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

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.1078/Mum/2021
(**Assessment Year :2015-16**)

M/s. Shivalik Ventures Private Limited Unit No.4,5 & 6, Gr. Floor New Udyog Mandir 2, Mogul Lane Mahim West Mumbai – 400 016	Vs.	DCIT CC 4(2), Mumbai Room No.1918, Air India Building, Nariman Point Mumbai – 400 021
PAN/GIR No.AALCS7683R		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Vijay Mehta
Revenue by	Shri Brajendra Kumar
Date of Hearing	**12/07/2022**
Date of Pronouncement	**14/07/2022**

आदेश / O R D E R

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

This appeal in ITA No.1078/Mum/2021 for A.Y.2015-16 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-52, Mumbai in appeal No.CIT(A)52, Mumbai/10496/2017-18 dated 16/03/2021 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/12/2017 by the ld. Dy. Commissioner of Income Tax, Central Circle-4(2), Mumbai (hereinafter referred to as ld. AO).

2. The only issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the addition made u/s 43CA of the Act in the sum of Rs 30,75,000/- in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record. We find that the assessee company is engaged in the business of development of commercial complexes and rehabilitation under SRA scheme. The return of income for the Asst Year 2015-16 was electronically filed by the assessee company on 30.9.2015 declaring total income of Rs 1,05,58,880/-. The ld. AO observed that assessee had sold its property held as stock in trade during the year under consideration for Rs 14 crores, for which the corresponding value determined by the stamp valuation authority for the purpose of levy of stamp duty was Rs 18,20,72,500/-. The assessee duly objected to the adoption of the stamp duty value as sale consideration in view of the fact that the same did not reflect the fair market value of the property. We find that the assessee had requested the ld. AO to refer the matter to ld. Departmental Valuation Officer (DVO in short) for determination of fair market value in accordance with provisions of section 43CA(2) of the Act. The ld. DVO vide his report dated 26.12.2017 determined the fair market value of the subject mentioned property at Rs 14,30,75,000/-. Since there was a difference of Rs 30,75,000/- between the DVO value and the sale consideration reported by the assessee, the ld. AO brought to tax the differential sum of Rs 30,75,000/- to tax by applying the provisions of section 43CA of the Act. This action of the ld. AO was upheld by the ld. CIT(A).

4. We find that the aforesaid facts are not in dispute. We find that the difference of Rs 30,75,000/- represent only 2.19% when compared to the

sale consideration reported by the assessee. We find that the statute had introduced a proviso to section 43CA(1) of the Act wherein the tolerance band of 5% is provided. If the value determined by the ld. DVO or by the stamp valuation authority does not exceed 105% of value reported by the assessee, then no addition need to be made and the consideration reported by the assessee need to be accepted. Though this proviso is introduced by the statute by the Finance Act,2018 with effect from 1.4.2019 (i.e Asst Year 2019-20 onwards) , the same has been held to be retrospective in operation by the decision of co-ordinate bench of this tribunal in the case of Maria Fernandes Cheryl vs ITO reported in 123 taxmann.com 252 (Mum Trib). In the said decision, this tribunal after considering the various decisions and the CBDT Circular No. 8 of 2018 dated 26.12.2018 had held that the amendment is retrospective in nature and relates back to the date of insertion of section 50C of the Act. It is not in dispute that the provisions of section 50C and section 43CA are pari material as the former deals with capital asset and latter deals with stock in trade. Hence the decision rendered in the context of section 50C of the Act would apply with equal force to section 43CA of the Act also. The relevant operative portion of the judgement of Maria Fernandes Cheryl supra is reproduced below:-

> ***7.*** *These submissions, however, do not impress us. As noted by the Central Board of Direct Taxes circular # 8 of 2018, explaining the reason for the insertion of the third proviso to Section 50C(1), has observed that "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 the shape of the plot or location". Once the CBDT itself accepts that these variations could be on account of a variety of factors, essentially bonafide factors, and, for this reason, Section 50C(1) should not come into play, it was an "unintended consequence" of Section 50(1) that even in such bonafide situations, this provision, which is inherently in the nature of an anti-avoidance provision, is invoked. Once this situation is sought to be addressed, as is the settled legal position- as we will see a little later in our analysis, this situation needs to be addressed in entirety for the entire period in which such legal provisions had effect, and not for a specific time period only. There is no good reason for holding the curative amendment to be only as prospective in effect. Dealing with a somewhat materially identical situation in*

the case of Rajeev Kumar Agarwal v. Addl. CIT [2014] 45 taxmann.com 555/149 ITD 363 (Agra) wherein a coordinate bench was dealing with the question whether insertion of a proviso to Section 40(a)(i) to cure intended consequence could have retrospective effect, even though not specifically provided for, and speaking through one of us (i.e. the Vice President), the coordinate bench had, after a detailed analysis of the legal position, observed that, "Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced". Referring to this decision, and extensively reproducing from the same, including the portion extracted above, Hon'ble Delhi High Court, in the case of CIT v. Ansal Landmark Township (P.) Ltd. [2015] 61 taxmann.com 45/234 Taxman 825/377 ITR 635 (Delhi), has approved this approach and observed that "the Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance". The same was the path followed by another bench of this Tribunal in the case of Dharamashibhai Sonani v. Asstt. CIT [2016] 75 taxmann.com 141/161 ITD 627 which has been approved by Hon'ble Madras High Court in the judgment reported as CIT v. Vummudi Amarendran [2020] 120 taxmann.com 171/429 ITR 97]. The question that we must take a call on, therefore, is as to what is the rationale behind the insertion of the third proviso to section 50C(1), and if that rationale is to provide a remedy for unintended consequences of the main provision, we must hold that the third proviso to section 50C(1) comes into force with effect from the same date on which the main provision, unintended provisions of which are sought to be nullified, itself was brought into effect. Let us understand what the nature of the provisions of section 50C is. In terms of this provision, if the property is sold below the stamp duty valuation rate, which is often called circle rate, this stamp duty valuation report is assumed as sale consideration for the property in question, and, accordingly, capital gains tax is levied. This deeming fiction to substitute apparent sale considerations by notional consideration computed on the basis of a stamp duty valuation rate, was thus to address the issue with respect to potential evasion of taxes by understating the sale consideration amount in a sale deed. As noted by the CBDT, while explaining the justification for insertion of section 50C, "(t)he Finance Act, 2002, has inserted a new section 50C in the Income-tax Act to make a special provision for determining the full value of consideration in cases of transfer of immovable property". Section 50C, thus, on a conceptual note, is a provision to address capital gains tax evasion on account of understatement of the consideration. Of course, the law provides, under section 50C(2), that wherever an assessee claims that the actual market rate is less than the stamp duty valuation, he can have the matter referred to a Departmental Valuation Officer for the ascertainment of the market value, but then it is a cumbersome procedure and, at the end of the day, every valuation, whether by the departmental valuation officer or under the stamp duty valuation notification, is an estimate, and there can always be bonafide variations, though

to a certain limited extent, in these estimations. Unless, therefore, some kind of a tolerance band or a safe harbour provision, in respect of such bonafide variations, is implicit in the scheme of law, the assessees are bound to face undue hardships. The mechanism under section 50C proceeds on the assumption that when the sale consideration is less than the stamp duty valuation, the sale consideration is to be treated as understated. This assumption is, however, laid to rest when the variations between the stated consideration and the stamp duty valuation figure are treated as explained. 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 is 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.*

5. We find that the proviso to section 43CA(1) of the Act has been inserted and subsequently the tolerance band limit has been enhanced to 10% to mitigate the hardship of genuine transactions in the real estate sector.

6. In view of the aforesaid observations and respectfully following the judicial precedent relied upon hereinabove, we have no hesitation in directing the ld. AO to delete the addition made in the sum of Rs

30,75,000/- u/s 43CA of the Act in the facts and circumstances of the instant case. Accordingly, the Ground No. 1 raised by the assessee is allowed.

7. The Ground No. 2 raised by the assessee was stated to be not pressed at the time of hearing by the ld. AR. The same is reckoned as a statement made from the Bar and hence dismissed as not pressed.

8. The Ground No. 3 raised by the assessee is general in nature and does not require any specific adjudication.

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

Order pronounced on 14/07/2022 by way of proper mentioning in the notice board.

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

Mumbai; Dated 14/07/2022
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,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai