

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H", MUMBAI  
BEFORE SHRIVIKAS AWASTHY, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
**ITA No. 7073/Mum/2019 (A.Y. 2014-15)**

Seema Promoters and Builders Pvt. Ltd.  
Shop No.8, Nirman Plaza Society,  
Station Road, Narman Nagari,  
Neral, Raigad, Maharashtra-410101.

**PAN: AAMCS7221A**

..... Appellant

Vs.

Dy.CIT, Panvel Circle  
3<sup>rd</sup> Floor, Trifed Tower,  
Opp. Khanda Colony,  
New Panvel-410206.

..... Respondent

Appellant by	:	Sh. Vasudev Ginde & Kumar Kale,
Respondent by	:	Sh. Manoj Sinha
Date of hearing	:	08/07/2022
Date of pronouncement	:	03/10/2022

**ORDER**

**PER GAGAN GOYAL, A.M:**

This appeal by the assessee is directed against the order of Ld. Commissioner of Income Tax (Appeals)-2, Thane [hereinafter referred to as ['CIT(A)'] dated 30.09.2019 passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ['the Act'] for the Assessment Year (AY) 2014-15. The assessee has raised the following grounds of appeal:

*“Being aggrieved by the order dated 30.09.2019 passed by the learned Commissioner of Income Tax (Appeals 2, Thane (“Ld. CIT(A)” u/s 250 of the Income-tax Act, 1961 (Act”), your appellant prefers this appeal, among others, on the following grounds of appeal, each of which is without prejudice to, and independent of, the other*

*1.1 On the facts and in the circumstances of the case, and also in law, the Ld. CIT(A) erred in confirming the addition of Rs.4,52,40,600/- made by the Ld. AO by invoking provisions of Section 43CA of the Act in regard to certain registered Cancellation Deeds executed by the appellant for cancelling the earlier purchase transactions of the plots of agricultural land.*

*1.2 The Ld. CIT(A) thus failed to appreciate, and ought to have held, that these Cancellation Deeds did not involve any transfer as envisaged under section 43CA of the Act since the earlier purchase transactions themselves were ab initio void, and illegal as per the provisions of Section 6h) of the Transfer of Property Act, 1882 read with Section 23 of the Indian Contract Act, 1872 and Section 63(1) of the Maharashtra Tenancy and Agricultural Lands Act, 1948.*

*Your appellant, therefore, prays that the addition of Rs.4,52,40,600/- be deleted.”*

2. Brief facts of the case are that the assessee-company is engaged in the business as Builder/promoter of residential and commercial complexes at Neral e-filed its return of income on 28.11.2014 declaring total income at Rs. 29,72,720/-.

3. During the assessment proceedings it is seen that assessee has sold some immovable property. It was seen that there is a substantial difference between the market value and the agreement value in respect of these transactions. The same is summarised as under:

Sr.No.	Date of Sale	Market Value	Agreement Value	Difference
(i)	24.12.2013	73,79,500	7,00,000	66,79,500
(ii)	10.01.2013	47,73,000	6,48,000	41,25,000

(iii)	24.12.2013	59,39,000	8,01,000	51,38,000
(iv)	24.12.2013	56,23,100	6,00,000	50,23,100
(v)	31.12.2013	40,75,200	3,87,000	36,88,200
(vi)	24.12.2013	33,70,000	4,80,000	28,90,000
(vii)	31.12.2013	73,16,300	7,00,000	66,16,300
(viii)	24.12.2013	36,64,500	3,50,000	33,14,500
(ix)	31.12.2013	34,62,300	4,50,000	30,12,300
(x)	10.10.2013	54,53,700	7,00,000	47,53,700
(xi)	11.04.2013	46,06,500	46,06,500	0
Total Difference				4,52,40,600

4. Through a show cause assessee was asked as to why the amount of difference amounting to Rs 4,52,40,600/- shouldn't be added u/s 43CA, in response to this show cause assessee submitted as under:

*"Further to our personal discussion, we submit following further details as requested by you.*

*Explanation for transactions reflected in Annual Information Return:*

*There are certain transactions which are reflected in the AIR of the company. After going through the same, it was observed as follows: In the earlier year, relevant to assessment year 2011-12, one of the directors, Mr. Yogesh Joshi has entered into the transaction, through registered agreement, with the assessee company, through which some plots of lands were taken over by the assessee company. The said plots of lands were purely the agricultural lands which were beyond 8 kilometres of municipal limits.*

*However, since there was no development in the area, Company could not develop said plots. In the year, relevant to assessment year 2014-15, when company thought of developing said plots of lands, came to know that there are certain discrepancies*

*due to which assessee company cannot develop the said plots. Even company cannot sell those plots as it is.*

*“Therefore the assessee-company again entered into the transaction through registered agreement for cancellations of those agreements which were entered into, in the year, relevant to the assessment year 2011-12.*

*Therefore, in principle, the transactions which are appearing in AIR, are cancellations deeds. There is no actual sale of said plots. The agreements entered in the year 2011-12, were nullified /cancelled by the agreements entered into in the year relevant to assessment year 2014-15.*

*Additionally, both Mr. Yogesh Joshi, in the year relevant to the assessment year 2011-12, & assessee-company, in the year, relevant to assessment year 2014-15 paid heavily towards stamp duty & registration charges for these transactions, which were entered in to through registered agreements.*

*We enclose herewith copies of these agreements for your perusal.*

*We hope the above explanation clarifies the situation. If you require any further explanation, we would be glad to submit the same”*

5. AO was not convinced with the factual submissions and still relied over the provisions of sec 43CA in isolation without considering the facts of the case. Being aggrieved with the order of AO assessee preferred an appeal before the Ld. CIT(A)-2 (Thane). Version of order Ld. CIT(A) is reproduced as under:

*“6. I have carefully considered facts of the case, findings of the AO in the assessment order, submission of the AR, decisions of various courts relied upon by the AR and material placed on record. In this case the AO after considering the factual and legal position held that the difference in market value and agreement value has to be added to the income of the seller and there is no case of exemption from the same. Accordingly the AO added difference of Rs 4,52,40,600/- to the income of the assessee.*

*6.1 During appellate proceedings the AR contended that the appellant was under mistaken belief that since its Memorandum of Association, inter alia, contained a clause enabling the appellant company to acquire agricultural land and that its directors are agriculturists, it was permitted to acquire agricultural land, without*

*any permission from the competent authority. It is further contended that later on when it became clear to the appellant that under the law agricultural land can be acquired only by an agriculturist, and no one else, it realised that it would not be possible for the appellant to either develop the said plots, nor could the appellant sell the same to anyone. In fact, the purchase of agricultural land itself was illegal and void. Consequently, the original purchase transaction was to be cancelled by the parties. Since the purchase was made by a registered document, it was necessary for the parties to execute and register the Cancellation Deed to cancel the earlier purchase transactions. It is under these circumstances, the Cancellation Deeds came to be executed and registered by the appellant, which are reported in the AIR data.*

*6.2 The AR after quoting relevant provision of Section 43CA of the Income Tax Act stated that the following essential ingredients are to co-exist for the provisions of Sec 43CA to be attracted (a) The 'consideration is either received by, or is accrued to, the assessee; (b) The 'consideration' results out of a "transfer by the assessee of an asset (other than a capital asset), being land or building or both; and (c) The 'consideration' is less than the value adopted for the purpose of stamp duty in respect of such 'transfer. It was contended that in the instant case, what the appellant received is not any consideration' for any 'transfer', but it is the return of the very same consideration that paid by it to the sellers, as a result of cancellation of earlier transaction that was not aw. Hence, it is submitted that the vital ingredients are missing in the appellant's case, and consequently, provisions of section 43CA of the Act do not apply.*

*6.3 Likewise after quoting relevant provisions of Section 63(1) of the Maharashtra Tenancy and Agricultural Land Act, stated that the aforesaid provision prohibits any sale, gift, exchange or lease of any agricultural land to a non-agriculturist. Accordingly it was contended that the appellant being a company, and not an agriculturist, purchase of agricultural land by it was in violation of the statutory provisions of Section 63(1), and hence, the purchase transaction itself was illegal and void in law. Therefore, even though the appellant purchased these agricultural lands by registered sale deeds, no title could legally vest in the appellant. It was further contended that since the appellant never got any legal title in the lands under reference, the appellant cannot "transfer the title to any other person, that which does not vest in it as per the law.*

*6.4 Now, let us see the facts as per the documents placed on record. The Appellant has translated one Sale Deed for one parcel of land as an example and I shall analyze that Sale Deed and Cancellation of Sale Deed. The exemplary Sale Deed has*

*been executed on 21.10.2010 between Shri Vijay Sudam Kadav and M/s Seema Promoters and Builders Pvt. Ltd (appellant), through its director Mrs Seema Yogesh Joshi. The first line of this Sale Deed states "this Sale Deed is executed between Vendors and Purchasers, both farmers in respect of permanent sale-purchase of immovable property which is agricultural property". This Sale Deed is duly registered before Sub-Registrar of Karjat and the Special Executive Magistrate and the same has been notarized by a Notary registered with the Government of Maharashtra. The Sale Deed has been duly witnessed, etc and the Sale Deed has been executed for Rs. 7,00,000/- only. Hence, the veracity of the Sale Deed cannot be doubted.*

*6.5 In the cancellation of instrument of Sale Deed or the cancellation of Deed of the same land, it is seen that the parties to the transaction are the same. The Sale Deed has been cancelled by stating the reason as-"Due to oversight in the said Sale Deed executed between both the parties, the description of the property has been wrongly mentioned. The property described in the said document and the property being seen at sight is having Discrepancies in land transfer of the properties. Therefore, the second party is not in a position to use the same and in future also they cannot use the same. Hence there is no possibility to succeed in aim for which the said property was purchased by the second party. In short, the said property is not usable to the second party. Hence the second-party has put the proposal before the first party to return the said property with all rights. The first party has accepted the proposal by considering the difficulty of the second party.*

*Accordingly, both the parties are cancelling the aforesaid Sale Deed which was executed between them." The same has again been stamped before the Sub-Registrar of Karjat and has been notarized by the Government of Maharashtra. The same has also been witnessed. Hence, the veracity of this document, too, cannot be doubted.*

*6.6 Now, it is seen that both the Sale Deed and the Cancellation of Sale Deed are true and proper documents are notarized in the Government of Maharashtra Stamp Duty has been paid in both the cases. In the Cancellation Deed, nowhere has it been mentioned that the Deed is cancelled because the appellant was not eligible to buy the agricultural land in the first place. However, as quoted above, the reason for cancellation has been stated as there is discrepancy in the property. Moreover, it has been clearly stated in the Cancellation of Sale Deed that "second party has put the proposal before the first party to return the said property with all rights". Hence, the argument of the AR that the appellant was never an owner of land and hence the transfer is invalid, is not logical, therefore, cannot be accepted. As per the legal*

*documents placed during the course of assessment proceedings and also placed before me, it is seen that transfer back of land has taken place from the appellant to the original seller of the land, after more than 2 years of being held at a consideration of Rs. 7,00,000/-. Hence, as per the Section 43CA of the I.T. Act, 1961 there has been both, a consideration and a transfer, in the transaction of this land. Therefore, the provisions of Section 43CA of the I.T. Act, 1961 are attracted in case of the appellant, the addition is therefore, confirmed.”*

6. We have gone through the order of the AO, order of the Ld. CIT(A) and submissions of the assessee along with the paper-book. We observed that assessee company had entered into an agreement with Mrs. Seema Yogesh Joshi one of the directors for purchase of some agricultural plots. It was further observed with reference to these agricultural plots that there was no development in the area and assessee couldn't develop the said plots. Details of plot purchased with date of cancellation, name of the party, purchase consideration/consideration return on cancellation, description of the property are placed on pg-1 of the paper -book. It is further observed that the land purchased by the assessee company was of the nature of agricultural land and as per law in force in the state of Maharashtra agricultural land can be purchased only by an agriculturalist. Assessee was of a wrong belief that a company having agriculturalist as share holder and director of the company can buy an agricultural land for further development in housing and commercial arena.

7. Not only this, the assessee company being a non-agriculturalist can't even sale further to any third party. Above all even this purchase of agricultural land by the assessee company from its agriculturalist director/shareholder is void *ab-initio*. In the given situation the only option available to the assessee company is to reverse the transaction with the original sellers.

8. As per paper-book submitted with us the transaction of purchase of the property were duly registered vide pg no-2-11, 22-32,49-59, 75-85,98-108, 127-137, 155-165, 178-188, 206-216, 229-241 and 259-268 of the paper-book. Hence even the cancellation of above-mentioned purchases has to be done through a registered cancellation deed. These registered cancellation deeds we have gone through are in the nature of reverse of purchase transactions entered earlier. In these cancellation deed all the relevant facts pertaining to purchase and non-usable feature to the buyer was clearly mentioned along with consideration. Based on these facts only assessee-company entered into this transaction of cancellation of earlier purchase transactions. These cancellation deeds wrongly picked as sale deed by the ITS and consequently AO also initiated action u/s 43CA. The details of cancellation deeds we relied upon are given vide pg no-12-21, 33-47,60-72,86-96, 109-125, 138-153, 166-176, 189-204, 217-227, 242-257 and 269-279 of the paper-book.

9. Sec. 43CA is applicable in the case of transfer of property in addition to other ingredients of the section. In this case what we observed assessee-company inadvertently entered into a transaction of purchase of agricultural land, which was void *ab-initio*. It means assessee was never a lawful owner of the said agricultural land as mentioned supra. When assessee is not an owner of any asset, there can't be any question of transferring the same to someone else whether provisions of sec43CA is complied with or not will be a secondary issue. In this case assessee-company simply rectified its earlier mistake to safe-guard the financial interest of the company and to come out an unlawful transaction entered earlier. For ready reference we are reproducing herein below the

relevant provisions of Maharashtra Tenancy and Agricultural Lands Act 1948 along with relevant provision of contract Act and Transfer of Property Act.

“All the above three ingredients are to co-exist for the provisions of Section 43CA of the Act to be attracted. In the present case, what the appellant received is not any 'consideration' for any transfer, but it is the return of the very same consideration that was paid by it to the sellers, as a result of cancellation of earlier transaction that was not per law. Hence, it is submitted that the vital ingredients are missing in the appellant's case, and consequently, provisions of section 43CA of the Act do not apply.

4.5 In this context, reference is made to Section 63(1) of the Maharashtra Tenancy and Agricultural Lands Act, 1948 ("MTALA"), the relevant part of which is reproduced below for ready reference:

**"Section 63**

*(1) Save as provided in this Act-*

*(a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest therein, or*

*(b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee,*

*shall be valid in favour of a person who is not an agriculturist or who being an agriculturist will after such sale, gift, exchange, lease or mortgage, hold land exceeding two thirds of the ceiling area determined under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 or who is not an agricultural labourer:*

*Provided that the Collector or an officer authorized by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, on such conditions as may be prescribed.*

*[Explanation-For the purpose of this sub-section, the expression "agriculturist" shall include any person and his heirs whose land has been acquired for a public purpose and who as a result of such acquisition has been rendered landless from the date of such acquisition.]"*

The aforesaid provision prohibits any sale, gift, exchange or lease of any agricultural land to a non-agriculturist. The appellant being a company, and not an agriculturist, purchase of agricultural land by it was violative of the statutory provisions enshrined in Section 63(1) referred to above, and hence, the very purchase transaction itself was void in law. Therefore, even though the appellant purchased these agricultural lands by registered sale deeds, the transaction itself being violative of the statute, no title could legally vest in the appellant. It is well settled law that when a contract is contrary to a statutory provision, it is non-est in law; it does not exist in the eyes of law.

In this context, it is useful to refer to the relevant provisions of the Indian Contract Act, 1872 (Contract Act") and the Transfer of Property Act, 1882 (TPA), which are reproduced below:

Section 23 of the Contract Act:

"23. What considerations and objects are lawful, and what not. –

The consideration or object of an agreement is lawful, unless-

it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy."

[Emphasis supplied)

Section 6 of the TPA:

**"Section 6. What may be transferred**

Property of any kind may be transferred, **except as otherwise provided by this Act or by any other law for the time being in force.**

.....

(h) No transfer can be made

(1) insofar as it is opposed to the nature of the interest affected thereby, or

(2) for an unlawful object or consideration **within the meaning of section 23 of the Indian Contract Act, 1872** (9 of 1872), or

**(3) to a person legally disqualified to be transferee."**

[Emphasis supplied]

Section 6 of TPA provides that property of any kind except as otherwise provided by -TPA or by any other law for the time being in force, can be transferred. It is, therefore, essential to test whether the subject matter of transfer falls outside the ambit of the exceptions carved out by that Section in order that there is a valid transfer in law.

Sub-cl. (2) of Clause (h) of Section 6 of TPA, among others, provides that if the object of the transfer is unlawful as per Section 23 of the Contract Act, then such transfer is not permissible. A plain reading of 23 of the Contract Act shows that if the object is forbidden by law or is of such nature that, if permitted, it would defeat the provisions of any law, then that object would be unlawful. As stated above, Section 63(1) of MTALA prohibits any transfer of agricultural land to a non agriculturist. Therefore, where a person transfers any such land to a non agriculturist, it is clearly not permitted by MTALA; it is prohibited by law. Therefore, it would be an unlawful object within the meaning of Section 23 of Contract Act, and hence, transfer would not be permitted under Section 6(h)(2) of TPA. In the appellant's case, purchase of agricultural land is thus not permitted u/s.6(h)(2) of TPA read with Section 23 of Contract Act, further read with Section 63(1) of MTALA. Secondly, if the transfer of agricultural land to a non-agriculturist is permitted, then it would defeat the provision of Section 63(1) of MTALA, and hence, such transfer of property is not permitted under Section 6(h)(2) of TPA.

Similarly, sub-cl. (3) of Clause (h) of Section 6 of TPA does not permit a transfer of any property to a person who is legally disqualified to be the transferee. Section 63(1) of MTALA does not permit a non-agriculturist to acquire any agricultural land, and hence, he is legally disqualified to be a transferee of such land. Therefore, the appellant is legally disqualified to be the transferee of the agricultural land it purchased, and hence, the purchase transaction itself was void at the very inception.

In view of above legal position, the appellant never got any legal title in the lands - under reference, and if that is the correct legal position, the appellant cannot 'transfer the title to any other person, that which does not vest in it as per the law.

A person cannot pass a title better than what he possesses, and where he has no legal title, obviously, he cannot pass on to other what he does not possess. The entire chain of transactions right from the inception, i.e. purchase to the cancellation should, therefore, be viewed in the above legal background. Therefore, by executing the Cancellation Deeds, what the appellant did was not an act of transfer of any land, but to wipe out the earlier void transaction, and receiving back the purchase consideration previously paid by it to the sellers, which was refundable to the appellant under the principle of equity.

Therefore, it is submitted that the appellant neither transferred' any land, nor did it receive any 'consideration' as a result of any transfer', when the appellant executed Cancellation Deeds, and received back the purchase consideration paid by it to the vendors. Therefore, provisions of Section 43CA of the Act has no application to the appellant's case under consideration.

4.6 In this context, the appellant refers to the judgment in **CIT vs. Sirehmal Nawalakha [2001] 118 Taxman 316 (SC)**, wherein the Hon'ble Supreme Court held that a gift of immovable property made without a registered document is not a valid gift in general law, and therefore, it cannot be subjected to gift-tax. Referring to the judgment in *CGT v. R. Valsala Amma [1971] 82 ITR 828 (SC)*, the Court held that the Gift-tax Act, did not change the general law relating to the rights of property. The general law would take in its ambit not only the provisions of the Transfer of Property Act but would also require application of the provisions of the Registration Act. Therefore, it is submitted that while construing provisions of Section 43CA of the Act as well, it is necessary to construe the term 'transfer' as known to the general law, having regard to the provisions of the Transfer of Property Act, 1882. Where the appellant did not have a legally valid title to the property as explained above, there can be no question of the appellant transferring it to another.

4.7 Reference is also made to a decision of the Hon'ble Tribunal, Chandigarh Bench in **DCIT vs. Winsome Yarns Ltd. [2014] 50 taxmann.com 318 (Chandigarh Trib.)**, where the issue for consideration was taxability of a sum received by the assessee as compensation upon set aside by the Hon'ble Supreme Court of auction sale of a property bought by the assessee. The Assessing Officer took a view that the assessee received the sum on extinguishment of right in the property, and therefore, it was liable to tax as capital gain. The Tribunal noted the facts, and held that a perusal of order of Supreme Court would clearly show that sale in favour of assessee was clearly set aside. The term set aside would also include 'cancel',

'annul' and therefore in the present case what has happened is that by setting aside the same the Supreme Court has cancelled the original sale made to the assessee-company. This shows that sale in favour of assessee stands cancelled. If sale itself is set aside by a Court then it can be said that the assessee never acquired any interest in such property. In the instant case, sale has been set aside by the Supreme Court and therefore it cannot be said that the assessee ever acquired any interest in the property. No doubt extinguishment is also covered in the definition of transfer under section 2(47)(ii). However, extinguishment would normally connote a situation where an asset goes out of existence. However, when the asset never comes into existence then such asset cannot be extinguished. Therefore, there is no extinguishment in the present case because the said property purchased through auction by assessee-company never came into existence because of the order of the Supreme Court through which sale itself was set aside. In view of above, it was held that surplus arising on account of compensation received by the assessee cannot be assessed under the head 'capital gain' because no asset came into existence with the assessee.

Though this decision is rendered in the context of capital gains, the ratio of the - decision is applicable to Section 43CA as well because what is held is that where the assessee does not acquire any interest in property in the first place due to cancellation of transaction previously executed, he simply cannot transfer that interest in the property. In the case before the Tribunal, the Supreme Court had set aside/cancelled the auction sale (purchase transaction); while in the appellant's case, the purchase transaction itself was void at the very inception, creating no legal right, title or interest in the land, necessitating cancellation of the same. The only right that remained with the appellant was to receive back the purchase consideration upon cancellation of the transaction, and that is the right in equity. Therefore, it is submitted that in the appellant's case too, there cannot be any transfer of the property.

5. In light of above, the appellant submits that the addition of Rs.4,52,40,600/- made u/s.43CA of the Act is not justified and is unsustainable in law. Your appellant, therefore, prays that the said addition be deleted.”

10. In view of the above action of AO in applying sec 43CA On the given facts of case was unlawful. AO and Ld. CIT(A) committed a mistake by ignoring the facts of the case and provisions of other civil laws applicable in the present case. In our considered opinion assessee being party of cancellation deed, do not tantamount to entering the transaction of sale /transfer. In absence of element of transfer sec 43CA can't be applied. We therefore direct the AO to delete the addition amounting to Rs 4,52,40,600/- to be deleted with consequential reliefs.

11. **In the result, appeal filed by the assessee is allowed.**

Order pronounced in the open court on 3<sup>rd</sup> day of October 2022.

Sd/-  
(VIKAS AWASTHY)  
JUDICIAL MEMBER  
Mumbai, दिनांक / Dated: 03/10/2022  
SK, Sr.PS

Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER

**Copy 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.

//True Copy//

BY ORDER,

(Dy. /Asstt.Registrar)  
ITAT, Mumbai