

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 468/Kol/2023
Assessment Year: 2016-17

Anil Kumar Paik C/o S.N. Ghosh & Associates, Advocates 2, Garstin Place, 2 nd Floor Suite No. 203 Off Hare Street Kolkata - 700001 [PAN : AFLPP6567R]	Vs	ACIT, Circle-8(1), Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Somnath Ghosh, Advocate
Revenue by :	Shri P.P. Barman, Addl. CIT, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 21/09/2023
घोषणा की तारीख /Date of Pronouncement: 29/11/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter the "ld. CIT(A)") dt. 15/03/2023, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2016-17.

2. The assessee has raised the following grounds of appeal:-

"1. FOR THAT the Ld. Commissioner of Income Tax (Appeals)-N.EA.C. was absolutely in error in impliedly upholding the addition of Rs. 2,02,56,909/-made by the Ld. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata without establishing any basis therefor and the purported conclusion reached on that behalf is entirely opposed to law.

2. FOR THAT the Ld. Commissioner of Income Tax (Appeals)-N.F.A.C. acted unlawfully in impliedly sustaining the purported addition of Rs. 1,71,18,489/-made the Ld. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata by invoking the mischief u/s. 43CA of the Income Tax Act, 1961 without satisfying the parameters thereof and the adverse conclusion reached on that behalf in violation of

the statutory prescription is completely unfounded, unjustified, and untenable in law.

3. FOR THAT the specious approach of the Ld. Commissioner of Income Tax (Appeals)-N.F.A.C. of misreading evidence, considering improper facts, failing to consider proper position in law and thus coming to an erroneous finding in impliedly sustaining the addition of Rs. 4,52,731/- made by the Ld. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata without satisfying the elementary mandate of s. 145(3) of the Income Tax Act, 1961 thereby basing on considerations not relevant to the issue is wholly illegal, illegitimate, and infirm in law.

4. FOR THAT the Ld. Commissioner of Income Tax (Appeals), NFAC failed to appreciate that none of the conditions precedent existed for and/or were fulfilled by the Ld. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata for his specious action of assuming jurisdiction u/s. 145(3) of the Income Tax Act, 1961 and thereby estimating an income of Rs. 3,76,28,573/- in a summary manner without adducing on record the genesis thereof and such addition impliedly sustained without any authority of law is therefore ab initio void, ultra vires, and ex-facie null in law."

3. Brief facts of the case are that the assessee is an individual and carries out various types of business which includes builder, liquor shop, medical and pathology lab etc. Income of Rs.1,62,82,830/- declared in the e-return filed for Assessment Year 2016-17 on 19/03/2018. Case selected for complete scrutiny through CASS followed by notice u/s 143(2) and 142(1) of the Act. Various informations were called for which was duly replied from time to time. The assessee is maintaining separate books of accounts for each type of business unit which is run under the sole proprietorship concern and the books of accounts are duly audited u/s 44AB of the Act. The Id. Assessing Officer while examining the details, firstly made an addition for unexplained cash credit of Rs.2,02,56,909/- which was calculated on the basis of sundry creditors and closing work in progress of preceding

year and purchase, labour charges, bank withdrawals during the year. The Id. Assessing Officer also made addition on account of suppressed sales computed at Rs.1,71,18,489/- based on the sales declared in the books *vis-à-vis* market value adopted by the stamp valuation authority appearing in the individual transaction statement. The Id. Assessing Officer also examined the financials of the liquor business and came to a conclusion that the assessee has not declared sales to the tune of Rs. 97,36,152/- and made the addition by applying gross profit rate @ 4.65% thereby adding Rs.4,52,731/- to the income of the assessee. Lastly, the Id. Assessing Officer on perusal of the various bank accounts held in the individual name of the assessee as well as other proprietorship concern and based on its own calculations which is available in the assessment order observed that unaccounted sales are to the tune of Rs.9,84,52,571/- and made addition by applying GP Rate of 38.22% being average rate of gross profit, rate offered in the three concerns, namely, M/s. Gitanjali Enterprises, M/s. Gitanjali Polyclinics & Diagnostics and M/s Gitanjali Chemist & Drugist. The addition was made at Rs.3,76,28,573/-. Accordingly along with other minor additions of Rs.15,000/-, total additions were made at Rs.7,54,71,702/- and income assessed at Rs.9,17,53,930/-.

