

आयकर अपीलीय अधिकरण
मुंबई पीठ "एस एम सी" , मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
आअसं. 5752/मुं/2019 (नि.व 2016-17)
ITA NO.5752/MUM/2019 (A.Y 2016-17)

Stalwart Impex Pvt. Ltd.,
Usha Kiran Residency, Kharwai Naka,
Kharwai, Badlapur East,
Thane 421 503

PAN: **AAICS-4110-J**

..... अपीलार्थी /Appellant

बनाम Vs.

Income Tax Officer 15(3)(4),
Room No.15, Ground Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Bhadresh Joshi

प्रतिवादी द्वारा/Respondent by : Ms. Smita Verma

सुनवाई की तिथि/ Date of hearing : 07/04/2021

घोषणा की तिथि/ Date of pronouncement : 02/07/2021

आदेश/ ORDER

This appeal by the assessee is directed against the order Commissioner of Income Tax (Appeals)-24 Mumbai [in short 'the CIT(A)'] dated 03/06/2019 for the assessment year 2016-17.

2. Shri Bhadresh Joshi appearing on behalf of the assessee submitted that the assessee is engaged in construction of commercial and residential housing projects. During the period relevant to assessment year under appeal, the assessee had sold flats to different buyers. In respect of three flats the

Assessing Officer held that the Market Value (Stamp Value) of the flats sold is more than the agreement value. The total agreement value of the said three flats sold was Rs.97,11,500/-. The Assessing Officer determined the Stamp Duty Value of the flats at Rs.1,09,83,000/-. On the objection raised by the assessee, the Assessing Officer made reference to the Department Valuation Officer (DVO) for determining the market value of the flats. However, before receipt of the report from DVO, the Assessing Officer made addition of the difference between the Stamp Duty value and the Agreement Value i.e. Rs.12,71,500/- under section 43CA of the Income Tax Act,1961 (in short 'the Act'). Aggrieved by the assessment order dated 12/12/2018, the assessee filed appeal before the CIT(A). The CIT(A) without appreciating the facts upheld the addition made by the Assessing Officer u/s 43CA of the Act. The Id. Authorized Representative of the assessee pointed that in the impugned order, the CIT(A) has made error in mentioning the amounts in para 5.1.4. of the order. The CIT(A) in the impugned order erroneously mentioned the value of units sold in AY 2015-16. In assessment year 2015-16 similar addition was made. On account of smallness of the amount involved, the assessee accepted the addition and did not file any appeal. The Id. Authorized Representative of the assessee submitted that the DVO in his report has determined the value of the three flats at Rs.1,03,93,000/-. The difference between agreement value and value determined by the DVO is 7% approximately. Since, the difference is less than 10% no addition should be made. To support his contentions, the Id. Authorized Representative of the assessee placed reliance on the decision of Tribunal in the case of Radhika Sales Corporation vs. Addl.CIT, in ITA No.1474/PUN/2016 for assessment year 2011-12 decided on 16/11/2018.

3. On the other hand, Ms. Smita Verma representing the Department vehemently defended the impugned order. The Id. Departmental Representative submitted that reference was made to the DVO, therefore, no leverage of percentage difference should be allowed to the assessee. The Id. DR contended that the benefit of difference in value disclosed and Stamp Value can be given to the assessee in accordance with proviso to sub-section (1) to section 43CA inserted by the Finance Act, 2018, w.e.f. 01/4/2019. The benefit of newly inserted proviso will not be available to the assessee in the impugned assessment year. The Assessing Officer has already granted due relief to the assessee u/s 154 of the Act after receipt of DVO's report. Now, the addition u/s43CA of the Act stands at Rs.6,81,500/-.

4. Both sides heard, orders of authorities below examined. The solitary issue assailed by the assessee is addition made u/s 43CA of the Act in respect of difference between agreement value of the flats and market value determined by the DVO. The value of flats as per assessee, Stamp Duty Value and value as determined by the DVO are tabulated herein under:

Sr. No.	Flat No.	Agreement value (in Rs.)	Stamp Duty Value (in Rs.)	Fair Market Value as determined by DVO (in Rs.)	Difference (in Rs.)
1.	E-1/404	30,92,250	34,04,000	32,27,000	1,34,750
2.	D-2/702	32,24,750	40,40,000	37,36,000	5,11,250
3.	F-1/502	33,94,500	35,39,000	34,30,000	35,500
	Total	97,11,500	1,09,83,000	1,03,93,000	6,81,500

The difference between agreement value and value determined by DVO is Rs.6,81,500/-. In terms of percentage the difference is 7% approximately. The short contention of the assessee is that where the difference between the

agreement value and the market value is less than 10% no addition should be made.

5. Similar issue had come up before the Tribunal in the case of Radhika Sales Corporation (supra). The Tribunal deleted the addition by observing as under:

“5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The solitary issue raised in the appeal by the assessee is against the addition of Rs.10,38,000/- on account of difference in Long Term Capital Gain declared by the assessee and computed by the Assessing Officer after considering the DVO’s valuation report. It is an undisputed fact that the assessee has disclosed sale consideration of the land as Rs.1,10,00,000/-. During the scrutiny assessment proceedings reference was made to DVO for the valuation of property. The DVO vide report dated 30-12-2013 determined the fair market value of the property as Rs.1,20,38,000/-. The difference between actual sale consideration declared by the assessee and the fair market value determined by the DVO is approximately 9.43%. We find that the Co-ordinate Bench of the Tribunal in the case of Dattatraya Kerba Lonkar Vs. Deputy Commissioner of Income Tax (supra) after considering various decisions including the decision rendered in the case of Rahul Constructions Vs. Deputy Commissioner of Income Tax (supra) and the judgment of Hon’ble Patna High Court in the case of Bimla Singh Vs. Commissioner of Income Tax (supra) has held as under:

“8. We find merit in the submission of Ld. A.R. The difference between the fair market value determined by the DVO and actual sale consideration is Rs.7,14,530/- i.e slightly more than 2 per cent of the sale consideration. The co-ordinate Bench of the Tribunal in the case of Rahul Construction V/s. DCIT (supra) has held that where difference between the sale consideration declared by the assessee and fair market value as determined by the DVO u/s 50C is less than 10 percent, the Assessing Officer was not justified in substituting the value determined for sale consideration disclosed by the assessee. The Co-ordinate Bench after considering the provisions of Section 50C of the Act and the provision of section 23A and 24(5) of the Wealth Tax Act held as under :-

“13. A combined reading of the above provisions shows that the valuation adopted by the DVO is subject to appeal and the same is not final. In the instant case we find that as Against the value of Rs. 28,73,000/- adopted by the stamp valuation authorities, the DVO has determined the FMV on the date of transfer at Rs. 20,55,000/- . This itself shows that there is wide variation between the two values. Further, the value adopted by the DVO is also based on some estimate. We find that the difference between sale consideration shown by the assessee at Rs.19,00,000/- and the FMV determined by the DVO at Rs.20,55,000/- is only Rs. 1,55,000 which is less than 10 per cent. The Courts and Tribunals are consistently taking a liberal approach in favour of the assessee where the difference between the value

adopted by the assessee and the value adopted by the DVO is less than 10 per cent.

14. We find that the Pune Bench of the Tribunal in the case of Asstt. CIT V/s. Harpreet Hotels (p) Ltd. vide ITA Nos. 1156-1160/pn/2000 and relied on by the learned counsel for the assessee had dismissed the appeal filed by the Revenue where the CIT(A) had deleted the unexplained investment in house construction on the ground that the difference between the figure shown by the assessee and the figure of the DVO is hardly 10 percent.

15. Similarly, we find that the Pune Bench of the Tribunal in the case of ITO V/s. Kaaddu Jayghosh Appasaheb, vide ITA No.441/PN/2004 for the asst. yr 1992-1993 and relied on by the learned counsel for the assessee following the decision of the J&K High Court in the case of Honest Group of Hotels (P) Ltd. V/s CIT (2002) 177 CTR (J&K) 232 had held that when the margin between the value as given by the assessee and the Departmental valuer was less than 10 per cent , the different is liable to be ignored and the addition made by the A.O cannot be sustained.

16. Since in the instant case such difference is less than 10 per cent and considering the fact that valuation is always a matter of estimation where some degree of difference bound to occur, we are of the considered opinion that the A.O. in the instant case is not justified in substituting the sale consideration at Rs.20,55,000 as Against the actual sale consideration of Rs.19,00,000/- disclosed by the assessee. We, therefore, set aside the order of the CIT(A) and direct the A.O. to take Rs.19,00,000/- only as the sale consideration of the property. The grounds raised by the assessee are accordingly allowed."

9. The Id. A.R of the assessee has further placed reliance on the decision of Hon'ble Patna High Court in the case of Bimla Singh V/s. CIT (supra) wherein Hon'ble High Court has held that difference between the cost of construction shown by the assessee and as determined by the Assessing Officer being less than 15 per cent, the same is to be ignored for the purposes of addition. The Hon'ble Delhi High Court in the case of CIT V/s. Sadna Gupta 352 ITA 595 held that unless and until there was some other evidence to indicate that extra consideration had flowed in transaction for purchase of property, report of DVO could not form basis of any addition on part of revenue. In absence of any evidence no reliance could be placed on the report of DVO for making addition.

10. Thus, in view of the fact that the difference between sale consideration and the market value determined by the DVO is not substantial and is approximately little over 2 per cent of the actual sale consideration, we find no reason for rejecting actual sale consideration mentioned in the Sale Deed for determining long term capital gain. Accordingly, the ground No.1 raised in appeal by the assessee is allowed. The Assessing Officer is directed to adopt actual sale consideration as mentioned in the Sale Deed as a fair market value for determining the long term capital gain."

6. In the light of the facts of the case and the decisions discussed above, we find merit in the submissions of assessee. In the present case, since difference between the value declared by the assessee and the value determined by the DVO is less than

10%, no addition in respect of Long Term Capital Gains is warranted. *The findings of Commissioner of Income Tax (Appeals) on this issue are accordingly, set aside and the appeal of assessee is allowed.”*

It would be relevant to mention here that the aforementioned decision was rendered with reference to provisions of Section 50C of the Act. The addition in the instant case is made u/s 43CA of the Act. I find that the provisions of both the sections are *pari materia*, except that the provisions of section 43CA operate in respect of consideration received on transfer of an asset (other than capital asset) being land or building or both and provisions of section 50C are attracted on transfer of capital asset being land or building or both. Hence, the decision rendered u/s.50C of the Act giving leverage of minor variation, in the value declared by the assessee and the stamp duty value would equally hold good for variation in the value u/s 43CA of the Act. Thus, from the above decision it can be safely deduced that where the difference between sale consideration declared by the assessee and stamp duty value of an asset (other than capital asset) being land or building or both is less than 10%, no addition under section 43CA of the Act is warranted.

6. Here, it would be relevant to mention that the Finance Act 2018 has inserted a proviso to sub-section (1) of section 43CA providing 5% tolerance limit in variation between declared sale consideration vis-a-vis stamp duty value for making no addition. Similar proviso was inserted by the Finance Act 2018 to sub-section (1) to section 50C of the Act. The said tolerance limit band was enhanced from 5% to 10% by the Finance Act 2020 w.e.f. 01/4/2021. The Tribunal in the case of Maria Fernandes Cheryl vs. ITO (International Taxation) reported as 123 taxmann.com 252 (Mumbai) after considering various decision and the CBDT Circular No. 8 of 2018 dated 26-12-2018 held, that the amendment is retrospective in nature and relates back to the date of insertion

of statutory section to the Act. The relevant extract of the observations made by the Bench reads as under:

*“ 7. The insertion of the third proviso to Section 50C(1) provides for this tolerance band with respect to a certain degree of variations between the stamp duty valuation and the stated consideration of an immovable property. In other words, as long as the variations are within the permissible limits, the anti-avoidance provisions of Section 50C do not come into play. As we have noted earlier, the CBDT itself accepts that there could be various bonafide reasons explaining the small variations between the sale consideration of immovable property as disclosed by the assessee vis-à-vis the stamp duty valuation for the said immovable property. Obviously, therefore, disturbing the actual sale consideration, for the purpose of computing capital gains, and adopting a notional figure, for that purpose, will not be justified in such cases. On a conceptual note, an estimation of market price is an estimation nevertheless, even if by a statutory authority like the stamp duty valuation authority, and such a valuation can never be elevated to the status of such a precise computation which admits no variations. The rigour of Section 50C(1) was thus relaxed, and very thoughtfully so, to take these bonafide cases of small variations between the stated sale consideration vis-à-vis stamp duty valuation, out of the scope of adjustments contemplated in the computation of capital gains under this anti-avoidance provision. **In our humble understanding, it is a case of a curative amendment to take care of unintended consequences of the scheme of Section 50C. It makes perfect sense, and truly reflects a very pragmatic approach full of compassion and fairness, that just because there is a small variation between the stated sale consideration of a property and stamp duty valuation of the same property, one cannot proceed to draw an inference against the assessee, and subject the assessee to practically prove his being truthful in stating the sale consideration. Clearly, therefore, this insertion of the third proviso to Section 50C(1) is in the nature of a remedial measure to address a bonafide situation where there is little justification for invoking an anti-avoidance provision. Similarly, so far as enhancement of tolerance band to 10% by the Finance Act 2020, is concerned, as noted in the CBDT circular itself, it was done in response to the representations of the stakeholders for enhancement in the tolerance band. Once the Government acknowledged this genuine hardship to the taxpayer and addressed the issue by a suitable amendment in law, the next question was what should be a fair tolerance band for variations in these values.** As a responsive Government, which is truly the hallmark of the present Government, even though the initial tolerance band level was taken at 5%, in response to the representations by the stakeholders, this tolerance band, or safe harbour provision, was increased to 10%. There is no particular reason to justify any particular time frame for implementing this enhancement of tolerance band or safe harbour provision. The reasons assigned by the CBDT, i.e., "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 the shape of the plot or location," was as much valid in 2003 as it is in 2021. There is no variation in the material facts in this respect in 2021 vis-à-vis the material facts in 2003. **What holds good in 2021 was also good in***

2003. If variations up to 10% need to be tolerated and need not be probed further, under section 50C, in 2021, there were no good reasons to probe such variations, under section 50C, in the earlier periods as well. We are, therefore, satisfied that the amendment in the scheme of Section 50 C(1), by inserting the third proviso thereto and by enhancing the tolerance band for variations between the stated sale consideration vis-à-vis stamp duty valuation to 10%, are curative in nature, and, therefore, these provisions, even though stated to be prospective, must be held to relate back to the date when the related statutory provision of Section 50C, i.e. 1st April 2003. In plain words, what it means is that even if the valuation of a property, for the purpose of stamp duty valuation, is 10% more than the stated sale consideration, the stated sale consideration will be accepted at the face value and the anti-avoidance provisions under section 50C will not be invoked.

8. Once legislature very graciously accepts, by introducing the legal amendments in question, that there were lacunas in the provisions of section 50C in the sense that even in the cases of genuine variations between the stated consideration and the stamp duty valuation, anti-avoidance provisions under section 50C could be pressed into service, and thus remedied the law, there is no escape from holding that these amendments are effective with effect from the date on which the related provision, i.e., Section 50C, itself was introduced. These amendments are thus held to be retrospective in effect. In our considered view, therefore, the provisions of the third proviso to Section 50C (1), as they stand now, must be held to be effective with effect from 1st April 2003. We order accordingly. Learned Departmental Representative, however, does not give up. Learned Departmental Representative has suggested that we may mention in our order that "relief is being provided as a special case and this decision may not be considered as a precedent". Nothing can be farther from a judicious approach to the process of dispensation of justice, and such an approach, as is prayed for, is an antithesis of the principle of "equality before the law," which is one of our most cherished constitutional values. Our judicial functioning has to be even-handed, transparent, and predictable, and what we decide for one litigant must hold good for all other similarly placed litigants as well. We, therefore, decline to entertain this plea of the assessee."

[Emphasis added now]

As has been aptly explained above, the rationale for holding newly inserted proviso to sub-section (1) to section 50C of the Act as curative in nature, hence, having retrospective application, the same analogy would apply to the provisions of Section 43CA of the Act. Both the sections are similarly worded except that both the sections have application on different sets of assessee. As has been pointed earlier, Section 43CA gets attracted where the consideration received or accrues as a result of transfer of an asset (other than a capital

asset) being land or building or both. Whereas, provisions of section 50C operates where the consideration received or accrues as a result of transfer of a capital asset being land or building or both. Both the sections induce deeming fiction to substitute actual sale consideration with notional value of asset based on Stamp Duty valuation. Further, a perusal of Circular 8 of 2018 (supra) would show that identical reasons have been given in Para 16 for 'Rationalization of Sections 43CA and 50C'. The proviso has been inserted and subsequently tolerance band limit has been enhanced to mitigate hardship of genuine transactions in the real estate sector. Ergo, in the light of reasoning given for insertion of the proviso and exposition by the Tribunal for retrospective application of the said proviso, I have no hesitation in holding that the proviso to sub-section (1) to section 43CA and the subsequent amendment thereto relates back to the date on which the said section was made effective i.e. 01/4/2014.

7. In light of above findings, the Assessing Officer is directed to delete the addition of Rs.6,81,500/- under section 43CA of the Act. The impugned order is quashed and appeal of the assessee is allowed.

Order pronounced in the open Court on Friday, the 2nd day of July, 2021

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 02/07/2021
Vm, Sr. PS (O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai