

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

**BEFORE SHRI B.R. BASKARAN, AM &
SHRI N. K. CHOUDHRY, JM**

I.T.A. No. 1550/Mum/2023
Assessment Year: 2014-15)

Alif Construction
E- 502, Dheeraj Residency-
11, Daulat Nagar,
Santacruz (W), Mumbai-
400054

VS

Income Tax Officer- 22(1)(1)
Piramal Chamber
Mumbai- 400012

PAN No. **AATFA4106E**

Appellant)

:

Respondent)

Appellant by
Respondent by

:
:

Shri. Subhash Bains, Ld. AR
Shri. Naganath B. Pasale, Ld. DR

Date of Hearing

:

20.07.2023

Date of pronouncement

:

29.08.2023

ORDER

Per N. K. Choudhry, JM:

This appeal has been preferred by the Assessee against the order dated 29/12/2016, impugned herein passed by the National Faceless Appeal Centre(NFAC) Delhi/Ld. Commissioner of Income Tax(Appeals) (in short 'the Act') u/s 250 of the Income Tax Act 1961 (in short 'the Act') for AY 2014-15.

2. At the outset, we observe that there is delay of 10 days in the filing of the instant appeal, which resulted into on account of illness of the Ld. AR. Considering the delay and the reasons disclosed by the Assessee, as genuine, the delay stands condoned

3. Coming to the merits of the case, we observe that the Assessee being a partnership firm engaged in the business of construction activities as a builders and developer, had shown its total income at Rs. 'Nil' by filing its return of income for the AY under consideration on dated 26.11.2014, which was selected for scrutiny under CASS. During the assessment proceedings, the assessing officer on verification of copy of sale agreements executed by the Assessee during the AY 2014-15, found the Assessee has executed 3 sale agreements, out of which sale consideration received by the Assessee for 2 agreements/properties was less than the stamp duty valuation which are detailed below:-

SR.	Agreement No.	Agreement Date	Stamp Duty Value	Sale consideration	Difference
1.	8458/2013	21.09.2013	61,61,500/-	48,00,000/-	13,61,500/-
2.	8459/2013	19.11.2013	61,61,500/-	48,00,000/-	13,61,500/-
				Total	27,23,000/-

4. The assessing officer by observing that since valuation of the property by the Assessee was less than stamp duty value and as provisions of section 43CA are applicable in this case, vide notice dated 06.12.2016 u/s 142(1) of the Act show caused the Assessee, as to why the difference of Rs. 27,23,000/- should not added to the total income of the Assessee.

4.1 The Assessee in response to the said show cause, furnished its reply vide letter dated 27.12.2016 which reads as under:-

5. The A.R. of the assessee vide letter dated 27.12.2016 furnish his reply which is reproduced as under:

"The above assessee had agreed to sold 2 flats initially to Mr. Fida Hussain in the year 2010-11 at the agreed price of Rs. 48,00,000/- each which was more than Stamp Duty value. Assessee has received payment for the both flats Rs. 32,00,000/- each, for which allotment letter were issue to Mr. Fida Hussain. But due to financial crises buyer unable to pay final payment of Rs. 16,00,000/- each.

Assessee has option to forfeit the entire money received from the buyer but buyer requested to assessee to sale the fiat to Mr. Fida Hussain's friend at the same price of Rs. 48,00,000/- and assessee can refund Mr. Fida's Hussain money after receiving full payment from his friend. Due to non availability of liquid funds and looking to market condition assessee accepted to sale the both flats in year 2013-14 at price agreed to be sold to Mr. Fida Hussain in the year 2010-11.

4.2 Though the assessing officer considered the reply of the Assessee, however not found acceptable and by reproducing the provisions of section 43CA of the Act held *"that from a plan reading of above provision it is clear that if the Assessee received or accrued any amount as a result of transfer on asset (not being capital asset) and consideration is less than the stamp duty value of the asset, then stamp duty value will be considered as full value of consideration for computing the profit and gain of the business"* and ultimately made the addition of Rs. 27,23,000/- being difference between stamp duty value and sale consideration of the properties, in the income of the Assessee by concluding as under:-

From a plain reading of the above provisions, it is clear that if assessee received or accrued any amount as a result of transfer of a asset (not being capital asset), and consideration is less than the stamp duty value of the asset, then stamp duty value will be considered as full value of consideration for computing the profit and gain of the business. Since assessee has already shown agreement value in his books, difference in agreement value and stamp duty value should have been added to the total income of the assessee. The assessee's submission to consider the allotment letter issued to Mr. Fida Hussain for purpose of stamp duty value is not acceptable Allotment of flat to Mr. Fida Hussain and later his request to consider it for his friend has no relation with 43CA In section 43CA the main conditions are transfer of asset, agreement between the parties and mode and time/date of payment. All these conditions are not fulfilled in this case. Transfer took place only in FY 2013-14, agreement was executed between the assessee and purchaser only in FY 2013-14 and payments were received by the assessee also in FY 2013-14 In view of all these facts, assessee's claim is hereby rejected.

7 Now in this case, on going through both agreements it is found that agreement and registration of both the flats have been made on 20.12.2013. Further, on perusal of bank statement of assessee it is seen that there were two credit entries of Rs 48,00,000/- each on 19.12.2013. It clearly shows that transaction of flats have been taken place in F.Y 2013-14 itself. Now section 43CA is introduced by Finance Act, 2013 and hence applicable for transaction pertaining to FY 2013-14. Therefore, section 43CA is fully applicable on the sale agreements executed by the assessee during the year under consideration.

*8. In view of the above discussion and self admission of the assessee vide letter dated 11.11.2016, it is clear that assessee had sold two flats vide two different agreements whose agreement value (Sale consideration) was less than stamp duty value (as mentioned in para4 above) and therefore sec 43CA is applicable. **Accordingly, an amount of Rs. 27,23,000/- being difference in stamp duty value and sale consideration of the properties is hereby added to the total income of the Assessee.** Penalty proceedings u/s 271(1)(c) of the Act is initiated for inaccurate particulars of income.*

5. The Assessee being aggrieved, challenged the said addition before the Ld. Commissioner and by filling written submissions claimed as under:-

"(2) The appellant had filed its return of income for A. Y. 2014-15 showing total income as Nil. During the year under reference, the appellant had sold two flats for an amount of Rs. 48,00,000/- each. In response to a query raised by the learned Income-tax officer during the assessment proceeding as regards the difference between the sale consideration and Stamp Duty value, it was submitted by the appellant vide letter dated 27-12-2016 that both the flats under question had already been once agreed to be sold to one Mr. Fida Hussain as early as in 2010-11 at an agreed price of Rs. 48 lakhs. Not only that the appellant had also received Rs. 32,00,000/- for each flat as long back as in 2010-11 and had therefore issued allotment letters of the said flats to Mr. Fida Hussain at that time.

(3) However, due to financial stringency, Mr. Fida Hussain, not being in a position to make the payment of remaining balance of Rs. 16 lacs for each flat, pressed upon the appellant to transfer the said flats in the name of his friend at an already agreed price.

(4) It was under such compulsion and also in view of the business prudence or considerations that the appellant had no option but to sell impugned flats at an agreed price of Rs. 48 lacs which was undisputedly in excess of the stamp value as on the date of original agreement.

(5) The invocation of deeming provisions of S. 43CA, therefore, in the instant case is highly unwarranted of facts and uncalled for."

6. The Ld. Commissioner by considering the submissions/claim of the Assessee confirmed the addition by concluding as under:-

*"As the flats were got registered in the name of new customer, the conditions put in the provisions u/s 43CA are not fulfilled. Had these flats been registered in the name of original customer who booked the Flat in F.Y.2010-11, the proviso would have applicable. **However, in this case sales have been made entirely to the new customer, the section 43CA come into the picture.** In view of these facts I don't find any irregularity in the order of AO. Accordingly, additions made by the AO are hereby confirmed and grounds of appeal are dismissed."*

7. The Assessee being aggrieved is an appeal before us.

8. We have heard both the parties and perused the material available on record. The Assessee has raised the issue that both the authorities below have relied upon the provisions of section 43CA of the Act, which were introduced vide finance Act 2013 with effect from 01.04.2014 and would be applicable from financial year 2014-15 relevant to the AY 2015-16 onwards but not to the previous Assessment Years and therefore both authorities below misdirected themselves in applying the provisions of section 43CA of the ACT for AY 2014-15, which is under consideration and hence the orders passed by the authority below are liable to the set aside.

8.1 On the contrary, the Ld. DR supported the orders passed by the authority below and emphasized that provisions of section 43CA have been introduced vide finance Act 2013 and made applicable with effect from

01.04.2014, therefore it can be construed that the same would be applicable from AY 2014-15 onwards.

8.2 We have given thoughtful consideration to the peculiar facts and circumstances of the case and rival claims of the parties.

8.3 The question involved in this to be answered is "whether the provisions of section 43CA would be applicable for AY 2014-15 or not".

8.4 It is admitted fact that the provisions of section 43CA were introduced vide finance Act 2013 and made applicable w.e.f. 01.04.2014 and the CBDT vide circular no. 3/2014 dated 24.01.2014 duly clarified that amendment made vide finance Act 2013 will take effects from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years. For completeness and ready reference, concluding part of the circular no. 3/2014 dated 24.01.2014 is reproduced as below.

Finance Act, 2013-Circular No. 3/2014, Dated 24-1-2014

13. Computation of income under the head "Profits and gains of business or profession" for transfer of immovable property in certain cases

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

13.2 Accordingly, a new section 43CA has been inserted in the Income tax Act which provides that where the consideration for the

transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of consideration for the purposes of computing income under the head "Profits and gains of business or profession"

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

13.4 Applicability: This amendment take effects from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years.

8.5 The Coordinate Benches of the Tribunal in the cases of Sai Bhargavanath Infra Vs The Asstt. Commissioner of Income-Tax {ITA no. 1332/PUN/2019 decided on 17-08-2022 and Shivji Amba Gami Vs DCIT, Panwel Circle {ITA no. 6651/Mum/2018 decided on 22-02-2021, as relied upon by the Assessee, infact have not decided the issue qua applicability of provisions of section 43CA to the AY 2014-15 specifically, hence not much help to the case of the Assessee being factually dissimilar.

Whereas the Hon'ble Co-ordinate Bench of Tribunal at Jaipur in the case of **M.S Spytech build vs ACIT** (ITA No. 255/M/2019 decided on 14.07.2021) also applied the provisions of section 43CA for the case pertaining to assessment year 2014-15. We further observe that Hon'ble High Court of Bombay in case of PCIT-3 Vs Swananda properties (P) Ltd (2019) 111 taxmann.com 94 (Bombay) has also taken into consideration the provisions of section 43CA of the Act with effect from 01.04.2014.

8.6 Therefore on the aforesaid analyzations, we are of the considered view that the provisions of section 43CA of the Act which came into effect from 01.04.2014 are applicable to the cases pertains to AY 2014-15 as well, hence we are inclined to dismiss the ground raised on this aspect.

9. Coming to the 2nd aspect of the case, we observe that the Assessee has claimed that it has initially/originally sold the flats/property under consideration to original allottees by issuing allotment letters (Page no 195 to 198 of the PB) wherein the consideration amount was fixed @ Rs. 48 Lakhs for each flat and the Assessee has received the sum of Rs. 64,00,000/- (Rs. 32,00,000/- each flat) as advance and was supposed to get further remaining amount of Rs. 16+16 Lakhs for 2 flats. However the original allottees due to financial crunch, were unable to the pay the balance amount therefore they vide latter dated 13.12.2012 requested for cancellation of allotment. Consequently the Assessee sold the said flats at pre-determined price of Rs. 40 Lakhs each by executing sale deeds even dated 28.12.2013 (Page no 87 to 192 of the PB) to other persons. The Assessee therefore claimed that as per valuation letter dated 06.04.2010 of the Government Department, the value of the flat at particular time was lower than the amount of Rs. 48 Lakhs as agreed between the Assessee originally and therefore it can be construed that as the allotment of property has already been made in 2010 and the Assessee had received the part consideration and therefore the transactions goes back to AY 2011-12 when part payment was received, and hence the provisions of section 43CA of the Act are not applicable as on 01.04.2010 being not introduced/available.

9.1 The Assessee further claimed that even otherwise, the provisions of section 43CA (2) of the Act are analogous to the provisions of section 50C(2) of the Act and therefore in the light of said provisions, the authorities below

committed an error by not making reference to DVO for valuation of property/flats. The Assessee further claimed that this property built up by the Assessee is specific and committed to particular communality and therefore non-community persons would neither invest nor purchase any flat for self use purpose. Further the Assessee has received the original booking amount as well as the subsequent amount from the subsequent buyer through banking channel and refunded the original amount/part payment received from original buyers through banking channel etc. therefore the value of the Assessee's flat cannot be doubted.

10. On the contrary, the Ld. DR refuted the claim of the Assessee.

11. We have given thoughtful consideration to the rival claims on this aspect. It is not in controversy that the Assessee made the transactions through banking channel and provisions of section 43CA(2) of the Act specifically provides that the provisions of sub sections 2 and 3 of section 50C shall, so far as may be, apply in relation to determination of value adopted or assessed or assessable under sub section (1). Hence considering the peculiar facts and circumstance, as claimed by the Assessee that the property under consideration was built up for particular community, having many restrictions and therefore outsider of community would not have purchased the property under consideration, hence the Assessee sold the same on the same consideration amount as fixed in 2010, to the persons of particular community, we for proper and just decision of the case and for ends of substantial justice, are inclined to direct the assessing officer to refer the capital assets/properties under consideration to District Valuation Officer (in short "DVO") as per the provisions of section 50C of the Act. Consequently the orders passed by the authorities below are set aside and case is remanded to the file of the Assessing Officer for decision afresh in accordance with law, after getting the valuation done by DVO.

12. In the result, appeal filed by the Assessee stands allowed for statistical purposes.

Order pronounced in the open court on 29.08.2023.

Sd/-
(BR Baskaran)
Accountant Member

Sd/-
(N. K. Choudhry)
Judicial Member

Mumbai, Dated: 29/08/2023
Shubham Lohar

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt.Registrar)

ITAT, Mumbai