

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

**BEFORE D.T. GARASIA, JUDICIAL MEMBER AND  
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

**ITA No.3253/M/2013  
Assessment Year: 2008-09**

M/s. Mema Engineers & Contractors Pvt. Ltd., B Wing, G6, Navbharat Estate, Zakaria Bunder Road, Sewri (W), Mumbai – 400 015 <b>PAN: AAACH 1383F</b>	Vs.	ITO 6(3)(3), Mumbai
(Appellant)		(Respondent)

**Present for:**

Assessee by : Ms. Dinkle Hariya, A.R.  
Revenue by : Shri Suman Kumar, D.R.

Date of Hearing : 22.06.2017  
Date of Pronouncement : 21.09.2017

**ORDER**

**Per D.T. GARASIA, Judicial Member:**

The present appeal has been preferred by the assessee against the order dated 25.02.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

**Ground No.1**

2. This ground is relating to addition made by the AO.

The short facts of the case are that the assessee was granted the land of 55 acres of Maharashtra land vide letter dated 15.06.1968 from collector's office, BSA, Mumbai. The assessee was required to incur expenses for development of road and infrastructure facilities. The assessee has sold some of the plots to existing lessee since they were occupants of plots since last several years and had offered the same as business income. During the year the assessee had sold land to M/s Bharat Insulations Co. and had declared receipt of sale consideration of Rs.1,79,265/-. From the copy of registration deed it was noticed by the Assessing Officer (hereinafter referred to as the AO) that as per the registration authority the market value of the property was Rs.25,65,000/- and accordingly registration charges of 1,28,250/- was paid. The AO issued show cause notice and in reply to show cause notice assessee contended that assessee had given plot No.844/25 and plot No.111-D on lease to M/s Bharat Insulations Co. in the year 1972 for a period of 98 years. The assessee has constructed factory building on the said plot and has been carrying manufacturing activities since last several years. The unexpired period of lease as on 31.03.08 was 62 years. The lessee approached the assessee for conveyance of the land for which the matter was taken upto the collector's office and collector of land, Mumbai to arrive at the rates for the purpose of stamp duty and registration and also to arrive at the rates at which the plots are to be allotted and the price was decided at Rs.1,79,266/-. The assessee contended that this is not a sale of land. It is merely conveyance of land already

occupied and used by the assessee. The AO was of a view that since assessee was leaseholder of land for 98 years and he is perpetual owner of the land and ownership of the land has been changed from assessee to others, therefore transaction is clear sale of land. In view of section 50C, amount of Rs.23,85,735/- is added to the total income of the assessee. **The AO issued show cause notice and in reply assessee stated that what has been sold was actually leasehold land and price of such sale was R.s.1,79,266/-. There was no sale of land and it was merely conveyance of the land already occupied and in use by the lessee. The AO did not satisfy with the explanation and considering section 50 C of the Income Tax Act, he held that assessee was a leaseholder of the land for 98 years and therefore a perpetual owner of the land. When such ownership of the land changed hands the transaction is a clear sale of land and accordingly Section 50 C is applicable.**

3. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has dismissed the appeal of the assessee.

4. The Ld. A.R. has submitted that assessee has leased the plot number in question in the year 1972 for a period of 98 years and had constructed factory building on the said plot for carrying manufacturing activities. The assessee had entered into sale of said plot for consideration of Rs.1,79,265/-. The assessee was lessee of the property for remaining 62 years. It is the government land, therefore, the assessee has approached the collector office and the

collector has arrived at a price at which rate the land has to be transferred and the price was decided at Rs.1,79,266/-. The Ld. A.R. has drawn our attention to the profit & loss account and submitted that assessee has treated this land as stock in trade and as per books of accounts of the assessee, assessee is never the owner of the land to which he was only the licensee of the land. When assessee has treated this land as business asset the provisions of section 50C is not applicable. The Ld. A.R. relied upon the decision of Hon'ble Madras High Court in the case of CIT vs. Thiruvengadam Investments Pvt. Ltd. (2010) 320 ITR 345 (Mad), decision of Mumbai Bench, ITAT in ITA No.8101/M/2011 in the case of Shavo Norgren (P) Ltd. and Hon'ble Jurisdictional Bombay High Court judgment in the case of CIT vs. Neelkamal Realtors & Erectors India (P.) Ltd. (2017) 79 taxmann.com 238 (Bombay). The Ld. A.R. further submitted that the sale of revisionary right in leasehold land is not allowed by the provisions of section 50C. The Ld. A.R. relied upon the copy of the agreement and submitted that no disallowance can be made.

5. The Ld. D.R. relied upon the orders of Revenue Authorities.
6. We have heard the rival contentions of both the parties. Looking into the facts and circumstances of the case, we find that the assessee has given plot No.844/25 and plot No.111-D on lease to M/s

Bharat Insulations Co. in 1972 for a period of 98 years. Lessee has constructed factory building on the said plot and has been carrying out manufacturing activities since last several years. The unexpired period of lease as on 31.03.08 was 62 years. The lessee approached the assessee for conveyance of the land for which the matter was taken to the collector's office and collector of land, Mumbai being an authority to arrive at the rates for the purpose of stamp duty and registration and also to arrive at the rates at which the plots are to be allotted and the price was decided at Rs.1,79,266/- by the collector. We find that assessee was allotted 55 acres of land in 1962. The assessee had shown this plot as stock in trade in his balance sheet. The Ld. A.R. drawn our attention to the profit & loss account wherein this land was shown as stock in trade. The question has to be determined whether section 50C is applicable when the land is shown as stock in trade in the books of accounts. The assessee was never the owner of the land. The owner of the land was the government. The collector has decided the price for transfer of this land. The assessee is not the owner of the property and it has been treated as business asset and not the capital asset. From the facts and circumstances of the case, it is found that the property in hands of the assessee was treated as business asset and not as capital asset. Therefore, section 50C is not applicable. Similar issue had come up before Hon'ble Madras High Court in the case of CIT vs.

Thiruvengadam Investments Pvt. Ltd. (2010) 320 ITR 345 (Mad) wherein the Hon'ble High Court held that when assessee is selling any property which was treated by assessee as a business asset then it cannot be treated as capital asset and there is no question of invoking the provisions of section 50C of the Act. In this instant case, the assessee is not a owner of the property/land but assessee is leaseholder of the land and the assessee, with permission of the collector, has transferred this revisionary right in lease for land to third party and that transfer is by the agreement. Therefore, when assessee himself has treated this land as his business assets, section 50C is not applicable. We also get supports from the decision of Hon'ble jurisdictional Bombay High Court in the case of CIT vs. Neelkamal Realtors & Erectors India (P.) Ltd. (2017) 79 taxmann.com 238 (Bombay) wherein it is held that when any business asset is sold section 50C is not applicable as it is a business asset. In the instant case, assessee was a builder following the project completion method of accounting. During the relevant assessment year assessee has offered certain net profit on sale of flat as his business income. The High Court held that section 50C is not applicable as it is a business income. Similarly in the instant case, the assessee treated the plot as stock in trade and not the capital assets. Moreover, we find that the ownership of the plot is the collector of Mumbai and 50% share of income has to be paid as

earned income. Therefore, we are of the view that AO and Ld. CIT(A) are not justified. We find that assessee has given plot No.844/25 and plot No.111-D on lease to M/s Bharat Insulations Co. and assessee is holding above asset as business asset since inception, therefore we allow this ground of the assessee.

7. In the result, ground No.1 of the appeal is allowed.

### **Ground No.2**

8. Ground No.2 relates to disallowance under section 43B of the Act.

The AO noticed that assessee has claimed the amount of Rs.11,04,587/- as amount payable to collector, Mumbai for sale of 3 plots of land. Earlier, assessee contested the payment of dues to collector on sale of plot of land. A sum of Rs.40,25,000/- was payable in respect of sale of plots prior to Financial Year 2007-08. Therefore, AO held that deduction of Rs.11,04,587/- from the sale proceeds of land is not justified. A sum payable to collector is covered by section 43B of the Income Tax Act. The AO further observed that assessee had treated said liabilities payable to collector as covered under section 43B of the Income Tax Act in A.Y. 1998-99. Accordingly, AO has proceeded to disallow the claim of deduction of the assessee.

9. The Ld. CIT(A) has dismissed the appeal of the assessee on the

same ground.

10. During the course of hearing, the Ld. A.R. has submitted that the similar issue had come up before the Tribunal for the assessment year 2006-07 in assessee's own case in ITA No.654/M/2011 wherein the Tribunal has restored this issue to the file of AO, therefore, this issue may be restored to the AO as per the order of the Tribunal.

11. The Ld. D.R. has no objection.

12. We have heard the rival contentions of both the parties. Looking into the facts and circumstances of the case, we find that the similar issue had come up before the Tribunal in the assessee's own case for assessment year 2006-07 in ITA No.654/M/2011 wherein the Tribunal has restored this issue to the file of the AO by observing as under:

"17. We have heard the rival contentions and also perused the material available on record. We have observed that the assessee company has entered into an agreement with Additional Collector of Bombay vide agreement dated 03-07-1964 whereby the assessee company was granted land admeasuring 55 acres as specified in schedule-I to the agreement dated 03-07-1964 on the terms and conditions as contained in the agreement dated 03-07-1964. Under the afore-stated agreement, 50% of the unearned increment in the event of sale or transfer of property is payable to the government as per clause 2(g) of the Schedule -II of said agreement dated 03- 07-1964 which is reproduced below :

"That the government will be entitled to half the unearned increment in the event of sale or transfer whether outright or as a result of unredeemed mortgage and that the land so sold or transferred should be used for a purpose approved by the Govt. if it is to be used for a purpose other than approved industrial or commercial purposes."

We have observed that there is a condition stipulated in afore-stated clause 2(g) of the agreement dated 03-07-1964, sharing of 50% of unearned increment in the land with the Government in the event of sale or transfer of plot of land , and the liability of the assessee company with respect thereto has arisen from the agreement dated 03-07-1964 rather than arising out of any law in force which is the

essential requirement to be made liable to be covered under the provision of [Section 43B\(a\)](#) of the Act which is reproduced below :

" [Certain deductions to be only on actual payment6.

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

[(a) any sum payable by the assessee by way of tax<sup>6</sup>, duty, cess or fee, by whatever name called, under any law for the time being in force, or] \*\*\*\*\*  
\*\*\*\*\* shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

[Provided that nothing contained in this section shall apply in relation to any sum [\*\*\*] which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

[\*\*\*]] \*\*\*\*\*  
\*\*\*\*\*"

The Revenue failed to bring on record provisions of any law in force under which this liability of sharing of 50% unearned increase in the land on sale or transfer with the Government can be crystallized or fastened on the assessee company , rather it is a contractual liability arising from contract between the two contracting parties viz. the assessee company on the one hand and Government on the other hand through Collector. In our considered view, the afore-stated amount of Rs.4,55,422/- stated to be payable towards unearned increase in the plot of land in the event of sale or transfer vide clause 2(g) of Schedule II of the agreement dated 03-07-194 entered into by the assessee company and Additional Collector of Bombay for grant of land in favour of the assessee company is not hit by provisions of Section 43B of the Act as the liability has not arisen on account of any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force , but the liability has arisen out of the contract between the two contracting parties and not arising out of any law in force. Thus, we hold that this amount stated to be payable of Rs.4,55,422/- to Collector towards unearned increase in the land on sale of reversionary rights in the plot is not hit by provisions of Section 43B of the Act. There is another aspect to this issue which also needs to be dealt with is with respect to the verification of the computation of Rs.4,55,422/- as computed by the assessee company , i.e. whether or not a correct amount of liability albeit not paid which has accrued and crystallized in favour of the Collector vide agreement dated 03-07-1964 with respect to the sale of reversionary rights in the two plots and hence limited verification is required to be done by the Revenue on the computation of working of Rs.4,55,422/- which has been produced before us

as the authorities below have not accepted the claim of the assessee company of Rs.4,55,422/- being payable to the Collector and allowed the actual amount of Rs.64890/- paid to the Collector which was computed by the Architect vide working enclosed in paper book page 44-45 filed with the Tribunal .

Accordingly, we set aside and restore this issue to the file of the A.O. with limited direction to verify the computation of the working of the unearned increment of Rs.4,55,422/- made by the assessee company with respect to the sale of the reversionary rights in the two plots by the assessee company and corresponding existence of liability of the assessee company to the tune of Rs.4,55,422/- in favour of the Collector in accordance with the agreement dated 03-07-1964 . The AO shall accordingly there-after verification allow the amount payable to the Collector in accordance with the terms of agreement dated 03-07-1964 . Our directions are only limited to the checking of the computational working of the amount as claimed by the assessee company stated to be payable to the Collector in accordance with the agreement dated 03-07-1964 being unearned increment on sale of the reversionary rights in two plots of land. The assessee company is directed to appear before the learned AO and produce and justify the computation of working of Collector charges stated to have accrued and payable to the Collector to the tune of Rs.4,55,422/- towards unearned increment in the land on the sale of reversionary rights in two plots in accordance and in terms of agreement dated 03-07-1964 . Needless to say proper and adequate opportunity of being heard will be provided by the AO to the assessee company in accordance with the principles of natural justice in accordance with the law. The AO shall allow and admit the relevant evidences and explanation submitted by the assessee company to support and substantiate its claim in its defense. We order accordingly.”

Respectfully following the same, we restore this issue to the file of AO.

13. In the result, ground No.2 of the appeal is allowed for statistical purposes.

### **Ground No.3**

14. This ground is regarding disallowance of expenditure.

The AO found that assessee had shown income of Rs.8,28,410/- as work bill. The assessee has received Rs.17.41 lakhs for digging and laying of cables in the premises. The assessee

explained that the purpose of doing such work, Mr. K.N. Varma had been appointed contractor. The AO has paid Rs.9.13 lakhs and after deducting the same from the amount received the balance was offered as income by the assessee. The AO examined the details and was of a view that there was no written contract between two parties to show that a sub contractor had been assigned by M/s. TATA Teleservices (Maharashtra) Ltd.

15. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has dismissed the appeal of the assessee.

16. We have heard the rival contentions of both the parties. Looking into the facts and circumstances of the case, we find that assessee has received order from M/s. TATA Teleservices (Maharashtra) Ltd. for Rs.17,41,600/- towards cable laying in premises of Shah Industrial Estate vide letter dated 01.08.07. For the said work assessee has appointed Mr. K.N. Varma as contractor for doing part of work as specification given by M/s. TATA Teleservices (Maharashtra) Ltd. The assessee has paid its amount by cheque and TDS is also deducted. Therefore, we allow the same.

17. In the result, appeal of the assessee is partly allowed.

**Order pronounced in the open court on 21.09.2017.**

Sd/-  
**(G. Manjunatha)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(D.T. Garasia)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 21.09.2017.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.