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

SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2270/MUM/2021
(Assessment Year: 2016-17)

Assistant Commissioner of Income Tax-
8(3)(1), Mumbai,
Aaykar Bhavan, Room No. 615,
M.K. Road, New Marine Lines,
Mumbai - 400020 ..... Appellant

Vs

Triple Securities Pvt. Ltd.,
3rd Floor, 33 Huges N S Patkar Marg,
Grant Road, Mumbai - 400007
[PAN: AABCT2752J] ..... Respondent

Appearances
For the Assessee/Department : Ms. Samruddhi Hande
For the Respondent/Assessee : Shri Nitesh Joshi

Date of conclusion of hearing : 23.09.2022
Date of pronouncement of order : 20.12.2022

O R D E R

Per Rahul Chaudhary, Judicial Member

1. By way of the present appeal the Revenue has challenged the order, dated 05.10.2021, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2016-17 whereby the Ld. CIT(A) had partly allowed the appeal filed by the Assessee against the Assessment Order, dated 30.12.2018 passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Revenue has raised the following grounds of appeal:

"1. Whether on facts and circumstances of the case, the Ld. CIT(A) is right in deleting the addition of Rs. 2.18,84,138/- & holding that the provision of section 43CA of the I.T. Act, 1961 are wrongly invoked by the assessing officer, without appreciating the fact that the area give to the tenants by the assessee in excess if 753 Sq.ft. is nothing but a transfer of an asset held as stock in trade without any consideration and hence the stamp duty value for the additional area transferred needs to be added to the total income as per the provisions of Section 43CA of the I.T. Act, 1961.

2. Whether on facts and circumstances of the case, the Ld. CIT(A) is correct in allowing the deduction of interest cost u/s 36(i)(iii) of the I.T. Act, 1961 without appreciating the facts the assessee in following project completion method of accounting and during the previous year the assessee has not recognized any revenue to the P&L account. Hence interest cost incurred also needs to be capitalized with the WIP."

3. The relevant facts in brief are that the Assessee filed its return of income for Assessment Year 2016-17 on 17.10.2016 declaring loss of INR 1,56,22,487/-. The case of the Assessee was selected for scrutiny, the Assessing Officer completed assessment under Section 143(3) of the Act vide Assessment Order, dated 30.12.2018, after making the addition of INR 2,18,84,138/- under Section 43CA of the Act and disallowance of interest expenditure of INR 1,55,42,291/-.

4. Being aggrieved, the Assessee preferred appeal before CIT(A). The CIT(A) granted relief to the Assessee, vide order dated 30.12.2018, by deleting the above addition/disallowance made by the Assessing Officer.

5. Now the Revenue is in appeal before us against the order passed by the CIT(A) on the grounds reproduced in paragraph 2 above which are taken up in seriatim hereinafter.

Ground No.1

6. Ground No. 1 is directed against the order of CIT(A) deleting the addition of INR 2,18,84,138/- made by the Assessing Officer under Section 43CA of the Act by holding that the provisions of Section 43CA of the Act were not applicable.

7. The facts relevant to adjudication of the issue, as emanating from the record, are that Assessee is a private limited company engaged in the business of development of land and construction of building as builder and developer. The Assessee undertook only one re-development project and redeveloped an old tenanted residential building named 'Govind Niwas' [hereinafter referred to as 'the Old Building']. As per the redevelopment plan the Assessee was required to construct & develop a new building, and rehabilitate the tenants therein by allotting units with specified carpet area. The 'No Objection Certificate' (NOC) for re-development of the Old Building was given by Mumbai Building Repair & Reconstruction Board (MBR&RB) on 19.10.2001, vide Approval Letter bearing No. R/NOC/F-10825/3274/MBRRD [Hereinafter referred to as the 'Approval']. Clause 1 of the Approval stated as under:

> *"All the occupants of the old building shall be reaccommodated in the redeveloped building. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum carpet area of 20.90 Sq.Mt. (225 sq. ft.) and/or maximum carpet area of 70 Sq.Mt. (753 sq. ft.) as provided in the MH&AD Act, 1976. In case of non-residential occupier, the area to be given in the reconstructed building will be equivalent to the area occupied in the old building."*

8. Thus, as per the Approval the Assessee was required to allot to the tenants minimum carpet area of 20.90 Sq. Mtrs. (225 Sq. Ft.) and maximum carpet area specified was 70 Sq. Mtrs. (753

Sq. Ft.) as per Maharashtra Housing and Area Development Act, 1976. (MHADA)

9. Permanent Alternative Accommodation Agreement (PAAA) were executed between with the tenants in January 2002. However, even after lapse of 4 years, the Assessee was not able to undertake development work as some of the tenants wanted more carpet area. Some tenants were occupying more area in the Building as compared to area specified in the Approval and therefore, were not willing to part possession and/or accept units with lesser carpet area. In order to break the deadlock, a meeting was held on 07.08.2006 in the presence of Deputy Chief Engineer (S), MBR&RB wherein a consensus was reached. The minutes of the meeting were recorded and signed by all present. Annexure 'A' to the Minutes of the meeting specified the area agreed to be allotted to the tenants. The relevant extract of the minutes of the meeting recorded and signed by all those present read as under:

> *"In the presence of Deputy Chief Engineer MBR &B, the tenants/occupants have unanimously agreed to the suggestion of the Owner/Developers to avoid the delay in implementation of the project:*
>
> *(a) To allot flats with additional area to erstwhile Landlords and their family members who are present tenants of the building.*
>
> *(b) To allot flats with additional area to managing committee members from the entitlement of the Owner/Developers.*
>
> *(c) erstwhile Landlords and their family members and also managing committee members who are present tenants of the building will not be liable to pay construction cost*

(d) Tenants/occupants will be allotted flats as per the approved plan.

Accordingly the Annexure "A" is prepared which reflects the flats number, area allotted to the tenants/occupants and the list of the Tenants/ occupants liable to contribute for construction cost."

10. After the above meeting the Assessee undertook the redevelopment work and the new building was constructed. The final PAAA with the tenants were registered in the Previous Year 2015-16 relevant to the Assessment Year 2016-17.

11. During the relevant previous year, the Assessing Officer received the Annual Information Report that six transaction related to property were carried out by the Assessee. Since as per the Profit & Loss Account the Assessee had declared 'Nil' income. The Assessee was asked to explain these transactions. The Assessee, vide letter dated 25.10.2018, replied that the aforesaid six property related transactions were in respect of registration of PAAA entered with the tenants who were rehabilitated under the redevelopment project. Since the tenants were allotted carpet area in additional area specified in the Approval, the Assessee was asked to show cause, vide notice dated 27.12.2018, as to why stamp duty valuation of the area in excess of the approved area should not be deemed to be full value of consideration for sale of additional area (which is stock-in-trade of the Assessee) in terms of Section 43CA of the Act and brought to tax in the hands of the Assessee. The Assessee, vide letter dated 29.12.2018, submitted that provisions of Section 43CA could not be applied as there was no sale of stock-in-trade by the Assessee. The carpet area allotted to the tenants, though in excess of carpet areas specified in the Approval, was as per the consensus reached

and recorded in the minutes of the meeting held on 07.08.2006 in the presence of MB&RB official. However, the Assessing Officer was not convinced with the submission/explanation furnished by the Assessee and therefore, proceeded to compute income in respect of the additional area allotted to the tenants by applying the provisions of Section 43CA of the Act. Taking the stamp duty value of the additional area as per the registered PAAA, the Assessing Officer made aggregate addition at INR 2,18,84,138/-.

12. In appeal before CIT(A) on this issue, it was contended by the Assessee that the Assessing Officer had erred in applying the provisions of Section 43CA of the Act. There was no sale or transfer. The area (including the additional area) was given to the tenants pursuant to the redevelopment of the Old Building. The transaction could be regarded as 'exchange' which took place during the financial year 2005-06 when the tenants granted redevelopment rights to the Assessee and parted with possession of the area occupied in the Old Building in lieu of the allotment of area in the new building to be developed by the Assessee. The area (including the additional area) to be allotted to the tenants was pre-assigned as per the Approval and the meeting held on 07.08.2006 and therefore, could not have been treated as stock-in-trade of the Assessee available for sale to any customer. The allotment of the additional area to the existing tenants pursuant to re-development was a prudential call taken by the Assessee to avoid huge losses on account of delay in execution of the re-development project.

13. The above submission of the Assessee found favour with the CIT(A) who was pleased to delete the addition made by the

Assessing Officer under Section 43CA of the Act holding that providing carpet area in the re-developed building to the tenants cannot be taken into the purview of Section 43CA of the Act. The relevant extract of the order of the CIT(A) reads as under:

> *"4.3. I have carefully considered the matter. The appellant was redeveloping an old building. In the scheme of thing, he was obliged to give flats in the new building to those who were staying/ having flats in the old building. This act of handing new flats to old occupants of the old building, in my view, cannot be taken within the purview of section 43CA of the Act. MHADA, the authority which gave assessee the permission to construct the new building had prescribed certain sizes to be allotted to tenants / members of the old building. In case of assessee, he allotted bigger flats than what was given in the MHADA permission. The assessee had given to how the flats allotted were bigger than what was given in the MHADA permission. In any event, this is not a case of assessee having received anything that can partake the character of income arising to him in the process.. The consideration received by him for transferring the flat was the development right it obtained with the concurrence of tenants/ members of the old building) The appellant had not contravened any part of the Income Tax law in the process. It is also not the case of the AO having evidence of the assessee getting extra consideration by handing over flats of bigger sizes to tenants. The flats allotted to tenants were pre-assigned and they cannot be treated as stock-in-trade which could have been sold to any suitable customer.*
>
> *In view of submission given and on careful consideration of the facts, invoking of section 43CA to this case is on wrong footing. Therefore the addition of Rs.2,18,84,138/- cannot be sustained.*
>
> *The ground is allowed."*

14. Being aggrieved by the above order of CIT(A), the Revenue is now in appeal before us.

15. The Learned Departmental Representative submitted that the provisions of Section 43CA of the Act were clearly attracted in the facts of the present case. The Assessee had transferred the additional area without any consideration. Since additional area constituted stock-in-trade of the Assessee, the stamp value of the additional area was to be adopted as full value of consideration in view of Section 43CA of the Act. Therefore, the Assessing Officer was correct for making addition of INR 2,18,84,138/-. Referring to paragraph 6.4 and 6.5 of the Assessment Order she submitted that the agreement between the tenants and the Assessee was in clear violation in terms of the Approval and therefore, could not be relied upon to avoid the tax liability by the Assessee. The additional area allotted to six tenants amounted to transfer of asset, being stock-in-trade of the Assessee, resulting profits taxable in the hands of the Assessee. In conclusion she submitted that the Assessing Officer was correct in invoking provisions of Section 43CA to compute the aforesaid profits and that the CIT(A) erred in deleting the addition by incorrectly interpreting provisions of Section 43CA of the Act.

16. Per contra, the Ld. Authorised Representative for the Assessee vehemently contended that the provisions of Section 43CA of the Act cannot be attracted in the facts of the present case. He submitted that there was no ‘transfer of land and/or building’ in the present case. Further, the value of additional area given to the tenants can at best be considered as the cost of acquisition of re-development rights acquired by the Assessee during the previous year 2006-07. The Assessing Officer was not correct in holding that the additional area was allotted without consideration. He submitted that the CIT(A) had rightly

observed that the consideration received by the Assessee was development rights obtained by the Assessee with the concurrence of the tenants of the Old Building. This aspect has not been considered by the Assessing Officer. Further, the additional area was transferred in terms of the settlement arrived at between the parties in a meeting conducted in the presence of Deputy Chief Engineer (S), MBR&RB. Therefore, the contention raised by the Ld. Departmental Representative that the allotment of area over and above the limited specified in the Approval was in violation of MHADA is without any merit. He further submitted that the Assessee had to allot additional area to some of the tenants to ensure with the project was not delayed further leading to huge losses. He submitted that though PAAA were executed in January 2002 no development work could take place till 2006. It was only after the issues were settled in the meeting held on 07.08.2006 that the Assessee was able to proceed with the re-development project. Allotment of the area (including the additional area) to be allotted to each of the tenants was approved by MBR&RB and formed part of the minutes of the meeting held on 07.08.2006. Without prejudice to the aforesaid, he submitted that the Assessing Officer had also erred in computing the amount of additional area allotted to the tenants.

17. We have considered the rival submissions and perused the material on record. While the Assessing Officer has made addition of INR 2,18,84,138/- by invoking provisions of Section 43CA of the Act, the CIT(A) has deleted the addition holding that the provisions of Section 43CA of the Act are not applicable. Accordingly, we proceed to examine the applicability of Section 43CA of the Act which read as under:

"Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.

43CA.(1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than 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 purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the asset."

18. We note that Section 43CA of the Act in inserted by Finance Act, 2013 w.e.f. 01.04.2014. The Memorandum explaining the provisions Finance Bill 2013 in relation to insertion of Section 43CA of the Act provided as under:

"Computation of Income Under The Head "Profits And Gains Of Business Or Profession" For Transfer Of Immovable Property In

Certain Cases

Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted, assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C of the Income-tax Act. These provisions do not apply to transfer of immovable property, held by the transferor as stock-in-trade.

It is proposed to provide by inserting a new section 43CA that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business of profession".

It is also proposed to provide that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been received by any mode other than cash on or before the date of the agreement.

These amendments will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years."

19. On perusal of above it can be seen that Section 43CA of the Act was inserted for the reason Section 50C of the Act only covered the transfer of capital asset being land and/or building and provided that for the purpose of computing income under the head 'Capital Gains' the stamp duty value shall be deemed to

be the full value of consideration in cases where the sale consideration was below the stamp value. Therefore, corresponding provisions for computing income under the head 'profits and gains of business or profession' were introduced by way of insertion of Section 43CA of the Act in case of transfer of asset (other than capital asset) being land and/or building.

20. Section 43CA of the Act creates a deeming fiction by which stamp value is taken as full value of consideration. The scope of a deeming provision has to be restricted to what is expressly stated in such a provision. We note that, both, Section 50C and 43CA use the expression 'land or building or both' whereas Section 54D, 54G and 54GA use the expression 'land or building or any right in land or building'. Therefore, the scope of deeming fiction contained in Section 43CA of the act would apply only in the case of transfer of asset (other than capital asset) being land or building or both and the same cannot be extended to cover any right in land or building. Accordingly, we hold that provisions of Section 43CA would apply only to transfer of land or building or both. Our view draws support from the decision the Delhi Bench of the Tribunal in the case of Noida Cyber Park (P.) Ltd. vs Income Tax Officer, Ward-18(4), New Delhi : [2021] 123 taxmann.com 213 (Delhi - Trib.), wherein after analyzing the provisions of Section 50C of the Act, the Tribunal has held as under:

> *"9. We have carefully considered the rival submissions. As our discussion in the earlier paragraphs show, the sum and substance of the preliminary controversy revolves around the applicability or otherwise of section 50C of the Act to the facts and circumstances of the instant case. Shorn of other details, section 50C(1) of the Act, in so far as it is relevant for our purpose, prescribes that where the sale 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 value adopted by the Stamp Valuation Authority for the purposes of payment of stamp duty, then the value so adopted by the Stamp Valuation Authority be deemed to be the full value of the consideration received or accruing as a result of the transfer for the purposes of computing Capital Gains in the hands of the seller u/s 48 of the Act. Before us, the case sought to be made out by the assessee is that section 50C, being a deeming provision, has to be strictly interpreted, a proposition which is quite acceptable; and, according to the assessee, section 50C(1) covers a capital asset being "land or building or both" whereas in the instant case, what is transacted is merely leasehold rights in land and building, which is a distinct 'Capital Asset'. The distinction sought to be made by the assessee is well-founded, and such distinction can be gauged from the Act itself. In this context, we may refer to section 54D(1) of the Act, whose relevant portion reads as under:

> *"Subject to the provisions of sub-section (2), where the capital gain arises from the transfer by way of compulsory acquisition under any law of a capital asset, being land or building or any right in land or building, forming part of an industrial undertaking...." [underlined for emphasis by us]*

10. Ostensibly, in section 54D(1) of the Act, the 'capital asset' has been understood to be 'land or building or any right in land or building', thereby supporting the distinction sought to be canvassed before us. On the contrary, the phraseology in section 50C(1) of the Act only covers 'land or building or both' and does not refer to "any right in land or building".

11. Thus, the expression 'land or building' in its coverage is quite distinct from the expression 'any right in land or building'. The legislature, in its wisdom, has used the expression 'land or building or both' in section 50C(1) of the Act, and not the expression 'any right in land or building'. Therefore, the express use of one expression would exclude the other, a legal premise which is supported by the judgment of Hon'ble Supreme Court in the case of GVK Industries Ltd. (supra). In this view of the matter, in our considered opinion, the point sought to be raised

by the assessee deserves to be upheld. Such a distinction also has found approval of the Hon'ble Bombay High Court in the case of Greenfield Hotels & Estates (P.) Ltd. (supra) and other Tribunal decisions which have been referred to in the earlier part of this order. Apart from that, we find that a recent decision of our Coordinate Bench in the case of Manish Traders v. ITO [IT Appeal No. 4481 (Delhi) of 2016, dated 22-7-2019] (reported in 2019 (7) TMI 1268 - ITAT Delhi has observed that assessee's leasehold right for a period of 90 years in question is a capital asset to which provisions contained u/s 50C are not applicable.

12. Now, we may turn to the argument of the learned C.I.T. DR that it is impermissible for the assessee to agitate the aforesaid point because the same has not been raised before the lower authorities. We have given our anxious thought to the aforesaid plea and find that the same is untenable as misconceived. Firstly, it is nobody's case that the action of the lower authorities of invoking Section 50C of the Act in the present case is not being resisted by the assessee. In fact, right from the assessment stage, assessee has resisted the same. In fact, the point canvassed by the assessee is directly emanating from the phraseology of section 50C(1) of the Act itself; and, therefore, it cannot be construed to be an issue which was not the subject matter of consideration by the lower authorities. Evidently, Section 50C has been the bone of contention between both the assessee and the Revenue right from the stage of assessment. However, even if for the sake of argument, it is understood to be a new plea, it does not change the complexion of the dispute, inasmuch as the subject matter of the dispute remains to be the efficacy or otherwise of the action of the Assessing Officer of invoking section 50C of the Act. More importantly, it has to be appreciated that the point of law raised by the assessee is competent to be adjudicated, based on the accepted factual position, which is available on record. In fact, we find that copies of the sale deed/tripartite lease deed were furnished before the Assessing Officer and the communication of the Assessing Officer to the DVO dated 27-12-2017, a copy of which is placed at pages 26 to 28 of the Paper Book reveals that the same has been forwarded by him to the DVO. In fact, the report of the DVO dated 21-6-2018 reveals

that the nature of property being 'lease hold', has been specifically noted. Thus, in our considered opinion, there is no merit in the plea of the Ld. C.I.T. DR to prevent the assessee from pursuing the aforesaid argument before us. The defence by the C.I.T. DR, in our view, is misplaced and is hereby negated.

13. In view of the aforesaid factual position and in law, we find that the present transaction of six properties in question does not warrant invoking of section 50C(1) of the Act as the property in question is not of the nature covered by section 50C(1) of the Act. Therefore, on this point itself, we set aside the order of the ld. Commissioner of Income Tax(A) and direct the Assessing Officer to delete the addition."

21. To the same effect are decision of the Mumbai Bench of the Tribunal in the case of Atulji Puranik vs. ITO 12(1)(1): 11 taxmann.com 92 (Mumbai), wherein the Mumbai Bench of the Tribunal has held as under:

"11.2 On going through the above provision, it transpires that where the full value of consideration shown to have been received or accruing on the transfer of an asset, being land or building of both, is less than the value adopted or assessed or assessable by stamp valuation authority, the value so adopted etc. shall, for the purposes of sec. 48, be deemed to be full value of consideration received or accruing as a result of such transfer. This section has been inserted by the Finance Act 2002 w.e.f. 01-04-2003 with a view to substitute the declared full value of consideration in respect of land or building or both transferred by the assessee with the value adopted or assessed or assessable by stamp valuation authority. But for this provision, there is nothing in the Act, by which the full value of a consideration received or accruing as a result of transfer of land or building or both is deemed to be any amount other than that actually received. From the language of sub-sec. (1), it is clear that the value of land or building or both adopted or assessed or assessable by the stamp valuation authority 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 a transfer. Two things are noticeable from this provision. Firstly, it is a deeming provision and secondly, it extends only to land or building or both. It is manifest that a deeming provision has been incorporated to substitute the value adopted or assessed or assessable by stamp valuation authority in place of consideration received or accruing as a result of transfer, in case the latter is lower than the former. It is further relevant to note that the mandate of sec. 50C extends only to a capital asset which is "land or building or both". It, therefore, follows that only if a capital asset being land or building or both is transferred and the consideration received or accruing as a result of such transfer is less than the value adopted or assessed or assessable by the stamp valuation authority, the deeming fiction under sub-sec. (1) shall be activated to substitute such adopted or assessed or assessable value as full value of consideration received or accruing as a result of such transfer in the given situation.

11.3 It is a settled legal proposition that a deeming provision cannot be extended beyond the purpose for which it is enacted. The Hon'ble Apex Court in CIT v. Amarchand N. Shroff [1963] 48 ITR 59 has considered the scope of a deeming provision and came to hold that it cannot be extended beyond the object for which it is enacted. Similar view has been reiterated by the Hon'ble Supreme Court in CIT v. Mother India Refrigeration Industries (P.) Ltd. [1985] 155 ITR 711/ 23 Taxman 8 by laying down that "legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond their legitimate field". In CIT v. ACE Builders (P.) Ltd. [2006] 281 ITR 210 /[2005] 144 Taxman 855 (Bom), the Hon'ble jurisdictional High Court considered the facts of a case in which the assessee was a partner in a firm which was dissolved in the year 1984 and the assessee was allotted a flat towards the credit in the capital asset with the firm. The assessee showed the flat as capital asset in its books of account and depreciation was claimed and allowed from year to year. In the previous year relevant to asst. year 1992-93, the assessee sold the flat and invested the net sale proceeds in a scheme

eligible u/s.54E of the Act and accordingly declared Nil income under the head 'Capital gains'. The AO formed the view that since the block of building ceased to exist on account of sale of flat during the year, the written down value of the flat was liable to be taken as cost of acquisition u/s.54E of the Act. He further held that since the assessee had availed depreciation on such asset, which was otherwise a long-term capital asset, the deeming provision u/s.50 would apply and it would be treated as capital gain on the sale of short-term capital asset and hence no benefit u/s.54E could be allowed. When the matter came up before the Hon'ble Bombay High Court, it was noticed that sub-sections (1) and (2) of sec. 50 contained a deeming provision and such fiction was restricted only to the mode of computation of capital gain contained in sections 48 and 49 and hence it did not apply to other provisions. The assessee was held to be eligible for exemption u/s.54E in respect of capital gain arising out of the capital asset on which depreciation was allowed." (Emphasis Supplied)

22. Since we have concluded that the provisions of Section 43CA would be attracted in case of transfer of land or building or both, the issue that arises for consideration is whether there is transfer land or building by the Assessee to the tenant. In our view whether allotment of area to a tenant/occupant on under a redevelopment project would result in transfer of land or building held as stock-in-trade would depend upon the facts and circumstances of each case that would require examination of the contractual arrangement between the owner, landlord, tenant, co-operative housing society and the developers.

23. Coming to the facts of the present case, it is admitted position that the Assessee had undertaken redevelopment of the Old Building. The Assessee was not the owner or either the land or the Old Building. On carrying out the redevelopment work the

Assessee would have received some area in the new building in his capacity as the Developer. In order to resolve the deadlock the Assessee agreed to settle for a lesser area in the meeting held on 07.08.2006 which was attended by Deputy Chief Engineer, MBR&RB who also signed the minutes of the meeting in this official capacity. In absence of any violation of specific provision of Maharashtra Housing & Area Development Act, 1976 having been brought to our notice, we are not inclined to accept the contention of Revenue that the allotment of additional area to the tenants was contrary to law. The amount of area to be given to the tenants was agreed upon and finalized when the minutes of the meeting held on 07.08.2006 were recorded since Annexure 'A' to the minutes of the meeting clearly provided for the details of the unit in the new building and the carpet area to be allotted to each tenant. Thus, the additional area that was allotted to tenants could not be considered as stock-in-trade for the Assessee as the Assessee was never entitled to hold/sale the same. Thus, we concur with the CIT(A) that the area allotted to the tenants (including the additional area) cannot be regarded as stock-in-trade of the Assessee and therefore, the provisions of Section 43CA of the Act would not be attracted. In view of the aforesaid, we decline to interfere with the order passed by the CIT(A) on this issue. Ground No. 1 raised by the Revenue is, therefore, dismissed.

Ground No. 2

24. Ground No. 2 is directed against the order of CIT(A) allowing deduction of interest expenditure of INR under Section 36(1)(iii) of the Act.

25. During the assessment proceedings the Assessing Officer noticed that the Assessee has claimed deduction for interest expenditure of INR 1,55,42,291/- while the Revenue offered during the entire year is ‘NIL’. The Assessee was asked to explain how the expenditure was allowable under the provision of the Act. Its reply was received by the Assessing Officer on 20.11.2018, the Assessee state that interest cost pertains to loan taken from M/s Bajaj Finance Limited which has been used for repaying original loan taken by the Assessee from shareholder and directors which were utilized for the construction of the building. The Interest expenses incurred during the year, were revenue in nature and were allowable under Section 36(1)(ii) of the Act having been incurred wholly or exclusive for the purpose of the business of the Assessee. However, the Assessing Officer disallowed deduction for interest expenditure holding that the claim of interest expenditure was in violation of the matching principle envisaged in Section 28 of the Act. The profits arising from the difference between Revenue and Expenditure of the business of the relevant previous year are to be offered to tax in the relevant assessment year. Since the Assessee has not offered any income during the year, deduction of this interest cost, which violates the 'matching' principle, cannot be allowed. Further, the loan has been used for discharging personal loan and therefore, has been utillized for personal purposes and not for the purpose of business of the Assessee. Thus, the Assessing Officer disallowed deduction for interest of INR 1,55,42,291/-.

26. In appeal preferred by the Assessee, the CIT(A) deleted the

disallowance of interest holding that the Assessing Officer had failed to being on record any material to show that the loan was utilized for personal purpose. Further, the fact that no income has been offered to tax by the Assessee, is not a good reason to disallow deduction for interest expenditure of INR 1,55,42,291/- incurred by the Assessee during the relevant previous year.

27. Being aggrieved the Revenue is now in appeal before us.

28. The Learned Departmental Representative submitted that the Assessee is following project completion method of accounting for revenues from its solitary construction project. No revenue has been offered to tax by the Appellant during the relevant assessment year and therefore, no deduction for expenses can allowed. The Assessee should have capitalized the interest expenses by loading the same on to cost of the closing finished goods inventory. Referring to paragraph 8.3 of the Assessment Order, she submitted that claim of deduction for the interest cost violated the matching principles of accounting contained in Section 28 of the Act. She further submitted that the Assessing Officer has returned a finding that the loan was utilized for the personal purposes and for this reason also deduction for interest cannot be allowed under Section 36(1)(iii) of the Act.

29. Per contra the Learned Authorised Representative for Assessee submitted that for the purpose of redevelopment of the building the Assessee had availed loan from the various lenders (including directors and shareholders) from time to time since 2006 and had used the same for the same for the

construction project. Due to considerable delay in execution of the project, the funds borrowed from the lenders were blocked in the project for several years and the lenders were demanding repayment of their loan. As a result the Assessee had to avail loan form Bajaj Finance Limited for refinancing purpose. The amount borrowed from Bajaj Finance Limited was not used for any other purpose or for any personal purpose as allege by Assessing Officer. The loan was utilized for the purpose of business of the Assessee, and the Interest expenses were incurred wholly & exclusively for the purpose of the business of the Assessee during the relevant previous year. The Assessee had produced before Assessing Officer, copy of the sanctioned letter, copy of bank statement and the fund utilization statement to show nexus and utilization of loans availed from Bajaj Finance Ltd. for business purpose. The same were not disputed by the Assessing Officer. Thus, the interest expenditure was allowable as deduction under Section 36(1)(iii) of the Act. In this regard he relied upon the decision of the Hon'ble Bombay High Court in the case of Lokhandwala Construction Industries Ltd. [2003] 260 ITR 579. He further submitted that Part Occupancy Certificate was issued to the Assessee in the Previous Year 2014-15 relevant to Assessment Year 2015-16 and therefore, all construction work-in-progress expenses were capitalized in the Financial Year 2014-15 and shown as closing finished goods inventory. The amount of interest incurred for the Assessment Year 2016-17 is a period cost for which deduction is allowable under Section 36(1)(iii) of the Act.

30. In rejoinder, the Ld. Departmental Representative submitted that the judgment in the case of Lokhandwala Construction

Industries (Supra) cited by the Ld. Authorised Representative for the Assessee would not be applicable to the present case as Section 36(1)(iii) has since been amended by way of insertion of proviso to Section 36(1)(iii) of the Act which specifically provides that no deduction would be allowed for amount of the interest paid in respect of capital borrowed for acquisition of an asset (whether capitalized in the books of accounts or not).

31. We have considered the rival submissions and perused the material on record. As rightly pointed out by the Ld. Departmental Representative, by way of Finance Act, 2003 proviso to Section 36(1)(iii) of the Act was inserted which has since been amended by Finance Act, 2015. The provisions of Section 36(1)(iii) of the Act as applicable to Assessment Year 2016-17 read as under:

> *"(iii) the amount of the interest paid in respect of capital borrowed for the purpose of the business or profession.*
>
> *Provided that any amount of the interest paid in respect of capital borrowed for acquisition of an asset [***] (whether capitalized in the books of accounts or not).; for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction]."*

32. We note that the Assessee has been following project completion method and had capitalized all cost relating to construction till part completion certificate was obtained during the previous year 2014-15 relevant to the Assessment Year 2015-16. Though the Assessee has not offered any profits to tax during the Assessment Year 2016-17, deduction for interest

of INR 1,55,42,291/- has been claimed by the Assessee as period cost under Section 36(1)(iii) of the Act. We note that the Assessee has undertaken only one redevelopment project. It is not disputed that interest cost is directly related to the project As per Accounting Standards 7 on Construction Contracts and Accounting Standard 16 on Borrowing Cost, the borrowing cost having direct nexus with the project needs to be treated as project cost and capitalized. However, we note that in the case of Lokhandwala Constructions (Supra) cited by the Learned Authorized Representative of the Assessee, the Hon'ble Bombay High Court has held as under:

> *"2. The assessee-company was engaged in the business of construction of buildings. As stated above, we are concerned with assessment year 1987-88. The assessee followed Mercantile System of Accounting. The assessee followed Modified Project Completion Method for computing its profits. The assessee had secured development rights from Bombay Gaw Rakshak Mandal under Agreement dated 13th December, 1984 in respect of a plot of land situated at Kandivali admeasuring 7,88,000 sq. metres for total consideration of Rs. 11 crores or Rs. 50 per sq. ft. of FSI that may be sanctioned by BMC. A sum of Rs. 1.10 crores was paid by the assessee to the transferor. Till the end of the accounting period relevant to the assessment year 1987-88, the conveyance was not executed and, there- fore, survey fees, professional fees etc. incurred by the assessee, amounting to Rs. 1.29 crores was shown as work-in-progress upto assessment year 1986-87. During the assessment year in question, no activities were carried out and, therefore, work-in-progress came to be carried forward. The assessee had taken loans amounting to Rs. 1.15 crores, out of which an amount of Rs. 1.10 crores came to be utilised during the assessment year in question for payment to the Mandal. The assessee claimed deduction of Rs. 14,09,942 paid as interest on moneys borrowed under section 36(1)(iii) of the Income-tax Act. By assessment order dated 30th September, 1986, the deduction was allowed. However, the Commissioner of Income-tax, exercising his authority under section 263 of the*

Income-tax Act, came to the conclusion that the loan of Rs. 1.15 crores was utilised by the assessee for acquiring an asset and, therefore, the claim for deduction under section 36(1)(iii) could not have been allowed; that it was not a revenue expenditure because it was a loan raised for acquiring a capital asset and, therefore, the interest incurred cannot form part of capital expenditure. Accordingly, the Commissioner of Income-tax cancelled the assessment order disallowing the interest of Rs. 14.09 lakhs.

Being aggrieved, the assessee preferred Appeal to the Tribunal, which, following its earlier decision, held that the interest paid by the assessee cannot be treated as capital expenditure. Accordingly, the Tribunal restored the Assessment Order dated 29th March, 1990. Being aggrieved, the department has come by way of Appeal to this Court under section 260A of the Income-tax Act.

3. On the above facts, the following question of law arises for our determination:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the interest claimed as revenue expenditure amounting to Rs. 14,09,942 cannot be treated as capital expenditure and added to work-in-progress in spite of the fact that other expenses on project were being capitalised by the assessee itself and holding that the Commissioner of Income-tax was wrong in directing the Assessing Officer to disallow the said interest and treat the same as capital expenditure as a part of work-in-progress, thereby quashing the order under section 263 of the Act of the Commissioner of Income-tax ?"*

Findings

4. From the facts found by the Tribunal on record, it is clear that assessee undertook two-fold activities. It bought and sold flats. Secondly, the assessee was also engaged in the business of construction of buildings. The profits from both the activities were assessed under section 28 of the Income-tax Act. In this case, we are concerned with the second activity (hereinafter referred to, for the sake of brevity, as "Kandivali Project"). According to the Commissioner, loan was raised for securing

land/development rights from the Mandal. That, the loan was utilised for purchasing the development rights, which, according to the Commissioner, constituted a capital asset. According to the Commissioner, since the loan was raised for securing capital asset, the interest incurred thereon constituted part of capital expenditure. This finding of the Commissioner was erroneous. In the case of India Cements Ltd. v. CIT [1966] 60 ITR 52 , it was held by the Supreme Court that in cases where the act of borrowing was incidental to carrying on of business, the loan obtained was not an asset. That, for the purposes of deciding the claim of deduction under section 10(2)(iii) of the Income-tax Act, 1922 [section 36(1)(iii) of the present Income-tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder. In the present case, the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under section 36(1)(iii). Since the assessee had received loan for obtaining stock-in-trade (Kandivali Project), the assessee was entitled to deduction under section 36(1)(iii) of the Act. That, while adjudicating the claim for deduction under section 36(1)(iii) of the Act, the nature of the expense - whether the expense was on capital account or revenue account - was irrelevant as the section itself says that interest paid by the assessee on the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under section 36(1)(iii) of the Act - Calico Dyeing & Printing Works v. CIT [1958] 34 ITR 265 (Bom.). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case." (Emphasis Supplied)

33. In the case of DCIT vs. Sanathnagar Enterprise Ltd: 196 ITD 89 (Mumbai - Trib.), vide order dated 12.04.2022, the Mumbai

Bench of the Tribunal has held as under:

7. When learned Departmental Representative's attention was invited to the decisions *of the coordinate benches in the cases of Ashish Builders (P.) Ltd v. Asstt. CIT [IT Appeal No. 1566 (Mum.) of 2011, dated 23-9-2016], Dy. CIT v. Palava Dewellers (P.) Ltd. [IT Appeal No. 2147 (Mum.) of 2018, dated 20-2-2020], Kotle Patil Developers Ltd. v. DCIT [IT Appeal No. 80 (Pune) of 16, dated 15-11-2017] wherein on the same set of facts it is held that irrespective of the capitalization of interest, as part of WIP, on account of following percentage of completion method, and even after insertion of proviso to Section 36(1)(iii), the interest has been allowed as a deduction, learned Departmental Representative fairly accepted that the law has been so laid down by the coordinate benches, but then he points out that it will result in a double deduction for deduction of interest as also deduction of WIP at the pint of booking revenue. He submits that the matter should be remitted to the file of the Assessing Officer at least for this factual verification. In any event, he vehemently relies upon the stand of the Assessing Officer and submits that the deduction of interest should not be allowed under section 36(1)(iii) in view of proviso thereto as also in view of the fact that at the point of time of booking related revenues, the WIP, which includes interest charges as well, the deduction is allowed anyway. We are, however, not inclined to approve his this plea in principle for the reason that the coordinate benches have consistently held that in view of the specific provisions under section 36(1)(iii), interest is to be allowed as a deduction irrespective of its capitalization as WIP, but while charging the WIP, corresponding reduction is to be allowed for the interest already claimed as deduction. In any event, the very foundation of disallowance is special bench decision in the case of Wall Street Construction (supra) which stands reversed by Hon'ble jurisdictional High Court in the case of CIT v. Lokhandwala Construction Inds. Ltd. [2003] 131 Taxman 810/260 ITR 579 (Bom.) which holds good even today. The proviso to section 36(1)(iii) does not come into play in the present case as the residential units are part of the stock in trade, and not the capital assets. Respectfully following the views so expressed by the coordinate benches, we approve the detailed and well-reasoned approach adopted by the CIT(A) and decline to*

<u>interfere, in principle, in the matter.</u> As regards the learned Departmental Representative's apprehension of double deduction, however, we consider it fit and proper to add that once these amounts are allowed as deduction in the year of incurring the expenditure, the same shall not be eligible for being allowed as deduction yet again as a part of the work in progress being debited to the profit and loss account in any subsequent year. The double deduction will thus not be permissible. The conclusions arrived at by the learned CIT(A), subject to this observation, are approved." (Emphasis Supplied)

34. In view of the above, we decline to interfere with the order passed by CIT(A). Ground No.2 raised by the Revenue is dismissed.

35. In result, the present appeal filed by the Revenue is dismissed.

Order pronounced on 20.12.2022.

Sd/-	*Sd/-*
(M. Balaganesh)	(Rahul Chaudhary)
Accountant Member	Judicial Member

मुंबई Mumbai; दिनांक Dated : 20.12.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai