

**IN THE INCOME TAX APPELLATE TRIBUNAL
“G” Bench, Mumbai**

**Before Shri S.Rifaur Rehman, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.4934/Mum/2018
(Assessment Year: 2015-16)**

Welfare Properties P. Ltd.
102-103, A-Wing, Shree Savgan CHS Ltd.,
1st Floor, RTO Lane, Near Ambedkar Hall,
Four Bungalow, Andheri (W),
Mumbai – 400 053

DCIT-13(3)(1),
2nd Floor, Aayakar Bhawan,
M.K. Road,
Mumbai – 400 020

PAN – AAACW1922C

(Appellant)

(Respondent)

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|------------------------|--------------------------|
| Appellant by: | Shri R.C. Jain, C.A |
| Respondent by: | Shri V. Vinod Kumar, D.R |
| Date of Hearing: | 20.11.2019 |
| Date of Pronouncement: | 29.11.2019 |

ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 29.06.2018, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 12.12.2017. The assessee has assailed the impugned order on the following grounds of appeal before us:

- "1. The Ld. CIT (A) erred in upholding the addition of Rs.448350/- u/s 43CA of the Act to the consideration received in respect of agreement to sale executed during the year and brought to tax as per revenue recognised on percentage completion method.
- 1.i In so doing, he did not appreciate the judgement of the Apex Court in the case of C. B. Gautam Vs. Union of India [199 ITR 530 (SC)] rendered in respect of presumptive purchase of property under Chapter XX-C of the Act wherein the Apex Court accepted the tolerance limit of 15% which tolerance limit was followed by various Benches of the Tribunal throughout the country while adjudicating the issues with regard to provisions of section 50-C of the Act on sale of capital asset namely land or building or both.

- 1.ii. The Ld. CIT (A) did not appreciate that sub-section 1 of section 43CA is in parameteria with sec. 50(C)(1) of the Act except that sec.43CA(1) applies to stock-in-trade while section 50C(1) applies to sale of capital asset and, therefore, the principles laid down in the case of C.B. Gautam (supra) followed by Benches of ITAT throughout the country with regard to provisions of sec.50C of the Act applies with full force to sec.43CA of the Act which is the fact in the instant case.
- 1.iii. The Ld. CIT(A) further did not appreciate that in the decisions relied upon by the appellant, the stamp duty value on reference to DVO was scaled down and the appellate authority further reduced the value as determined by DVO based on the decision in the case of C.B Gautam (supra).
2. The CIT (A), in the circumstances, ought to have deleted the addition of Rs.448350/- as the difference between the stamp duty value and the agreement value in percentage terms works out to 9.56% of the stamp duty value which is less than the tolerance limit of 15% as accepted by the Supreme Court in the case of C.B. Gautam (supra)."

2. Briefly stated, the assessee company which is engaged in the business of real estate activities, trading and development of properties had e-filed its return of income for A.Y. 2015-16 on 30.09.2015, declaring its total income at Rs. 66,99,670/-. Return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2) of the Act.

3. During the course of the assessment proceedings, on a perusal of the 'Tax Audit Report', it was observed by the A.O that the assessee company during the year under consideration had transferred Flats Nos. 401 & 402, 4th Floor, Vrindavan CHSL, Plot No.54, Church Road, Ville Parle (West), Mumbai, for a sale consideration of Rs.42,40,000/-. On a perusal of the records, it was observed by the A.O that the aforesaid sale consideration was lower than the value of Rs. 74,23,500/- that was adopted by the Sub-registrar, Government of Maharashtra. In the backdrop of the aforesaid facts, the A.O called upon the assessee to explain as to why the provisions of Sec. 43CA of the Act may not be invoked, and the value adopted by the stamp valuation authority for the purpose of payment of stamp duty may not be deemed as the full value of consideration received as a result of such transfer. In reply, it was submitted by the assessee, that the disclosure made by the auditors in "Item No. 17" of "Form No.3CD" was incorrect. It was the claim of the assessee, that 'agreements' were registered in respect of the additional area purchased by the tenants besides the area to which they were entitled free of cost pursuant to the re-development agreement that was entered into by them with the society. In sum and substance, it was the claim of the assessee that the stamp duty value comprised of the cost of construction of the area which was agreed to be given free of

cost to the tenants, and also the cost of land, building and the construction cost of the additional area that was purchased by the said tenant. On the basis of his aforesaid claim, it was submitted by the assessee that as the sale consideration as per the "agreement" was only in respect of the additional area purchased by the tenants, therefore, what could be considered for the purpose of applying Sec. 43CA was the stamp duty value of such additional area, which as per the assessee worked out at Rs.46,88,350/- and not Rs.74,23,500/- that was wrongly reported in the "Form No. 3CD". As such, it was submitted by the assessee, that as the stamp duty value adopted for the additional area purchased by the tenants worked out at Rs. 46,88,350/-, therefore, considering the actual sale consideration of Rs. 42,40,000/-, the 'deemed income' under Sec. 43CA worked out at Rs. 4,48,350/- [Rs.46,88,350/- (-) Rs.42,40,000/-]. At the same time, as the aforesaid difference worked out to 9.56% of the stamp duty value which was less than 15%, therefore, it was submitted by the assessee that the same in the backdrop of the judicial pronouncements was to be ignored and no addition was called for in its case. In sum and substance, it was the claim of the assessee that as the difference between the actual sale consideration received and the value adopted by the stamp valuation authority was less than 15%, therefore, no addition under Sec.43CA was called for in its case. Alternatively, it was submitted by the assessee, that if at all the deemed income of Rs.4,48,350/- was to be assessed, the same could be brought to tax only in the year when the revenue was recognised in respect of the aforesaid flats as per the method of accounting regularly followed by the assessee.

4. The A.O after deliberating on the contentions advanced by the assessee was in agreement with its claim that the stamp duty value/segment value of the additional area purchased by the tenants was to be taken at Rs. 46,88,350/-. However, the A.O was of the view, that as the difference between the F.M.V of the aforesaid property (as adopted by the stamp valuation authority) and the actual sale consideration of the flats registered during the year worked out at Rs. 4,48,350/-, therefore, the same as per the provisions of Sec. 43CA was to be added to the consideration received by the assessee. At the same time, it was observed by the A.O, that the aforesaid amount was to be brought to tax as per the percentage completion method that was being followed by the assessee.

5. Aggrieved, the assessee assailed the assessment framed by the A.O before the CIT(A). In the course of the proceedings before the first appellate authority, it was submitted by the assessee, that as the difference between the stamp duty value and the actual sale consideration received in percentage terms worked out substantially less than 15%, therefore, the same ought to be ignored and no adjustment would be called for as regards the sale consideration received by the assessee. However, the CIT(A) was not persuaded to subscribe to the contentions advanced by the assessee and upheld the addition of Rs.4,48,350/- made by the A.O.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R.') for the assessee took us through the facts of the case. It was reiterated by the Id. A.R, that as the difference between the stamp duty value i.e Rs.46,88,350/- and the actual sale consideration of Rs. 42,40,000/- received by the assessee on the transfer of the aforesaid property was less than 15%, therefore, as had consistently been held in various judicial pronouncements the said difference was to be ignored and no addition was called for in the hands of the assessee. In support of his aforesaid contention, the Id. A.R had relied on certain judicial pronouncements viz. (i) C.B. Gautam Vs. Union of India & Ors. 1993 (1) SCC 78; (ii) Rahul Construction Vs. Dy. CIT (2010) 38 DTR (Pune) (Trib.) 19; (iii) ITO Ward-2(3), Kolkata Vs. M/s L.G.M Ltd. Kolkata (ITA No.267/Kol/2013); (iv) M/s John Fowler (I) Pvt. Ltd. Vs. Dy. CIT, 1(2), Mumbai, ITA 7545/Mum/2014; and (v) Smt.Seeta Bai Khetan s. ITO Ward 6(3), Jaipur (ITA No.826/JP/2013).

7. Per contra, the Id. Departmental representative (for short 'D.R') relied on the orders of the lower authorities.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. After deliberating at length on the contentions advanced by the Id. A.R, we are unable to persuade ourselves to subscribe to the same. It is the claim of the Id. A.R, that as the difference between the value adopted by the stamp valuation authority and the actual sale consideration received by the assessee on the transfer of the aforesaid property works out to 9.56% i.e less than 15%, therefore, no addition of the impugned

difference of Rs.4,48,350/- was called for in the hands of the assessee. In support of his aforesaid contention, the Id. A.R had relied on certain judicial pronouncements to which we would hereinafter refer. Before advertng any further, it would be relevant to cull out the provisions of Sec. 43CA as were available on the statute during the year under consideration, and read as under:

“[Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.

- 43CA. (1). Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by a authority of a State Government 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 computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer.
- (2). The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).
- (3). Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.
- (4). The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received 43a [by any mode other than cash] on or before the date of agreement for transfer of the asset.]

In this regard, we may herein observe, that vide the Finance Act, 2018, w.e.f 01.04.2019, the legislature in all its wisdom has inserted a proviso to sub-section (1) of Sec.43CA, which reads as under:

“Provided that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.”

On a perusal of the aforesaid statutory provision i.e Sec.43CA, we find, that no tolerance limit of 15% between the value adopted by the stamp valuation authority and the actual sale consideration received on the transfer of the asset (other than a capital asset) being land or

building or both, was therein contemplated. On the contrary, a plain reading of the aforesaid statutory provision revealed, that if the consideration received or accruing as a result of the transfer by the assessee of an asset (other than a capital asset), being land or building or both, was less than the value adopted or assessed or assessable by an authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then the value so adopted or assessed or assessable was mandatorily to be deemed as the full value of the consideration received or accruing as a result of such transfer, for the purposes of computing profits and gains from transfer of such asset. In fact, a perusal of the *proviso* made available in sub-section (1) of Sec.43CA, vide the “Finance Act, 2018”, w.e.f 01.04.2019, therein reveals that the legislature had for the very first time provided for a tolerance limit of 5% difference between the value adopted by the stamp valuation authority and the actual consideration received or accruing as a result of transfer of the asset (other than a capital asset). Our aforesaid view, that prior to incorporation of the ‘*proviso*’ to sub-section (1) of Sec. 43CA, vide the ‘Finance Act, 2018, w.e.f 01.04.2019, there was no tolerance limit envisaged in Sec.43CA, as regards the difference between the value adopted by the stamp valuation authority and the actual sale consideration received by the assessee on the transfer of the asset (other than a capital asset), is fortified from a perusal of the “Explanatory Notes” to the provisions of the “Finance Act, 2018”, which reads as under :

“ Explanatory Notes to the provisions of the Finance Act, 2018 [Circular No. /2018, dated the 26th Of December, 2018]

16. Rationalization of section 43CA, section 50C and section 56

16.1 Before amendment by the Act, for computing income from business profits (section 43CA), capital gains (section 50C) and other sources (section 56) arising out of transactions in immovable property, the higher of sale consideration or stamp duty value was adopted. The difference was taxed as income both in the hands of the purchaser and the seller.

16.2 It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location.

16.3 In order to minimize hardship in case of genuine transactions in the real estate sector, section 43CA, section 50C and section 56 of the Income-tax Act have been amended to provide that no adjustments shall be made in a case where the variation between stamp duty value and the sale consideration is not more than five per cent of the sale consideration.

16.4 *Applicability*; These amendments take effect from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20 and subsequent assessment years. “

9. Accordingly, In our considered view, there is no substance in the claim of the assessee that as per the pre-amended provision of Sec.43CA, in case the difference between the value adopted by the stamp valuation authority and the actual sale consideration was less than 15%, then the same was to be ignored and no addition on the said count was called for in the hands of the assessee. As per the doctrine of statutory interpretation, no word howsoever meaningful it may so appear can be allowed to be read into a statutory provision unless the same had specifically been therein provided for. As observed by us hereinabove, it is only vide the Finance Act, 2018, w.e.f 01.04.2019, that as per the 'proviso' incorporated in Sec. 43CA(1) that the legislature in all its wisdom had provided for a tolerance limit of 5% as regards the difference between the value adopted by the stamp valuation authority and the actual consideration received or accruing as a result of transfer of the asset (other than a capital asset). As such, it is only w.e.f 01.04.2019, if the value adopted or assessed or assessable by the stamp valuation authority for the purpose of payment of stamp duty does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer of the asset (other than a capital asset), then the consideration so received or accruing as a result of the transfer, for the purposes of computing the profits and gains from transfer of such asset, was to be deemed to be the full value of consideration. Accordingly, as long as the difference between the value adopted by the stamp valuation authority and the actual consideration received or accrued to the assessee on the transfer of the asset (other than a capital asset) is not in excess of five percent, then such difference is to be ignored and the profits and gains on transfer of the asset has to be worked out on the basis of the actual consideration received or accruing to the assessee. In case, the aforesaid claim of the assessee that if the difference between the value adopted by the stamp valuation authority and the actual consideration received or accruing as a result of transfer of the asset (other than a capital asset) does not exceed 15%, then no addition would be called for under Sec.43CA is accepted, then we are afraid that the same would render the aforesaid 'proviso' to Sec. 43CA(1) as had specifically been made available on the statute vide the Finance Act, 2018 w.e.f A.Y. 2019-20 would be rendered as meaningless.

10. We shall now advert to the claim of the Id. A.R, that as the difference between the stamp duty value and the actual consideration received as a result of transfer of the aforesaid property under consideration in percentage terms works out to 9.56%, therefore, as per the judicial pronouncements relied upon by him no addition was called for in the hands of the assessee. We are unable to persuade ourselves to subscribe to the reliance placed by the Id. A.R on the various judicial pronouncements, which we find are distinguishable on facts. As regards the judgment of the Hon'ble Supreme Court in the case of C.B. Gautam Vs. Union of India & Ors. 1993 (1) SCC 78, we find that as the said judgement was rendered in context of the scope and gamut of the provisions of Chapter XX-C of the Act, therefore, the same would not assist the case of the assessee before us. In fact, we find that in the aforesaid judgment the Hon'ble Apex Court had observed that the right of pre-emptive purchase has to be exercised by the appropriate authority only if the fair market value was found to be at least 15% more than the apparent consideration. In our considered view, as the aforesaid judgment had been rendered by the Hon'ble Apex Court in a different context, therefore, the same being distinguishable as against the issue involved in the case before us, we decline to accept the support drawn by the Id. A.R from the said judicial pronouncement. As regards the remaining orders of the co-ordinate benches of the Tribunal that have been relied upon by the Id. A.R, we find that neither of the said orders were rendered in specific context of Sec. 43CA. Alternatively, we may herein observe, that in neither of the aforesaid orders the co-ordinate benches of the Tribunal had before them the 'proviso' to Sec.43CA(1) that has been made available on the statute vide the Finance Act, 2018, w.e.f 01.04.2019. As observed by us hereinabove, as a tolerance limit of 5% between the value adopted by the stamp valuation authority and the actual consideration received or accruing as a result of transfer of the asset (other than a capital asset), had been made available on the statute only vide the Finance Act, 2018 w.e.f A.Y. 01.04.2019, therefore, it would be absolutely incorrect to infer that prior to the aforesaid amendment a tolerance limit of 15% was already available and/or inbuilt in the said statutory provision. In our considered view, if that would have been so, then there would have been no requirement for incorporation of the 'proviso' to Sec. 43CA (1) of the Act. On the basis of our aforesaid observations, we are of the considered view, that the contention of the Id. A.R that as the difference of Rs. 4,48,350/- between the value adopted by the stamp valuation authority and the actual consideration received as a result of transfer of the aforesaid property works out

to 9.56%, i.e less than 15%, therefore, the same was to be ignored and no addition was called for in the hands of the assessee, does not merit acceptance and is resultantly rejected. We thus in terms of our aforesaid observations, finding no infirmity in sustaining of the addition of Rs.4,48,350/- by the CIT(A), uphold his order.

11. Resultantly, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 29.11.2019

Sd/-
(S. Rifaur Rehman)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 29.11.2019
PS. Rohit

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

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

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai