No capital gain on family settlement if property wasn't transferred to assessee as per will of deceased person

Summary – The Delhi ITAT in a recent case of Tarlochan Singh., (the Assessee) held that where assessee received a certain sum towards one time settlement of his right in estate of his deceased brother in family settlement, but as per will of brother, no right and title in immovable property was given to assessee, and thus assessee could not sell or transfer any right in property, provisions of section 45 would not apply

Facts

- The Assessee received a certain amount from the Estate of his deceased brother in family settlement.
- The Assessing Officer held that said receipt amounted to 'transfer' within the meaning of section 2(47). According to the assessee, the said amount was received as per the family settlement and the same was not liable to any capital gain as there was no transfer involved. The Assessing Officer noted that assessee was allotted 500 sq. feet through family settlement and assessee and others were entitled to sell, mortgage, lease, gift or deal with their share in any manner. The assessee after obtaining the share of 500 sq. feet of the area through the family settlement subsequently transferred the same to one 'J' for a sum of Rs. 30 lakhs. This subsequent transfer was a transfer within the meaning of section 2(47) and would clearly attract the provisions of capital gain tax. Therefore, after giving benefit of cost of acquisition, short term capital gain was computed.
- The Commissioner (Appeals) dismissed appeal of assessee.
- On appeal

Held

- The entire facts of the case revolve around the right of the deceased Kanwaljeet who was having share in a property. Copy of his Will dated 23-11-1978 has been filed on record. The salient feature of the Will of the deceased shows that he was having ¼ share in property in question. He was bachelor and made the Will out of sound disposing of mind. He has distributed his properties through this Will in the event of his death. He states in the Will that his share in property in question be sold in open market and if his co-partners pay the price, then they will get the preference to buy. The money so received from sale of his share after deducting all liabilities like death duties, tax etc., shall be divided by giving 50 per cent to the Prime Minister's Relief Fund and 50 per cent be given to Gurudwara Committee at New Delhi to construct dispensaries and reading room etc. Out of the cash in Bank, he desired that after his death the same be distributed to different persons and 10 per cent have been given to 'J' who was Architect and Executor to his Will. It would, therefore, show that none have been given any right, title or interest in immovable property of the deceased. The copy of the family settlement deed dated 18-4-2005 is filed on record which is executed in the presence of

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the 'J' amongst family member. This family settlement deed was executed between the family members and real-heirs of the deceased Kanwaljeet. The terms of the family settlement deed are contrary to the Will executed by the deceased because according to the Will of the deceased dated 23-11-1978, no right, title or interest have been given to any one and the sale proceeds of share in disputed property shall have to go to Prime Minister of India Relief Fund and Gurudwara Committee, Delhi. Therefore, how 500 sq. feet have been allotted in the property in question to the assessee is not at all explained and, it would be against the desire of the deceased through his Will as well as against the provisions of Law. The assessee due to this fact explained before Assessing Officer that assessee and other legal-heirs were not interested in taking the area at 4th floor of Naurang House because they were not able to get clear title of the share allocated. The assessee and others were not in a position to sell the property independently. That's why he has taken Rs. 30 lakhs from 'J', Executor of the Will. It would show that assessee did not own and possess any capital asset so as to transfer it to 'J'.

- Considering the above provision of law, it is clear that for charging capital gain there should be transfer of capital asset in previous year and capital asset would mean property of any kind held by assessee and that transfer in relation to capital asset includes, sale, exchange, relinquishment of the asset or extinguishment of any right therein etc. In the facts and circumstances of the case, the assessee did not own, hold or possess any property. Therefore, there is no question of assessee having any right/title/interest in 500 sq feet in Naurang House, 21. The share of the deceased was never given to the assessee or others through Will. Therefore, mere execution of the family settlement would be of no consequence to provide any right, title or interest to the assessee in property in question in which assessee is alleged to have been allotted 500 sq. feet which was subject matter of transfer for charging capital gain. There is no transfer in the case of the assessee because there is no sale, exchange or relinquishment of any asset or extinguishment of any right therein. There is no case made out for transfer under section 53A of the Transfer of Property Act. Therefore, the provisions of section 45 read with section 2(14)/(47) would not apply in the case of the assessee. There is no transfer of capital asset in the facts and circumstances of the case.
- It appears from the facts and circumstances of the case that the assessee might have exploited his position on the death of his deceased brother and for clearing some portion, he would have asked for some money from the Executor and in lieu thereof Rs. 30 lakhs have been given by Executor of the Will to the assessee. Therefore, the transaction would not disclose any capital gain within the meaning of section 45. The orders of the authorities below are therefore, liable to be set aside. No capital gain arise in the facts and circumstances of the case so as to put the assessee in liability to pay capital gains tax.
- However, the assessee has received Rs. 30 lakhs in assessment year under appeal in his S. B. account maintained with Bank. The duty of the Tribunal would not end by directing that capital gain may not be charged. The proper order to be passed in such a case would be to set aside the orders of the authorities below and direct the Assessing Officer to make fresh assessment in accordance with law

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because assessee received Rs. 30 lakhs in his bank account from 'J' which remain unverified and unexplained.

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