rs.4,83,000/- as the right in the property was recognized by "Memorandum of Family Arrangement Cum - Compromise dt.03/06/2004 and the same was accepted in the case of Father and Brother of the Assessee.

III. Income from long term capital gain is directed to be taxed under the head of income from other sources.

3. Without prejudice to the above, the Learned CIT(A) erred in taxing Long term capital gains under the head Income from other sources, without giving any opportunity of hearing and without any notice of enhancement, hence, the finding of the CIT(A) that receipt to be taxed as Income from other source may be deleted and receipt may be directed to be taxed as capital gains and consequential indexation cost may be directed to be allowed.

4. Without prejudice to above, if the transaction of Family Arrangement is not recognized, the



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amount received by the assessee being the capital receipt and cannot be taxed either as income from other sources nor as income from capital gains.”

3. Briefly stated facts are that during the year under consideration, the assessee declared receipt of 30% of consideration received in respect of sale of property No.3, Ram Kutir, Besant Street, Santacruz (W) on 25-04-2011 amounting to ₹ 3.15 crores (for his share) as Long Term Capital Gains. The assessee claimed that this property devolved on him in view of Memorandum of Family Arrangement cum compromised deed dated 03-06-2004 to the extent of 30%. The other share of 30% to the other brother Shri Vishal Rajesh Gupta and other 40% went to father Shri Rajesh B Gupta. But according to AO, since no cost is incurred by the assessee to acquire the asset and the mode of acquisition is other than that mentioned in section 49 of the Act, the cost of the previous owner cannot be allowed as cost in the hands of the assessee and hence, he treated the entire share of ₹ 3.15 crore as long term capital gain and allowed deduction/exemption under section 54 of the Act amounting to ₹ 2,76,92,646/- and assessed the balance long term capital gain of ₹ 38,07,354/- as income of the assessee. Aggrieved assessee preferred the appeal before CIT(A). The CIT(A) after considering the submissions of the assessee treated the entire consideration of his share of ₹ 3.15 Crores as income from other sources by observing in Para 6.8 to 6.11 as under: -

“6.8 The above facts of the case are carefully considered. It is noted that the claim of the assessee that he had acquired 30% right over the consideration received in respect of Ram Kutir due to a family arrangement is a wrong statement. A family arrangement is a transaction between members of the same family which is for the benefit

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of the family generally. It is an arrangement between member of a family descending from a common ancestor or near relation trying to sink their differences and disputes, settle and solve their conflicting claims once and for all to buy peace of mind by an equitable distribution or allotment of assets and properties amongst the member of the family. The object is to preserve the property and the good name of the family by recognizing that it is not in the good interest of the family or the members to engage in fights or disputes. For a family arrangement to be valid there must be a common property or joint property. Individual or self-acquired properties are not considered unless antecedent title, claim or interest in the property is shown to be in existence. In the present case, the Ram Kutir property was the self acquired property of Late Shri Balakram Kamal and he had bequeathed it through a Will to his adopted son Shri Rajesh Gupta. There is no antecedent dispute over the title of the property and there is no right of any third person over this property by law. Therefore, the claim of the assessee (son of Rajesh Gupta) that there was a dispute over the Will of Shri Balakram Gupta is a false claim because in the Order of Probate or in the succession proceedings no such claim has been made by the assessee before any court of law. It is the law that it is necessary to prove that every party taking benefit under the arrangement must necessarily have, under the law, a claim to the property. This has not been done.

6.9 Normally, a dispute is a prelude to a family arrangement. In the case of the present assessee

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no such pre-existing dispute has been shown to exist. Further no claim had been made by the assessee before any court of law or before any other authority in this context. An agreement as to division of property where the heir gives up property to which he has undoubted right without consideration is not covered under the term of Family Settlement. In the present case it has been claimed in the Memorandum of Family Arrangement cum Compromise date 03/06/2004 that these sons of Shri Rajesh Gupta (the assessee and his brother) had some difference with regard to the 'Will' and the validity of the same as the acquisition of the property and in occupancy and possession since the death of Shri Balakram Kamal. This statement in the Family Arrangement is vague and without any basis Shri Rajesh Gupta was the lawful owner of the property in his own right and this property was earlier also self acquired property of Late Shri Balakram Kamal. The present assessee, the son of Shri Rajesh Gupta and the grandson of Late Shri Balakram Gupta had no rights in the said property. Further even as per the Hindu Succession Act, 1956 the heir in Class I category are only the son, daughter, widow; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter ; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; and widow of a predeceased son of a predeceased son. The grandson is not a Class I heir if the father is alive at the time of death of the grandfather. As long



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as the Class I heirs are available there is no necessity to look for the rights of any other legal heirs. It is also required to be noted that in the present case there was a 'Will' properly executed by Late Shri Balakram Kamal and the same has also been subject of a Probate by the High Court of Bombay. Therefore, there was no necessity by law to infer that the rights in the property would extend to persons other than those mentioned in the 'Will'. It is noted that by virtue of the Family Settlement the assessee along with his brother and father have merely agreed that for all practical purposes the Ram Kutir property shall be held in the name of Shri Rajesh Gupta only in all the records of the concerned authorities and it is only when Shri Rajesh Gupta seeks to sell the property or dispose off the property that the assessee and his brother would get 30% share each of the consideration. This means that the assessee and his brother have not crafted any right in the property but have only sought a division in the consideration received on the transfer of the property at a future date. This is akin to application of the income by Shri Rajesh Gupta and there is no diversion of income by way of any overriding title in favour of the assessee.

6.10 It is also necessary to note that if Shri Rajesh Gupta had intended to create a title in the property in favour of the assessee, he would have been required by law to have it registered as per the Registration Act. This issue had been considered by the Supreme Court in Roshan Singh v. Zile Singh AIR 1988 SC 881, and the true principle that emerges from this judgment can be stated thus 'if



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the arrangement, of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to others, the formalities differences are resolved by the compromise, then, there is no question of one deriving title from other and therefore, the arrangement does not fall within the mischief of section 17 (1) (b) it read with section 49 of the Registration Act as no interest in property is created or declared by the document for the first time'. In the present case there is no registration of the Family Arrangement as per the Registration Act, 1908 also. Therefore, the present claim of the assessee is rejected as an weak attempt to circumvent the taxation law through a self-serving document. The present family arrangement, a copy of which was filed by the assessee as discussed above, has not been made in good faith but it has been made with a view to circumvent provisions of law relating to stamp duty/capital gains tax. Therefore, the same cannot be relied upon.

6.11 In view of the above discussion it is held that the assessee had no right in the Ram Kutir property and even the Family Arrangement did not create any right in the property itself in the hands of the assessee. Sri Rajesh Gupta was the intended heir of Late Shri Balakram Kamal and he succeeded to the Ram Kutir property by a process of law ending with the Probate Order. The assessee and his brother had no right in the property as they were never even the Class I heirs. The property was the self-earned property of Shri Halakram Kamal and he could bequeath it to anyone. By virtue of a private

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and personal arrangement with his father, the assessee only received cash of Rs. 3,15,00,000/- from his father after the sale of Ram Kutir. Therefore, this amount cannot be held eligible for the purposes of section 54 of the Act. The amount received is not held to be received on account of a transfer of a residential house belonging to the assessee. The amount was also not received in connection with any transfer of any asset. The assessee has also not parted with any tangible or intangible asset or property to get hold of the same. Therefore, the amount of Rs. 3,15,00,000/- is held taxable as 'Income from Other Sources' of the assessee and no deduction under section 54 is available to the assessee. For the same reason, the assessee cannot claim any deduction for any indexed cost of acquisition u/s 54 of the Act. The ground of appeal no: 2 of the assessee is dismissed."

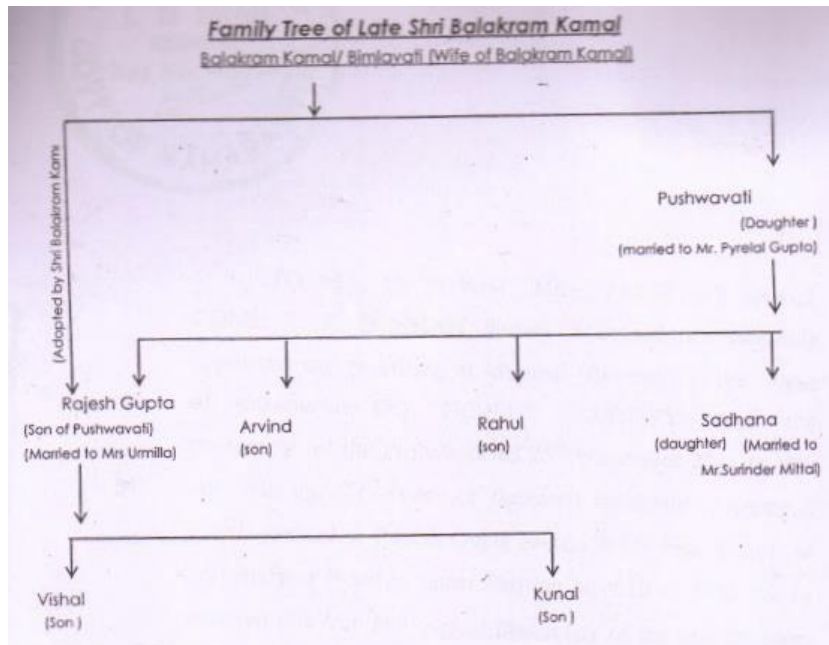
Aggrieved, now assessee is in second appeal before Tribunal.

4. I have heard the rival contentions and gone through the facts and circumstances of the case. Before me, the learned Counsel for the assessee explained the facts that during the year under consideration the assessee has declared receipt of 30% of share of sale consideration in respect of property Ram Kutir and claimed deduction of index cost of acquisition at ₹ 37,91,550/- and declared long term capital gain of ₹ 2,77,08,450/-. The assessee claimed deduction under section 54 of the Act as this long term capital gain was invested in purchase of new residential property. The learned Counsel for the assessee explained that 30% share of Ram Kutir was acquired by assessee by way of family arrangement cum compromised deed dated 03-06-2004, which was



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documented and registered on 03-06-2004 in the presence of witnesses. It was claimed by the assessee that the assessee is grandson of Shri Balakram Kamal and son of Shri Rajesh Gupta. The learned counsel for the assessee drew our attention to paper book page 62 wherein family tree of late Shri Balakram Kamal is exhibited, which is as under: -



5. It was explained that this property Ram Kutir was acquired by assessee's father Shri Rajesh Gupta through a will of Shri Balak Ram Kamal dated 15-09-1997, which was executed by probate order dated 25-11-2011. The learned Counsel stated that assessee's father Shri Rajesh Gupta entered into agreement of sale of this Ram Kutir with ED Developers Pvt. Ltd. dated 25-04-2011. From the above facts it is clear that the sale consideration of this property was settled as per the memorandum of settlement cum compromised deed dated 03-06-2004 among Shri Rajesh Gupta and his sons' namely Shri Vishal Gupta and Shri Kunal Gupta, the present assessee. As per memorandum of family arrangement cum compromise deed dated 03-06-2004, a document was registered and by virtue of this document the property was settled. The relevant clause 4 of Memorandum of family arrangement cum



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compromise deed dated 03-06-2004 clearly depicts the dispute which read as under:-

“Due to the dispute and difference having arisen between and amongst the party of the ONE PART and the PARTY OF THE OTHER PART and with the object of resolving the disputes and differences and for effectusting and permanent solution of all the disputes and differences once and for all and for ensuing family peace and harmony after considering what is most important in the interest of Rajesh Gupta Family on one side and the family of the other heir/s on the other side, through family friends Mr. Ramesh Gupta & Mr. Rajkumar Goel and arrangement and compromise was arrived at. To ensuing family peace, goodwill and harmony after due deliberation and discussions an arrangement was arrived at and the same was made binding upon all the parties hereto for all time to come.”

Further, to settle this dispute the understanding was recorded for dividing the property vide clause 5 as under:-

“5. In case Shri Rajesh Gupta, with the consent of the party of the other part, decide to dispose off/ sale or otherwise deal with or development of the said “property” in any manner, the total realization amount of the said “property” being the amount of consideration the same shall be distributed as under:

Rajesh B. Gupta 40%

Vishal Rajesh Gutpa 30%



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Kunal Rajesh Gupta 30%

It is clearly understood and agreed that for all practical purpose though the house "property" held in the name of Late Shri Balakram Kamal shall remain in the name of Rajesh B. Gupta in all the relevant records of the concerned authorities, Shri Rajesh Gupta Shall pay/ or arrange to pay the respective shares as mentioned above in clause – above as if they are entitled to the same in terms of the Family Arrangement cum compromise since inception of the said property."

6. In view of the above, the learned Counsel for the assessee argued that the rights of the assessee were recognized by this family arrangement cum compromise deed and the same has been accepted by the Revenue while framing assessment under section 143(3) of the Act in the case of Shri Rajesh Gupta, the father and Shri Vishal Gupta, the brother of the assessee. The copy of the Assessment Order of Shri Vishal Gupta for AY 2012-13 dated 14-11-2014 is enclosed in Assessee's Paper Book at page 137. The learned Counsel argued that the family arrangement cum compromise is equivalent to partition attracting the provisions of section 49(1) of the Act. He stated that the property acquired by way of family settlement for the purpose of computation of capital gains, indexation is always allowable. Consequently, the deduction under section 54 of the Act for investment made in residential property should be allowed to the assessee.

7. The learned Sr. Departmental Representative relied on the order of CIT(A) and she stated that from memorandum of family arrangement cum compromise deed nothing is coming out that what was the dispute for making this family settlement. He argued that CIT(A) has rightly held that the assessee has no right in the Ram Kutir property and even the family

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arrangement did not create any legal right in the property and hence, the amount received in cash from his father after the sale of the property Ram Kutir is only income from other sources. Therefore, she stated that this amount of ₹ 3.15 crores received by assessee is not in connection with any transfer of asset and therefore the same was rightly assessed by the CIT(A) as income from other sources and consequently, no deduction under section 54 of the Act was allowed to the assessee. And rightly so.

8. I find from the facts of the case that this family arrangement cum compromise deed was documented by way of Memorandum in writing and this is registered in the presence of witnesses. The memorandum of family arrangement cum compromise clearly states about the dispute, which was never disputed by the Revenue. I am of the view that it is settled law that when parties entered into family arrangement, validity of the family arrangement is not to be judged with reference to whether the parties should raised dispute or rights or claimed rights or a certain properties had in law any such right or not. This position is explained by Hon'ble Supreme Court in the case of *Maturi Pullaiah v. Maturi Narasimham*, AIR 1966 SC 1836 (SC), wherein Hon'ble Court as under:-

"17. Briefly stated, though conflict of legal claims in present or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it." (p. 1841)



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9. From the above judgment of Hon'ble Supreme Court, it is clear that even the conflict of legal claims in present or future is a condition for validity of family arrangement, it is not necessary so. Even future dispute if any possible that can be the reasons for family settling the property by way of family arrangement. Even, Hon'ble Supreme Court in the case of Kale vs. Deputy Director of Consolidation, AIR 1976 (SC) 807, as laid down the principles which are essential for family arrangement.

"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;" (p. 813)

10. I find from the authority referred by the learned for the assessee of Hon'ble Madras High Court in the case of CIT vs AL Ramanathan (2000) 245 ITR 494, wherein Hon'ble court has clearly held that family arrangement should be bonafide one so as to resolve the family dispute and rival claims by a fair and equitable division of properties between various members of the family. Before me, the learned Sr. Departmental Representative could not point out that the present memorandum of family arrangement cum compromise deed dated 03-06-2004 is not a bonafide or it is obtained under any fraud or coercion. There is no such challenged to this family arrangement. I have gone through the order of CIT(A) and noticed that the only casting doubt that there is no dispute over the title of the property and there is no right in third person over sale of property by law. This proposition has been settled by Hon'ble Supreme Court in the case of Maturi Pullaiah (Supra), wherein it is stated that even if there is no right of the property for any of the family members he can

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claim the same by way of family settlement. Similarly, Hon'ble Madras High Court in the case of CIT vs. R Poonammal (1987) 164 ITR 706 (Mad) held that:-

" . . . the family arrangement had been brought about by the intervention of the panchayatdars and this clearly shows that the sons and daughters of the assessee were laying claims to the property which the assessee got under the will of her father and it was not relevant at the time when the family arrangement was entered into to find out as to whether such claims if made in a Court of law would be sustained or not. If the assessee found it worthwhile to settle the dispute between herself, her sons and daughters by making the family arrangement, the said arrangement could not be ignored by a tax authority. In view of the finding of the Tribunal, the family arrangement dated December 17th, 1971, had to be held to be a valid piece of document and, hence, the Tribunal was right in its view that no transfer of property was involved within the meaning of section 2(xxiv) of the Gift-tax Act and, hence, there was no liability to gift-tax either under section 4(1)(a) or under section 4(2) and consequently no question of inclusion of the income of the minor in the hands of the assessee would also arise." (p. 707)

11. From the above facts of the present case and the proposition of law discussed above through various case laws, I am of the view that it is settled law that when parties entered into family arrangement, the validity of the family arrangement is not to be judged with reference to whether the parties who raised disputes or rights or claimed rights to certain

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properties had in law any such right or not. A perusal of the record in the present case before me, establishes that a dispute was there in the family as per memorandum of family arrangement cum compromised deed and family arrangement was arrived at was documented much prior to the sale of the property in 2011. The family arrangement was made in 2004. In view of these, I treat the family arrangement as genuine and distribution of sale consideration according to the same is to be assessed as capital gains. The consequential benefits and deductions are to be allowed as per law. Accordingly, the appeal of the assessee is allowed.

12. In the result, the appeal of assessee is allowed.

Order pronounced in the open court on 28-02-2018.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 28-02-2018
Sudip Sarkar /Sr.PS

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