

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

Before Shri Rajesh Kumar, Accountant Member
& Shri Ram Lal Negi, Judicial Member

ITA No.7395/Mum/2017
Assessment Year: 2012-13

White Rose Holdings (India) Pvt.Ltd. C/o. Mandhania & Associates 6-A Pil Court 111, M.K.Road, Mumbai-400 020	Vs.	ITO-13(3)(2) Room NO.227, 2 nd Floor Aaykar Bhavan, Mumbai-400 020 PAN AAACW0478K
(Assessee)		(Revenue)

Revenue By : Shri Chaudhary Arun Kumar Singh
Assessee By : Shri Hari S. Raheja

Date of Hearing :25.04.2019

Date of Pronouncement :24.05.2019

ORDER

Per Rajesh Kumar, Accountant Member

1. The assessee by way of this appeal is challenging the order dated 31.10.2017 of the Ld. Commissioner of Income-Tax (Appeals)-21 hereinafter called [CIT(A)], Mumbai, in Appeal No.CIT(A)-21/ITO-13(3)(2)/IT-156/2015-16. The assessment for impugned AY was framed by Ld. Income Tax Officer-13(3)(2),Mumbai [AO] u/s 143(3) of the Income Tax Act,1961 on 24/04/2015. The Revenue has raised the following grounds in its appeal.

The various grounds raised by the assessee are as under:

1. On the facts and In the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in directing the Assessing Officer

to adopt the market value of property "Sharma House" at Rs.4,05,35,360/- for assessment year 2012-13 for the purpose of computing the long term capital gain on sale of property as against the sale price of Rs. 28 lakhs.

2. On the facts and in the circumstances of the case, the learned Commissioner of income tax (Appeals) erred in holding that the Assessing Officer was Justified in treating the gain on Sharma House as long term capital gain. The appellant submits that the gain on Sharma House is assessable under the head business income.

3. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in holding that the Assessing Officer was justified in referring the matter to the Valuation officer u/s 50C of the Income tax act, 1961. The appellant submits that Sharma House is stock-in-trade and hence not coming under the purview of section 50C of the Income tax Act.

4. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in accepting the Valuation Report of the Valuation Officer which has been referred to under section 55A of the Income Lax Act 1961, The appellant submits that the provisions of section 55A are not applicable to the facts of the case.

5. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in accepting the market value of the property at Rs.4,05,35,360/- without taking into consideration various objections raised by the appellant before the Valuation officer as well as before the CIT(A) vide letter dated 23rd October, 2017.

6 On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in not accepting the valuation of the property the appellant's registered valuer Kanti Karamsey S. Co. as per their Valuation Report.

7. Your appellant craves leave to add to , amend, alter, delete and/or modify the above grounds of appeal on or before the final date of hearing of this appeal petition.

2. At the outset the ld. Counsel of the assessee submitted that the ground no. 2,3 and 4 may be allowed to the withdrawn and accordingly the same are dismissed as withdrawn.

3. The issue raised in ground no.1,5 and 6 are connected to each other and common issue raised in these grounds by the assessee is against the order of CIT(A) directing the AO to adopt market value the property known as Sharma house at Rs.

4,05,35,360/- for the purpose of calculating the capital gain on sale of property as against sale of price Rs. 28 lacs by ignoring the objections raised by the assessee before the valuation officer.

4. The facts in brief are that the assessee filed return income of Rs. 06/09/2012 declaring of income of Rs. 3,71,250/- which was processed u/s 143(1) of the Act. Thereafter case of the assessee was selected in scrutiny under CASS and statutory notices were issued and served upon the assessee. During the course of assessment proceedings AO observed that the assessee has declared Rs.4 lacs as profit from sale of property known as Sharma house and accordingly ask the assessee to furnish complete details of the said transactions such as details of purchase/sale agreements and stamp duty valuation of the same. The matter was also referred to DVO. The AO did not receive the valuation report from the DVO till the date of order and the value of the property was ascertained on the basis of ready reckoner rates. The AO thereafter issued show cause notice on 25/03/2015 stating therein that the sharma building at Bandra for was sold for Rs. 28 lacs without registering the same while value of the property as per ready reckoner was Rs. 15,04,04,950/- and therefore as to why the same should not be treated as sale value which was replied by the assessee vide letter dated 26/03/2015 by submitting as under:

a)you have taken Ready Reckoner rate of 2011 of residential flat. But the area is taken of land. Hence, the calculation is totally wrong.

b) The owners occupied area is only 627 sq.ft ie.. 58.27 sq.mtrs only Balance area is occupied by various tenants and occupants. Hence, the valuation should be made separately for owners's occupied area and for tenants area.

Therefore, the valuation of area which is in occupation of tenants is to be valued on the basis of 112 months rent only.

c) The property has various pending suits in various Courts. The vendors have also entered into diverse agreements with various persons/parties for sale of this property. Hence, even owners occupied area of 627 sq.ft cannot be valued as per Ready Reckoner rate.

d) In short, the value of the company's right in the in the said property on as it is where it is basis cannot be more than Rs. 28 lacs.

5. Finally after considering reply of the assessee, the AO calculated the profit at Rs. 6,98,41,631 by taking the value of the property at Rs. 7,20,91,631/- u/s 50C of the Act as has been calculated by the AO on page no. 4 and 5 of the AO and after allowing the cost of purchase of the property of Rs. 22,50,000/- only as per AO calculation and added Rs. 6,98,41,631/- to the income of the assessee by framing assessment u/s 143(3) vide order dated 31/03/2015 assessing the total income at Rs. 7,02,12,880/-.

6. In the appellate proceedings CIT(A) partly allowed the appeal of the assessee after considering the submissions and contentions of the assessee made during the course of the appellate proceedings by observing and holding as under:

"I have considered the facts of the case and submission made by the appellant. Prima facie , the issue boils down to the matter that "if an immovable property located in a prime locality of Sharma House, Khar West, 4th Road, Mumbai-400052, was purchased on 4/7/1996 for Rs.24,00,000/- was sold to one of the directors holding 40% shares in the company during previous year 2011-12 relevant to AY 2012-13 only for Rs.28,00,000/-, irrespective of the fact whether the immovable property consisting of "Sharma House, Khar West., Mumbai-400052" was held as an investment, that is, capital asset or as current assets/stock in trade books of accounts from 1996 onwards and classified as Loan of Rs.24,00,000/- and not to an outside third party. Further, why was the Agreement for sale in 2011 made for only Rs.28,00,000/- and even if so, why was stamp duty not paid and sale deed not registered In this connection, following facts also deserve attention:

"Assesses has sold the property for a meagre profit of Rs.4,00,000/- to one of the directors of the company after holding the immovable property at Khar West Mumbai for nearly 16 years and to a Director of the company after a substantive and qualitative change in the redevelopment policy of land and building called " Development Rules and Regulations after 2009 due to notification issued by Govt of Maharashtra enhancing the FSI, that is floor space index from 1:1 to 1: 2. This clearly means that" an owner of the plot became entitled to construct double the size of the plot of land with effect from 2010/2011 and hence the value of all the properties in suburban areas from Bandra to Dahisar on Western Railway side and from Sion to Mulund on Central Railway side was enhanced manifold due to this revision in FSI. Moreover, assessee was the owner of not only five rooms in the building located on Sharma House, Khar West, Mumbai, but had also purchased all the rights , title and interest in the property-Sharma House, Khar West, Mumbai-400052. Thus what the assessee sold was " Right in title and interest along with the tenancy rights in five rooms in the building and plot of land located in Sharma House, 4th Road, Khar West, Mumbai 1-400052 and not only the Tenancy rights in five rooms in the building" and thus the "sale of right, title and interest in the entire plot of land along with five rooms in Sharma House, Khar West, Mumbai-400052" was much more valuable than Rs.28,00,000/- despite the fact that there were several court cases pending against the owners and holders of title to the original and subsequent holders

1.4 It also appears from the accounts of the assessee that" assessee was showing the amount of Rs.24,00,000/- as "advance against purchase of properties" under "other current assets" for the last several years and even during the year has shown an amount of Rs.4,00,000/- as "Gain on sale of rights in assets" and not as "Profit from sale of stock in trade". Even though the assessee had purchased the immovable property in 1996, it had never shown the same or classified as 'stock in trade'. And thus it appears from the records that "the property Sharma House, Khar West, Mumbai" was held as a 'Capital asset' and not as 'Stock in trade'. Anyhow, the assessee offered the income from the sale of property as business income and the AO has taxed the same as long term capital gains.

1.5: Entire issue raised by the assessee in all the nine grounds of appeal centers around this issue that " the AO erred in referring the issue of valuation of property u/s, 50C of the I.T.Act, 1961 when the profit on sale was offered as business income and not as capital gains and hence the entire process of reference to valuation officer and its subsequent determination is vitiated from the beginning. Assuming without admitting that "the AO should not have referred the issue of valuation of property— Sharma House, Khar West, Mumbai' to valuation officer u/s. 50C of the IT. Act, 1961 the basic question is not answered by the assessee in as much as" why was a property purchased in 1996 sold to a director and shareholder of the company for Rs 28,00,000/- making a property of Rs.4,00,000/- only especially when the Government had increased the FSI in respect of the plots of land in Mumbai suburban areas with effect from 2009/2010"? Another aspect of the matter is that "assessee did not pay any stamp duty and did not register the agreement for sale

executed in 2011 either to avoid payment of stamp duty and the valuation of the property at market rates by stamp duty authorities! Even if the matter regarding the valuation u/s. 50C of the IT Act 1961 is treated as erroneous, the issue is 'at what rate and price the immovable property-Sharma House, Khar West, Mumbai, should have been sold or the property would have fetched if the property had been sold to a third party in an open auction and what would have been determined as its market value on the date of sale in 2011? The answer is quite obvious and clear that" assessee has tried to sell the property Sharma House, Khar west, Mumbai for a meagre amount of Rs.28,00,000/- in 2011 against purchase price of Rs 24,00,000/- in 1996 to a director of the company" to pass on the benefit accruing from the enhancement of FSI from 1:1 to 1:2 to the director of the company and not retaining accrued benefit for itself. In this connection the valuation report made by the valuation officer u/s. 50C of the IT Act 1961 dated 26/5/2017 furnished by the assessee is quite eye opening. The valuation officer has determined the value of the property in 2011 after taking into consideration all the factors like presence of the tenants, litigation, and other factors at Rs.4,05,35,360/- as against the market value of Rs.3,60,91,360/- and then allocating one eighth share of the assessee at Rs45,11,420/- and then discounting it further to Rs.27,06,852/-. Prima facie the basic error is committed by the assessee's valuer is in the fact that the valuer has valued the land and allocating the value on the basis that there are 'eight owners" of right, title and property in Sharma House whereas the assessee was the only holder of right, title and interest and hence the entire value of the property and tenancy rights in five rooms would have been allocable to the assessee only and not to other seven owners. Moreover, calculating the value of land of a prime property located in Khar West, Mumbai at discounted basis is also erroneous and debatable Even otherwise, the value of Rs 3,60,91,360/- determined by the assessee's valuer is more or less nearer to the value of the property determined at Rs4,05,35,360/- by Valuation Officer Prima facie, It appears and it is held that the AO was not only justified in assessing the gains from the sale of Sharma House, Khar west, Mumbai-400052 as Long Term Capital Gains but was fully justified in referring the matter to the valuation officer u/s. 50C of the IT Act, 1961. The AO was forced to calculate the value of the property as on 2011 during the assessment proceedings in absence of valuation report, however, the valuation report of the department valuer is now available and hence the long term capital gains need to be computed with reference to the revised market value of the property determined by the valuer at Rs 4,05,35,360/-. AO is directed to adopt the market value of the property Sharma House at Rs4,05,35,360/- for AY 2012-13 and compute the long term capital gains with reference to actual cost of Rs 24,00,000/- of 1996 and allowing the benefit of indexation, available if any, to the assessee and tax the long term capital gains for AY 2012-13 accordingly. This ground of appeal is partly allowed.

6. In the result, appeal is Partly Allowed.

7. The Ld. AR vehemently submitted for the bench that the application of provision of section 50C of the Act qua property which is not registered at all in the name of the assessee is totally

wrong and against the provisions of the Act. The Ld. AR while briefing on the facts submitted that the assessee entered into an agreement on 04/07/1996 for the purchase of said property known as Sharma house for 40 lacs out of which only a sum of Rs. 24 lacs only paid and shown in the balance sheet under the head advance against the purchase of Sharma house under current assets. The said house property was constructed somewhere in 1935 and is fully tenanted property except the portion of the property which was in the possession of the assessee app measuring 627 Sq.ft. and remaining portion of the building was in acquisition of the tenants. The Ld. AR submitted that the copy of the agreement dated 04/07/1996 was filed before the AO and it was submitted that rent from Sharma House was receivable at Rs. 603 per month which was also not received by the assessee on account of multiple litigation going on the said property. The Ld. AR submitted that the vendors from whom the purchased was property in 1996 have also entered into several agreements for the said property with various parties and the property was totally in dispute. The Ld. AR submitted that the various suits were going on in the various civil courts such as Bombay city civil court suit no. 5809 of 1997 Bombay high court suit no. 7048 of 1981 Bombay city civil court suit no. 3611 of 1998. The assessee purchased the property subject to the pending litigations and other proceedings pending in various courts of law and also subject to other various defects and deficiencies and third parties rights in the property as a result of various agreements entered into by the assessee along with various tenants occupying the said building. The Ld. AR

submitted that in 1996 the vendors of the property were not able to settle the matters and the sale was not registered in the name of the assessee and even possession of the building could not be handed over to the assessee except a portion measuring 620 sq.ft . Therefore the Ld. AR submitted that the assessee has no absolute title in the said property in 2011. The assessee company has entered into agreement for sale of its right in the said property with Mr. Jayakishan Awtani one of the directors/ shareholder of the assessee company with all the defects/suits/tenants and other various litigations for a consideration of Rs. 28 lacs as against the earnest money paid by the company of 24 lacs. The assessee company has sold whatever rights in the said property with all tenants /litigations and other proceedings going on in the various courts of law and hence the profit of Rs. 3,71,250/- on the sale of rights in the property was shown in the return of income after claiming expense of Rs. 25,750/-.

8. The assessee submitted that the property is under heavy litigations having many cases pending against the same and cannot be considered as marketable property. The Ld. AR also submitted that the said property does not having market value for the following reasons:-

1. *The property is under heavy litigations having many cases pending against the same and hence cannot be considered to be a marketable property.*
2. *The property does not have a market value as the property is subject matter of many claims and court cases and based on the decision of the Mumai Tribunal in the case of Mohd Yusuf Trust (copy attached) the provisions of section 50C do not apply.*
3. *Without Prejudice the valuation of the property has to be done on the basis on as is where is basis without considering the future potential of the*

property since it is not a free sale but a sale subject to number of litigations and except for the fact of the appellant having only 627 square feet in possession, the rest of the property is. Tenanted fetching rent of only Rs. 603 per month"

4. *Hence the valuation of the property has to be done on free sale basis for 627 square feet which is in the occupation of the appellant and for the rented portion on rent capitalization method at 1:2 times the annual rent.*

5 *The adoption of Stamp Valuation as the sale consideration is not justified in the absence of any evidence that the sale consideration was more than the value shown in the agreement The Assessing Officer has not brought on record to show that the appellant has received much more consideration than shown in the agreement for sale, more particularly when the property is sold to one of the Directors and shareholders holding 31.25% of the total share capital of the appellant and the other directors and shareholders are family members of the purchaser i.e. his Father and Brother. Hence, the question of receiving any on money payment by the appellant does not arise.*

6. *The appellant's own Registered Valuer M/s. Kanti Karamsey & Go Advisory LLP has valued the appellant's share in the property only at Rs.27 lakhs and not Rs.3,60,91,360/- as held by the CIT(A).*

7 *Without prejudice to the above, the learned CIT(A) and the learned Valuation Officer have not properly considered the various objections filed by the appellant against the Preliminary Valuation Report made by the Assistant Valuation Ofificer. It is submitted that if the objections of the appellant are properly considered, the value of the subject property works out to ony Rs. 31,51,776/- as given in the written submission dated 23rd October, 2017 filed before the CIT(A)-21, Mumbai.*

8. *It may be that there is no development commenced on this property till date.*

9. *The property with all its tenants is in the same condition as it was in the year 1996 when the appellant has entered into the agreement with the owners of the property.*

10. *Further, the appellant and/or any of its Directors including Mr. Jaikishan Paraskumar Awtani to whom the property was sold by the appellant have not got any conveyance of the property in their favour till date.*

11. *The possession of the property is with its original owners of property and with the tenants.*

12. *Appellant and/or its directors have no authority to collect the rent from the tenants. All the rent from the tenants are being collected by the original owners of the property till date.*

13. *Appellant and/or its directors have no Power of Attorney in their favour in respect of any matters relating to said property. In nutshell, after lapse of 23 years (2019-2006), the status fo the property is same.*

14 *In such a case the valuation done by the Valuation Officer on the basis of Development method by considering development potential and by considering*

built up area rate analyzed/derived from the sale instances of ready flat available in nearby locality was totally wrong and against the principles of method of valuation of the immovable properties i.e. Land and Building. The valuation of such type of property which is fully tenanted property should be made on the basis of capitalization of rental method and not by any other method.

9. In defense of his arguments, the Ld. AR relied on following decisions namely Mohd Yousuf Trust Vs ACIT ITR NO. 2243/Mum/2015 AY 2011-12, CIT vs Smt. Ashadevi Agrwal 1988 169 ITR 400 (Kol) and Shri Prafulla Kumar Bhowse Vs ITO ITA NO. 316/KOI/2015 AY 2007-08.

10. The Ld. DR relied on the other hand relied heavily on the orders of authorities below by submitting that though the property was subject to litigations and under occupation of tenants, the potential of the property cannot be ignored and has to be brought to tax as the transaction was entered between related parties and was grossly under priced. The ld Dr therefore submitted that the order of ld CIT(A) may be upheld.

11. After hearing both the parties and perused material available on record, we observe that in this case the property in question is disputed property and in the occupation of tenants for which even the rent of Rs. 603/- per month is not being paid to the assessee due to chronic litigations and the appellant is having possession of only of 626 sq.ft out of the total property as the balance is in the occupation of the tenants. We notice from the records before us that several cases were going on against the said property and are of the view that the contention of the Ld.AR that stamp valuation cannot be considered as sale consideration merit consideration. We further notice that the AO has failed to

bring on the record any evidence to show that the assessee has received more than what has been mentioned in the agreement stating that the that property was sold to one of the directors and share holder who is holding 31.25% of total share capital in the assessee company. Even the assessee's registered value M/s Kanti Karamsey & Co valued the appellant's share in the property only at Rs. 27 Lacs and not Rs. 3,60,91,360/- has been held been the CIT(A). Thus we are not in agreement with the order of Ld. CIT(A) in taking the valuation as per – report of Rs. 4,05,35,360/-. We find that the – value of the property was determined by the registered valuer at Rs. 3,60,91,360/- and then allocating 1/8th share to the assessee at Rs. 45,11,420/- and further discounting the said amount to arrive at a figure of Rs. 27,6,852/-. We also note that the development of the said property has not even started till date due to the litigations going on. We further note that the director of the company Shri. Jaikishan Awtani have not got any convenience of the property in his favour till date. The possession of the property still with the tenants and the assessee. The purchaser director having no authority to collect the rent from the tenants. In other words even after elapse of 23 years, the status of the property is same. Thus in such a scenario the valuation done by the valuation officer on the basis of development method by considering the developmental potential and by considering the built up area rate analyzed /sale and ready flat available in the nearby locality was totally wrong and against the principle of method of valuation of the immovable properties. We are quite convince with the arguments of Ld. AR that the said property which is occupied by

the tenants should be valued on the basis of capitalization rental method and not any other method. The case of the assessee supported by the decision of coordinate bench in the case of Mhd. Yusuf Trust vs ACIT ITA 2243/mum/2015 supra the operative part whereof is reproduced as under:

4. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue and perused the material available on record. Ground No.1 to 3 relates to invoking the provision of section 50C of the Act. The ld. AR of the assessee submits that the assessee is a Private Family Discretionary Trust settled by Sir Mohammed Yusuf in 1929. The Trust is registered as per the provision of Mohammedan Law. The certain provision of trust was amended in pursuance Hon'ble Bombay High Court order and decree dated 19.02.1952 passed by in Suit No. 1286 of 1951. During the assessment proceeding, the assessee submitted the computation of LTCG earned on sale of land and declared LTCG. The assessee-trust was in possession of certain right in the land which was in the name of assessee. However, the assessee was not in possession. The land was encroached by unauthorized occupant/hutments. There were other certain part of land in which even as per land record, the name of assessee was not appeared. Therefore, the assessee trust was not having clear and marketable title over the said land nor the assessee was in possession. The assessee trust issued a public notice for inviting bids for sale of their rights in the said properties on the basis of "as is where is" vide public notice published in Newspaper in Hindustan Times and Urdu News paper, copy of which is placed on record at page no. 145 and 146 of Paper Book. The assessee in the public notice published that cost with regard to verification of revenue record and verification of title would be borne by the bidder. In response to the notice the trust received four bids. The bids were open in the presence of Advocates appointed by assessee on 22.07.2003 the said bids were placed before the Board of Trustees on 17.09.2003. The bid of M/s Essa Associates was accepted being highest bidder. The Board of Trustees of assessee approved the bid of Essa Associates. Pursuant to the bid

accepting the assessee entered into Memorandum of Intent (MOI) on 18.12.2003, copy of which is placed on record as per page no. 147 to 154 of the Paper Book. As per MOI, the assessee agreed only to sale the land which was in the name of assessee, however, the assessee was not in possession and it was in possessing of unauthorized occupant. Therefore, M/s Essa Associates agreed to pay Rs. 13.06 Lakh per acre. For the land which were in the name of assessee was not shown though, it was earlier owned by assessee, M/s Essa Associates agreed to pay Rs. 6.53 Lakh per acre to the assessee. In the MOI, the assessee entered into registered agreement with M/s Essa Associates on 10.08.2010 for 4 Acre and 11 Gunta out of which the assessee was having only 50% of share, remaining 50% of share in the land was owned by 3 different parties, which were also parties to the said conveyance. Thus, out of total consideration of Rs. 27,93,285/-, assessee's share being 50% is Rs. 13,96,642/- which was received by assessee before 26.09.2009.

5. The ld. AR further submits that as per Clause 14 & 20 of Trust-Deed dated 29.04.1929, the said MOI was subject to the sanction of Hon'ble Bombay High Court. The assessee filed a petition before Hon'ble Bombay High Court on 08.07.2004. The Hon'ble Bombay High Court vide its order dated 01.10.2004 approved the MOI. The copy of the petition presented before the Hon'ble Bombay High Court dated 08.07.2004 and the order passed by Hon'ble High Court dated 01.10.2004 is also placed on record. Therefore, after sanction/approval of the Hon'ble Bombay High Court, the assessee executed the registered agreement with M/s Essa Associates on 10.08.2010 for sale of rights in land of 4 Acre and 11 Gunta as stated above.

6. The ld. AR of the assessee further submits that the provision of section 50C have no application as the assessee has transferred only right in the land which would not be equated to land or building or both as per the language of section 50C of the Act. The ld. AR of the assessee submits that the reference of section 50C is not absolute but subject to certain condition, which is mentioned in sub-section (2) of section 50C. The land under reference was not having clear title and many claims were there. The ld. AR of the

assessee submits that the right in the said land cannot be described as capital asset which can be described as “land & building or both” then section 50C would cease to apply. The Fair Market Value of the right was ascertained by the assessee on the basis of highest bidder of the participants received by assessee, which was duly approved by Hon’ble Bombay High Court accepted and granted the approval. The Assessing Officer is under obligation to accept the same as correct. Section 50C was brought to curb the black money and not for the genuine transaction. In support of his submission, the ld. AR of the assessee relied upon the following decisions:

- (1) Devindra Barot [70 taxmann.com 235 (Ahmadabad Trib.)],*
- (2) Smt. D. Anitha [2015] 68 SOT 266 (Hyderabad Trib.),*
- (3) Green Field Hotels & Estates (ITA No. 735 of 2014) (Bom. HC),*
- (4) Shri Atul G. Puranik (ITA No. 3051/Mum/2010 (Mum Trib.),*
- (5) Tej Singh [2012] 138 ITD 489 (Agra Trib.),*
- (6) K.P. Varghese [1981] 7 TAXMAN (SC),*
- (7) K.R. Palanisamy [2008] 306 ITR 61 (Madras HC),*
- (8) Khoobsurat Resorts (211 taxman 510 (Del.HC) and*
- (9) Hanuman Prasad Generiwala [2014] 43 taxmann.com 133(Delhi).*

7. On the point that the valuation as on the date of execution of MOI date 18.12.2003 be adopted, the ld AR for the assessee relied on the following decisions;

- (1)Sanjeev Lal [2014]365 ITR 389(SC),*
- (2)Modipon Ltd [2015] 154 ITD 369 (Delhi Tribunal),*
- (3)Dharmasibhai Soni [2016] 161 ITD 627 (Ahmedabad Tribunal) and*
- (4)Chalasanani Naga Ratna Kumari (ITA No. 639/Vizag/2013 (Vishakhapatnam Tribunal)*

8. On the other hand the ld. DR for the revenue supported the order of the authorities below. The ld DR further submits that the assessee has raised certain new grounds of appeal which were not raised before lower authorities, therefore, the issue may be restored to the lower authorities for adjudication afresh.

9. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. We have also deliberated on the various case laws referred and relied by lower authorities. The assessing officer treated the stamp valuation as value of consideration holding that section 50C is deeming provision which is mandatory in nature is to be applied on the basis of stamp duty valuation irrespective of the fact that the value was approved by High Court or not. The assessing officer also took the view that essence before the High Court was consent and not the valuations. The assessing officer also took his that he has recorded that the statement of Mr. Nissar Ahmed Patel sole proprietor of M/s Essa Associate. Nissar Ahmed Patel stated that the land was conveyed to him and he made all payment to the trust to settle the litigation and technical formalities. The assessing officer adopted the stamp value of the consideration of the piece land as cost of consideration and computed LTCG. The ld CIT(A) confirmed the action of assessing officer on similar lines.

10. We have gone through the various documentary evidences filed by the assessee. From the documentary evidences we have seen that the assessee issued a Public notice for sale of the piece of land (page 145 of PB). In the said notice the assessee clearly mentioned that the land under offer for sale is encroached wrongfully. It was also published that the title of the land is also not perfect. In response to the notice the assessee received bid from M/s Essa Associate. The bid of Essa Associate was accepted by the trusty of the assessee and executed MOI date 18.12.2003. The perusal of the MOI dated 18.12.2003 reveals M/s Essa Associate agreed to acquire the piece of land from assessee on "as is where is" basis. It is clearly mentioned in clause 'D' at page 3 of the said MOI that it is impossible to define and determine the exact area of non- acquired land at that stage until the purchaser actually succeeded in clearing and perfecting title of the owner's title. Further, vide clause '5' on page 5 of the said MOI, the purchaser was allowed to act in a lawful manner in clearing the

title of the owner on the encroached upon land and /or wrongfully deleting the title of the owner(assessee) from revenue record of the authority concerned. Vide clause '6' of MOI the purchaser was restricted not to transfer or delegate or subcontract the benefit of the agreement ton any other person. In our view there is no doubt from the Public notice issued by the assessee for sale of the piece of the land and from MOI that other documentary evidence produced by the assessee that the was sufficient to indicate that the property was under various encumbrances and the assessee could not be said to be the absolute marketable title of the said property. At the same time, it is also true that the said documentary evidence read with the MOI entered into by the assessee with M/s. Essa Associate that the assessee was still holding certain rights in the property and the same constituting capital asset. Moreover, the MOI was duly approved by Hon'ble Bombay High Court in its order dated 01.10.2004. 11. So far as the issue involved in the appeal relating to the applicability of the provisions of section 50C in the case of the assessee, it is observed that the market value of the property for stamp duty purpose was determined by the concerned authority at Rs.11.76 Crore and accordingly the stamp duty thereon was also duly paid, while registering the relevant agreement. The value adopted for the purpose of payment of stamp duty is not disputed by the assessee. The assessing officer has not brought on record that the property under sale was not was under various encumbrances and the assessee was having the absolute marketable title of the said property. No material is brought on record by assessing officer that the assessee has received much more consideration than shown in the MOI. The assessing officer treated the stamp valuation rate as the value of consideration, despite the facts that the assessee throughout the proceedings contended that the assessee was neither having possessing of the impugned piece of land nor having marketable title. The assessee offered the said piece of land on the basis 'as is where is'. These vital facts were ignored by the lower authorities.

12. The Hon'ble Apex Court in celebrated case of K.P. Varghese Vs ITO (supra) held that literal interpretation of section 52(2) leads to manifestly unreasonable and absurd consequences, the same should be construed having regard to the object and purpose for

which it has been enacted and the setting in which it occurs. A fair and reasonable construction of section 52(2) would be to read into it a condition that it would apply only where the consideration for the transfer is understated or, in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bona fide transaction where the full value of the consideration for the transfer is correctly declared by the assessee. Accordingly, if the revenue seeks to bring a case within section 52(2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15 per cent of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him. There are two distinct conditions which have to be satisfied before sub-section (2) can be invoked by the revenue and the burden of showing that these two conditions are satisfied rests on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is understatement or concealment of the consideration in respect of the transfer. 13. The Hon'ble Delhi High Court in CIT Vs Khoobsurat Resort (supra) while considering the question of law with regard to the addition on account of difference between the circle rate and the purchase price of immovable properties, declared by the assessee held that that the express provision of Section 50-C enabling the revenue to treat the value declared by an assessee for payment of stamp duty, ipso facto, cannot be a legitimate ground for concluding that there was undervaluation, in the acquisition of immovable property. If Parliamentary intention was to enable such a finding, a provision akin to Section 50-C would have been included in the statute book, to assess income on the basis of a similar fiction in the case of the assessee who acquires such an asset. No doubt, the declaration of a higher cost for acquisition for stamp duty might be the starting point for an inquiry in that regard; that inquiry might extend to analyzing sale or transfer deeds executed in respect of similar or neighboring

properties, contemporaneously at the time of the transaction. Yet, the finding cannot start and conclude with the fact that such stamp duty value or basis is higher than the consideration mentioned in the deed. The compulsion for such higher value is the mandate of the Stamp Act, and provisions which levy stamp duty at pre-determined or notified dates. In the present case, the revenue did not rely on any objective fact or circumstances; consequently, the Court holds that there is no infirmity in the approach of the lower authorities and the Tribunal, granting relief to the assessee. Thus, the question was accordingly answered in favour of the assessee, and against the revenue.

14. The coordinate bench of Hyderabad Tribunal in Smt. D. Anitha Vs ITO (supra) held that Where property held by assessee was encumbered and, thus, she was not absolute owner of property, while computing capital gain arising from transfer of such a property, market value of property as taken for purpose of payment of stamp duty could not be adopted as sale consideration by applying provisions of section 50C.

15. Considering the above discussed legal position as held by superior courts in K. P. Varghese (supra) by Hon'ble Apex Court, Hon'ble Delhi High Court in CIT Vs Khoobsurat Resort (supra) and the coordinate bench of the Tribunal in Smt D. Anita (supra) and the undisputed fact that when the land under sale was having encumbrances the adoption of stamp valuation as a sale consideration by applying the provisions of section 50C was not justified by assessing officer, in absence of any evidence that the sale consideration was more than the value shown in the MOI. Therefore, we direct the assessing officer to work out the capital gain on the basis of consideration shown by the assessee. In the result the grounds No. 1 to 3 of the appeal are allowed. No contrary decision is brought to our notice. The contention of the ld. DR for the revenue has no force that the assessee has raised new grounds of appeal before this Tribunal. The sum and substance of the grounds of appeal raised by the assessee before the lower authorities and before the Tribunal is the same.

16. Ground No. 4 relates to treating the income in AY 2010-11 instead of AY 2011-12. Since we have granted relief to the

assessee on grounds No. 1 to 3, therefore, this ground needs no specific adjudication.

17. Ground No. 5 & 6 relates to addition of Rs. 4.80 lakhs under the head 'income from other sources', which has already been offered in the hand of individual. The ld. AR for the assessee submits that the amounts distributed in the hands of beneficiary have been taxed at the hand of assessee, though it has been offered to tax in their individual return. Thus, there is double taxation of the same amount.

18. On the other hand the ld DR for the revenue submits that the assessee failed to furnish the require copies of return of the alleged individual to the ld. CIT(A) despite specific direction. The ld DR submits that the assessee be directed to file relevant evidences before assessing officer to verify the claim of assessee.

19. We have considered the rival submissions of the parties and gone through the orders of the lower authorities. We have noted that the ld CIT(A) has recorded that the assessee failed to established the shares of the various beneficiary on the basis of trust deed and their return of income to substantiate that the sums received from the assessee have been offered to tax by those individual. Considering the contention of both the parties this issue is restored to the file of assessing officer to verify the fact and grant relief to the assessee in accordance with law. Needless to direct that the assessing officer shall grant opportunity to the assessee for filing relevant documentary evidences to substantiate its contention. The assessee is also directed to provide the relevant documentary evidences at the earliest possible date and not to seek time without any valid reasons. In the result this ground of appeal is allowed for statistical purpose.

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

12. In the case of Prafulla kumar Bhowse vs ITO ITA No. 316/Kol/2015 AY 2007-08 the hon'ble tribunal held as under:

6. We have heard the arguments of both the sides and also perused the material available on record. At the time of hearing before us, ld. Counsel I . T.

A . N o. 3 1 6 / K O L . / 2 0 1 5 Assessment year: 2007-2008 for the assessee has raised a limited issue that while determining the fair market value of the assessee's property, the valuation of the portion occupied by tenant should be determined by applying the rent capitalization method taking the rent actually received by the assessee and not the fair market rent as done by the DVO. It is observed that this claim of the assessee is duly supported by the decision of the Hon'ble jurisdictional High Court in the case of Asha Devi Agarwal (supra), wherein it was held by Their Lordships that while estimating the value of a property on rental basis, only the rent, which is actually payable by the tenants to the owners of the property, as the landlords should be taken into account. It was held that when the property is a tenanted property, the owner is entitled to collect only the rent payable by the tenants and a purchaser of such tenanted property would be in the same position as the vendor, i.e. original owner. It was held that a purchaser, therefore, would be restricted to collection of rent only from the tenants and the value of such property in the hands of the owner or transferee, if calculated on the rental basis, would have to be determined by the rent, which is available to them for collection. At the time of hearing before us, no authority has cited on behalf of the Department taking a contrary view on this issue. We, therefore, respectfully follow the ratio of the decision of the Hon'ble jurisdictional High Court in the case of Asha Devi Agarwal and direct the Assessing Officer/Departmental Valuation Officer to compute the fair market value of the let out portion of the assessee's property by taking into consideration the rent actually receivable by the assessee from the tenants. Id. Counsel for the assessee has also contended that if the valuation of the let out portion of the assessee's property is done by taking into consideration, the actual rent receivable by the assessee from the tenants, the total fair market value of the property of the assessee as per such revised estimation would be less than the sale consideration of Rs.1,30,00,000/- shown by the assessee and there would be no case of making addition on account of capital gain. We direct the Assessing Officer to verify this contention of the Id. Counsel for the assessee and if it is found after recomputation of the valuation of the assessee's property I . T. A . N o. 3 1 6 / K O L . / 2 0 1 5 Assessment year: 2007-2008 that the fair market value is less than the sale consideration shown by the assessee, no addition shall be required to be made on this issue.

13. Considering the facts of the case of the assessee with the ratio laid down by the coordinate benches we hold that the property in question cannot be valued as has been directed by the Id CIT in view of the litigations underway and also the fact that the property is in the possession of the tenants. Accordingly, we set aside the order of CIT(A) and direct the AO delete the disallowances. Appeal of the assessee is allowed.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this day of 24th May,2019.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated : 24/May/2019
*** Thirumalesh**

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'G' Bench, ITAT, Mumbai

BY ORDER

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai