IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH MUMBAI

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.598/Mum/2020
(**Assessment Year :2011-12**)

ITO-16(1)(3) Mumbai Ward – 16(1)(3) Mumbai Room No.438, 4th Floor Aayakar Bhavan M.K.Road, Mumbai-400 020	Vs.	Shri Prem Ramanand Sagar Sagar Villa, Road No.12-A J.V.P.D. Scheme Mumbai – 400 049
PAN/GIR No.AAPPS2469E		
(Appellant)	..	**(Respondent**)

Revenue by	Ms. Shreekala Pardeshi
Assessee by	Ms. Neha Paranjpe
Date of Hearing	**11/08/2021**
Date of Pronouncement	**16/08/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.598/Mum/2020 for A.Y.2011-12 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-4, Mumbai in appeal No.CIT(A)-4/e-file-137/ITO-16(1)(3)/2016-17 dated 21/11/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/12/2016 by the ld. Income Tax Officer-16(1)(3), Mumbai (hereinafter referred to as ld. AO).

2. Revenue has raised the following grounds of appeal:-

a. *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating that in the case of Chirrayu Estate Developers Pvt. Ltd., the issue of application of 50C was not even discussed since the cost at which capital assets was brought in, was the same as that recorded in the books of the joint venture and as such there was on capital gain at first place which is not the issue in this case.*

b. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the importance of the insertion of word "assessable" in Section 50C, which makes it even more clear that even in the absence of registration of the deed, the stamp duty value / market value has to be adopted as deemed full value of consideration in Section 48 of the Act.*

3. We have heard rival submissions and perused the materials available on record. Both the parties mutually agreed that the grounds raised by the Revenue are squarely covered by the order of this Tribunal in assessee's own case for A.Y.2012-13 in ITA No.7442/Mum/2016 dated 16/10/2019.

3.1. We find that the ld. CIT(A) had infact relied on the order passed by the predecessor for A.Y.2012-13 in assessee's own case and granted relief to the assessee. This order of the ld. CIT(A) for A.Y.2012-13 has been upheld by this Tribunal vide its order dated 16/10/2019. The relevant observations of the ld. CIT(A) in respect of the impugned issue are as under:-

> ***6.2 <u>Ground No. 2:</u>*** *Vide this ground of appeal appellant is agitated against addition of ₹ 4,79,69,522/- by invoking section 50C of the Act. The case was reopened by Ld. AO on the basis of findings in appellant's own case for A.Y. 2012-13. The reasons recorded by Ld. AO are reproduced para 3 of the assessment order.*
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> *"6.2.1 During the course of appellate proceedings, it was stated that similar type of addition was made by the Ld. AO in appellant's own case for A.Y. 2012-13 which was the basis for reopening for year under consideration. Appellant filed an appeal against the order of the AO before Ld. CIT(A). The Ld. CIT(A)-4, Mumbai vide order no. CIT(A)-4/IT-41/ACIT-16(1)/2015-16 dated 08.09.2016*

decided the appeal of the assessee. The relevant part of the order is reproduced as under:

> *"3.4. I have considered the findings of the Assessing Officer, rival submission of the appellant and background of the case, carefully. During the year, the Appellant has shown contribution of capital in the firm namely, M/s. Mansagar Infrastructure and Maa Shakti Infrastructure of Rs.2,33,81,603/- being value of plot of land. The value of the plot of land has been credited in the books of firms on which capita! gain has been calculated and paid. The Id. Assessing Officer has not accepted the value of plot of land and has estimated by invoking Sec.500 of the I.T. Act, 1961 for taking circle rate prescribed by local authority. This approach of the Assessing Officer is not tenable because there is a specific provision of law u/s.45(3) of the I.T. Act, 1961 which provides that for the purpose of Sec,48, the amount recorded in the books of accounts of the firm shall be deemed to be the full value of the consideration received or accruing as a result of the consideration of the capital asset. Thus, it is abundantly clear that the value of the consideration has to be taken as record in the books of the firm, hence, Sec.500 will not such transaction. I find substance in the argument therefore hold that section 50C cannot be invoked in the present case as section 45(3) is specifically applicable in the present case. Even otherwise also without referring to DVO section 50C cannot be invoked. Further the Appellant gets support from the decision of jurisdictional ITAT in the case of ITO vs. Chirag Estate Developers Pvt. Ltd., ITA No.263/Mum/2010, The Hon'ble ITAT has held as under :-*
>
> > *"14. A plain reading of the said provision would reveal that the profits or gains arising from the transfer of a capital asset to another entity by way of capital contribution or otherwise shall be chargeable to tax. The profit or gain would arise only when the transfer has been made at a price which is more than the cost price and the difference between the cost price and amount at which transfer has taken place can be charged under section 45(3). In the instant case the purchase price of land as recorded in the transferor's book and recorded in the books of the joint venture are the same. As per provisions of section 45(3) price of land recorded in the books of joint venture is required to be considered as receipt of full value of consideration received or accrued as a result of transfer of capital assets. Once the price recorded in the joint venture's books is treated as full value of consideration, the provisions do not permit substitution of any value so as to make addition under section 45(3). In fact the approach of the A.O. is also not correct in the sense that under section 45(3) once the full value of consideration is taken as the amount recorded in the books of the joint venture, the capital gain can be worked out by reducing the cost of purchase as per the books of assessee. In case the A.O. substitutes the cost of purchase, by whatever means, then that cost price has to be adjusted in the capital gains. This may result in a loss of equal amount as the books of joint venture show the book value as consideration and substituted cost price(value determined by AO in the order) as a deduction. This working would result in a loss but not a gain. This simple arithmetic calculation was missed by the A. O. and he made the addition under section 45(3) which does not permit him to substitute the full value of consideration other than the amount recorded in the books of account of the joint venture. As the Assessing Officer's action is not according to the provisions of Sec 45(3), there is no justification for upholding the contentions of Revenue. We uphold the order of the CIT(A) and reject the ground of appeal."*

Respectfully, following the decision of jurisdictional ITAT, the Assessing Officer is directed to adopt the value of consideration of Rs.2,48,84,277/- as shown by the Appellant.

3.5. *In the result,* ***Ground No.1 is allowed."***

3.2. The relevant operative portion of the Tribunal order in assessee's own case for A.Y.2012-13 are as under:-

2. During the course of the assessment proceedings it was observed by the A.O that the assessee had transferred certain ancestral plot of land by way of his capital contribution as a partner in two partnership firms viz. (i). M/s Mansagar Infrastructure; and (ii). M/s MaaShaki Infrastructure, and had worked out the „Long Terms Capital Gain"(for short „LTCG") under Sec. 45(3), as under:

Consideration *– Amount credited in the books of Mansagar infrastructure to the capital account for bringing in said plot for the benefit of said firm [u/s 45 (3)] under Declaration*	*1,28,62,887*
Consideration *– Amount credited in the books of Maa Shakti Infrastructure to the capital account for bringing in said plot to the benefit of said firm [u/s 45(3)] under Deed of Partnership dt. 26.01.2012 effective from 19.01.2012*	*1,05,18,716*
Consideration *– For confirming the ownership of Sagar Entertainment Pvt. Ltd. (granting NOC) under declaration*	*15,02,674*
Total consideration	*2,48,84,277*
Indexed cost *of the land (cost of plot no 33 Rs.1949297/- + cost of plot no. 19 Rs. 2323061/- = total cost Rs.4272358/- [as per original deed of purchase dt. 7.03.1998] [applicable index 331 x 785] assesses share in property 20.04% hence indexed cost Rs.20,30,078/- - copy of purchase deed already placed on your record*	*20,30,078*
Cost of transfer/ cost of improvement *- Amount payable to SEL for reimbursing capital expenditure by SEL incurred on plot no. 33 Rs.200357/- and plot no. 19 Rs.40,013/- copy of MOU enclosed*	*6,01,070*
Long Term Capital Gain	*2,22,53,129*

Being of the view, that the LTCG on the transfer of the aforesaid property was to be supposedly worked out as per Sec. 50C of the Act, the A.O called upon the assessee to put forth his explanation as regards the same. In reply, the assessee tried to impress upon the A.O that the provisions of Sec. 50C were not attracted in his case for two fold reasons, viz. (i). that, as per Sec. 45(3) the amount credited to the partners account was deemed to be the full value of consideration accruing or received by the partner; and (ii). that, as introduction of asset by the partner in a firm by way of his capital contribution was not a transfer, therefore, the provisions of Sec. 50C were not attracted. However, the A.O not being persuaded to subscribe to the aforesaid contentions of the assessee invoked the provisions of Sec. 50C and worked out the „LTCG" on the aforesaid transfer transaction at

*Rs. 6,43,56,086/-. As the assessee had already offered to tax LTCG of Rs. 2,22,53,129/- in his return of income, therefore, the A.O made a consequential addition of Rs. 4,21,02,957/- [Rs. 6,43,56,086/- (-) Rs. 2,22,53,129/-]. Further, it was noticed by the A.O, that in the course of the assessment proceedings in the case of M/s Gayatri Films & Music Pvt. Ltd., it was observed that the said company had received substantial advances of Rs.5,37,46,284/- from M/s Sagar Entertainment Ltd. (now known as M/s Sagar Entertainment Pvt. Ltd.), i.e a relate*d *party, which was prima facie covered by Sec. 2(22)(e) of the Act. Observing, that two of the substantial shareholders of M/s Sagar Entertainment Pvt. Ltd., viz. (i). Sh. Jyoti Sagar (26.17%); and (ii). Sh. Prem Sagar, i.e the assessee (18.40%), were also holding substantial shareholding in M/s Gayatri Films & Music Pvt. Ltd., viz. (i). Sh. Jyoti Sagar (32.40%); and (ii). Sh. Prem Sagar, i.e the assessee (25.34%), the assessee was called upon to explain as to why the aforesaid amount of advances may not be treated as „deemed dividend" in his hands. As the reply filed by the assessee did not find favour with the A.O, therefore, he added the entire amount of Rs. 5,37,46,284/- advanced by M/s Sagar Entertainment Ltd. to M/s Gayatri Films & Music Pvt. Ltd. as "deemed dividend" u/s 2(22)(e) in the hands of the assessee. On the basis of his aforesaid deliberations, the A.O after inter alia making the afore stated additions assessed the income of the assessee at Rs. 12,68,30,630/- (including enhancement in the amount of LTCG).*

4. Aggrieved, the assessee assailed the aforesaid assessment in appeal before the CIT(A). Insofar, the claim of the assessee that the amount recorded in the „books of account" was to be deemed to be the full value of consideration received or accruing on the transfer of the capital asset was concerned, the same did find favour with the CIT(A). It was observed by the CIT(A), that as it was specifically provided u/s 45(3), that for the purpose of Sec. 48 the amount recorded in the "books of accounts" of the firm shall be deemed to be the full value of consideration, therefore, the provisions of Sec. 50C would not be applicable to such transaction. As regards the addition of Rs. 5,37,46,284/- that was made by the A.O u/s 2(22)(e) of the Act, it was observed by the CIT(A), that none of the shareholder of M/s Gayatri Films & Music Pvt. Ltd. was having more than 20% of equity capital and was simultaneously having more than 10% shareholding in the lending company. Also, it was observed by the CIT(A), that as Sec. 2(22)(e) referred to the beneficial ownership of the shareholder, therefore, the holding of the assessee in his individual capacity could not be clubbed with the holding of his HUF. On a similar footing, it was observed by him, that the holding of the other shareholder i.e Sh. Jyoti Sagar in his individual capacity could also not be combined with his shareholding in the capacity as that of Executor to the Estate of Late Subhash Sagar. In the backdrop of his aforesaid deliberations, it was concluded by the CIT(A) that the addition made by the A.O u/s 2(22)(e) was not sustainable and was liable to be vacated.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. Order of the CIT(A) has been assailed by the revenue before us on two grounds, viz. (i). that, the CIT(A) was in error in vacating the addition of LTCG of Rs. 4,21,02,957/- made by the A.O u/s 50C of the Act; and (ii). that, the CIT(A) had wrongly vacated the addition of Rs. 5,37,46,284/- made by the A.O u/s 2(22)(e) of the Act.

6. We shall first advert to the grievance of the revenue that the CIT(A) had erred in dislodging the well founded LTCG addition of Rs. 4,21,02,957/- that was made by the A.O u/s 50C of the Act. As observed by us hereinabove, the assessee had transferred certain ancestral plot of land by way of his „capital contribution" as a partner in two partnership firms viz. (i). M/s Mansagar Infrastructure; and (ii). M/s Maa Shakti Infrastructure. Amount recorded in the „capital account, of the assessee with the said respective firms, was as under:

Particulars	*Amount Credited in the „Capital account" of the assessee.*
M/s Mansagar Infrastructure	*Rs. 1,28,62,887/-*
M/s Maa Shakti Infrastructure	*Rs. 1,05,18,716/-*

As per the mandate of Sec. 45(3) of the Act, the assessee had adopted the amount recorded in the "books of accounts" of the respective firms as the deemed full value of consideration received or accruing as a result of the respective transfer of the aforesaid plot of land and worked out the amount of LTCG at Rs. 2,22,53,129/-. Observing, that the provisions of Sec. 50C would be applicable to the aforesaid transfer transaction, the A.O adopted the „market value" of the property as per the ready reckoner rates and worked out the LTCG at Rs. 6,43,56,086/-. On appeal, the CIT(A) not finding favour with the reading of the deeming provisions of Sec. 50C for working out the LTCG u/s 45(3) by the A.O, vacated the addition made by him. Our indulgence has been sought by the revenue, to adjudicate, as to whether the view taken by the CIT(A) is sustainable in the eyes of law, or not. On a perusal of Sec. 45(3), we find that the same provides that for the purpose of Sec. 48, the amount recorded in the „books of account" of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset. On the other hand, Sec. 50C provides, that where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any 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 purpose of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer. As observed by us hereinabove, both of the aforesaid statutory provisions i.e Sec. 45(3) and Sec. 50C envisages a deeming provision for the purpose of adopting the „full value of consideration" received or accruing as a result of transfer of the "capital asset", in order to work out the „capital gain" in the hands of the assessee. In our considered view, the deeming provisions of Sec. 45(3) would be rendered as otiose and the working of the said statutory provision would stand jeopardised, in case, the deeming provisions of Sec. 50C are allowed to be transposed and read into the same. For the purpose of resolving the controversy involved, it would be relevant to consider the circumstances which had led to insertion of Sec. 45(3) on the statute w.e.f 01.04.1988. As can be gathered from a perusal of CBDT Circular No. 495, dated 22.09.1987 (para 24.1), Sec. 45(3) was made available on the statute in order to overcome the problem of income going untaxed due to the decision of the ***Hon'ble Supreme Court*** *in the case of* ***Kartikeya V. Sarabhai Vs. CIT (1997) 94 Taxman 164 (SC)****. As per the Hon'ble Apex Court, the capital gain could not be computed in respect of a transaction of contribution of capital asset by a partner in the firm since the value of consideration could not be determined. It was observed by the Hon'ble Apex Court, that the amount credited in the partners capital account in the books of the partnership firm did not represent the true value of consideration, as it was only a notional value intended to be taken into account at the time of determining the value of the partners share in the net partnership assets on the date of dissolution or his retirement. Accordingly, it was only with the introduction of Sec. 45(3), the notional value of the asset recorded in the „books of account" was deemed as the "full value of consideration" for the purpose of computing the*

capital gain under Sec. 48, and the aforesaid transactions which were earlier going untaxed were made taxable. Although, the Hon'ble Apex Court in the case of Kartikeya V. Sarabai (supra) had observed that the amount of consideration which accrued in case of contribution of a capital asset to a firm by a partner is indeterminable, however, the same as observed by us hereinabove was deemed to be determined only pursuant to insertion of Sec. 45(3) on the statute. As observed by the ***Hon'ble Supreme Court*** *in the case of* ***G. Viswanathan Vs. Speaker Tamil Nadu Legislative Assembly (1996) 2 SCC 353****, a deeming provision is an admission of the non-existence of the fact deemed. It was held by the Hon'ble Apex Court, that the legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. On the basis of our aforesaid observations, it can safely be concluded that the provisions of Sec. 45(3) deem the value recorded in the „books of accounts" as the full value of consideration (which is otherwise not), in order to make the transaction taxable. As observed by us hereinabove, Sec. 45(3) comprises of two limbs, viz. (i). the first limb, is the charging section which enables the levy of capital gains tax on the profits or gains arising on the transfer of a „capital asset" by a partner as its capital contribution in a firm or other association of persons or body of individuals; and (ii). the second limb, is a deeming fiction which enables adoption of the amount recorded in the „books of accounts" of the firm or other association of persons or body of individuals, as the "full value of consideration" received or accruing as a result of the transfer of the capital asset. As can be gathered from a perusal of Sec. 45(3), the „charging" of the transaction therein envisaged to levy of capital gain tax and quantification of such tax, both go hand in hand for facilitating quantification of the capital gains tax. Now, in case the quantification of the capital gain tax as envisaged in Sec. 45(3) is substituted by Sec. 50C, then, in our considered view, the charging to tax of the transaction under consideration would in itself stand jeopardised and the section would be rendered as inoperative. In sum and substance, the provisions of Sec. 45(3) cannot be substituted. In other words, the deeming of the amount recorded in the „books of accounts" of the firm or other association of persons or body of individuals, as the "full value of consideration" received or accruing as a result of the transfer of the capital asset in Sec. 45(3), cannot be dissected and the charging provision therein provided be allowed to subsist in isolation. As such, we are of a strong conviction, that the deeming of the amount recorded in the „books of accounts" of the firm or other association of persons or body of individuals, as the "full value of consideration" received or accruing as a result of the transfer of the capital asset in Sec. 45(3), cannot be substituted by the deemed sale consideration contemplated in Sec. 50C of the Act. Apart there from, we find that as per the Latin maxim generallia speciali bus non derogant, which is a rule of construction, the special provisions prevail over the general provisions. In fact, the* ***Hon'ble Supreme Court*** *in the case of* ***D.R Yadav Vs. R.K Singh (2003) 7 SCC 110****, had observed, that where there are two conflicting provisions of law in operation in the same field, the rule that specifically operates in that field would apply over the general rule. In the backdrop of our aforesaid observations, we are of a strong conviction that in case the legislature in all its wisdom would had intended to apply the deeming provisions of Sec. 50C to the transactions contemplated in Sec. 45(3) of the Act, then it would have removed Sec. 45(3) from the Act. Having not so done, we are of the considered view, that the deeming provisions of Sec. 50C cannot be transposed and therein be read into Sec. 45(3) of the Act, as the same would frustrate the very chargeability to tax of the transactions therein provided. Our aforesaid view is fortified by the orders of the coordinate bench of the* ***ITAT, "C" Bench, Mumbai*** *in the case of* ***ITO- 21(2), Mumbai Vs. M/s Chirayu Estate & Developer Pvt. Ltd. [ITA No. 263/Mum/2010; dated 24.08.2011]*** *and that of* ***ITAT, "B" Bench, Chennai*** *in the case of* ***Shri Sarrangam Ashok Vs. the Income-Tax Officer, Chennai [ITA No. 544/Chhny/2019]****. In the case of ITO- 21(2), Mumbai Vs. M/s Chirayu Estate & Developer Pvt. Ltd., it was observed*

by the Tribunal, that once the price recorded in the joint venture"s books was treated as full value of consideration, the substitution of any value so as to make addition under section 45(3) would not be permissible. It was observed by the Tribunal, as under:

> *"14. A plain reading of the said provision would reveal that the profits or gains arising from the transfer of a capital asset to another entity by way of capital contribution or otherwise shall be chargeable to tax. The profit or gain would arise only when the transfer has been made at a price which is more than the cost price and the difference between the cost price and amount at which transfer has taken place can be charged under section 45(3). In the instant case the purchase price of land as recorded in the transferor's book and recorded in the books of the joint venture are the same. As per provisions of section 45(3) price of land recorded in the books of joint venture is required to be considered as receipt of full value of consideration received or accrued as a result of transfer of capital assets. Once the price recorded in the joint venture's books is treated as full value of consideration, the provisions do not permit substitution of any value so as to make addition under section 45(3). In fact the approach of the A.O. is also not correct in the sense that under section 45(3) once the full value of consideration is taken as the amount recorded in the books of the joint venture, the capital gain can be worked out by reducing the cost of purchase as per the books of assessee. In case the A. O. substitutes the cost of purchase, by whatever means, then that cost price has to be adjusted in the capital gains. This may result in a loss of equal amount as the books of joint venture show the book value as consideration and substituted cost price (value determined by AO in the order) as a deduction. This working would result in a loss but not a gain. This simple arithmetic calculation was missed by the A.O and he made the addition under section 45(3) which does not permit him to substitute the full value of consideration other than the amount recorded in the books of account of the joint venture. As the Assessing Officer's action is not according to the provisions of Sec 45(3), there is no justification or upholding the contentions of Revenue. We uphold the order of the CIT(A) and reject the ground of appeal."*

We thus, in terms of our aforesaid observations, and also finding ourselves to be in agreement with the view taken by the aforesaid coordinate benches of the Tribunal, are of the considered view that the CIT(A) had rightly vacated the addition of Rs. 4,21,02,957 that was made by the A.O by substituting the market value of the property as per the ready reckoner rates u/s 50C, as against the amount recorded in the „books of accounts" of the respective firms, which was adopted by the assessee as the "full value of consideration" received or accruing as a result of the transfer. Accordingly, finding no infirmity in the order of the CIT(A) to the said extent, we uphold the same. ***Grounds of appeal Nos. 1 & 2*** *are dismissed.*

3.3. Respectfully following the same, the grounds raised by the Revenue are dismissed.

4. In the result, appeal of the Revenue is dismissed.

Order pronounced on 16/08/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 16/08/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai