

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'B' BENCH, KOLKATA**

**[Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member]**

**I.T.A. No. 554/Kol/2016  
Assessment Year: 2006-07**

**Income Tax Officer, Ward-2(1), Kolkata.....Appellant**  
**P-7, Chowringhee Square**  
**7<sup>th</sup> Floor**  
**Room No.21**  
**Kolkata - 700 069**

**Shri Sheila Sen..... Respondent**  
**(L/H of Late Bimalendu Sen)**  
**16, Convent Road**  
**Kolkata -14**  
**[PAN : ALPP 5489 B]**

**C.O. No. 28/Kol/2018  
Assessment Year: 2006-07**

**Shri Sheila Sen..... Appellant**  
**(L/H of Late Bimalendu Sen)**  
**16, Convent Road**  
**Kolkata -14**  
**[PAN : ALPP 5489 B]**

**Income Tax Officer, Ward-2(1), Kolkata.....Appellant**  
**P-7, Chowringhee Square**  
**7<sup>th</sup> Floor**  
**Room No.21**  
**Kolkata - 700 069**

**I.T.A. No. 23/Kol/2016  
Assessment Year: 2006-07**

**Income Tax Officer, Ward-2(1), Kolkata.....Appellant**  
**P-7, Chowringhee Square**  
**7<sup>th</sup> Floor**  
**Room No.21**  
**Kolkata - 700 069**

**Shri Nirmalendu Sen..... Respondent**  
**16, Convent Road**  
**Kolkata -14**  
**[PAN : ALHPS 3417 K]**

**I.T.A. No. 1387/Kol/2015**  
*Assessment Year: 2011-12*  
**C.O. No. 31/Kol/2018**  
*Assessment Year: 2011-12*  
**Smt. Swagata Guha Mustafi**

**C.O. No. 03/Kol/2016**  
*Assessment Year: 2006-07*

**Shri Nirmalendu Sen..... Respondent**  
**16, Convent Road**  
**Kolkata -14**  
**[PAN : ALHPS 3417 K]**

**Income Tax Officer, Ward-2(1), Kolkata.....Appellant**  
**P-7, Chowringhee Square**  
**7<sup>th</sup> Floor**  
**Room No.21**  
**Kolkata - 700 069**

**Appearances by:**

*Shri Soumitra Choudhury, Advocate & Shri Anirban Gupta, Advocate, appeared on behalf of the assessee.*  
*Shri Debashish Lahiri, Adl. CIT, DR appearing on behalf of the Revenue.*

Date of concluding the hearing : August 20<sup>th</sup>, 2018  
Date of pronouncing the order : September 7<sup>th</sup>, 2018

**O R D E R**

**Per J. Sudhakar Reddy :-**

These appeals filed by the Revenue and the Cross-Objections by the assessee are directed against two separate orders of the Id. Commissioner of Income Tax (Appeals)-I, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), for the Assessment Year 2006-07.

2. Facts in brief:-

The assessee's, Shri Nirmalendu Sen and Smt. Sheila Sen, legal heir of Late Shri Bimalendu Sen, were co-owners of land situated at 74, 74/1 and 82 Topsia Road, Kolkata - 700 046. Shri Nirmalendu Sen and Late Shri Bimalendu Sen, entered into an partnership business on 05/03/2002, under the name and style of "East End Developers" with three other partners, namely, Shri Jugal Kishore Khetawat, Shri Vishal Khatawat and M/s. Khetawat Towers Pvt. Ltd., for the development of the above referred property. Shri Nirmalendu Sen and Late Shri Bimalendu Sen, contributed this above referred property as their capital in the above said partnership. Disputes arose between the partners on the issue of valuation of the property. The matter was carried

before the Hon'ble Calcutta High Court vide judgment dt. 16/03/2016, the value of the property was determined at Rs.7,10,00,000/- by the Hon'ble High Court. The capital contribution from each of the partners was determined at Rs.3,55,00,000/-. The capital gain in question was brought to tax during the Assessment Year 2002-03.

The assessee carried the matter in appeal and the Id. CIT(A), deleted the addition. Thereafter the Assessing Officer reopened the assessments for the current Assessment Year and brought to tax, the capital gain that arose on the contribution of the capital asset into the partnership firm by the partners by invoking Section 45(3) of the Act. The Assessing Officer further invoked the provision of Section 50C of the Act, for computing the capital gain. On appeal, the Id. First Appellate Authority, held that the re-opening is bad in law. He also held that Section 50C of the Act which is a deeming provision, cannot be applied as, Section 45(3) of the Act is also a deeming provision by following the order of the Jodhpur Bench of the ITAT in the case of *Navneet Kumar Thakkar v. Income-tax Officer, Ward-4, [2008] 110 ITD 525*. Aggrieved the revenue is in appeal before us.

3. The Id. D/R, submitted that, the Id. CIT(A) was in error in holding that the re-opening of the assessment is bad in law. Further it was submitted that Section 50C of Act, applies as it is a statutory provision. On the issue of re-opening, the Id. D/R, relied on the judgment of *Commissioner of Income-tax, Central-II, Kolkata v. Glass Equipment (India) Ltd. [2014] 47 taxmann.com 138 (Cal.)*.

The Id. Counsel for the assessee, relied on the order of the Id. CIT(A). He also cited various judgments in support of the propositions.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:- .

The addition in question, is made u/s 45(3) of the Act. The Id. CIT(A) on merits had followed the order of the ITAT Jodhpur Bench in the case of *Navneet Kumar Thakkar v. Income-tax Officer, Ward-4, [2008] 110 ITD 525* and held as follows:-

*"5.1. I have carefully considered the matter before me. It is found that the A/R, of the Appellant submitted that:*

*"I am of the opinion that the additions made by the A. O. of the appellant under the head Long Term Capital Gain value of Rs.9,14,02,914.50 determined as per DVO's report, do not stand the test of judicial scrutiny and therefore, respectfully following the judgement given by the Hon'ble I.T.A. Bench in the case of Navneet Kumar Thakkar (Supra), the action of the A. O. is found to be unwarranted.*

*As a result, it is held that the Assessing Officer was not justified in adopting the value of land property as on 01.04.1981 an sale value as on 27.1.2006 as determined by the DVO by incorrectly taking recourse to the provisions of section 50C by referring the issue of market value of capital asset transferred i.e. land properties. Therefore, the value at which capital asset is transferred to the firm as record by it in its books would only by the full value of the consideration for the purpose of computing capital gains under provisions of section 45(3) of the I. T. Act, the A. O. is directed to calculate the capital gains accordingly as per law.*

*In view of the above, the addition of Rs.5,24,06,587/- as Long Term Capital Gains computed by the A. O. is directed to be deleted. Thus Grounds No. 6 to 9 of the appellant are allowed."*

*Considering the above observation and following the earlier decision for the A.Y. 2006-07 in the co-owner's case on identical facts, I am of the view that addition of Rs.5,24,06,587/- on account of long-term capital gain computed by the AO is directed to be deleted. These grounds are allowed.*

This decision is in line with the propositions of law laid down by the Mumbai 'A' Bench of the Tribunal in the case of *DCIT, Mumbai vs. M/s. Amartara Pvt. Ltd. in ITA Nos. 6050/Mum/2016 & 6114/Kol/2016, Assessment Year 2012-13, order dt. 29/12/2017*, wherein at para 9 the law on the issue has been explained as follows:-

*"9. Having heard both the sides, we find merit in the argument of the assessee for the reason that the provisions of [section 45\(3\)](#) deals with special cases of transfer of capital asset where the profits or gains arising from the transfer of capital asset by way of capital contribution or otherwise shall be chargeable to tax in the previous year in which such transfer takes place and for the purpose of [section 48](#), the amount recorded in the books of account of the firm shall be deemed to be the full value of consideration received or accruing as a result of transfer. A plain reading of provisions of [section 45\(3\)](#) makes it clear that it comes into operation only in special cases of transfer between partnership firm and partners and in such circumstances, a deemed full value of consideration shall be considered for the purpose of computation of capital gain as per which the amount recorded in the Amartara Pvt Ltd books of account of the firm shall be taken as full value of consideration. Though the provisions of [section 45\(3\)](#) is not*

*a specific provision overrides the other provisions of the Act, importing a deeming fiction provided in [section 50C](#) of the Act cannot be extended to another deeming fiction created by the statute by way of [section 45\(3\)](#) to deal with special cases of transfer. The purpose of insertion of [section 45\(3\)](#) is to deal with cases of transfer between partnership firm and partners and in such cases, the Act provides for computation mechanism of capital gain and also provides for consideration to be adopted for the purpose of determination of full value of consideration. Since the Act itself is provided for deeming consideration to be adopted for the purpose of [section 48](#) of the Act, another deeming fiction provided by way of [section 50C](#) cannot be extended to compute deemed full value of consideration as a result of transfer of capital asset. This legal proposition is further supported by the decision of Hon'ble Supreme Court in the case of [CIT vs Moon Mills Ltd](#) (supra) wherein it was observed that one deeming fiction cannot be extended by importing another deeming fiction. Therefore, we are of the considered view that the profits or gains arising from the transfer of a capital asset by a partner to a firm in which he is or becomes a partner by way of capital contribution, then for the purpose of [section 48](#), the amount recorded in the books of account of the firm shall be deemed to Amartara Pvt Ltd be full value of consideration received or accruing as a result of transfer of a capital asset. The AO cannot import another deeming fiction created for the purpose of determination of full value of consideration as a result of transfer of a capital asset by importing the provisions of [section 50C](#) of the Act. The CIT(A), without appreciating the facts, simply upheld addition made by the AO by following the decision of ITAT, Lucknow Bench in the case of [ACIT vs Carlton Hotel Pvt Ltd](#) (supra) where the ITAT has simply observed that the provisions of [section 50C](#) overrides the provisions of [section 45\(3\)](#) but not given a categorical finding. The ITAT has give its findings under different facts considering the fact that when a document is registered under the Provisions of Registration Act, 1908, the value determined by the stamp duty authority shall be replaced to determine full value of consideration. Therefore, we reverse the finding of the CIT(A) and delete the addition made towards recomputation of long term capital gain on account of transfer of capital asset into partnership firm.*

*10. In the result, appeal filed by the assessee is allowed."*

5. The wording of Section 45(3) is specific. We respectfully follow the propositions of law laid down by the co-ordinate bench of the ITAT, Mumbai. Hence we uphold the order of the Id. CIT(A) on merits and dismiss this ground of the revenue on merits.

6. On the issue of re-opening in the case of Smt. Sheila Sen, legal heir of Late Shri Bimalendu Sen, the original assessment has been completed u/s 143(3) on 31/12/2008, and the re-opening is made beyond a period of four years. There is no whisper, in the reasons that there is failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment. On this ground alone, the re-opening has to be quashed as held by the Hon'ble Delhi High in the case of *Haryana Acrylic Manufacturing Co. v. Commissioner of Income-tax [2009] 308 ITR 38 (Delhi)*.

Further, in the reasons, the Assessing Officer states that, the issue had been considered in the assessment proceedings for the Assessment Year 2002-03. While so, the re-opening is done on a change of opinion. This is also bad in law.

6.1. Coming to the case of Shri Nirmalendu Sen, the Assessing Officer, in the reasons recorded, relies on the observations made in the order of the Id. CIT(A) for the Assessment Year 2002-03, dt. 26/09/2012. This order of the Id. CIT(A) was not accepted by the revenue and the Assessing Officer has filed an appeal against the same. While the matter was pending before the ITAT, the assessments were re-opened.

The Hon'ble Bombay High Court in the case of *Metro Auto Corporation v. Income-tax Officer [2006] 286 ITR 618 (Bombay)*, considered a similar situation and held as follows:-

*"Mr. Shah, learned counsel appearing for the respondents, points out that the decision of the Commissioner is not on facts and it is only on the ground that the valid notice under section 143(2) was not issued before the expiry of the period of limitation. Be that as it may, the fact remains that the decision of the Assessing Officer was interfered with by the Commissioner and that is the order which presently survives. During the pendency of the further proceedings, obviously the impugned notice could not have been issued.*

*Mr. Sathe has relied upon a decision of this court in the case of Ador Technopack Ltd. v. Dr. Zakir Hussein, Deputy CIT reported in [2004] [271 ITR 50](#), to the effect that during the pendency of such proceedings the assessment could not be treated as final.*

*In the circumstances, we allow the petition and quash and set aside the notice dated February 13, 2006.*

*Accordingly, rule is made absolute as above. No order as to costs."*

6.2. The Hon'ble Bombay High Court, quashed the notice. Applying the propositions of law laid down in this case, to the facts of the case on hand, we hold that, when the order of

the Id. CIT(A) has not been accepted by the Assessing Officer, who had challenged the same by way of appeal before the ITAT, he could not, on the other hand, make contrary recordings in the reasons recorded for re-opening the assessment. Hence on this ground also, we uphold the order of the Id. CIT(A).

**7. In the result, both the appeals of the revenue are dismissed.**

8. The Cross-objections are filed only in support of the order of the Id. CIT(A). Ground No. 3, of the Cross-objections, has not been argued by the assessee. Hence, the same are dismissed as a consequence to our finding in the revenue's appeal.

9. In the result, both the appeals of the revenue and the cross-objections by the assessee thereon are dismissed.

***Kolkata, the 7<sup>th</sup> day of September, 2018.***

Sd/-  
**[S.S. Godara]**  
Judicial Member

Sd/-  
**[J. Sudhakar Reddy]**  
Accountant Member

Dated : 07.09.2018  
{SC SPS}

**I.T.A. No. 1387/Kol/2015**  
Assessment Year: 2011-12  
**C.O. No. 31/Kol/2018**  
Assessment Year: 2011-12  
**Smt. Swagata Guha Mustafi**

*Copy of the order forwarded to:*

- 1. Smt. Swagata Guha Mustafi**  
**38/1D, Gopal Nagar Road**  
**Kolkata - 700 027**
- 2. Asstt. Commissioner of Income tax, Circle-29, Kolkata**
3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Private Secretary  
Head of Office/ D.D.O. ITAT, Kolkata Benches