आयकर अपीलीय अधिकरण "डी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VP AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No.5538/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2014-15)

Disha Construction 201, Square One Gulmohar Road No. 1 Vile Parle(W) Mumbai-400 049	**बनाम**/ Vs.	**Jt. CIT-25(2)** 220, 2nd floor, Kautilya Bhavan C-41 to C-43, G Block Bandra Kurla Complex Bandra (E),Mumbai-400 051
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AADFD-9171-G**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Written Submissions dated 18/03/2021
Revenue by	:	Shri Bharat Andhale-Ld. Sr. DR

सुनवाई की तारीख/ **Date of Hearing**	:	01/06/2021
घोषणा की तारीख / **Date of Pronouncement**	:	17/06/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2014-15 contest the order of Learned Commissioner of Income-Tax (Appeals)-53, Mumbai [CIT(A)], dated 14/06/2019 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) on 20/12/2016. The grounds raised by the assessee read as under:-

> 1. The ld. CIT(A) erred in upholding the action of the AO in adding a sum of Rs.618000/- u/s 43CA of the Act to the consideration received in respect of

agreements to sale executed during the year in respect of redevelopment project under construction.

1.i. In doing so, the ld. CIT (A) did not appreciate that the price in respect of the additional area sold to the existing members over & above the entitled area was pre-fixed haying regard to the development agreement dt. 6.03.2011 which was duly registered with the sub-registrar of Assurances, Mumbai and the said price was more than the ready reckoner rate prevailing on the date of the said agreement and the part consideration whereof has been received by mode other than cash which is in accordance with subsections 3 & 4 of sec.43 CA of the Act as they stood for the assessment year under appeal.

1.ii. Further in doing so, the ld. CIT (A) erred in holding that the appellant has not furnished any evidence of the rate at which the additional area was sold and the date on which such agreement was entered into which is against the material on record.

1.iii. In any event of the matter, as the stamp duty value was not in excess of 105% of the consideration received, the addition upheld by the ld. CIT(A) was not justified in view of the insertion of proviso to sub sec. 1 to sec. 43CA of the Act by the Finance Act, 2018 w.e.f. 1.4.19 which amendment being procedural & curative in nature has retrospective effect. Even if the said amendment is considered to be prospective in nature, still no addition could have been made as the difference between the stamp duty value and the consideration received is only 2.75% of the consideration received which is well within the 15% tolerance limit laid down by the Apex Court in the case of CB Gautam [199 ITR 530(SC)].

1.iv. Further in any event of the matter and without prejudice to the above, the ld. CIT(A) in confirming the action of the AO did not appreciate that the amount which if at all can be added to total income of the year would only be Rs. 61800/- being 10% of Rs. 618000/- based on progressive declaration method of accounting of net profit before remuneration at 10% of agreements to sale executed during the year being regularly followed by the appellant which method of revenue recognition is accepted by the Deptt. not only in the past scrutiny assessments but also in the year under appeal.

The assessee has filed written submissions in support of his claim whereas Ld. DR pleaded for dismissal of appeal.

2.1 The material facts are that the assessee being resident firm stated to be engaged in construction and re-development of residential and commercial premises was assessed for the year u/s 143(3) on 20/12/2016. It transpired that the assessee entered into a redevelopment agreement on 06/03/2011 with members of Datta Ramanand CHS Ltd for re-developing the society property under contractual terms. In terms of the agreement, if any member was desirous of taking additional area over and above the area agreed to be

allotted to them in lieu of existing flat, the same would be given to them @Rs.15000/- per square feet of carpet area. The additional area that could be opted for by the members and rate per square feet of the additional area was fixed in the registered development agreement. During this year, the assessee sold additional area to 11 members for aggregate sale consideration of Rs.224.70 Lacs. However, the stamp duty value of the same aggregated to Rs.230.88 Lacs which led Ld. AO to invoke the provisions of Sec.43CA against the assessee to make impugned additions of differential amount i.e. Rs.6.18 Lacs. The details of 11 flats so sold during the year has been enumerated in para 5.1 of the order. All these flats were situated on 5th floor.

2.2 The assessee submitted that it had agreed to sell the additional area in the flats during financial year 2010-11. At that time, stamp duty reckoner value was Rs.9,700/- per square feet whereas the additional area was sold at much higher price of Rs.15000/- per square feet. The Stamp duty valuation would vary from year to year but the agreement value could not be changed. The provisions of Sec.43CA as inserted from financial year (FY) 2013-14 would not apply to sale agreement entered into during FY 2010-11. The details of sale agreement entered into by the assessee with respect to all the flats under consideration was furnished which has been extracted in para 5.4 of the assessment order. However, not convinced, Ld. AO added the difference of Rs.6.18 Lacs to the income of the assessee u/s 43CA.

3. During appellate proceedings, the assessee reiterated that agreement value was much higher than the stamp duty value prevailing in the year of agreement. The rates were fixed as per the development agreement and the same could not be enhanced and higher prices could

not be sought from the members. However, Ld. CIT(A) chose to confirm the action of Ld. AO, inter-alia, by observing that the assessee could not furnish any evidence of the rate for additional area to be purchased by the buyers and the date on which such agreement was entered in to ny the assessee. Further, there was no evidence that any payment was made in earlier years as per the rates then agreed. In the absence of these evidences, the contentions of the assessee could not be accepted and therefore, the action of Ld. AO was upheld. Aggrieved, the assessee is in further appeal before us.

4. Upon perusal of impugned order, we find that it is the observation of Ld. CIT(A) that the assessee failed to adduce evidences in support of the plea that the additional area was sold pursuant to agreement executed in earlier years. The assessee could not furnish any evidence of the rate for additional area to be purchased by the buyers and the date on which such agreement was entered in to by the assessee. Further, there was no evidence that any payment was made in earlier years as per the rates then agreed. In the absence of these evidences, the contentions of the assessee has been rejected.

5. We find that the assessee, along with its written submissions, have placed on record copy of development agreement dated 06/03/2011 entered in to by the assessee with the Society. As per Clause-12 of the agreement, the assessee has agreed to sell additional carpet area of 12350 square feet to 92 members of the society. The additional area was to be sold at Rs.15000/- per square feet and the sale consideration was to be paid by the members in various trenches as specified in sub-clause (c) of Clause-12. Thus, quite clearly the additional area has been sold by the assessee pursuant to the development agreement which has

been entered into by the assessee during financial year 2010-11 which is prior to introduction of Sec.43CA. The provisions of Sec.43CA has been inserted by the legislatures only with effect from 01st April, 2014 and the same would not apply to any such agreements as entered into by the assessee in earlier years as held by Hon'ble Bombay High Court in **Pr. CIT V/s Swananda Properties (P.) Ltd. {2019 111 taxmann.com 94 (Bombay) dated 09/09/2019}**. The Hon'ble Court declined to admit the question of law as raised by the revenue with following observations: -

> **Re. Question (b)**
> **12.** The Respondent- Assessee is a Developer. He is in the business of real estate development. The flats sold by the Respondent- assessee are stock-in-trade. The CIT (A) by his order passed the best judgment assessment and noted that the sale consideration of twelve flats in the project has been suppressed. According to him, the market rate nearest to that date is Rs.8,992/- per sq.ft. and, thus, reassessed the sale of each of the twelve flats. This basis of the nearest market rate is not found in his order. Therefore, on this basis itself the assessment is bad. In any case, Mr. Sharma, the learned Counsel for the Revenue submits that the market rate is the stamp duty rate of registration. Therefore, the stamp duty rate is used as a means to consider proper sales value of transfer of the flats. At the relevant time i.e. for the assessment year 2005-06, the only provision for application of deemed value for consideration was found under Section 50C of the Act relating to capital assets. At the relevant time there was no provision in the Act for deeming the consideration received on sale of goods/assets other than capital assets on the basis of stamp duty valuation. However, this provision in the form of Section 43CA of the Act has been introduced with effect from 1 April 2014. The present case pertains to the assessment year 2005-06. Therefore, Section 43CA of the Act will have no application for the subject Assessment Year.
> **13.** In the case of *CIT* v. *Neelkamal Realtors & Erectors India (P.) Ltd.* [2017] 79 taxmann.com 238/246 Taxman 274, the Division Bench of this Court had an occasion to consider the value of the flat in case of sale by the Developer in the context of section 50C and section 56(2)(vii)(b)(ii) of the Act. The Division Bench observed thus:
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> "3. Regarding question No. (i):
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> ** ** **
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> (*f*) It is self evident from reading of section 50C of the Act it would not have any application while determining 'Profits and gains of business or profession'. This is so as its application is only limited to computation of income chargeable under the head 'Capital gains' as is evident from specific reference in sub-section (1) of section 50 of the Act to section 48 of the Act i.e. mode of computation of capital gains. In fact section 50C of the Act as observed by the impugned order is placed as part of the Chapter IV-E under

the head 'capital gains', it can only govern the valuation of the property to determine capital gains and cannot govern valuation of transfer of assets (other than a capital asset) i.e. stock in trade. This view is further strengthened by the fact that section 43CA has been introduced into the Act w.e.f. 1st April, 2014 which governs taking of full value of consideration for transfer of assets other than capital assets on the basis of stamp duty valuation. This section 43CA of the Act finds a place as a part of Chapter IV-D - Profits and gains of business or profession. Therefore, with effect from 1st April 2014 the stamp duty valuation of assets sold could be taken as value of consideration. Our above view that section 50C of the Act has no application to value stock in trade is also a view taken by Allahabad High Court in *Commissioner of Income Tax* v. *Ken Construction and Colonizers (P.) Ltd.* (2012) 208 Taxman 478/20 taxman.com 381. Similarly the Madras High Court in *CIT* v. *Thiruvengadam Investments (P.) Ltd.* (2010) 320 ITR 345 has also held that section 50C of the Act cannot be invoked to arrive at full consideration of sale of business asset. We see no reason not to adopt the views of the above two High Courts to the present facts." (Emphasis Supplied)

Therefore, section 43CA cannot be made applicable to the facts of the present case. By the plain language of this provision it is not retrospective. Thus, there is no statutory provision based on which the stamp duty valuation could have been made a basis in the present case.

14. The Division Bench of this Court in the case of *Zain Constructions* v. *ITO* [2019] 107 taxmann.com 300/265 Taxman 82 (Mag.) has conclusively decided the issue as under:

"8. In our opinion, the entire approach of the Assessing Officer is wholly incorrect. As is well known, Section 50C of the Act would enable the Revenue to bring to tax by way of deemed capital gain difference between the stamp valuation and the sale price of a capital asset. For obvious reasons, this provision would not apply in case of a builder for whom such immovable property is in nature of stock in trade and not capital asset. To overcome this difficulty the legislature had inserted Section 43CA under Finance Act, 2013 w.e.f 1.4.2014. This provision would enable the Revenue to tax the income arising out of sale of stock by a deeming fiction where subject to certain conditions, stamp valuation of such stock would substitute the actual receipt thereof. In absence of any such statutory provisions, giving rise to the deeming fiction, the Revenue cannot tax any amount which has not been received by a seller of an immovable property at the time of sale." (Emphasis Supplied)

No contrary decision is shown.

15. As regards the decision in the case of *Associated Builders* relied upon by the Appellant- Revenue, it arose in the context of valuation of assets including stock in trade on dissolution of a partnership firm. This Court was concerned with the issue whether, when the asset was valued on the basis of book value as provided in the contract between the parties, is it open to the Assessing Officer to ignore it and ascertain whether the valuation done does represent the fair value of the asset. This the Court answered in the affirmative by holding that the contract between the parties will not bind the Revenue, while determining the fair market value of the assets of the partnership firm. In the present case, we are not dealing with the valuation of assets on dissolution of a firm. In case of dissolution, there is no sale as in the case of running business. Thus, the decision in the case of Associated

Builders is in different facts and circumstances and would have no application to the present facts.

16. It is to be noted that the Revenue has not made any reference even remotely that the Respondent had received amounts in excess of that shown in the agreements in respect of twelve flats which is not being accepted. The entire case of the Revenue is merely on suspicion. It is not the case of the Revenue that the Respondent made secret profits out of sale of the twelve flats.

17. The Supreme Court has observed in the case of *CIT* v. *A. Raman & Co.* [1968] 67 ITR 11 that the law does not oblige a trader to make maximum profit, he can make, out of his trading activity. Income on which he can be taxed is only the income he has earned. So also recently, the Supreme Court in the case of *S.A. Builders* v. *CIT* [2007] 158 Taxman 74/288 ITR 1 has observed that no businessman can be compelled to maximize his profits. Therefore, in view of the above, this question as proposed also does not give rise to any substantial question of law. Thus not entertained.

18. The appeal is dismissed.

The Hon'ble Court has held that the provisions of Sec.43CA would not have retrospective application and accordingly, do not apply to agreement executed prior to its introduction. The ratio of this decision is squarely applicable to the case of the assessee. Therefore, the impugned additions could not be sustained in the eyes of law on this point alone. We order so. Consequently, the other arguments made by the assessee has become merely academic in nature.

6. The appeal stand partly allowed in terms of our above order.

Order pronounced on 17th June, 2021

Sd/-	**Sd/-**
(Mahavir Singh)	**(Manoj Kumar Aggarwal)**
उपाध्यक्ष / **Vice President**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 17/06/2021
Sr.PS, Jaisy Varghese

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**