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

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

ITA NO. 3142/MUM/2022 (A.Y: 2018-19)

Axia Infoserve LLP 16th Floor, Tower 2A One Indiabulls Centre Senapati Bapat Road, Elphinstone Road Mumbai- 400013 **PAN: ABIFA7158G**	*v.*	Additional/Joint/Dy/ACIT National e-assessment Centre Delhi
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Nitesh Joshi**
Department Represented by	**:**	**Shri Minal Kamble**
Date of conclusion of Hearing	**:**	**01.02.2023**
Date of Pronouncement	**:**	**02.05.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 07.10.2022 for the A.Y.2018-19.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2018-19 on 17.10.2018 declaring loss of ₹.1,63,549/-. The same was processed u/s. 143(1) of the Income-tax Act, 1961 (in short "Act"). The case was selected for scrutiny for verification of "Transaction in immovable properties". Accordingly, notices u/s. 143(2) and 142(1) of the Act were issued and served on the assessee alongwith the questionnaire. In response Authorised Representative of the assessee attended and submitted the relevant information as called for.

3. Assessee is a limited liability partnership (LLP) incorporated in accordance with the provisions of the Limited Liability Partnership Act, 2008 on 28.12.2016. During the current assessment year, assessee has made investment in the purchase of two flats. Assessing Officer observed that as per copy of Agreement of Sale' executed on 28.07.2017 which was furnished dated 24.09.2020, the assessee purchased Flat No.3201, in 'Thakkar Tower Building, having area admeasuring 934 sq. ft alongwith two car-parking spaces in basement in the society known as "Willingdon View Cooperative Housing Society Ltd. situated at C.S.T. No.369, Tulsiwadi Road, Tardeo, Mumbai for a consideration of ₹.3,25,00,000/- from its partners Mrs. Sonal Jiten

Choksey and Mrs. Sonal Jiten Choksey and assessee had paid stamp duty on the value of ₹.3,34,30,500/-.

4. Further, assessee furnished copy of 'Supplementary Agreement showing therein purchase of car parking No.2 for a consideration of ₹.9.30,500/-. Assessing Officer observed that Supplementary Agreement was made only to cover up the difference of stamp duty value, as the Supplementary Agreement was neither registered nor witnessed and the date was also not mentioned on it. Accordingly, he rejected the supplementary agreement.

5. He Further, observed that as per the copy of 'Agreement of Sale' the flat was purchased alongwith two car parking spaces in basement earmarked as 1 and 2, therefore, there was no need to make any further 'Supplementary Agreement for the purchase of car parking. The Assessing Officer issued notice u/s 142(1) issued alongwith questionnaire on 15.01.2021 to the assessee and was asked as to why addition of ₹.9,30,500/- may not be made by invoking the provision of section 56(2)(x)(b) of the Act.

6. Further, Assessing Officer observed that as per copy of another Agreement of Sale executed on 28.07.2017, assessee made investment

of ₹.3,25,00,000/- in the purchase of flat no. 3202, in the above mentioned society alongwith one car-parking space and for this flat also consideration was received from its partners and registration stamp duty value of the flat is ₹.3.25.88,900/-. Accordingly, a notice u/s 142(1) was issued to the assessee as to why the addition of ₹.88,900/- should not be made by invoking the provision of the section 56(2)(x)(b) of the Act.

7. In response, Ld. AR of the assessee submitted as under: -

> *"3. With respect to investment in flat no. 3201, the total purchase consideration as well as stamp duty value of the said flat is Rs.3,34,30,500/- We wish to bring to the notice of your good self that we had inadvertently submitted the undated copy of supplementary agreement of Rs 9,30,500 vide our submission dated 24.09.2020. We are enclosing herewith the copy of supplementary agreement which is duly dated and witnessed.*
>
> *4. The said supplementary agreement was made for 2nd car parking space, consideration for which was not recorded in the main agreement even though adequate stamp duty was paid for it the time of registration of main agreement.*
>
> *5. Further, your good self will also appreciate that as per the provision of the section 56(2)(x)(b) of the Income Tax Act, 1961 which provides as follows:*
>
> > *"any immovable property-*
> >
> > *(A) Without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty of such property;*
> >
> > *(B) For a consideration, the stamp duty value of such property as exceeds such consideration, if the amount of such excess is more than the higher of the following amounts, namely:-*
> >
> > *(i) The amount of fifty thousand rupees; and*

(ii) The amount equal to [five] per cent of the consideration"

However, in the case of the assessee, the difference between purchase consideration and stamp duty value is within the permissible tolerance band/safe harbour limit of 5%. The details of which are as follows-

Flat No.	**Amount of purchase consideration**	**Stamp duty value (Market value)**	**Difference between stamp duty value and purchase consideration**	**Permissible tolerance band (5% of purchase consideration)**
3201	Actual consideration is Rs.3,34,30,500	Rs.3,34,30,500	Nil	Rs.16,71,525
	In case your good self is not satisfied with the reliability of the supplementary agreement of Rs.9,30,500 - cost would be Rs.3,25,00,000	Rs.3,34,30,500	Rs.9,30500/-	Rs.16,25,000
3202	Rs.3,25,00,000	Rs.3,25,88,900	Rs.88,900/-	Rs.16,25,000

In view of the above, the provision of section 56(2)(x)(b) of the Income Tax Act, 1961 cannot be invoked and addition cannot be made in case of the assessee."

8. After considering the submissions of the assessee, Assessing Officer rejected the submissions of the assessee as well as supplementary agreement submitted by the assessee and proceeded to make the addition of ₹.10,19,400/- (₹.9,30,500 + ₹.88,900/-) the difference of stamp duty and sale agreement as income of the assessee.

9. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) dismissed the appeal of the assessee observing as under: -

"7. Ground No. 4: The Appellant has argued that since the concerned provisions of the Act i.e section 56(2)(x)(b)(B) of the Act has been amended and the amendment is declaratory and curative in nature and applies retroactively therefore, provisions of section 56(2)(x) cannot be invoked in the Appellant's case and hence, no addition can be made under section 56(2)(x) as the difference between stamp duty value and purchase consideration for flat no. 3201 & flat No. 3202 is within the allowable limit of 5% and now w.e.f 1-4-2021, limit of 10%.

7.1 It is a well-settled rule of interpretation fallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute, so as to take away or impair an existing right, or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in volume 36 of the Laws of England (third edition) and reiterated in several decisions of the Supreme Court as well as English courts is that "all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective" and retrospective operation should not be given to a statute so as to effect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

7.2. In Hitendra Vishnu Thakur vs. State of Maharashtra, AIR 1994 S.C. 2623, the Supreme Court held:

(i) A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits. (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature; (iii) every litigant has a vested right in substantive law, but no such right exists in procedural law. (iv) A procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished. (v) A statute which not only changes the procedure but also creates newrights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary

implication. This principle stands approved by the Constitution Bench in the case of Shyam Sunder vs. Ram Kumar AIR 2001 S.C. 2472.

7.3 It has been consistently held by the Supreme Court in CIT vs. Varas International P. Ltd. (2006) 283-ITR-484 (SC) and recently, that for an amendment of a statute to be construed as being retrospective, the amended provision itself should indicate either in terms or by necessary implication that it is to operate retrospectively. Of the various rules providing guidance as to how legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock, that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit law looks forward not backward. As was observed in Phillips vs. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated, when introduced for the first time to deal with future acts, ought not to change the character of past transactions carried on upon the faith of the then existing laws as observed in CIT vs. Vatika Township P. Ltd. (2014) 367-ITR-466 at 486.

7.4 In the case of CIT vs. Scindia Steam Navigation Co. Ltd. (1961) 42-ITR-589 (SC), the court held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year.

7.5 Respectfully, following the decisions discussed above, the undersigned beg to opine that the appellant is not eligible for the benefit of the amendment which was not available at the year under consideration and thus the difference between the stamp duty value and sale consideration, if exceeds Fifty thousand rupees, will be treated as income from Other sources as per the provisions of Section 56(2)(x)(b)(B) of the Act, as applicable for the year under consideration. Accordingly, the ground no 4 of appeal is dismissed.

8. Ground no 2 &3: The Appellant contended that the AO rejected the supplementary agreement by doubting the authenticity of the supplementary agreement on a flimsy ground that the addresses of witness are not mentioned in the Agreement and without considering the fact that the same was franked and was duly signed by both the parties and corresponding witnesses. The copy of the said 'supplementary agreement was supplied during the appellate proceedings.

8.1 During the assessment proceedings, the appellant submitted the supplementary agreement in regard to second car parking for the Flat no 3201. The AO found that there were various discrepancies and the same were pointed out to the appellant. The discrepancies detected by the AO were

1. It was not registered;

2. It was not signed by the witnesses;

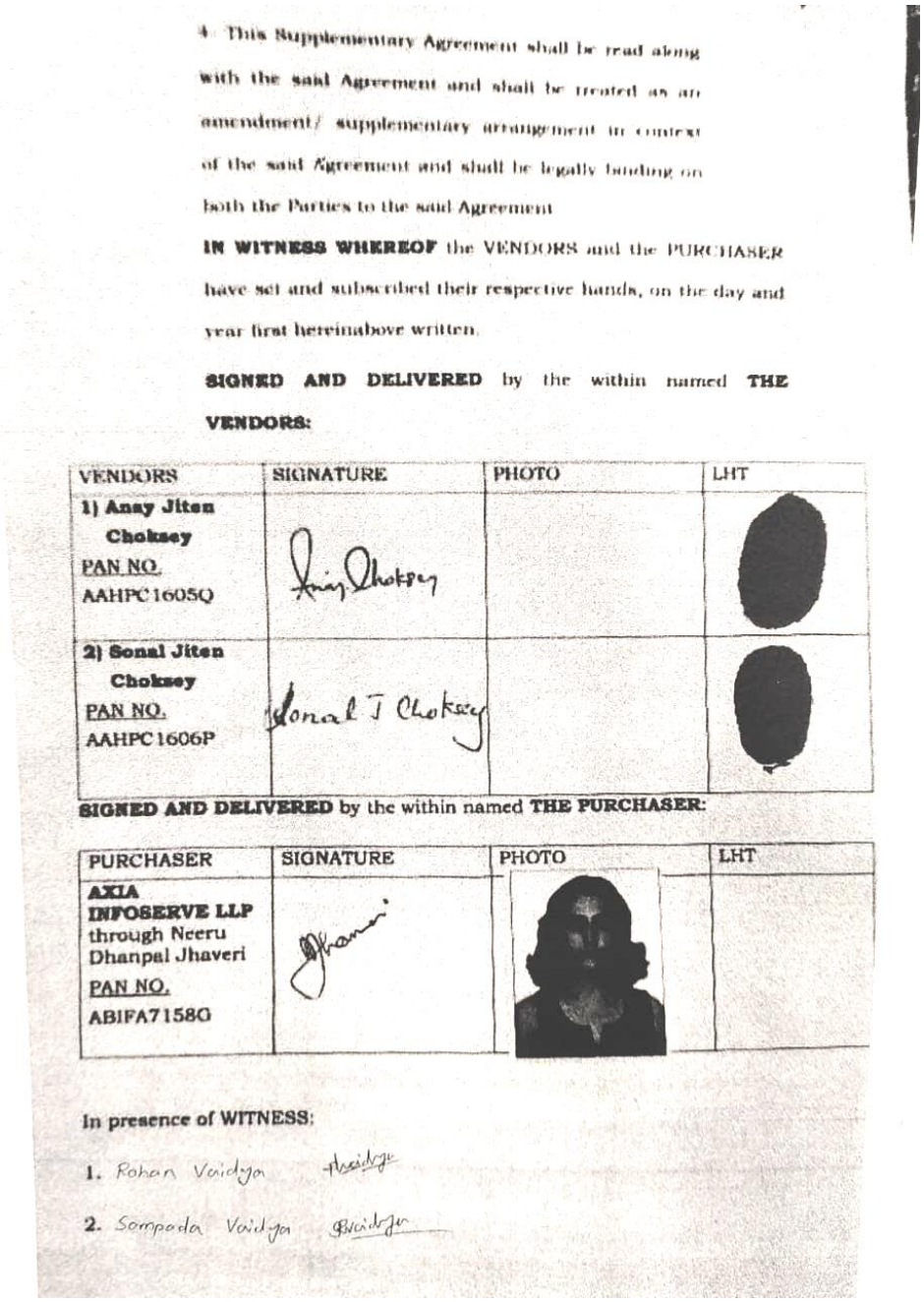
3. It was undated.

4. It was never a part of the main agreement

8.2. The Appellant revisited the AO and submitted the same copy but with dates mentioned and with signature of witnesses marked without any address of the witnesses. The AO has INCOmished a copy of Supplementary Agreement' showing made observations after the perusal of the supplementary agreement in the assessment order which is as below

> *"The assessee therein purchase of car parking no 2 for a consideration of Rs 9,30,500/- from the same persons. The Supplementary Agreement furnished by the assessee was neither registered nor witnessed and was also undated. When discrepancies of the Supplementary Agreement were pointed out to the assessee, copy of the same agreement was furnished by writing date on the first page of it by pen and after obtaining signature of two witnesses on the agreement. The addresses of the witnesses are not mentioned on the agreement. Since the assessee had purchased flat no. 3201 alongwith car parking no. 1 & 2, there was no need to make separate 'supplementary Agreement for the purchase of car parking no. 2. In view of the facts narrated above there is no authenticity of the 'Supplementary Agreement furnished by the assessee."*

8.3 The last page of the Supplementary Agreement has the signatures of witness which is only sign without any details e.g. PAN, Address etc. The copy is as below:



4. This Supplementary Agreement shall be read along with the said Agreement and shall be treated as an amendment/ supplementary arrangement in context of the said Agreement and shall be legally binding on both the Parties to the said Agreement

IN WITNESS WHEREOF the VENDORS and the PURCHASER have set and subscribed their respective hands, on the day and year first hereinabove written.

SIGNED AND DELIVERED by the within named **THE VENDORS:**

VENDORS	SIGNATURE	PHOTO	LHT
1) Anay Jiten Choksey PAN NO. AAHPC1605Q			
2) Sonal Jiten Choksey PAN NO. AAHPC1606P			

SIGNED AND DELIVERED by the within named **THE PURCHASER:**

PURCHASER	SIGNATURE	PHOTO	LHT
AXIA INFOSERVE LLP through Neeru Dhanpal Jhaveri PAN NO. ABIFA7158G			

In presence of WITNESS:

1. Rohan Vaidya
2. Sampada Vaidya

8.4 From the perusal of the said Supplementary Agreement furnished by the assessee, it is evident that the remarks made by the AO is undoubtable correct. The said agreement is not registered, the addressees of witness are not mentioned making the role of witness blurred. The appellant has never disputed or filed any contrary view that the signature and dates were written after the same were pointed out by the AO. In view of the above discussion, the undersigned is of considered view that the Supplementary Agreement was unsuccessful attempt made by the

appellant to bridge the gap between the Stam Duty value and sale consideration and the AO was correct in not allowing the same. The argument of the appellant that the accounts are duly audited by senior Chartered Accountant thus should be admitted does not have merit as the Chartered Accountant does the audit on the basis of documents as supplied by the client. Thus there is no occasion to interfere with the findings of the assessing officer and the additions made are sustained. The Ground No 2 and 3 are therefore dismissed."

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

"1. On the facts and circumstances of the case and in law, the Ld. NFAC erred in sustaining the order passed by the National e-Assessment Centre, making addition of Rs.10,19,400/- u/s.56(2)(x)(b) of the Income Tax Act, 1961.

2. On the facts and circumstances of the case and in law, the Ld. NFAC erred in not appreciating the fact that the amendment to section 56(2)(x)(b) by inserting sub clause (B) in section 56(2)(x)(b) is not a substantive amendment but is curative in nature and applies retroactively and therefore, provisions of section 56(2)(x) cannot be invoked in the Appellant's case and hence, no addition can be made under section 56(2)(x) as the difference between stamp duty value and purchase consideration for flat no. 3201 & flat no. 3202 is within the allowable limit of 5%.

3. On the facts and circumstances of the case and in law, the Ld. NFAC erred in not accepting the supplementary agreement for purchase of parking space for flat no. 3201.

4. On the facts and circumstances of the case and in law, the Ld. NFAC erred in not appreciating fact that Assessing officer having accepted the books of accounts of the Appellant, which duly recorded consideration paid under supplementary agreement for Flat no 3201 dated 05/10/2017, cannot reject the supplementary agreement for purchase of parking space for flat no. 3201."

11. At the time of hearing, with regard to Ground No. 2, Ld. AR brought to our notice Page No. 3 of the Assessment Order and

submitted that there is a difference of sale consideration and stamp duty valuation and the difference was added by applying provisions of section 56(2)(x) of the Act. He submitted that the present assessment year is A.Y. 2018-19 and as per amended provisions of section 56(2)(x) of the Act there is a tolerance limit of 5% which is applicable w.e.f 01.04.2019. However, he submitted that the relevant tolerance limit was amended by the Finance Act, 2020 w.e.f. 01.04.2021 to 10% in place of 5%. He submitted that the amendment made in section 56(2)(x) in A.Y. 2018-19 and enhancement of the tolerance band for variation between sale consideration and stamp duty valuation to 5% or 10% are curative in nature. Therefore, these provisions even though amended w.e.f. 01.04.2019 and 01.04.2021 it is retrospective in nature which is similar to the provisions introduced in section 50(C) of the Act. In this regard he relied on the decision of the ITAT Chennai Bench in the case of Shanmuga Sundaram govindaraj *v.* ACIT [2022] 141 taxmann.com 119 (Chennai – Trib).

12. With regard to Ground Nos. 3 and 4, Ld. AR submitted that the first agreement entered by the assessee with the builder relating to purchase of flat with one car parking. In this regard, he brought to our notice Page No. 2 of the Paper Book wherein the value of agreement is

mentioned as ₹.3,25,00,000/- and value registered was for ₹.3,34,30,500/- this registration cost inclusive of are 934 sq.ft along with two (2) car parking's. Further, he brought to our notice Page No. 37 of the Paper Book which is agreement for sale and he specifically brought to our notice Page No. 38 of the Paper Book to highlight that assessee has entered into agreement to purchase 934 sq.ft of carpet area along with one car parking and consideration accepted for the above purchases is ₹.3,25,00,000/-. The above said agreement is for Flat No. 3202 which has similar carpet area and car parking in Flat No. 3201. The difference between the above said two flats are only additional car parking for which assessee has submitted that assessee has entered into supplementary agreement only to purchase the additional car parking. Therefore, he submitted that if we consider the supplementary agreement the difference will be exactly similar to Flat No. 3202. He submitted that lower authorities have rejected supplementary agreement on the face value without considering the relevant facts on record.

13. On the other hand, Ld. DR relied on the orders of the lower authorities.

14. Considered the rival submissions and material placed on record, we observe from the record that assessee has purchased two flats i.e, Flat No. 3201 an Flat No. 3202 with the carpet area 934 sq.ft along with one car parking. In Flat No. 3201 assessee has entered into supplementary agreement to purchase additional car parking. Therefore, the amount of purchase consideration for Flat No. 3201 is ₹.3,34,30,500/- and purchase consideration for Flat No. 3202 is ₹.3,25,00,000/-. The stamp duty value adopted are ₹.3,34,30,500/- and ₹.3,25,88,900/- respectively. Assessing Officer observed that tolerance limit of 5% in section 52(x)(b) was introduced by the Finance Act, 2018 effective from A.Y. 2019-20. Therefore, the above said amendment will not be applicable for the current Assessment Year. Accordingly, he proceeded to make the addition the difference of stamp duty valuation and the purchase consideration. Before us, Ld. AR of the assessee brought to our notice that ITAT Chennai Bench has decided above said issue of tolerance limit of 5% is applicable retrospectively considering the amendment made are curative in nature. The relevant decision ratio relied by the Ld. AR is reproduced below: -

> *7. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the Co-ordinate bench of this Tribunal, Mumbai Bench in the case of Maria Fernandes Cheryl, supra, has considered this issue in detail and further considered the Finance Act, 2018 inserting second proviso to section 50C of the*

Act, whereby the tolerance limit of 5% was introduced and similarly in the provisions of section 56(2)(x)(b)(A) of the Act, tolerance limit of 5% is increased, which was increased subsequently by the Finance Act, 2020 to 10%. We noted that the Co-ordinate Bench in the case of Maria Fernandes Cheryl, supra, has considered this issue and also considered the issue of provisions of section 43CA, 50C and 56 of the Act and held as under:-

> *"The Honourable Member directed the undersigned to submit a note on the larger question of retrospective applicability of third proviso of Section 50C whereby a variation of 5% wef 1.4.2019 [10% wef 1.4.2021 as Act no. 12 of 2020] is permissible in the sale consideration vis-a-vis valuation adopted by Stamp valuation authorities.*
>
> *In this regard, it is humbly submitted that the Finance Act 2018 specifically mentions that the third proviso will come into force prospectively from 1.4.2019 and likewise the Act No 12 of 2020 enhancing the variation from 5% to 10% also specifically states that the enhanced variation will be effective from 1.4.2021. The relevant amendments and explanatory notes are reproduced below for ready reference :*
>
> *The Finance Act 2018 inserted Second proviso to section 50C as under:*
>
> *Amendment of section 50C. 20. In section 50C of the Income-tax Act, in sub-section (1), after the second proviso, the following proviso shall be inserted with effect from the 1st day of April, 2019, namely:—*
>
> *"Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration."*
>
> *The amendment to Section 50C is explained in Circular 8 of 2018 titled Explanatory Notes to the provisions of The Finance Act 2018 as under :*
>
> *16. Rationalization of section 43CA, section SOC and section 56*

16.1 Before amendment by the Act, for computing income from business profits (section 43CA), capital gains (section SOC) and other sources (section 56) arising out of transactions in immovable property, the higher of sale consideration or stamp duty value was adopted. The difference was taxed as income both in the hands of the purchaser and the seller.

16.2 It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location.

16.3 In order to minimize hardship in case of genuine transactions in the real estate sector, section 43CA, section 50C and section 56 of the Income-tax Act have been amended to provide that no adjustments shall be made in a case ITA No. 4850/Mum/2019 Assessment year: 2011-12 Page 4 of 9 where the variation between stamp duty value and the sale consideration is not more than five per cent of the sale consideration.

16.4 Applicability: These amendments take effect from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20 and subsequent assessment years

Explanatory Notes to Finance Act 2020

Increase in safe harbour limit of 5 per cent. under section 43CA, 50C and 56 of the Act to 10 per cent..

Section 43CA of the Act, inter alia, provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (i.e. "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall for the purpose of computing profits and gains from transfer of such assets, be deemed to be the full value of consideration. The said section also provide that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the

consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.

Section 50C of the Act provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by stamp valuation authority for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration and capital gains shall be computed on the basis of such consideration under section 48 of the Act. The said section also provides that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.

Clause (x) of sub-section (2) of section 56 of the Act, inter alia, provides that where any person receives, in any previous year, from any person or persons on or after 1st April, 2017, any immovable property, for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration shall be charged to tax under the head "income from other sources". It also provide that where the assessee receives any immovable property for a consideration and the stamp duty value of such property exceeds five per cent of the consideration or fifty thousand rupees, whichever is higher, the stamp duty value of such property as exceeds such consideration shall be charged to tax under the head "Income from other sources".

Thus, the present provisions of section 43CA, 50C and 56 of the Act provide for safe harbour of five per cent.

Representations have been received in this regard requesting that the said safe harbour of five per cent may be increased.

It is, therefore, proposed to increase the limit to ten per cent..

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.

Thus, the safe harbour limit of 5% is applicable upto AY 2020-21 and 10% is specifically from AY 2021-22 onwards.

It is humbly submitted that in the present case the variation is 6.55% which is more than specified safe harbour limit of 5%.

It is further humbly submitted that

a. *The value determined by Valuation officer is statutorily required to be adopted u/s 50C(2) of Act and in the present case, the AO has already referred the matter to valuation officer and the same is awaited. Hence, it is humbly submitted that deemed sale consideration may be taken as determined u/s 50C(2) of the Act*

b. *the third proviso is applicable prospectively especially as retrospective effect is neither mentioned in the provisions of section 50C nor in the Explanatory Notes to Finance Act 2018 issued vide Circular 8/2018*

c. *the variation permissible is only 5% as on date and the enhanced variation of 10% is applicable only from 1.4.2021.*

Lastly it is also submitted that in case the Honourable Tribunal is not inclined to accept the submissions, it is requested that it may kindly be mentioned that relief is being provided as a special case and this decision may not be considered as a precedent.

7. These submissions, however, do not impress us. As noted by the Central Board of Direct Taxes circular # 8 of 2018, explaining the reason for the insertion of the third proviso to Section 50C(1), has observed that "It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location". Once the CBDT itself accepts that these variations could be on account of a variety of factors, essentially bonafide factors, and, for this reason, Section 50C(1) should not come into play, it was an

"unintended consequence" of Section 50(1) that even in such bonafide situations, this provision, which is inherently in the nature of an anti-avoidance provision, is invoked. Once this situation is sought to be addressed, as is the settled legal position- as we will see a little later in our analysis, this situation needs to be addressed in entirety for the entire period in which such legal provisions had effect, and not for a specific time period only. There is no good reason for holding the curative amendment to be only as prospective in effect. Dealing with a somewhat materially identical situation in the case of Rajeev Kumar Agarwal Vs ACIT [(2014) 45 taxmnann.com 555 (Agra)] wherein a coordinate bench was dealing with the question whether insertion of a proviso to Section 40(a)(i) to cure intended consequence could have retrospective effect, even though not specifically provided for, and speaking through one of us (i.e. the Vice President), the coordinate bench had, after a detailed analysis of the legal position, observed that, "Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced". Referring to this decision, and extensively reproducing from the same, including the portion extracted above, Hon'ble Delhi High Court, in the case of CIT Vs Ansal Landmark Township Pvt Ltd [(2015) 61 taxmann.com 45 (Del)], has approved this approach and observed that "(t)he Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance". The same was the path followed by another bench of this Tribunal in the case of Dharmashibhai Sonani Vs ACIT [(2016) 161 ITD 627 (Ahd)] which has been approved by Hon'ble Madras High Court in the judgment reported as CIT Vs Vummudi Amarendran [(2020) 429 ITR 97 (Mad)]. The question that we must take a call on, therefore, is as to what is the rationale behind the insertion of the third proviso to Section 50C(1), and if that rationale is to provide a remedy for unintended consequences of the main provision, we must hold that the third proviso to Section 50C(1) comes into force

with effect from the same date on which the main provision, unintended provisions of which are sought to be nullified, itself was brought into effect. Let us understand what the nature of the provisions of Section 50C is. In terms of this provision, if the property is sold below the stamp duty valuation rate, which is often called circle rate, this stamp duty valuation report is assumed as sale consideration for the property in question, and, accordingly, capital gains tax is levied. This deeming fiction to substitute apparent sale considerations by notional consideration computed on the basis of a stamp duty valuation rate, was thus to address the issue with respect to potential evasion of taxes by understating the sale consideration amount in a sale deed. As noted by the CBDT, while explaining the justification for insertion of Section 50 C, "(t)he Finance Act, 2002, has inserted a new section 50C in the Income-tax Act to make a special provision for determining the full value of consideration in cases of transfer of immovable property". Section 50C, thus, on a conceptual note, is a provision to address capital gains tax evasion on account of understatement of the consideration. Of course, the law provides, under section 50C(2), that wherever an assessee claims that the actual market rate is less than the stamp duty valuation, he can have the matter referred to a Departmental Valuation Officer for the ascertainment of the market value, but then it is a cumbersome procedure and, at the end of the day, every valuation, whether by the departmental valuation officer or under the stamp duty valuation notification, is an estimate, and there can always be bonafide variations, though to a certain limited extent, in these estimations. Unless, therefore, some kind of a tolerance band or a safe harbour provision, in respect of such bonafide variations, is implicit in the scheme of law, the assessees are bound to face undue hardships. The mechanism under section 50C proceeds on the assumption that when the sale consideration is less than the stamp duty valuation, the sale consideration is to be treated as understated. This assumption is, however, laid to rest when the variations between the stated consideration and the stamp duty valuation figure are treated as explained. The insertion of the third proviso to Section 50C(1) provides for this tolerance band with respect to a certain degree of variations between the stamp duty valuation and the stated consideration of an immovable property. In other words, as long as the variations are within the permissible limits, the anti-avoidance provisions of Section 50C do not come into play. As we have noted earlier, the CBDT itself accepts that there could be various bonafide

reasons explaining the small variations between the sale consideration of immovable property as disclosed by the assessee vis-à-vis the stamp duty valuation for the said immovable property. Obviously, therefore, disturbing the actual sale consideration, for the purpose of computing capital gains, and adopting a notional figure, for that purpose, will not be justified in such cases. On a conceptual note, an estimation of market price is an estimation nevertheless, even if by a statutory authority like the stamp duty valuation authority, and such a valuation can never be elevated to the status of such a precise computation which admits no variations. The rigour of Section 50C(1) was thus relaxed, and very thoughtfully so, to take these bonafide cases of small variations between the stated sale consideration vis-à-vis stamp duty valuation, out of the scope of adjustments contemplated in the computation of capital gains under this anti-avoidance provision. In our humble understanding, it is a case of a curative amendment to take care of unintended consequences of the scheme of Section 50C. It makes perfect sense, and truly reflects a very pragmatic approach full of compassion and fairness, that just because there is a small variation between the stated sale consideration of a property and stamp duty valuation of the same property, one cannot proceed to draw an inference against the assessee, and subject the assessee to practically prove his being truthful in stating the sale consideration. Clearly, therefore, this insertion of the third proviso to Section 50C(1) is in the nature of a remedial measure to address a bonafide situation where there is little justification for invoking an anti-avoidance provision. Similarly, so far as enhancement of tolerance band to 10% by the Finance Act 2020, is concerned, as noted in the CBDT circular itself, it was done in response to the representations of the stakeholders for enhancement in the tolerance band. Once the Government acknowledged this genuine hardship to the taxpayer and addressed the issue by a suitable amendment in law, the next question was what should be a fair tolerance band for variations in these values. As a responsive Government, which is truly the hallmark of the present Government, even though the initial tolerance band level was taken at 5%, in response to the representations by the stakeholders, this tolerance band, or safe harbour provision, was increased to 10%. There is no particular reason to justify any particular time frame for implementing this enhancement of tolerance band or safe harbour provision. The reasons assigned by the CBDT, i.e., "the variation between stamp duty value and actual

consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location," was as much valid in 2003 as it is in 2021. There is no variation in the material facts in this respect in 2021 vis-à-vis the material facts in 2003. What holds good in 2021 was also good in 2003. If variations up to 10% need to be tolerated and need not be probed further, under section 50C, in 2021, there were no good reasons to probe such variations, under section 50C, in the earlier periods as well. We are, therefore, satisfied that the amendment in the scheme of Section 50 C(1), by inserting the third proviso thereto and by enhancing the tolerance band for variations between the stated sale consideration vis-à-vis stamp duty valuation to 10%, are curative in nature, and, therefore, these provisions, even though stated to be prospective, must be held to relate back to the date when the related statutory provision of Section 50C, i.e. 1st April 2003. In plain words, what is means is that even if the valuation of a property, for the purpose of stamp duty valuation, is 10% more than the stated sale consideration, the stated sale consideration will be accepted at the face value and the anti-avoidance provisions under section 50C will not be invoked."

15. Respectfully following the above said decision, we are also inclined to accept that the amendment brought by the Finance Act, 2018 which is curative in nature and the effective rate of tolerance limit of 5% is applicable for the current Assessment Year also. Accordingly, the relief of 5% is extended to the current Assessment Year, when the above relief is granted, the addition made by the Assessing Officer is within the above tolerance limit, accordingly, Ground No. 2 raised by the assessee is allowed.

16. Since Ground No. 2 goes to the root of the case and the disallowance made by the Assessing Officer is covers the above said tolerance limit, therefore we do not intend to adjudicate the issue on car parking and supplemental agreement. Therefore, Ground No. 3 and 4 are not adjusted at this stage, accordingly, above said grounds are kept open.

17. The Ground No.1 is general in nature, and needs no adjudication.

18. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 02nd May, 2023.

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

Mumbai / Dated 02/05/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum