

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, PUNE

**SHRI R.S. SYAL, VICE PRESIDENT AND
PARTHA SARATHI CHAUDHURY, JM**

ITA No. 1332/PUN/2019 : Assessment Year : 2015-16

Sai Bhargavanath Infra
Plot No. 17, Sr. No. 16, Bhargav House
Sinhagad Road, Hingne Khurd,
PUNE – 411 051

PAN: ACBFS 9830 K

:Appellant

Vs.

The Asstt. Commissioner of Income-tax
Circle 6, Pune.

: Respondent

Appellant by : Shri Suhas Bora
Respondent by : Shri Arvind Desai

Date of Hearing : 11-08-2022

Date of Pronouncement : 17-08-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the order of the Id. CIT(A)-4, Pune dated 09-07-2019 for A.Y. 2015-16 as per the grounds of appeal on record.

2. The brief facts in this case are that the assessee filed its return of income on 27-09-2015 declaring total income of Rs. 47,17,490/-. The assessee is a builder and developer. Assessment order was passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") assessing total income at Rs. 66.76,365/-. In the assessment order, the A.O made an addition of Rs. 19,58,875/- u/s 43CA of the Act being the difference between sale value of the flats sold and the stamp duty value of the same. It was contended by the assessee that stamp value was at uniform rate without taking into consideration the peculiar features of a particular property. It was also contended that the

A.O has ignored the fact that the difference of Rs. 19,58,875/- was less than 10% and therefore, not required to be added.

3. Section 43CA of the Act provides that where a consideration received or accruing as a result of the transfer by an assessee of an asset other than the 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 difference will be taxed as deemed income. In this case, the assessee had sold 10 flats for a consideration of Rs. 43,32,266/- which is lower than the stamp duty value of the flats of Rs. 43,67,500/-. Therefore, the A.O added the difference of Rs. 19,58,875/- u/s 43CA of the Act. Apart from reiterating the submissions made before the revenue authorities, the Id. A.R submitted before us that when the difference in the sale value shown by the assessee and the D.V.O's report is less than 10% then the addition is not warranted. In this regard, he has placed reliance on the decision of Pune Tribunal in IT No. 923/PUN/2019 for A.Y. 2016-17, order dated 04-08-2022. The Id. A.R also submitted that in assessee's own case in ITA No. 2417/PUN/2017 for A.Y. 2014-15, the Tribunal on the very similar issue had remanded the matter back to the file of the A.O for fresh adjudication .

4. We observe from plain reading of sec. 43CA that it provides in a case where consideration received or accruing as a result of the transfer by an assessee of an asset other than the capital asset being land or building is lesser than the value adopted or assessed by any Government authority for the purpose of payment of stamp duty then the difference will taxed as deemed income. At the same time, the proviso to this section states that if there is a difference of such value within 10% margin then there cannot be any addition

on the pretext of deemed income and this 10% margin has been inserted by Finance Act, 2020 w.e.f. 1-4-2021. The assessment year under consideration before us is A.Y. 2015-16 which is prior to the date when the amendment took place and such 10% margin was inserted. The question therefore, arises whether this amendment effective from 1-4-2021 can even apply to prior assessment years as well. The assessee had relied on Pune Tribunal decision in ITA No. 923/PUN/2019 (supra) where the Tribunal has given retrospective effect in regard to section 43CA first proviso where the tolerance margin of 10% has been held to be applicable even for the prior assessment years. However, in this decision, reliance was placed on another decision of Bombay Tribunal in the case of Maria Fernandes Cheryl Vs ITO (2021) 187 ITD 738 (Mum) which relates to section 50C of the Act. It was contended that section 43CA and section 50C of the Act are pari materia provisions and therefore, holding of retrospective application of section 50C is even applicable making retrospective application to section 43CA of the Act as well. The Id. A.R was unable to place on record before us any direct decision where the first proviso of section 43CA which has been brought into effect from 1-4-2021 was held to be applicable retrospectively. In such scenario, we place reliance on the doctrine enshrined in the judgment of the full bench decision of Hon'ble Supreme Court in the case of CIT Vs. Vatika Township Pvt. Ltd. (2014) 367 ITR 466 (SC). The fact in this case was that search and seizure u/s 132 was conducted on 10-2-2001 pursuant to which the assessment order for the block period from 1-4-1989 to 10-2-2000 was passed on 28-02-2002 at a total undisclosed income of Rs. 85,00,000/-. The tax was charged as prescribed in section 113 of the Act. Subsequently, a proviso was inserted u/s 113 by the Finance Act, 2002 w.e.f. 01-06-2002 to provide for levy of surcharge at 10%. The A.O took the view that the said amendment was clarificatory in nature and he levied surcharge by

passing rectification order u/s 154 of the Act. However, the Tribunal and the Hon'ble High Court upheld the assessee's claim that the said amendment was prospective in nature and did not apply to block period falling before 01-06-2002. However, the plea of the assessee was rejected by the Hon'ble Supreme Court in CIT Vs. Suresh N. Gupta (2008) 297 ITR 322 (SC) also held that the proviso to section 113 is clarificatory and hence, should be read into block assessment scheme under Chapter XIV-B with retrospective effect. Similar view was reiterated by the Hon'ble Supreme Court in CIT Vs. Rajiv Bhatara (2009) 310 ITR 105 (SC) by holding the proviso u/s 113 to be retrospective in nature. Then the Supreme Court was of the view that the issue ought to be referred to a larger Bench of Five Judges. In this decision, the Hon'ble Supreme Court has given fundamental doctrine of retrospective applicability of provision. It has been held that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act or arises by necessary and distinct implication. The assessment creates a vested right on the assessee. The assessee cannot be subjected to re-assessment unless the provision to that effect is inserted by amendment either retrospectively or by necessary implications retrospectively. The Hon'ble Apex Court also opined that there cannot be any imposition of tax without the authority of law and such law has to be unambiguous and should prescribe liability to pay taxes in clear terms. This very principle is based on the doctrine which means that if a particular provision of statute is not clear regarding imposition of tax or because of persons from whom the tax has to be collected, in such case the persons should not be fastened with any liability to pay tax. It was further observed that though the Chief Commissioner in their Conference suggested that there should be retrospective amendment to section 113 of the Act, the Legislature chose not to do so even though for other

provisions in which the legislature in its wisdom felt the need to do so has brought in amendments made with retrospective effect. The CBDT circular No. 2002 dated 27-08-2002 also makes it clear that the amendment to section 113 is prospective. Consequently, the conclusion reached in Suresh Gupta (297 ITR 322) (supra) treating the proviso to section 113 of the Act as clarificatory and having retrospective effect was held to be incorrect and was over-ruled.

6. The essence of the decision is that if any liability has to be fastened with the assessee tax-payer retrospectively then the statute and the provision must spell out specifically regarding such retrospective applicability. However, if the provision is beneficial for the assessee, in view of the welfare legislation spirit imbibed in the Income-tax Act, such beneficial provision can be applied in a retrospective manner. In the case of the assessee before us for the preceding assessment year i.e. A.Y. 2014-15, the difference of the consideration received from transfer of asset and the value adopted for stamp duty valuation was apparently not less than 10% tolerance margin which has been brought into effect from 1-4-2021 in the first proviso to section 43CA and therefore, the Tribunal in its wisdom had restored the matter to the file of the A.O for fresh adjudication (supra). Before us, admittedly such difference of tolerance margin is less than 10%. Now the question of applicability of this proviso of section 43CA retrospectively covering the assessment year in question i.e. A.Y. 2015-16, from the spirit of Supreme Court decision in Vatika Township Pvt. Ltd. (supra)'s case is analysed. Now, the intent of the legislature is to provide relief to the assessee in case such difference is less than 10% which has been brought into effect from 01-04-2021 thereby providing benefit to the assessee. This being the beneficial provision therefore will even have retrospective effect and would apply to the present assessment year 2015-16. At this juncture we

would also refer to the decision of Pune Tribunal in ITA No. 1503/PUN/2015 for A.Y. 2011-12 dated 25-1-2019 in the case of Shri Dinar Umeshkumar More Vs. ITO Ward 3(3) Malegaon, where the said proposition of applicability of a beneficial provision was considered in light of Hon'ble Apex Court decision in the case of Vitika Township Pvt. Ltd. (supra). In the said Tribunal order, the Bench observed that if the legislature is going to confer a benefit then such an averment will have a retrospective effect. The Tribunal observed that while discussing this issue in para 33 of the said judgment, the Hon'ble Apex Court held that "We would also like to point out, for the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect". The net effect of this judgment is that if a fresh benefit is provided by the Parliament in an existing provision, then such an amendment should be given retrospective effect. Therefore, even without going into the merits of the case by the application of first proviso to section 43CA having retrospective effect, the grounds of appeal of the assessee stands allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on this 17th August 2022.

Sd/-
(R.S. SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, this 17th day of August 2022
Ankam

ITA No. 1332/PUN/2019
Sai Bhargavnath Infra
A.Y. 2015-16

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CCIT, Pune.
4. The CIT(A)- NFAC, Delhi
5. The D.R. ITAT 'B' Bench Pune.
6. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

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		Date	
1	Draft dictated on	11-08-2022	Sr.PS
2	Draft placed before author	16-08-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on	17-08-2022	Sr.PS/PS
7	Date of uploading of order	17-08-2022	Sr.PS/PS
8	File sent to Bench Clerk	17-08-2022	Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		