

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND  
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.865/MUM/2021 (A.Y: 2016-17)**

Arihant Associates Anand Tower-C, Bldg.42 Tilak Nagar, Chembur Mumbai -400089  <b>PAN: AAPFA1588C</b>	v.	Pr.CIT – Mumbai – 17 Room No. 120, 1 <sup>st</sup> floor Kautilya Bhavan, C-41 to C-43 G-Block, Bandra Kurla Complex Bandra(E), Mumbai - 400051
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Ruturaj Gurjar</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri R.M. Madhavi</b>
<b>Date of Hearing</b>	<b>:</b>	<b>28.09.2022</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>22.12.2022</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

**1.** This appeal is filed by the assessee against the order of the Learned Principal Commissioner of Income Tax, Mumbai-17 [hereinafter in short "Ld. Pr.CIT"] dated 24.02.2021 for the A.Y.2016-17 passed u/s.263 of the Income-tax Act, 1961 (in short "Act").

**2.** Brief facts of the case are, assessee has filed its return of income on 17.10.2016 declaring total income of ₹.37,45,600/-. The case was

selected for scrutiny and the assessment u/s. 143(3) of the Act was completed on 26.10.2018. While perusing the assessment records Pr.CIT, Mumbai-17 has observed that assessee has sold flats at the rate below the stamp duty valuation which comes to ₹.9,48,66,068/- which is in contravention of section 43CA of the Act. He observed that the above said issue has not been considered by the Assessing Officer while framing the Assessment Order in this case. the Assessing Officer has passed the Assessment Order without making the necessary enquiries and verification in these aspects which should have been made to ascertain the relevant facts for the purpose of deciding the issue at hand. Therefore, the Assessment Order suffers from this infirmity and same is erroneous in so far as prejudicial to the interest of the Revenue in light of Explanation 2 to subsection 1 of section 263 of the Act. Accordingly, a show cause notice u/s. 263 of the Act was issued on 05.02.2021. In response to the show cause notice assessee has filed its written submissions, for the sake of clarity it is reproduced below: -

*"Assessee firm, having two partners namely Mr. Hemendra Mapara (PAN: ACSPM6526H) & Mr. Chetan Mapara (PAN: AEEPM4246C), carrying on business of land development - redevelopment under the scheme framed by MHADA. Firm has undertaken redevelopment project of building No. 42 at Tilak Nagar.*

*Assessee Firm has collected advances for the said development from various buyers since FY 2007-08 & allotted the Flats with Issuance of Allotment letter.*

*During assessment year assessee entered into agreement & registered the same but as flats already allotted to customers vide allotment letters & sale value was defined in allotment letter and also advance received by assessee before issuance of allotment letter. Sales value rate as per allotment letter is higher than ready reckoner rate at the Time of date of allotment letter.*

*We relied on sub-section (3) of section 43CA reads as under.*

*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."*

*Now, the Income-tax Act, 1961 does not define the word "agreement". However, its cognate, Direct Taxes Code, 2010 defines agreement" under section 314(8), which reads as under agreement includes any arrangement or understanding or action in concert, whether or not such arrangement understanding or action, is a) in writing: (b) formal; or (c) intended to be enforceable by legal proceedings.*

*A letter of allotment which is dated and is for transfer of specific asset and is accepted by the purchaser and which fixes the value of consideration for transfer of the asset would be regarded as an agreement for transfer for the purposes of sub-section (3) of section 43CA provided the condition mentioned in sub-section (4) of section 43CA is satisfied viz. that consideration or part thereof has been received on or before the date of letter of allotment. Thus, from the above definition it is clear that allotment letters issued in 2009 & 2010 etc. & signed by the Developer and countersigned by the customer is an "agreement", as it is formal and intended to be enforceable by legal proceedings. Therefore, the value mentioned in that allotment letter would be value assessable by any authority of State Government for the payment of stamp duty.*

*For the proposition that the letter of allotment constitutes an agreement for transfer reliance can be placed on the ratio of the decision of the Supreme court in the case of DLF Universal Ltd. V. Appropriate Authority & another (243 ITR 730) (SC).*

*We request you to review of list of agreements registered during the year for which agreement value is less than Municipal Ready reckoner value of AY 2016-17. In this Annexure we have given details regarding date of allotment letter, date of first amount received from customer, Market Value on the date of allotment. Thus when market*

*value on the date of letter of allotment is compared with agreement value, it can be clearly seen that agreement value is higher.*

*Only in Flat Nos. C-704, C-803 & C-804 agreement, value is less than market value respectively by Rs.3,75,000/-, Rs. 3,80,500/- & Rs.3,75,000/- for which we state that considering the delayed project, it was just like a distress sell. Project was delayed almost for more than 8 years due to policy changes in MHADA. As current partners in AY 2016-17 have decided to complete the project, they have no other option but to sell at best available price. This decision was taken to overcome worst cash flow position. In case of Flat No. C-704, C-803 & C-804, Customer has given lump sum Rs. 50,00,000/- each as advance in March, 2015, which lead assessee to agree lesser price for these three flats."*

*In this connection, we on behalf of our client object to the impugned notice under section 263 in as much as the order of the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue: and that the Assessing Officer has not committed the lapse of non application of his mind which is evident from the letters filed with him during the course of assessment proceedings. Thus, the Assessing Officer has passed the order after going through the information available with him and hence, the impugned order cannot be subject to proceedings under section 263."*

**3.** After considering the submissions of the assessee Ld. Pr.CIT observed that the assessee's reliance on section 43CA(3) is misplaced and he observed that a letter of allotment can never be considered to be an agreement. He relied on the decision of Sujauddin Kasimsab Sayyed v. Income Tax Officer (ITA.No. 5498/Mum/2018 dated 10.06.2019) and he reproduced the relevant ratio of the case and further, he observed that three flats namely C-704, C-803 and C-804 of the agreement value is less than the market value as per the assessee itself on the date of purported allotment letters. So provisions of section 43CA are squarely applicable to the assessee. By relying on case law relevant to section 263 of the Act

Ld. Pr.CIT came to the conclusion that the Assessment Order passed by the Assessing Officer without giving any reason in the Assessment Order or even did not discuss the issue concerned it shows that the Assessing Officer failed to exercise due diligence to determine the income Accordingly, he set aside the order passed u/s. 143(3) of the Act by invoking provisions of section 263(1) Explanation 2 of the Act and he directed the Assessing Officer to conduct required enquiries to arrive at the correct conclusion as per law and frame the assessment denovo.

**4.** Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

*"On the facts and in the circumstances of the case and in law, the appellant has raised following grounds of appeal without prejudice to one another.*

*1) The learned Pr. Commissioner of Income Tax- 17 (CIT) erred in setting aside the assessment order by invoking powers under s.263, when the said assessment order was neither erroneous nor prejudicial to the interests of the revenue.*

*2) The learned CIT erred in passing the order u/s 263, by relying on irrelevant material & on the basis of surmises & conjectures. The order passed by the CIT is devoid of any merits & bad in law.*

*(i) The learned CIT erred in directing for de-novo assessment without rebutting the submissions made in reply to show-cause notices u/s 263. In doing so, the learned CIT has erred in holding that, the assessing officer (AO) failed to verify complete details with regards to determination of full value of consideration as per the provisions of section 43CA(1) in case of the flats sold by the assessee.*

3) *The Ld CIT has further erred in holding that the Assessing officer has failed to make necessary enquiry and examination of claim of the appellant, without appreciating the fact that the appellant's case was originally assessed under regular scrutiny for applicability of section 43CA as well as other details. The Ld CIT also failed to consider the entire details filed along with reply to show cause notices u/s 263, which also consisted details filed during the original scrutiny proceedings.*

4) *The Order of learned CIT is against the weight of evidence, equity and natural justice.*

5) *Without prejudice to the above grounds, the Ld. CIT has also erred in relying of provisions of section 43CA when the same is not at all applicable to the present facts of the petitioner.*

6) *The Appellant craves leave to add, alter or amend the above grounds of appeal."*

5. At the time of hearing, Ld. AR brought to our notice Page No. 27 of the Paper Book which is the submissions made before the Assessing Officer relating to the same issue in which Assessing Officer has issued notice u/s. 142(1) of the Act. Assessee has filed all the relevant information as requested by the Assessing Officer. Further, he brought to our notice Page No. 15 of the Paper Book which is Form 3CD submitted by the assessee in which assessee has given all the details of the properties sold, sale consideration received or accrued and value as per stamp duty assessable value. Further, he brought to our notice Page No. 52 of the Paper Book which is the details of list of agreements entered of which agreement value is less than the municipal ready reckoner value as on the date of allotment of letters. He submitted that assessee has

submitted that as per section 43CA sub-section (3) is applicable in the case of assessee considering the fact that assessee has issued the allotment letters to all the parties in the year 2009 and 2010 itself. Due to various reasons the project was delayed and as per the provisions of section 43CA(3) the stamp duty value has to be adopted as on the date of allotment letter.

**6.** Further, he brought to our notice Page No. 34 of the Paper Book which is the letter submitted by the assessee before the Assessing Officer for submission of ledger copy of all the parties who has booked flats, shops in the projects from the date of booking till 31.03.2016. He submitted that letter of allotment is a proper agreement entered by the assessee with the various parties. Therefore the provisions of section 43CA(3) are squarely applicable to the case of the assessee. Further, he brought to our notice Page No. 54 and 55 of the Paper Book to bring on record the ready reckoner value as per the Mumbai suburb, Chembur village. Further, he brought to our notice Page No. 35 of the Paper Book to submit that assessee has filed details of sale agreements of flats/shops during the assessment proceedings before the Assessing Officer with complete details like sale agreement and stamp duty valuation.

**7.** Further, he brought to our notice another letter submitted by the assessee before the Assessing Officer on the application of provisions of section 43CA(3) of the Act in the case of the assessee and filed a detailed submissions. Further, he brought to our notice Page No. 44 of the Paper Book which is the notice issued u/s. 263 of the Act and assessee has submitted in response to the notice issued u/s. 263 of the Act all the relevant information which was submitted before the Assessing Officer which is placed on record at Page No. 46 to 48 of the Paper Book. Finally, he prayed that except in three flats in which the value adopted for stamp duty is in excess of market value on the date of allotment. He submitted that difference in market value on the date of allotment and value as per allotment letter is less than or in and around 5%. Therefore, the provisions of section 43CA is not applicable in the case of the assessee.

**8.** On the other hand, Ld.DR submitted that no doubt Assessing Officer has collected all the relevant information and failed to make verification. He heavily relied on the orders passed by the Ld. Pr.CIT u/s. 263 of the Act.

**9.** Considered the rival submissions and material placed on record, we observe that Ld. Pr.CIT while verifying the assessment records he came

to the conclusion that Assessing Officer has not verified on the applicability of section 43CA of the Act and he observed that there is a huge value difference compared to the market value on the date of registration and the agreement value. It is brought to our notice that Assessing Officer while making assessment u/s. 143(3) of the Act issued various notices u/s. 142(1) and assessee has submitted all the relevant information before the Assessing Officer and the assessee has clearly brought on record all the relevant information to substantiate its claim that the case of the assessee falls under section 43CA(3) of the Act. It is fact on record that assessee has entered into sale agreement with various parties in the year 2009 and 2010 and received advances against the above allotment letters. However, it is fact on record that assessee has issued allotment letter for all the above proposed sales. Due to delay in completion of the project on various reasons assessee could not complete the project and proceeded to register the sale deed only in the current Assessment Year. It is fact on record that Assessing Officer has collected all the informations and taken one of the possible view that the case of the assessee falls u/s. 43CA(3) of the Act and it is also fact on record only in three flats the value of the market value on the date of allotment is less than the registered value which is also within the range of 5%. Therefore,

the provisions of section 43CA is not applicable in the case of the assessee. However, we also observe that Ld. Pr.CIT also collected all the informations and he has not verified all the relevant information and not given a clear finding how the case of the assessee is prejudicial to the interest of the Revenue. He merely remitted the issue back to the file of the Assessing Officer by relying on Explanation 2 to section 263(1) of the Act. By considering overall facts on record, we are of the view that Assessing Officer has taken one of the possible view in the case of the assessee and also we observe that the Coordinate Bench has considered similar issue in the case of Shree Laxmi Estate (P.) Ltd. v. ITO [2019] 108 taxmann.com 195 (Mumbai – Trib) and held as under:

*"5.7.1.It is not in dispute that the assessee had not reported any sales from sale of units during the year under appeal in view of the fact that it is following project completion method and since the project was completed in Asst Year 2015-16, the assessee had reported the sale of units as its turnover in Asst Year 2015-16 by declaring the agreement value as the full value of consideration. It is not in dispute that the assessee had not sold any land or building or both in respect of any of the units during the year under appeal. We find that the assessee had only registered the agreement during the year under appeal, wherein, it is very clearly stated that the subject mentioned property (i.e the property proposed to be transferred by the assessee to the ultimate flat buyers) was still under construction and that the ultimate flat owners shall allow the assessee to enter upon the subject mentioned property premises to complete the construction of the flats as agreed upon in the said agreement which was subject matter of registration with the stamp duty authorities. In other words, the agreement that was registered with the stamp duty valuation authorities was only the 'property under construction' and not the property per se. In these circumstances, whether the provisions of section 43CA of the Act could at all be applied is to be seen. We are conscious of the fact*

*that the provisions of section 43CA of the Act are applicable only when there is transfer of land or building or both. In the instant case, neither of those had happened pursuant to registration of agreement with the stamp duty valuation authorities. In respect of allotment of offices made prior to 31.3.2013, we find from the documents enclosed in the paper book that the assessee and the prospective buyer of flats had specifically agreed that till such time the agreement of sale is executed and registered, no right is being created in favour of the flat buyer and that the allotment letter is just a confirmation of booking subject to the execution of the agreement which is to be drafted at a later point of time. The said allotment letter also specifies that the relevant office has been allotted to the flat buyer with rights reserved to assessee to amend the building plan as it may deem fit. Accordingly, the flat buyer is bound to accept unconditionally and confirm that any kind of increase or decrease in the area of the said office or shift in the position of the said office, if arises, due to amendment in the plan etc and in case of variation of the area, the value of the office shall be proportionately adjusted. All these documentary evidences clearly go to prove that the assessee had not completed the construction of the office during the relevant year. It could also be inferred that pursuant to registration of agreement with the stamp duty valuation authorities, a right is created in favour of the flat buyer. Hence what the assessee had transferred pursuant to registration of the agreement was only the rights in the flat/ office (which is under construction) and not the property per se. Hence it could be safely concluded that there was no transfer of any land or building or both by the assessee in favour of the flat buyers pursuant to registration of the agreement in the year under appeal. Hence we hold that the provisions of section 43CA of the Act cannot be made applicable to the same. Reliance in this regard is placed on the following decisions of co-ordinate benches of tribunals :-*

*(a) Ahmedabad Tribunal in the case of ITO vs Yasin Moosa Godil in ITA No. 2519/Ahd/2009 dated 13.4.2012 wherein it was held as under:-*

*"16. ....*

*(b) Jaipur Tribunal in the case of Mrs Rekha Agarwal vs ITO reported in (2017) 79 taxmann.com 290 (Jaipur Trib.) dated 17.2.2017*

*"2.9. ....*

*2.10. ....*

*2.11. ....*

2.12 .....

*We find that the aforesaid decisions are directly applicable to the facts of the case before us. In view of our aforesaid observations in the facts and circumstances of the case, we hold that the provisions of section 43CA of the Act could not be made applicable to the issue in dispute before us. In view of this finding, the other arguments advanced by the Id AR with regard to the fact that the Id AO ought to have made reference to the Id Departmental Valuation Officer (DVO) in the light of provisions of section 43CA(2) of the Act which is analogous to provisions of section 50C(2) of the Act need not be gone into as it becomes academic in nature. Accordingly, the grounds raised by the assessee are allowed.*

**10.** Respectfully following the above said decision and also in view of our above observations we hold that the provisions of section 43CA of the Act could not be made applicable to the case of the assessee. Accordingly, we set-aside the order passed u/s. 263 of the Act. Grounds raised by the assessee are allowed.

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

Order pronounced in the open court on 22<sup>nd</sup> December, 2022

Sd/-  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**  
Mumbai / Dated 22/12/2022  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**