

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, B, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.8111/Mum/2011
Assessment Year: 2005-06**

Mohd Raza Akberali Ghugharia, M/s. N.S. Virani & Co., C.A. s 28, Bhanushali Bldg. 35, Mint Road, Mumbai-400001	बनाम/ Vs.	ITO 15(2)(3), Matru Mandir Tardeo, Mumbai-400034
(Assessee)		(Revenue)
P.A. No.AABPG3107B		

निर्धारित की ओर से / Assessee by	Shri Vijay Mehta & Shri Anuj Kisnadwala. (AR)
राजस्व की ओर से / Revenue by	Shri K. V. Vispure (DR)

सुनवाई की तारीख / Date of Hearing :	27/04/2016
आदेश की तारीख / Date of Order:	01/07/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

Instant appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-26 Mumbai

(in short 'CIT(A), dated 01.07.2011 passed in consequence to AO's assessment order u/s 143(2) r.w.s. 263 dated 07.07.2009 for the Assessment Year 2005-06 on the following grounds:

"I. The earned Assessing Officer erred in invoking the provisions of section 50C of the I.T. Act, 1961 and thereby assessing the taxable Long Term Capital Gain at Rs.15,89,972/- in place of Rs.NIL returned by the Appellant.

II. The Appellant respectfully submits as follows:

i) that the provision of section 50C of the I.T. Act, 1961 is not applicable to the case of the Appellant.

ii) that the provisions of section 50C are applicable only for limited purpose of section 48 of the I.T. Act, 1961 for computing the taxable Capital Gain.

iii) that under the charging section 45 of the I.T. Act, there is no Capital Gain left (considering the exemption u/s 54) to which the other provision of the Act, for the purpose of the Capital Gain like section 48, section 50-C etc., apply.

iv) that the deeming provisions of section 50C of the I.T. Act, is applicable only for limited purpose of section 48 of the I.T. Act, 1961 . Therefore, when section 48 is not applicable (in view of exemption u/s 54) section 50C does not apply.

v) that it is never the intention of legislature of tax notional gain by invoking deeming provisions of section 50C of the Act, 1961.

III. The Appellant, therefore prays that the notional Capital Gain computed by invoking the provisions of section 50C should be deleted and the exemption of Capital Gain claimed by the Appellant u/s 54 of the I.T. Act, may be accepted and the Assessing Officer may be directed to modify his assessment accordingly."

2. In this case it has been noted that the appeal has been filed late before the Tribunal by 48 days. In this regard, Ld. Counsel of the assessee drew our attention on the petition for condonation of delay wherein it was submitted that the impugned order was forwarded to Shri N.S. Virani CA, who was regular counsel of the assessee, the appeal documents were prepared in time. But, Shri N.S. Virani had to go out of station and out of country due to which delay occurred, inadvertently on account of the reasons beyond the control of the assessee. During the course of hearing before us Ld. Counsel drew our attention on the affidavits filed by the assessee as well as Shri N. S. Virani wherein the facts were disposed on oath. These affidavits were shown by the Ld. DR also for the sake of ready reference the assessee filed following affidavit:

I, Mohd. Raza Akberali Chugharia, aged about 68 years of Mumbai Indian inhabitant, residing at Al Hilal Bldg., Bandra Reclamation, Bandra (West), Mumbai - 400050 do solemnly affirm and state as under:

1. I say that since my taxation matters are being attended by Shri N. S. Virani, Chartered Accountant, the order of the id. CIT (A) dated 01.07.2011, upon receipt, was forwarded to him in the last week of August, 2011 for preparation of second appeal. I further say that after finalization of Form No. 36 and grounds of appeal, they were received back from Shri N. S. Virani in the 1st week of September, 2011 and they were duly signed and returned back on 10.09.2011.

2) I say that on my enquiry in the 1st week of December, 2011 about the status of the appeal, it was found out that it was not filed but had got mixed up with other papers. After tracing out the appeal papers, as per advice of Shri N. S. Virani, the requisite appeal fee was deposited on the very next day, namely, 02.12.2011 and the appeal was filed on that day itself. I further say that the delay

of 48 days occurred in presentation of the captioned appeal was, thus, not due to any deliberate or negligence on my part but for reasons beyond my control as detailed in the accompanying application for condonation of delay.

3. I repeat and reiterate the statements and averments made in the accompanying application for condonation of delay and they may be treated as reproduced verbatim in this affidavit.

4. I say that whatever stated above is true to the best of my knowledge and belief.”

Similarly Shri N. S. Virani has filed following affidavit:

I, N. S. Virani, aged about 61 years of Mumbai Indian inhabitant having my place of practice at 28, Bhanushali Bldg., 35, Mint Road, Mumbai - 400 001 do solemnly affirm and state as under:

1. I say that I am a Chartered Accountant by profession and Shri Mohd. Raza Akberali Ghugharia is my client since the last eight years; and, as such, I have been representing him before the Assessing Officer and the Id. CIT (A). I further say that the order of the Id. CIT (A) for A.Y. 2005-06 was sent by Shri Mohd. Raza Akberali Ghugharia to my office in the last week of August, 2011 for preparation of second appeal.

2. I say that accordingly, Form No. 36 and grounds of appeal were prepared and sent back to Shri Mohd. Raza Akberali Ghugharia for his signatures in the 1st week of September, 2011 with instructions to my office staff for doing the needful after they were received back, as immediately thereafter I had to proceed to Baroda and UAE for some professional work. I further say that the Form No. 36 and grounds of appeal were returned back by Shri Mohd. Raza Akberali Ghugharia to my office in the 1st week of September itself. Due to my absence, they could not be attended to by the staff as directed since the said papers got mixed up with other papers in the office due to unintentional mistake on their part. In addition, no steps for deposit of the appeal fees were also taken.

3. I say that the non-presentation of the appeal came to my notice only in the 1st week of December when Shri Mohd. Raza Akberali Ghugharia made enquiries about its status. I further say that realizing the seriousness of the mistake, the requisite appeal fee was paid then and there and the appeal was presented before the Hon'ble Tribunal on 02.12.2011. I further say that the delay of 48 days in presentation of the captioned appeal was, thus, not due to any deliberate or negligence on the part of Shri Mohd. Raza Akberali Ghugharia, but it was only for the reasons stated hereinabove.

4. I say that whatever stated above is true to the best of my knowledge and belief.

Ld. DR could not point out anything wrong in the factual deposition made in the aforesaid affidavit and he did not make serious objection for granting condonation of delay. Under these facts and circumstances and in the interest of justice, we find that there was sufficient cause due to which delay occurred in filing this appeal and therefore, we condone the delay and admit this appeal for adjudication.

2.1. The return of the income for the assessment year in question was filed by the assessee on 13.10.2005 which was processed u/s 143(1)(a). Subsequently, the case was selected for scrutiny and assessment was framed u/s 143(3) vide order dated 26.10.2007. The total income declared by the assessee was Rs.1,06,630/- and the same was duly accepted as such. Subsequently, the order was sought to be revised u/s 263 by Commissioner of Income Tax -15 Mumbai. The impugned order u/s 143(3) was considered erroneous and prejudicial to the interest of the revenue within the meaning of section 263 on the ground that provision of section 50C were not made

applicable to the case of the assessee although they were applicable. After hearing the arguments of the Authorised Representative (AR), the case was sent back to the AO for reframing of assessment order vide Ld. CIT(A) order u/s 263 dated 27.02.2009. The AO completed the assessment u/s 143(3) r.w.s 263 of the Income Tax Act, 1961 vide its order dated 07.07.2009. After re-examining the issue of applicability of section 50C of the Income Tax Act, that total income was recomputed at Rs.16,96,600/-.

2.2. The assessee preferred first appeal to Ld. CIT(A) but did not succeed. Aggrieved by this order of AO, the assessee is in second appeal before us.

2.3. Brief facts are that the assessee during the year under consideration has sold a property situated at Bandra, Mumbai, having half share for a consideration of Rs.30,00,000/- on 21.03.2005. The sale proceeds of this property has been invested in purchase of another property situate at Bandra Mumbai for Rs.35,00,000/- on 06.04.2005. However, on going through the copy of stamp duty receipt in respect of the flat sold on 21.03.2005, it was noticed that the Stamp Duty Authority have taken the value of the flat at Rs.48,71,615/- for the purpose of charging stamp duty. As the sale value shown by the assessee was less than the value of adopted by the Stamp Duty Valuation Authorities, provisions of section 50C were applied in the case. The assessee contended that a provision of section 50C is not applicable as

the assessee has invested entire capital gain as per provisions of section 54 and resultantly, entire long term capital gain is exempted as per the provisions. He pleaded that provisions of section 50C will apply only when there is computation of capital gain u/s 48 whereas in the instant case, there is no need to compute the capital gain and apply provisions of section 50C as the entire capital gain got exempted u/s 54. The stand of the assessee was not accepted by the AO and accordingly, he recomputed the capital gain by taking stamp duty value. The cost of acquisition was indexed and deduction u/s 54 was granted on assessee's share and resultantly the net long term capital gain was computed at Rs.15,89,972/- as against nil declared by the assessee in his return of income.

2.4. Before us, Ld. AR of the assessee has raised similar contentions that provision of section 50C has no application in the case as the assessee has invested entire capital gain as per provision of section 54 and hence the entire long term capital gain is exempted. When entire capital gain is exempted then provision of section 48 are not applicable as section 48 provides only for mode of computation. Section 45 is charging section and when capital gains are nil as per charging section then mode of computation as per section 48 do not apply, section 50C provides a deeming fiction which applies specifically only for the purpose of section 48 and when section 48 no application, section 50C cannot be applied. To support his contentions, he relied on various judicial pronouncements which are listed below:

1. Sanjeev Lal, Smt. Shail Moti Lal v. CIT 365 ITR 389 (SC)
2. CIT v. ACE Builders P. Ltd. 281 ITR 210 (Bom)
3. Mrs. Nila v. Shah v. CIT 152 TTJ (Mumbai) (UO) 38
4. ITO v. Mr. Kondal Reddy Mandal Reddy (ITA No.848/Hyd/2015) (ITAT Hyderabad)
5. Shri Nand Lal Sharma v. ITO 413/JP/2012(ITAT Jaipur)
6. ITO v. Shri Mehul J. Dhabalia (ITA No.2235/Mum/2012)(ITAT Mumbai)

2.5. On the other hand, Ld. DR stated that section 50C has been introduced to unearth unaccounted money in property transactions and whenever the actual sale value declared by the assessee in respect of any property is less than the value adopted by the Stamp Duty Authorities, section 50C would come into play. So the provisions of section 50C would apply in all cases and therefore, in this case the value adopted by the Stamp Duty Valuation authorities should be substituted with the actual sale value declared by the assessee.

2.6. We have heard the arguments advanced by both the parties. It would be convenient to reproduce the relevant portions of Section 50C:

Section 50C

(1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State Government (hereafter in this section referred to as

the “stamp valuation authority”) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed [or assessable] shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.....(emphasis supplied by us)

Section 48 Mode of computation

“The income chargeable under the head “Capital gains” 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(emphasis supplied by us)”

Section 45 Capital Gains

(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, 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....” (emphasis supplied by us)

2.7. It is settled position of law that whenever deeming fiction has been provided in the provisions, it as to be construed strictly and it applies to specific provisions only. The words ‘for the purpose of section 48’ mentioned in section 50C makes it amply clear that the provisions of this section applies specifically only to section 48 and to no other section. Section 48 deal with mode of computation of capital gains and it

applies only when there are certain capital gain which are chargeable to tax as per section 45 meaning thereby section 48 is applicable only where there was a capital gain on which tax has to be calculated. When a capital gain is exempted as per the charging section 45, mode of computation as provided under section 48 do not apply. Moreover, section 45 provides that capital gain has to be calculated after applying the provisions of section 54, 54B, 54D and other similar exemption provisions. We have also taken note of various observation of relevant judicial pronouncements relied upon by the Ld. AR which have been discussed in subsequent paragraphs.

2.8. Hon'ble Bombay High Court in the case of CIT v. ACE Builders P. Ltd. 281 ITR 210 (Bom) vide its order dated 7th March 2005 held as under:

“In our opinion, the assessee cannot be denied exemption under [section 54E](#), because, firstly, there is nothing in [section 50](#) to suggest that the fiction created in [Section 50](#) is not only restricted to [sections 48](#) and [49](#) but also applies to other provisions. On the contrary, [Section 50](#) makes it explicitly clear that the deemed fiction created in sub-section (1) & (2) of [section 50](#) is restricted only to the mode of computation of capital gains contained in [Section 48](#) and [49](#). Secondly, it is well established in law that a fiction created by the legislature has to be confined to the purpose for which it is created. In this connection, we may refer to the decision of the Apex Court in the case of [State Bank of India v. D. Hanumantha Rao](#) reported in [1998] 6 SCC 183.”

Further, the following observation in the same case is relevant for us:

“Applying the ratio of the said Judgment, we are of the opinion, that the fiction created under section 50 is confined to the computation of capital gains only and cannot be extended beyond that. Thirdly, section 54E does not make any distinction between depreciable asset and non depreciable asset and, therefore, the exemption available to the depreciable asset under section 54E cannot be denied by referring to the fiction created under section 50. Section 54E specifically provides that where capital gain arising on transfer of a long term capital asset is invested or deposited (whole or any part of the net consideration) in the specified assets, the assessee shall not be charged to capital gains. Therefore, the exemption under section 54E of the I.T.Act cannot be denied to the assessee on account of the fiction created in section 50.”

2.9. The coordinate Bench of ITAT Mumbai in the case of Mrs. Nila v. Shah v. CIT 152 TTJ (Mumbai) (UO) 38, has observed:-

“Whereas S.50C provides for deeming fiction where value of consideration is adopted as per the stamp valuation authorities or any authority of the State Government. Even if the property has been sold at a lesser price but under the deeming fiction of s.50C, the value adopted by the Stamp Valuation authorities is taken as sale consideration. Such a deeming fiction cannot be imported into s. 54EC and hence the deemed value cannot be considered for the purpose of exemption under s.54EC.”

2.10. Hon’ble Jaipur Bench in the case of Shri Nand Lal Sharma v. ITO 413/JP/2012(ITAT Jaipur) has observed:

“Hon’ble Delhi High Court in the case of CIT vs. Smt. Nilofer I sing (supra) has categorically held that mode of computation of capital gain is statutorily defined u/s 48 of the Act which uses the words actual cost of "consideration" and not the deemed cost of consideration u/s 50C. We find merit in the arguments of the Id. AR that Section 50C is deeming fiction by which stamp duty value of the asset sold is to be substituted for actual consideration. This being purely a fiction, its scope is

limited to Section 50C only and cannot be enlarged without a specific reference. In the absence of any enabling statutory provision, a fiction cannot be imported in other section. This view has been squarely adopted by Honble Delhi High Court in the case of CIT vs. Sint. Nilofer Singh (supra) and followed it by this Bench ITAT in the case of Gyan Chand Batra vs. ITO (supra). Respectfully following the same, we hold that while computing exemption u/s 54, the actual sale consideration is to be taken into consideration and not the stamp duty valuation u/s 50C.”

2.11. Similar observations has been made in other cases also.

2.12. It is undisputed that the assessee has fulfilled the condition of section 54 and entitled for the same. The investment has been made within the specified time in prescribed manner. The sale value declared by the assessee Rs.30,00,000/- and the value adopted by the Stamp Duty Valuation Authorities is Rs.48,71,615/-. The indexed cost of the acquisition comes out to Rs.3,30,275/-. Thus, long term capital gains work out to be as follows:

Sale value as declared by the assessee	Rs. 30,00,000/-
Indexed Cost of acquisition	<u>- Rs.3,30,275/-</u>
	Rs.26,69,725/-

2.13. As per provisions of section 54, this amount was required to be invested in the new asset to claim exemption. The assessee has invested a sum of Rs.29,51,368/- which is more than long term capital gains and he is therefore, entitled for full exemption u/s 54. The long term capital gain works out to Nil and hence section 48 do not apply which only

provides for a mode of computation only. The long term capital gain as per charging section 45 is Nil. Further, deeming fiction created section 50C applies only for the purpose of section 48 and hence, has no application in the instant case. In view of the above findings the appeal of the assessee is allowed.

3. The appeal filed by the assessee is allowed.

Order pronounced in the open court on 1st July , 2016.

Sd/-
(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 01 /07 /2016

Patel, P.S. नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai