

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 958/Mum/2023 (A.Y.2016-17)

Reliable Constructions,
1st floor, Rohini CHS Ltd,
Building No. 10, Shastri
Nagar, Goregaon West,
Mumbai-400 104
PAN: AAIFR7192E

..... Appellant

Vs.

ACIT-21(3)
Piramal Chamber,
Lalbaug Parel,
Mumbai-400012

..... Respondent

Appellant by : Shri Ashwin Chhag
Respondent by : Smt. Mahita Nair, Sr. AR – CIT

Date of hearing : 21/06/2023
Date of pronouncement : 21/06/2023

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of National Faceless Appeal Centre (for short "NFAC") dated 27.01.2023 u/s. 250 of the Income Tax

Act, 1961 (in short 'the Act') for A.Y. 2016-17. The assessee has raised the following grounds (revised) of appeal:-

1. DIFFERENCE IN SALE VALUE AS PER SECTION 43CA OF THE INCOME TAX ACT:

Without prejudice to the aforesaid, on merit, the Ld. AO erred in invoking provisions of section 43CA and made addition Rs. 22, 78,610/- on account of difference between the stamp duty value and agreement value. Ld. AO is erred to invoking provisions of Section 43CA of the Act particularly by plain reading of the section without considering the situations under which your Appellant had to sale flats/shops below the stamp duty value. The addition made on this ground is without considering the situations of the Appellant and request your honour to remove the same as:

i. Universal presumption that stamp duty value would be regarded as the full value of consideration without looking into the factual aspects tantamount to discrimination.

ii. Circle rate is not always the true indicator of the market value of the property as the market value keeps on fluctuating at different times. Further there were various factors when market value can be less than the stamp duty value like location of the property, decrease in the prices, situations prevailing at the time of sale, vastu compliant and auction sale, intensity of builders to sale the flat/shop, distress sale, financial crises etc, etc.

iii. Delhi HC admits plea against section 43CA:

Delhi HC admits Ansal Housing & Construction Ltd.'s (assessee') writ challenging virus of Sec. 43CA (which deems stamp duty valuation as sales consideration for land and building held as stock in trade) and amendment to Sec. 56(2) (vii) (b); Assessee argues that these provisions attempt to tax notional income and result in double taxation; HC lists the matter for hearing on January 16, 2018. The appeal was admitted by a division bench

comprising of Justice Ravindra Bhat and Justice Sanjeev Sachdeva. Senior Advocate Arvind Datar, assisted by Advocates Kavita Jha and Bhuwan Dhoopar, are representing the taxpayer before the HC. The information contained in the alert is source based. Assessee, Ansal Housing & Construction Ltd., filed a writ petition before Delhi HC challenging the insertion of section 43CA and amendment to Section 56(2) (vii) (b) of the Income Tax Act, 1961 by the Finance Act, 2013.

2. Further Penalty u/s. 271(1) (c) is uncalled for and unwarranted in this case.

2. Brief facts of the case are that assessee's partnership firm engaged in the business of reconstruction and redevelopment of existing tenanted buildings and chawls, builder and developers, civil construction work. The assessee's firm filed its return of income on 19.12.2016 declaring total income at Rs. 1,02,92,420/-. The case of the assessee was selected for complete scrutiny during the assessment proceedings it was observed by the AO that assessee has sold total 7 properties and the value of those properties were below the stamp duty value for the purposes of section 43CA.

3. Details of the properties alongwith amount of difference in value terms and in percentage also reproduced herein below:-

Sr. No	Flat No	Name of person	Date of agreement	Agreement value	Stamp duty value(as per Booking date)	Difference	Percentage
1	205/B	Rajan M. Khamkar	05/07/2015	770000	770400	400	0.052%
2	204/B	Priti M Khanchandani	21/04/2015	440000	441360	1360	0.31%
3	1101/A	Premshankar B Pandya	03/07/2015	5000000	5037956	37956	0.76%
4	805/B	Ayub Hasan Siddiqui	11/03/2016	6000000	6548094	548094	9.13%
5	1005/B	Shabnam Abdul Hai	30/04/2015	7136000	7136800	800	0.01%
6	1804	Rajiv S Prakash	18/03/2016	10680000	11525000	845000	7.91%

7	1505	Amit Raj	15/03/2016	10680000	11525000	845000	7.91%
			TOTAL	40706000	42984610	2278610	5.56%

4. For sake of clarity on issue and relevant provision of Act, we are reproducing herewith section 43CA as under:

Section - 43CA

[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:

[**Provided** 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 [ten] 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:]

[**Provided further** that in case of transfer of an asset, being a residential unit, the provisions of this proviso shall have the effect as if for the words "one hundred and ten per cent", the words "one hundred and twenty per cent" had been substituted, if the following conditions are satisfied, namely:—

- (i) the transfer of such residential unit takes place during the period beginning from the 12th day of November, 2020 and ending on the 30th day of June, 2021;
- (ii) such transfer is by way of first time allotment of the residential unit to any person; and
- (iii) the consideration received or accruing as a result of such transfer does not exceed two crore rupees.]

(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 way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account] [or through such other electronic mode as may be prescribed] on or before the date of agreement for transfer of the asset.]

[*Explanation.*—For the purposes of this section, "residential unit" means an independent housing unit with separate facilities for living, cooking and sanitary requirement, distinctly separated from other residential units within the building, which is directly accessible from an outer door or through an interior door in a shared hallway and not by walking through the living space of another household.]

5. Section 43CA was inserted w.e.f. AY 2014-15 and first proviso and second proviso were inserted w.e.f. AY 2019-20 and AY 2021-22 respectively. In first proviso initially tolerance limit was 5% and then increased to 10% w.e.f. AY 2021-22. Second proviso always have a tolerance limit of 20% subject to that asset must be a residential unit. We find even if we cover the case of the assessee in first proviso i.e. with a tolerance limit of 10% w.e.f. AY 2021-22 (although the transactions of the assessee are with respect to residential units), no addition u/s. 43CA is warranted as the effect of first proviso with enhanced tolerance limit is retrospective in nature. As demonstrated above through table that individually and cumulatively assessee is not crossing the limit of tolerance i.e. 10%, these provisos although inserted later on w.e.f. AY 2019-20 and 2021-22, but the same have

retrospective effect. To fortify our this view, we rely on following judicial pronouncements of Coordinate Benches and Hon'ble Supreme Court as under:-

[2022] 144 taxmann.com 168 (Pune - Trib.) Sai Bhargavanath Infra v. ACIT

*“The essence of the decision is that if any liability has to be fastened with the assessee tax-payer retrospectively then the statute and the provision must spell out specifically regarding such retrospective applicability. However, if the provision is beneficial for the assessee, in view of the welfare legislation spirit imbibed in the Income-tax Act, such beneficial provision can be applied in a retrospective manner. In the case of the assessee before us for the preceding assessment year i.e. A.Y. 2014-15, the difference of the consideration received from transfer of asset and the value adopted for stamp duty valuation was apparently less than 10% tolerance margin which has been brought into effect from 1-4-2021 in the first proviso to section 43CA and therefore, the Tribunal in its wisdom had restored the matter to the file of the A.O for fresh adjudication (supra). Before us, admittedly such difference of tolerance margin is less than 10%. Now the question of applicability of this proviso of section 43CA retrospectively covering the assessment year in question i.e. A.Y. 2015-16, from the spirit of Supreme Court decision in Vatika Township (P.) Ltd. (supra) case is analysed. Now, the intent of the legislature is to provide relief to the assessee in case such difference is less than 10% which has been brought into effect from 1-04-2021 thereby providing benefit to the assessee. This being the beneficial provision therefore will even have retrospective effect and would apply to the present assessment year 2015-16. At this juncture we would also refer to the decision of Pune Tribunal in Dinar Umesh kumar More v. ITO [IT Appeal No. 1503 (Pune) of 2015, dated 25-1-2019], where the said proposition of applicability of a beneficial provision was considered in light of Hon'ble Apex Court decision in the case of Vatika Township (P.) Ltd.(supra). **In the said Tribunal order, the Bench observed that if the legislature is going to confer a benefit then such an averment will have a retrospective effect. The Tribunal observed that while discussing this issue in para 33 of the said judgment, the Hon'ble Apex Court held that "We would also like to point out, for the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect". The net effect of this judgment is that if a fresh benefit is provided by the Parliament in an existing provision, then such an amendment should be given retrospective effect. Therefore, even without going into the merits of the case by the application of first proviso to section 43CA having retrospective effect, the grounds of appeal of the assessee stands allowed.**”*

[2014] 49 taxmann.com 249 (SC) CIT (Central-1) v. VatikaTownship (P.) Ltd.

“For the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. [Para 33]”

6. In view of the above facts, and law pronounced by various judicial forums including coordinate benches and Hon’ble Apex Court, it can be safely concluded that benefit of tolerance limit of 10% is there for assessee and AO is not justified in making any addition applying the provisions of section 43CA of the Act. In view of the above **Ground No.1 of the assessee is allowed.** Ground Nos. 2 and 3 are consequential/ general in nature; hence no specific adjudication is required.

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

Order pronounced in the open court on 21st day of June, 2023.

Sd/-

(VIKAS AWASTHY)

JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 21/06/2023

Sr. PS (Dhananjay)

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai