

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'ए', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष

Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.354/Kol/2023
Assessment year: 2015-16

M/s Reegal Construction.....Appellant
53A, Ankit Apartment,
N.S. Avenue, Serampore,
Hooghly-712201.
[PAN: AAOFR5279A]

vs.

ITO, Ward-23(1), Hooghly.....Respondent

Appearances by:

Shri Sunil Surana, FCA, appeared on behalf of the appellant.

Shri P. P. Barman, Addl. CIT- Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : May 25, 2023

Date of pronouncing the order : July 13, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा/ Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 27.03.2023 of the National Faceless Appeal Centre(hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The brief facts relevant to the issue raised vide Ground Nos.2 to 4 are that the assessee has been engaged in the business of promoting/developing/construction and sale of residential/commercial building. During the assessment proceedings, the Assessing Officer noted that as per the audited accounts, the assessee had shown sale of 12 flats, one office room and four shops (total 17) at a consideration of

Rs.3,00,32,750/-. Further, as per the information obtained from the sub-Registrar office, the assessee had sold total 18 properties vide separate 18 registered sale deeds. The Assessing Officer noted that the assessee did not disclose the sale value of one property vide deed no.I-0605055487/2014 registered on 21.07.2014 of the sale value of Rs.12,05,200/-. The Assessing Officer further noted that the total stamp duty value of all the properties sold was at Rs.4,96,06,660/-. The total sale consideration mentioned in the sale deed of 18 properties was Rs.3,19,55,150/-. However, the assessee had shown in its books of account a total sale consideration received of Rs.3,00,32,750/- only. The Assessing Officer tabulated the figures of the sale consideration, stamp duty value and the difference between the sale consideration and stamp duty value in respect of 18 properties as under:

<i>Sl. No.</i>	<i>Deed No.</i>	<i>Sale value/ consideration value</i>	<i>Stamp duty value</i>	<i>Difference</i>
1	1-060503596/2014 <i>Registered on 21.05.2014</i>	27,36,300	29,96,900	2,60,600
2	1-060503610/2014 <i>Registered on 21.05.2014</i>	27,14,800	28,50,540	1,35,740
3	1-060503616/2014 <i>Registered on 21.05.2014</i>	14,70,000	16,17,000	1,47,000
4	1-060504999/2014 <i>Registered on 04.07.2014</i>	25,19,000	26,33,500	1,14,500
5	1-060505483/2014 <i>Registered on 21.07.2014</i>	23,41,500	27,87,500	4,46,000
6	1-060505484/2014 <i>Registered on 21.07.2014</i>	25,30,000	54,39,500	29,09,500
7	1-060505486/2014	14,84,700	16,26,100	1,41,400

	<i>Registered on 21.07.2014</i>			
8	<i>1-060505487/2014 Registered on 21.07.2014</i>	<i>12,05,200</i>	<i>12,05,200</i>	<i>-</i>
9	<i>1-060505488/2014 Registered on 21.07.2014</i>	<i>15,80,250</i>	<i>16,90,500</i>	<i>1,10,250</i>
10	<i>1-060505490/2014 Registered on 21.07.2014</i>	<i>14,85,000</i>	<i>15,52,500</i>	<i>67,500</i>
11	<i>1-060505491/2014 Registered on 21.07.2014</i>	<i>14,85,000</i>	<i>15,52,500</i>	<i>67,500</i>
12	<i>1-060505497/2014 Registered on 21.07.2014</i>	<i>15,92,800</i>	<i>16,65,200</i>	<i>72,400</i>
13	<i>1-060506013/2014 Registered on 06.08.2014</i>	<i>14,70,000</i>	<i>17,50,000</i>	<i>2,80,000</i>
14	<i>1-060506014/2014 Registered on 06.08.2014</i>	<i>20,01,600</i>	<i>25,68,720</i>	<i>5,67,120</i>
15	<i>1-060508780/2014 Registered on 02.12.2014</i>	<i>14,74,000</i>	<i>46,43,100</i>	<i>31,69,100</i>
16	<i>1-060508781/2014 Registered on 02.12.2014</i>	<i>12,04,200</i>	<i>42,14,700</i>	<i>30,10,500</i>
17	<i>1-060508782/2014 Registered on 02.12.2014</i>	<i>14,26,000</i>	<i>44,91,900</i>	<i>30,65,900</i>
18	<i>1-060508783/2014 Registered on 02.12.2014</i>	<i>12,34,800</i>	<i>43,21,800</i>	<i>30,87,000</i>
	<i>TOTAL</i>	<i>3,19,55,150</i>	<i>4,96,06,660</i>	<i>1,76,52,010</i>

2.1 The Assessing Officer, accordingly, applying the provisions of section 43CA of the Act, calculated the difference between the sale consideration shown and the stamp duty value in respect of 17 properties at Rs.1,83,68,710/- and added the same into the income of

the assessee u/s 43CA of the Act. He also added the amount of Rs.12,05,200/- on account of concealment of sale consideration relating to the 18th property.

3. The ld. CIT(A) confirmed the additions so made by the Assessing Officer. The assessee, thus, has come in appeal before us with the following grounds of appeal: .

“1. For that the Ld. CIT(A) erred in confirming the action of the A.O while passing the assessment order in haste without affording the assessee a reasonable opportunity of being heard.

2. For that on the facts and circumstances of the case, the Ld. CIT(A) erred in accepting the addition made by the AO for a sum of Rs.1,83,68,710/- under sec. 43CA being the difference in the value taken by the Registration Authority for the purpose of stamp duty and the actual sale consideration without taking into account the stamp valuation on the date of signing of the agreement in earlier years and even otherwise the addition was not called for.

3. For that even otherwise the consideration agreed as per the agreement of sale was fair and reasonable as on the date of agreement and therefore the value as may be taken by the Stamp Valuation Authority was not applicable.

4. For that the provisions of Sec. 43CA introduced from 1.4.2014 were not applicable in the case of the assessee since all the agreements was entered into before the said date.

5. For that on the facts and circumstances of the case, the Ld. CIT(A) erred in confirming the addition made by A.O for Rs.12,05,200/- when no sale consideration was received by the assessee or accrued to the assessee in respect of the transfer of the property.”

4. **Ground No.1** is general in nature.

5. **Ground Nos.2 to 4** :Assessee, vide these grounds, has contested the application of section 43CA of the Income Tax Act. We have heard the rival contentions and gone through the record. At the outset, the ld.

counsel for the assessee has invited our attention to the provisions of section 43CA of the Act which have been inserted by Finance Act 2013 w.e.f. 01.04.2014. The relevant provisions of section 43CA of the Act are reproduced 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:*

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 [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.*

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 ⁸⁵[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.]

6. A perusal of the above provisions of section 43CA of the Act would reveal that the said section has been inserted to check the suppressed sales in relation to the stock-in-trade of immovable properties. It has been provided that the stamp duty value of the property on the date of sale would be treated as the deemed sale value of the property and if the sale value shown in the sale deed is less than the stamp duty value then the difference is to be added u/s 43CA of the Act. However, as per Sub-Section (3) to section 43CA of the Act, where, there is prior ‘agreement to sell’ of the property sold subsequently, the stamp duty value on the date of agreement is to be taken as the deemed sale value of the property. However, as per the sub-section (4), the exceptions of sub-section (3) will apply only in case where the amount of consideration or part thereof has

been received by way of an account payee cheque or other electronic mode other than cash.

7. In this case, the plea of the assessee is that the 'agreement to sell' with respective buyers were entered much prior to the actual sale deed and the sale consideration was paid by the proposed buyers through instalments. The ld. counsel for the assessee in this respect has placed reliance on the various individual agreement entered into by the assessee with the buyers, copies of which, have been placed at pages 97 to 322 of the paper-book. The ld. counsel has further submitted that though the initial payment in some cases might not have been paid through banking mode/electronic mode, however, some of the subsequent instalments in almost all the cases have been paid through cheque as per the schedule given in the agreement. That the facts and circumstances on the file would reveal that the sale consideration as mentioned in the sale deed is as per the agreement for sale of flat as placed in the paper-book.

8. The next contention raised by the ld. counsel for the assessee is that the provisions to section 43CA have been inserted w.e.f 01.04.2014, whereas, the assessee had entered into agreement of sale of flats with the buyers in the year 2012-13 itself and therefore the assessee could not have foreseen the provisions of section 43CA and that the condition of accepting the part of sale consideration through cheque/banking mode/electronic mode could not have been fastened upon the assessee in a retrospective manner applying the provisions of section 43CA of the Act. The ld. counsel in this respect has also relied upon the decision of Coordinate bench of the Tribunal in the case of Disha Construction vs. JCIT in ITA No.5538/Mu/2019 order dated 17.06.2021. The ld. AR has further submitted that even otherwise, the difference between the stamp

duty value and the sale consideration in respect of properties mentioned at serial no.1,3,4,7,9,10,11,12 was less than 10% and therefore, even otherwise no addition was warranted in view of the 1st Proviso to section 43CA(1) of the Act. The Id. AR has also relied upon the chart in respect of properties sold by the assessee and has further submitted that in fact the total properties sold were 19 properties and not 18 properties. However, two properties were sold by the land owners and not by the assessee. The assessee had sold only 17 properties.

9. The Id. DR, on the other hand, has relied upon the findings of the lower authorities.

10. We have considered the rival submissions and gone through the record. Before proceeding further, it will be appropriate to first reproduce the chart of sale of properties relied upon by Id. counsel for the assessee as under:

SI. No	Name	F/No	Area	Sale value	Avg Rate	Dt of agmt	Dt of booking	booki ng amou nt	Dt of Registry	Stamp duty value	Avgs tam pt duty valu e	Diff	Deed no.
1	RajarshiB asu&Swa gata Das	40 2	1303	2,73 6,30 0	2,100 .00	16/10/2 012	14/8/20 12	60,00 0	19/5/20 14	2,996, 900	230 0	260,60 0	60503 596
2	Ramkrish naSaha	20 2	1234	-	-		13/6/20 12	-	19/5/20 14	2,850, 540	231 0	2,850,5 40	60503 610 Sale deed was execut ed by Landlo rd from their share

													not related to our sale
3	Sukumar Mukherjee	10 6	700	1,47 0,00 0	2,100 .00	27/7/20 12	30/9/20 12	60,00 0	19/5/20 14	1,617, 000	230 0	147,00 0	60503 616
4	DebjyotiChakraborty	30 2	1145	2,51 9,00 0	2,200 .00	9/10/20 12	16/6/20 12	50,00 0	21/4/20 14	2,633, 500	230 0	114,50 0	60504 999
5	Sunil Hazra	30 3	1115	2,34 1,50 0	2,100 .00	28/8/20 12	4/6/201 3	50,00 0	18/7/20 14	2,787, 500	250 0	446,00 0	60505 483
6	Prabhat Kumar Dutta&Ors	G-1	1265	2,53 0,00 0	2,000 .00		20/5/20 13	11,00 0	18/7/20 14	5,439, 500	430 0	2,909,5 00	60505 484
7	Mousumi Laha	40 5	707	1,48 4,70 0	2,100 .00	22/5/20 13		60,00 0	18/7/20 14	1,626, 100	230 0	141,40 0	60505 486
8	Ankita Bhattacharyya	40 1	524	-	-			-	18/07/2 014	1,205, 200	230 0	1,205,2 00	60505 487 Gift deed was executed to tenant by Landlord from their share not related to our sale
9	AjoyGhosh&Anisha Nandy	30 6	735	1,58 0,25 0	2,150 .00	17/11/2 012	15/7/20 12	50,00 0	18/7/20 14	1,690, 500	230 0	110,25 0	60505 488
10	Chinmay Bala	30 4	675	1,48 5,00 0	2,200 .00	1/12/20 12	19/10/2 012	200,0 00	18/7/20 14	1,552, 500	230 0	67,500	60505 490
11	Samir Kumar	40 4	675	1,48 5,00	2,200 .00	16/09/2 013	8/4/201 3	60,00 0	18/7/20 14	1,552, 500	230 0	67,500	60505 491

	Daw			0									
12	JharnaM urmu&Ba idyanath	30 5	724	1,59 2,80 0	2,200 .00	2/11/20 12	18/8/20 12	60,00 0	18/7/20 14	1,665, 200	230 0	72,400	60505 497
13	Pramod Kumar Singh	40 6	700	1,47 0,00 0	2,100 .00	18/04/2 013	25/02/2 013	60,00 0	18/7/20 14	1,750, 000	250 0	280,00 0	60506 013
14	Md. Reyaz	10 2	1112	2,00 1,60 0	1,800 .00	19/02/2 013	5/10/20 12	100,0 00	25/7/20 14	2,568, 720	231 0	567,12 0	60506 014
15	Menoka Jewellery	S- 1A	737	1,47 4,00 0	2,000 .00	1/6/201 3	29/4/20 13	50,00 0	1/12/20 14	4,643, 100	630 0	3,169,1 00	60508 780
16	Menoka Jewellery	S-5	669	1,20 4,20 0	1,800 .00	1/6/201 3	11/5/20 13	50,00 0	1/12/20 14	4,214, 700	630 0	3,010,5 00	60508 781
17	Menoka Jewellery	S-1	713	1,42 6,00 0	2,000 .00	1/6/201 3	29/4/20 13	50,00 0	1/12/20 14	4,491. 900	630 0	3,065,9 00	60508 782
18	Menoka Jewellery	S-6	686	1,23 4,80 0	1,800 .00	1/6/201 3	11/5/20 13	50,00 0	1/12/20 14	4,321, 800	630 0	3,087,0 00	60508 783
19	Subrendu Bhowal	10 5	908	1,99 7,60 0	2,200 .00	17/5/20 13	7/5/201 3	60,00 0	19/5/20 14	-	-	(1,997, 600)	60503 612 Sale deed was execut ed by us but it has been escape d by ITO
	Total							1,081 ,000		49,607 ,160		19,574, 410	

11. We have also gone through the copies of the sale agreement placed at page 97 to 322 along with copy of ledger account of the sellers. A perusal of the above chart and read with copies of the sale agreement would reveal that in almost of the cases, the booking of the flat was made in the year 2012 or in the year 2013, whereas, the sale deeds were effected in F.Y 2014-15. Further, the assessee has also placed on file the ledger account in respect of each of the party showing the receipts of payments of the parties along with date and amount. A perusal of the ledger of each of the party in the accounts of the assessee would reveal that in each case, certain payment/instalment has been paid by cheque before the execution of the sale deed in pursuance of the terms of agreement of sale affected in the FY 2012-13 and 2013-14, as the case may be. In almost every case, the flat was booked much prior to the date of actual sale and some of the instalments were paid by cheque in pursuance to the respective agreement to sale but much before the date of execution of the sale deed. The purpose of requirement of payment by cheque vide sub-section (4) is to avoid the introduction of any bogus back-dated 'agreement to sell' to claim a lesser stamp duty value of a past date. The payment through cheque is required to ensure that the agreement to sell, if any, relied upon by the assessee has been actually executed and acted upon as back dated cheque payment cannot be claimed by an assessee. In the case in hand, though some of the parties had not made initial payment i.e. on or before the date of agreement through cheque/banking mode, however, the facts show that the some of the payments were made in each case much before the execution of the sale deed. Under the circumstances, it cannot be said that the 'agreement to sell' relied upon by the assessee are bogus, rather, the payment of consideration in this case has been settled and paid as per the terms of the agreement. Under the circumstances, in the peculiar

facts and circumstances, it will not be justified to adopt the stamp duty value as on the date of execution of the sale deed, rather, the object and purpose of the provisions will be achieved by taking the stamp duty value as on the date of execution of the agreement in the light of the peculiar facts and circumstances of this case. Moreover, the issue is otherwise decided by the Coordinate bench of the Tribunal in the case of Disha Construction (supra), wherein, the Coordinate Bench of the Tribunal further relied upon the decision of the Bombay High Court in the case of PCIT vs. Swananda Properties (P) Ltd. [2019] 111 taxmann.com 94 (Bombay) dated 09.09.2019. The relevant part of the order of the Tribunal is reproduced as under:

“5. We find that the assessee, along with its written submissions, have placed on record copy of development agreement dated 06/03/2011 entered in to by the assessee with the Society. As per Clause-12 of the agreement, the assessee has agreed to sell additional carpet area of 12350 square feet to 92 members of the society. The additional area was to be sold at Rs.15000/- per square feet and the sale consideration was to be paid by the members in various trenches as specified in sub- clause (c) of Clause-12. Thus, quite clearly the additional area has been sold by the assessee pursuant to the development agreement which has been entered into by the assessee during financial year 2010-11 which is prior to introduction of Sec.43CA. The provisions of Sec.43CA has been inserted by the legislatures only with effect from 01st April, 2014 and the same would not apply to any such agreements as entered into by the assessee in earlier years as held by Hon'ble Bombay High Court in Pr. CIT V/s Swananda Properties (P.) Ltd. {2019 111 taxmann.com 94 (Bombay) dated 09/09/2019}. The Hon'ble Court declined to admit the question of law as raised by the revenue with following observations: -

Re. Question (b)

12. The Respondent- Assessee is a Developer. He is in the business of real estate development. The flats sold by the Respondent- assessee are stock-in-trade. The CIT (A) by his order passed the best judgment assessment and noted that the sale consideration of twelve flats in the project has been suppressed. According to him, the market rate nearest to that date is Rs.8,992/- per sq.ft. and, thus, reassessed the sale of each of the twelve flats. This basis of

the nearest market rate is not found in his order. Therefore, on this basis itself the assessment is bad. In any case, Mr. Sharma, the learned Counsel for the Revenue submits that the market rate is the stamp duty rate of registration. Therefore, the stamp duty rate is used as a means to consider proper sales value of transfer of the flats. At the relevant time i.e. for the assessment year 2005-06, the only provision for application of deemed value for consideration was found under Section 50C of the Act relating to capital assets. At the relevant time there was no provision in the Act for deeming the consideration received on sale of goods/assets other than capital assets on the basis of stamp duty valuation. However, this provision in the form of Section 43CA of the Act has been introduced with effect from 1 April 2014. The present case pertains to the assessment year 2005-06. Therefore, Section 43CA of the Act will have no application for the subject Assessment Year.

13. In the case of CIT v. Neelkamal Realtors & Erectors India (P.) Ltd. [2017] 79 taxmann.com 238/246 Taxman 274, the Division Bench of this Court had an occasion to consider the value of the flat in case of sale by the Developer in the context of section 50C and section 56(2)(vii)(b)(ii) of the Act. The Division Bench observed thus:

"3. Regarding question No. (i):

** ** *

(f) It is self evident from reading of section 50C of the Act it would not have any application while determining 'Profits and gains of business or profession'. This is so as its application is only limited to computation of income chargeable under the head 'Capital gains' as is evident from specific reference in sub-section (1) of section 50 of the Act to section 48 of the Act i.e. mode of computation of capital gains. In fact section 50C of the Act as observed by the impugned order is placed as part of the Chapter IV-E under the head 'capital gains', it can only govern the valuation of the property to determine capital gains and cannot govern valuation of transfer of assets (other than a capital asset) i.e. stock in trade. This view is further strengthened by the fact that section 43CA has been introduced into the Act w.e.f. 1st April, 2014 which governs taking of full value of consideration for transfer of assets other than capital assets on the basis of stamp duty valuation. This section 43CA of the Act finds

a place as a part of Chapter IV-D - Profits and gains of business or profession. Therefore, with effect from 1st April 2014 the stamp duty valuation of assets sold could be taken as value of consideration. Our above view that section 50C of the Act has no application to value stock in trade is also a view taken by Allahabad High Court in Commissioner of Income Tax v. Ken Construction and Colonizers (P.) Ltd.(2012) 208 Taxman 478/20 taxman.com 381. Similarly the Madras High Court in CIT v. Thiruvengadam Investments (P.) Ltd. (2010) 320 ITR 345 has also held that section 50C of the Act cannot be invoked to arrive at full consideration of sale of business asset. We see no reason not to adopt the views of the above two High Courts to the present facts." (Emphasis Supplied)

Therefore, section 43CA cannot be made applicable to the facts of the present case. By the plain language of this provision it is not retrospective. Thus, there is no statutory provision based on which the stamp duty valuation could have been made a basis in the present case.

14. The Division Bench of this Court in the case of Zain Constructions v. ITO [2019] 107 taxmann.com 300/265 Taxman 82 (Mag.) has conclusively decided the issue as under:

"8. In our opinion, the entire approach of the Assessing Officer is wholly incorrect. As is well known, Section 50C of the Act would enable the Revenue to bring to tax by way of deemed capital gain difference between the stamp valuation and the sale price of a capital asset. For obvious reasons, this provision would not apply in case of a builder for whom such immovable property is in nature of stock in trade and not capital asset. To overcome this difficulty the legislature had inserted Section 43CA under Finance Act, 2013 w.e.f 1.4.2014. This provision would enable the Revenue to tax the income arising out of sale of stock by a deeming fiction where subject to certain conditions, stamp valuation of such stock would substitute the actual receipt thereof. In absence of any such statutory provisions, giving rise to the deeming fiction, the Revenue cannot tax any amount which has not been received by a seller of an immovable property at the time of sale." (Emphasis Supplied) No contrary decision is shown.

15. As regards the decision in the case of Associated Builders relied upon by the Appellant- Revenue, it arose in the context of valuation of assets including stock in trade on dissolution of a partnership firm. This Court was concerned with the issue whether, when the

asset was valued on the basis of book value as provided in the contract between the parties, is it open to the Assessing Officer to ignore it and ascertain whether the valuation done does represent the fair value of the asset. This the Court answered in the affirmative by holding that the contract between the parties will not bind the Revenue, while determining the fair market value of the assets of the partnership firm. In the present case, we are not dealing with the valuation of assets on dissolution of a firm. In case of dissolution, there is no sale as in the case of running business. Thus, the decision in the case of Associated Builders is in different facts and circumstances and would have no application to the present facts.

16. It is to be noted that the Revenue has not made any reference even remotely that the Respondent had received amounts in excess of that shown in the agreements in respect of twelve flats which is not being accepted. The entire case of the Revenue is merely on suspicion. It is not the case of the Revenue that the Respondent made secret profits out of sale of the twelve flats.

17. The Supreme Court has observed in the case of CIT v. A. Raman & Co. [1968] 67 ITR 11 that the law does not oblige a trader to make maximum profit, he can make, out of his trading activity. Income on which he can be taxed is only the income he has earned. So also recently, the Supreme Court in the case of S.A. Builders v. CIT [2007] 158 Taxman 74/288 ITR 1 has observed that no businessman can be compelled to maximize his profits. Therefore, in view of the above, this question as proposed also does not give rise to any substantial question of law. Thus not entertained.

18. The appeal is dismissed.

The Hon'ble Court has held that the provisions of Sec.43CA would not have retrospective application and accordingly, do not apply to agreement executed prior to its introduction. The ratio of this decision is squarely applicable to the case of the assessee. Therefore, the impugned additions could not be sustained in the eyes of law on this point alone. We order so. Consequently, the other arguments made by the assessee has become merely academic in nature."

11.1. It has been categorically held in the aforesaid decision of the Tribunal while placing reliance on the decision of the Hon'ble Bombay High Court in the case of PCIT vs. Swananda Properties (P) Ltd. (supra) that since the provisions to section 43CA have been introduced w.e.f.

01.04.2014 and the 'agreement to sell' was entered prior to the 1st April 2014 and therefore, the condition of payment or part payment of consideration on or before the date of agreement cannot be imposed back-dated as the assessee could not have foreseen the introduction of section 43CA.

12. In view of the above discussion, considering the peculiar facts and circumstances of the case and the decision of the co-ordinate bench of the Tribunal, the additions made by the Assessing Officer/CIT(A) on the above issue are not sustainable and the same are accordingly ordered to be deleted.

13. **Ground No.5** – Vide Ground No.5, the assessee has agitated the action of the CIT(A) in making the addition of Rs.12,05,200/- on account of concealment of sale consideration.

14. The ld. counsel in this respect has relied upon the chart as reproduced above and further followed by the copies of the sale deed/gift deed placed at page 44 and page 74 of the paper-book respectively to submit that in fact the flat no.2 was sold by the land-owner and not by the assessee and similarly flat no.8 was also transferred by way of gift by the land-owner and not by the assessee. The statement was filed before the Assessing Officer but the Assessing Officer has not considered the same.

15. We find that since the sale consideration of Rs.12,05,200/- was not received by the assessee as the said flat was sold by the land-owner as per the development agreement and not by the assessee, hence, the addition made by the Assessing Officer on this issue is not sustainable. In view of our findings given above, the additions made by the Assessing

Officer/CIT(A) in this issue was not sustainable and the same are accordingly ordered to be deleted.

16. In the result, the appeal of the assessee stands allowed.

Kolkata, the 13th July, 2023.

Sd/-
[डॉक्टर मनीष बोरड /Dr. Manish Borad]
लेखा सदस्य /Accountant Member

Sd/-
[संजय गर्ग/Sanjay Garg]
न्यायिक सदस्य/Judicial Member

Dated: 13.07.2023.

RS

Copy of the order forwarded to:

1. M/s Reegal Construction
2. ITO, Ward-23(1), Hooghly
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches