

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'A' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),  
and Pavan Kumar Gadale (Judicial Member)]**

ITA No. 5332/Mum/2015  
Assessment year: 2006-07

**Abbasbhai A. Upletawala** .....Appellant  
*Flat No. 192, Neelamber, 37, Dr. G Deshmukh Marg,  
Peddar Road, Mumbai 400 026 [PAN: AAPPU5526L]*

Vs

**Income Tax Officer Ward 16(1)(1)**  
**Mumbai** .....Respondent

**Appearances by**

**Madhur Agarwal**, along with **Fenil Bhat and Kiran Mehta** for the appellant  
**Shailja Rai** along with **Manoj Sinha** for the respondent

Date of concluding the hearing : July 28, 2022  
Date of pronouncing the order : October 21, 2022

**O R D E R**

**Per Pramod Kumar, VP:**

1. By way of this appeal, the assessee-appellant has challenged the correctness of the order dated 3<sup>rd</sup> September 2015, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2006-07.

2. The assessee before us is an individual, and it is a case of reopened assessment. The reassessment proceedings on the short ground that “the assessee has sold immovable property valued at Rs 2,05,24,524 on 26.9.2015” and that the Assessing Officer had “reasons to believe that the long term capital gain from the said transaction is taxable, and the income, to that extent, has escaped assessment for the assessment year 2006-07”. In the ensuing assessment proceedings, the Assessing Officer noted that the assessee was a director of M/s Abid Steels Co Ltd (ASCL, in short) and the assessee had given his personal guarantee to, on behalf of the ASCL and in respect of its commercial borrowings from, the State Bank of India. The assessee owned land admeasuring 2291.9 square meters of land bearing CTS No. 12A, 28A, 29 to 33 and survey no 56 as part of Malad Village. The assessee had purchased this property, on 22.8.1983, for Rs 2 lakhs. As a collateral security this property was given to the State Bank of India. The State Bank of India recalled the credit facilities given to ASCL, and invoked the personal guarantee given by the assessee. The assessee was also made a party, as a director of ASCL as also as a guarantor to the ASCL, to the recovery proceedings

before the Debts Recovery Tribunal. On 29<sup>th</sup> March 2004, the State Bank of India entered into an assignment agreement with Asset Reconstruction Co India Ltd (ARCIL), a company registered as a securitization and asset reconstruction company pursuant to section 3 of Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. As evident from entry at serial no. 20 at Schedule 2 of this assignment agreement, the Malad land of the assessee, which was offered as collateral security by the assessee to the SBI, was assigned to the ARCIL. The ARCIL, vide agreement dated 1<sup>st</sup> September 2005, sold this property to Advent Developers Pvt Ltd (ADPL) for Rs 2,00,00,000, whereas, as per stamp duty valuation, the market rate of the property was Rs 2,04,93,500. The assessee was a confirming party to this sale transaction between the ARCIL and ADPL. The Assessing Officer took note of these facts as also of the fact that, as noted in the sale deed, 'confirming party has surrendered all his rights, title and interest to the vendor' (i.e ADPL). He thus proceeded to tax the entire amount of Rs 2,04,93,500 as a long-term capital gain. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) but without success.

3. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

4. As learned counsel rightly points out, under section 45, "any profits or gains arising from the transfer of a capital asset effected in the previous year shall.....be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place". What is important therefore is the year in which the transfer takes place vis-à-vis the assessee. So far as the transaction before us is concerned, that is between the ARC and the end buyer but the very fact that ARC is selling the property as the owner of the property does indicate that the transfer from the assessee to the ARC, via SBI perhaps, taken place at an earlier stage. That is the year of transfer in which the taxability arises so far as the assessee is concerned. However, there is no categorical finding about that aspect of the matter at any stage. It is also not clear as to what is the date on which the transfer took place from the assessee to the State Bank of India, and what is the documentation or court/ DRT orders in this regard. This aspect of the matter has simply not been examined. In this view of the matter, we deem it fit and proper to remit the matter to the file of the CIT(A) for recording a specific finding in this regard, after giving a due and reasonable opportunity of hearing to the assessee, in accordance with the law and by way of a speaking order. The question of taxability of capital gains will arise only in the year in which such a transfer takes place. As the matter is being reknitted to the file of the CIT(A) for this purpose, all contentions remain open.

5. There is, also, a fundamental point regarding the protection of legitimate interests of the revenue. In most of the cases in which the assets are taken over, as part of the recovery of commercial borrowings, by the bankers, or by the ARCs, the owners of these assets are not in a position to pay their dues, and that is the reasons that these assets get taken over. However, on sale of such properties, even as the entire sale proceeds of the properties goes to the bankers, the owner of the property alone is expected to pay the capital gains tax, and there is no mechanism to ensure that the dues of the state, i.e. tax on the long term capital gains, are secured in the process of sale of such properties. While owners of these assets, in many cases, have no money to pay the tax in question as they are already bankrupt and no part of sale consideration reaches them anyway, the recipients of sale considerations in these transactions, i.e. the banks and the ARCs, have no liability to make such payments of taxes-even in the vicarious capacity as tax withholdings. It may end up in a situation where the tax

department unwillingly ends up subsidizing the banks, because banks end up getting the entire sale consideration on sale of properties held as collateral security- including the State's share by way of tax on long-term capital gains. On a conceptual note, that is an undesirable situation, and it is time that the Government seriously considers protecting its legitimate interests by ensuring some mechanism to ensure that the tax liability on the capital gains is duly recovered from the borrower whose property is sold, and when it is not possible to do so on account of the borrower's genuine financial difficulties, from the person who receives the proceeds of the sale of such assets. With the increasing number of cases in which recovery measures are enforced by selling properties, held by the bankers and ARCs as collateral securities, and inevitable liquidity or bankruptcy issues with such borrowers, there must already be good amount of such avoidable losses to the revenue. Such a position must not continue.

6. As we have remitted the matter to the file of the CIT(A) for fresh adjudication, after taking a call on the year in which the actual transfer has taken place, the issues raised by the assessee with respect to the correct quantification of capital gains are academic at this stage. Let the CIT(A), if so necessary, recompute the capital gains after taking into duly indexed cost of acquisition and the cost of improvement, and let the assessee furnish necessary information input in this regard. This aspect of the matter also, therefore, may be examined afresh by the learned CIT(A).

7. In the result, the appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 21<sup>st</sup> day of October 2022

Sd/-  
**Pavan Kumar Gadale**  
(Judicial Member)  
**Mumbai, dated the 21<sup>st</sup> day of October, 2022**

Sd/-  
**Pramod Kumar**  
(Vice President)

*Copies to:*

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

*By order*

*Assistant Registrar*  
*Income Tax Appellate Tribunal*  
*Mumbai benches, Mumbai*