3.1. Aggrieved, assessee preferred appeal before the Id. CIT(A), challenging various additions except the one at Rs.15,000/- and filed all necessary details which were filed before the Assessing Officer. However, on account of Covid restrictions, he could not appear through

his A/R on various dates of hearing and the Id. CIT(A) confirmed the additions made by the Assessing Officer.

4. Aggrieved the assessee is now in appeal before this Tribunal.

5. The Id. Counsel for the assessee vehemently argued referring to the detailed written submissions placed at page nos. 2 to 9 and also the paper book containing 462 pages and further made submission on each of the issues claiming that the Id. Assessing Officer has made additions merely on surmises and conjectures without rejecting the books of account and the same deserves to be deleted. He also contended that the Id. Assessing Officer erred in applying the provisions of Section 43CA of the Act on all the transactions of sale during the year without considering the fact that most of such transactions were on account of agreement to sale which were entered into in the preceding years of which mostly are prior to 2012 and, therefore, the Id. Assessing Officer has erred in making the addition taking the basis of value adopted by the stamp valuation authority as on the date of registration of the conveyance deed. Reliance placed on the decision of this Tribunal in the case of *M/s. Reegal Construction vs. ITO in ITA No. 354/Kol/2023; Assessment Year 2015-16, order dt. 13/07/2023.*

6. On the other hand, the Id. D/R vehemently argued supporting the orders of the Id. Assessing Officer stating that the Id. Assessing Officer has examined each and every aspect of the financial statements and has come to a clear finding for each of the additions and the same deserves to be confirmed. He also stated that the assessee failed to appear before the Id. CIT(A) even though sufficient opportunity was granted.

7. We have heard rival contentions and perused the record placed before us and carefully gone through the written submission and documents filed in the paper book. First issue for our consideration is addition of Rs.2,02,56,909/- made by the Assessing Officer towards unexplained cash credit. We observe that the Id. Assessing Officer during the course of assessment proceedings, firstly issued a notice to the assessee towards excess purchase of building material at Rs.48,69,666/- but thereafter this was stated to be an inadvertent typing mistake and then alleged for claim of excess liability of Rs.92,56,909/- and another figure of excess sundry creditor of Rs.1,10,00,000/- was arrived for making the impugned addition of Rs.2,02,56,909/-. The observation of the Assessing Officer is interesting and the same is extracted below:-

“2.4 In view of above, the balance sheet and profit & loss account of S. Paik & Co., a proprietorship concern of the assessee has been considered and found that liability as on 31.03.2015 is shown at Rs.1,49,95,800/- and purchased of building materials debited to P/L a/c at Rs.3,16,95,298/-, labour charges for Rs.42,11,928/- and liability for such materials is shown at Rs.3,48,64,832/- as on 31.03.2016. It was also noticed from the profit & loss account that opening work-in-progress is Rs.48,07,000/- and closing work-in-progress is Rs.39,96,040/-. Total withdrawal from the related bank account is Rs.2,61,06,063/- during the F. Yr. 2015-16. As per disclosed method of recognition of revenue & expenses by the assessee in course of assessment proceedings, whatever materials were purchased during the year was subjected to current year expenses. As such total sundry creditors for such materials & services should have been at Rs.2,56,07,923/- [(purchase sundry creditor for goods as on 31.03.2015+labour charges* opening work-in-progress)-(debit amount from bank+ closing work-in-progress)] {(Rs.3,16,95,298 + Rs.1,49,95,800 + Rs.42,11,928+ Rs.48,07,000) - (Rs.2,61,06,063+ Rs.39,96,040)} in place of Rs.3,48,64,832/-. Hence the excess liability comes to Rs.92,56,909/-. But due to inadvertent mistyping such amount was written as Rs.48,69,666/- in the show-cause notice dtd. 06.12.2018.*

2.5. The assessee submitted ledger account of inter-proprietorship bank transaction in respect of S. Paik & Co. and Anil Kumar Paik. It is noticed from that an amount of Rs.1,10,00,000/- was transferred from S. Paik & Co. bank account to Anil Kumar Paik Account. So total debit from the bank account for purchase of raw materials & services comes to Rs.1,51,06,063/-(Rs.2,61,06,063/- - Rs.1,10,00,000/-) only. In view of the discussion held in Para 2.4, total sundry creditors should be at Rs.1,46,07,923/-(Rs.2,56,06,063/- - Rs.1,10,00,000/-) and accordingly, excess liability on account of sundry creditors for raw

materials & services claimed by the assessee at Rs.2,02,56,909/-(Rs.3,48,64,832/- - Rs.1,46,07,923/-).

2.6. *From the profit & loss account it is noticed that the prior period expenses like KMC Plan Sanction fees for Rs.7,12,767/-, architect fees paid for Rs.1,00,000/- are claimed in the current previous year, i.e. 2015-16. It can safely derived from such booking of prior period expenses that the assessee recognised his income & expenses on actuarial basis as is claimed by the assessee himself.*

2.7. *The assessee was asked for to furnish month -wise cash books for the previous year 2015-16 vide noticed u/s 142(1) dtd. 14.09.2018 and other details in support of his claim, which, till date has not been submitted. The assessee submitted some documents based on the figures of the transaction through bank account which does not help to ascertain the claim of the assessee that sundry debtors shown to be payable is genuine. As such, amount claimed as excess liability on account of sundry creditors for materials & services for Rs.92,56,909/- does directly affect the purchase of materials & service cost debited to profit & loss account. Hence, Rs.92,56,909/- is hereby treated as cash credit of the assessee during the year under consideration and due to unexplained of such cash credit, Rs.92,56,909/- is hereby added to total income of the assessee u/s 68 of the Act."*

8. Now, before adverting to the working of the impugned addition made by the Assessing Officer, it is brought to our notice that the books of accounts of the sole proprietorship concern M/s. S. Paik & Co., are duly audited u/s 44AB of the Act. Assessee follows mercantile system of accounting and details of each and every transactions are claimed to have been maintained in the books of accounts to which there is no doubt at the end of the Assessing Officer as he has not pin-pointed to any specific observation, for e.g., wrong claim of expenditure or excess/bogus purchase or any other item of profit and loss account and balance sheet tantamounting to excess claim of expenditure or suppressed revenue/income. Coming to the working of the Assessing Officer extracted *supra*, we notice that the Id. Assessing Officer has disregarded the regular books of account of which the results are arrived at after making entries on day to day basis in cash book, bank book and journal, and finally the trading profit and loss account and

audited balance sheet are arrived at which is the final picture of the transactions carried out during the year. It is also judicially settled that the manner of carrying out of the business activity is a prerogative of the business as to in what manner he carries out and even the profitability or incurring of expenditure varies from case to case. Basic requirement is the consistency in maintaining the books of accounts and adopting the proper and regular system of accounting. In assessee's case, undisputedly, the mercantile system of accounting is adopted and entries are consistently made on day to day basis and thus regular books of account are being maintained. Now, the Id. Assessing Officer while examining the profit and loss account and the balance sheet of M/s S. Paik & Co., has on his own made certain calculations by taking the basis of opening work in progress, purchase during the year, closing work-in-progress, withdrawals made from the bank account. Here it is also worth observing that the Id. Assessing Officer has on his own construed that total withdrawal from the bank are towards purchase of materials and services and then at the next step, he finds that the assessee has transferred a sum of Rs.10,00,000/- from one of his concern S. Paik & Co. to Anil Kumar Paik and then he revised his calculations and then observed that the assessee has claimed excess liability on account of sundry creditors for raw material service charges at Rs. 2,02,56,909/- and to arrive at this figure, the Id. Assessing Officer firstly arrived at a figure of Rs.1,46,07,923/- by way of deducting the amount transferred from S. Paik & Co to Anil Kumar Paik at Rs.1,10,00,000/- from the figure of total withdrawals made from the bank account at Rs.2,56,06,063/-

and then the resultant figure was reduced from the total of purchases + sundry creditors as on 31/03/2015 + labour charges + opening work in progress. We are surprised to observe such kind of working by the Assessing Officer which is dumb founded and has merely picked up certain figures from the financial statements on the closing dates to arrive at such irrelevant workings. He has failed to understand that when the assessee has consistently and regularly followed a method of accounting and proper documents are kept for each and every entry then without rejecting the book results and without finding any discrepancy in the books can an Assessing Officer carry out such an exercise which is not meaningful and is purely a guess work. We thus, are of the considered view that the impugned addition for unexplained credit is based on surmises and conjectures. We find support from the decision in the case of *M.N. Dastur & Co. Ltd. vs. DCIT (1997) 61 ITD 167 (Cal.)* and the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 (SC)*. Accordingly, Ground No. 1 raised by the assessee is allowed.

9. Ground No. 2 challenges the addition of Rs.1,71,18,489/- made by the Assessing Officer invoking Section 43CA of the Act. The ld. Assessing Officer while examining the records of the assessee also possessed the individual transactions statement related to the assessee pertaining to 15 flats sold during the year of which market value was reported at Rs.6,19,56,040/- but the credit in the profit and loss account was only Rs.4,48,37,551/-. In reply, the assessee furnished the information about the flats sold during the year stating that most of the

flats were booked in the preceding years and agreement to sale was entered and part of the consideration was received through account payee cheques. For the sake of reference, the names of the customers, date of booking, registry date, amount of sale consideration and market value as adopted by the stamp valuation authority for calculating stamp duty:-

.NO.	NAME	DATE OF BOOKING	REGISTRY DATE	Flat Address	AMOUNT OF DEED	FLAT NO.	AREA (SQFT)	FLOOR	MARKET VALUE
1	SUSMITA BASU	08.02.2015	02.06.2015	19, Banamali Ghosh Lane, Kolkata -700 034	5,310,000.00	3A	1150	3RD	5310000
2	PRIYABRATA CHATTERJEE	25.05.2015	09.06.2015	"	3,100,000.00	3E	1063	3RD	4826280
3	SHIBNATH DAS	03.01.2015	03.03.2015	"	3,232,800.00	1D	1128	1ST	5100880
4	PARASH AND MADANLAL KEINTH	18.09.2015	22.02.2016	71, Roy Bahadur Road, Kolkata -700 053	4,500,000.00	2D	1500	2ND	5737160
5	SATYABRATA BHATTACHARYA	23.07.2012	18.11.2015	19, Banamali Ghosh Lane, Kolkata -700 034	4,750,000.00	5A	1150	5TH	4900840
6	DHARAMVEER JHALA	23.07.2012	18.11.2015	"	2,182,000.00	4A	1150	4TH	5182000
7	SOMNATH DAS	24.07.2012	27.02.2015	"	2,839,200.00	1C	1092	1ST	4597320
8	AMALENDU BARIK	10.05.2011	02.06.2015	"	3,000,000.00	4E	1063	4TH	4807800
9	DEBANJAN CHAKRABORTY	25.07.2012	18.11.2015	"	1,595,000.00	1E	1063	1ST	4565210
10	BALAI CHAND/ TARUN SARKAR	26.07.2012	22.04.2015	"	2,600,000.00	2C	1397	2ND	
11	DEBASISH MONDAL	10.09.2012	02.06.2015	"	2,000,000.00	1A	1150	1ST	4841500
12	NEELAM PANDEY	03.06.2012	02.06.2015	"	2,146,800.00	2D	1128	2ND	5100880
13	KAMAL KEINTH	10.08.2005	22.02.2016	71, Roy Bahadur Road, Kolkata -700 053	3,232,800.00	3C	1397	3RD	5349300
14	JIBACHH PRASAD	05.09.2011	22.04.2015	19, Banamali Ghosh Lane, Kolkata -700 034	3,980,000.00	2A	1150	2ND	5193500
15	MANOJ KUMAR JHA			71, Roy Bahadur Road, Kolkata -700 053	368,951.00				
					44837551.00				65512670.00

10. From perusal of the above details, we find that so far as the flats sold to customers appearing at S. No. 5 to 16, the date of booking of the flats are prior to 31/03/2013. Assessee has filed the ledger accounts, details of agreement to sale and the proof that part of the consideration have been received through banking channel at the time of booking and in some cases, the said advance or consideration through banking channel has been received prior to financial year 2013-14. We notice that similar issue came up for adjudication before us for Assessment Year 2014-15, wherein we have held that since the agreement for sale was entered prior to 01/04/2015 and the assets in question are stock-in-trade and not capital asset, Section 43CA of the Act will have no application on such transactions. Before us, the Id. Counsel for the

assessee has referred and relied on the decision of the Co-ordinate Bench of this Tribunal in the case of *M/s. Reegal Construction vs. ITO (supra)* and this Tribunal after examining the facts of the case observed as under:-

"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 I.T.A No.354/Kol/2023 Assessment year: 2015-16 M/s Reegal Construction 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):

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(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."

11. In light of the above decision and discussion made in the preceding paragraphs and the fact that flats appearing in the list from Serial No. 5 to 15, agreement to sale was prior to 01/04/2013 and part of the consideration was received through account payee cheques, therefore, Section 43CA of the Act will not be applicable and the difference between the amount of sale consideration appearing in the conveyance deed and the value adopted by the stamp valuation authority cannot be added in the hands of the assessee and the same is hereby deleted.

11.1. So far as the remaining four flats are concerned, we find that in the case of first person, namely, Susmita Basu, there is no difference between the amount in the conveyance deed and the market value and both are stated as Rs.53,10,000/- and, therefore, as there is no difference, no addition is called for. So far as the remaining three parties are concerned, namely, Shri P. Chatterjee, Shri Shibnath Das and Shri Paras Keinth, we notice that the date of booking and the date of registry both falls under FY 2015-16 and there is a difference in the amount of sale

consideration stated in the conveyance deed and the market price. Total of such difference come to Rs. 48,31,520/-. The ld. Counsel for the assessee has claimed that the details of payments have not been examined by the ld. Assessing Officer. Considering the location of the flats, the market valuation cannot be adopted from the stamp valuation authority and matter may be referred to Department valuation officer. Further since no such opportunity was granted during the course of hearing, prayer has been made for restoring the examination of these three transactions carried out with Shri P. Chatterjee, Shri Shibnath Das and Shri Paras Keinth, to the file of the Assessing Officer for examining it afresh. Needless to mention that the assessee shall be provided sufficient opportunity. Accordingly, against the total addition of Rs.1,71,18,489/-, assessee gets relief of Rs.1,18,08,489/- and for the remaining addition of Rs. 48,31,520/-, the matter is remanded back to the Assessing Officer as per the directions given above. Thus, Ground No. 2 raised by the assessee is partly allowed for statistical purposes.

12. Ground No. 3 is raised against the addition of Rs. 4,52,731/-, which the ld. Assessing Officer has made by applying GP rate of 4.65% on the suppressed sales of Rs.97,36,152/-. For arriving at this figure, the ld. Assessing Officer on going through the details of total cash deposits in respect of sale of country spirit noticed with the actual receipts from sale of liquor credited to the profit and loss account is Rs.14,07,20,712/- but the amount credited in the bank account is Rs.15,04,56,864/-. We find that the ld. Assessing Officer while arriving at this figure of suppressed sales has mentioned that total cash deposit is

Rs.13,91,47,825/- but then refers to the total amount of credits in the bank account at Rs.15,04,56,864/-. It seems that the Id. Assessing Officer has himself not worked out the deposit figure properly. What he intended to mention is the cash deposits but then he referred to the total deposits in the bank account which can be on other account also and not only the sales. While taking this course, the Id. Assessing Officer has nowhere disputed the book results as the same has not be rejected and even considering the finding of the Assessing Officer, it indicates that the total cash deposits in the bank account is less than the total sales shown in the profit and loss account.

12.1. Therefore, in our considered view, it is not a case of suppressed sales and working made by the Assessing Officer is purely on surmises and conjectures and, therefore, the action of the Assessing Officer, applying gross profit rate on the alleged suppressed sales tis uncalled for. Addition of Rs. 4,52,731/- is deleted and the Ground No. 3 raised by the assessee is allowed.

13. Ground No. 4 is raised against the addition of Rs. 3,76,28,573/-. The Id. Assessing Officer firstly referred to three business concerns of the assessee, namely, M/s. Gitanjali Enterprises, M/s. Gitanjali Polyclinics & Diagnostics and M/s Gitanjali Chemist & Drugist and referred to the commission income earned from sale of medicine. Thereafter, the Id. Assessing Officer referred to the total amount of credits in the bank account which amounted to Rs.13,86,52,917/- and asked the assessee to give a breakup of the same. The assessee filed the details of the two bank accounts held with Oriental Bank of Commerce

and three bank accounts held with Allahabad Bank and total of the credits in its bank accounts was Rs.12,18,31,381/-. Thereafter, the Id. Assessing Officer applied the gross profit rate of 38.22% on a figure of Rs.9,84,52,571/- observing as follows:-

“6.3 It is to note here that the amount of credit claimed in the above reconciliation in respect of S. Paik & Co. is not included into total of Rs. 13,86,52,91 II- as discussed above. So total credit as per reconciliation comes to Rs.9,40,67,835/- (Rs. 12,18,31,381/- - Rs.2,77,63,546/-). Hence, total amount remained un-reconciled stands at Rs.4,45,85,082/-. Moreover, the assessee has further submitted ledger account of inter-concerns transactions. It is observed from them that the amount of Rs. 1,30,30,600/- has been credited to Anil Kumar Paik account (OBC bank) from C.S. Shop. Hence the credit amount of Rs. 13,86,52,917/- is reduced to Rs.12,56,22,317/-(i.e. Rs.13,86,52,917/- - Rs. 1,30,30,600/-). The assessee credited his profit & loss account of the proprietorship concerns other than C.S. Shop and Real Estate concern by Rs. 1,61,69,800/- . Hence, the assessee has to explain the difference of Rs. 10,94,52,517/- which is considered as unaccounted sale. It is mentioned in para 2 that an amount of Rs. 1,10,00,000/- was transferred from the Account of S. Paik & Co. to Shri. Anil Kumar Paik's Account. It is therefore the total credit amount of Rs. 10,94,52,517/- is reduced to Rs. 9,84,52,521/- i.e. [Rs. 10,94,52,517/- - Rs. 1,10,00,000/-]. Finally, Rs. 9,84,52,571/- is considered as unaccounted sale.

This amount of undisclosed sale carries with it cost of purchase of goods, materials, services & other related expenses. For the interest of natural justice as well as of revenue, it would be fair to estimate income from undisclosed sale applying the average G.P. ratio as is disclosed in the respective concerns.

Name of the concern	G.P. ratio
M/s Gitanjali Enterprises	28.75
M/s Gitanjali Polyclinics & diagnostics	52.00
M/s Gitanjali Chemist & Drugist	<u>33.90</u>
Total	114.65
 Average GP ratio to sale %	 38.22

The average GP Ratio as computed above is 38.22%. Hence the average GP ratio is applied to computed taxable income which comes to Rs.3,76,28,573/-. (38.22% of Rs.9,84,52,571/-)”

14. The above working of the Id. Assessing Officer is neither here nor there. Books of account have not been rejected u/s 145(3) of the Act. There is no link of the figures mentioned in the assessment order giving rise to the impugned addition. The Id. Assessing Officer has adopted his own theory for making the said addition but it is not supported by proper facts. The Id. Counsel for the assessee admitted the fact that the assessee carries on his businesses of running a diagnostic and polyclinic

styled "Gitanjali Polyclinic & Diagnostics", running of retail trading of medicines under the name of "Gitanjali Chemists & Druggists" and also acting as a Clearing and Forwarding (C&F) agent under the name and style of "Gitanjali Enterprises". The appellant had maintained books of accounts u/s. 44AA of the Income Tax Act, 1961 only in respect to his concern styled "Gitanjali Enterprises" which were duly audited under the statutory requirement of s. 44AB of the Act and the entries made therein were fully supported by proper bills and vouchers. In pursuance of the activities of the appellant, it acts as Clearing and Forwarding agents and receives the payments on behalf of his principal and thereafter, he remits such sum to the principal after keeping his commission. The total receipt disclosed by the appellant in respect of "Gitanjali Polyclinic & Diagnostics" was Rs. 65,57,062/-, "Gitanjali Chemists & Druggists" was Rs. 65,22,864/- and "Gitanjali Enterprises" was Rs. 30,49,764/- during the relevant previous year. The Ld. Assessing Officer misconceived such receipts to be income and thereafter considered the total deposits in the related banks accounts to the tune of Rs. 13,86,52,917/- as revenue, without giving the breakup of such amount, nor desired an explanation regarding the source thereof. The appellant, in rejoinder, prayed to provide the breakup of such figure of the alleged deposits in the bank accounts. Nevertheless, the appellant had filed a reconciliation of the aggregated deposits in bank accounts at Rs. 12,18,31,381/-. However, the Ld. Assessing Officer opined that the total deposit of Rs. 2,77,63,546/- is not considered since the same is not included in the total deposits of Rs. 13,86,52,917/- and as such, the

reconciliation is to the extent of Rs. 9,40,67,535/-. Thereafter, he deducted inter concern transactions of Rs. 30,600/- and Rs.1,10,00,000/- from the total deposits assumed at Rs. 13,86,52,917/-. He also considered that the income of Rs. 1,61,69,800/- so earned from three concerns stands explained to such extent of deposits and accordingly, computed an amount of Rs. 9,84,52,571/- as unaccounted sale.

14.1. Thereafter, he applied a rule of thumb to impose an average gross profit ratio of 38.22% on such alleged unexplained sale to compute undisclosed profit of Rs. 3,76,28,573/-. In the first place, there cannot be any unexplained sale in respect of the activities carried out as C & F agents under the name and style of "Gitanjali Enterprises". Further, the income from the businesses carried on as "Gitanjali Polyclinic & Diagnostics" and "Gitanjali Chemists & Druggists" are offered u/s. 44AD of the Income Tax Act, 1961. Further, the bank statement in the case of "Gitanjali Enterprises" was duly explained with narration to the satisfaction of the Ld. Assessing Officer. The commission earned from such activities as C & F Agents was duly explained with evidence. It is also not in dispute that the Ld. Assessing Officer did not adversely comment regarding the veracity of the deposits in carrying on the activities as a C & F Agent. It is an undisputed fact that the sanctity and veracity of entries in the books of accounts in this relation were explained to the Ld. Assessing Officer who had not expressed any doubts regarding the veracity thereof. In other words, the Ld. Assessing Officer was unable to identify any defect in such books of accounts, which were duly supported by evidence. In

fact, the Ld. Assessing Officer without any ostensible reason resorted to estimating the gross profit of the appellant. The provisions of s. 145(3) of the Income Tax Act, 1961 require that where the accounts produced by an assessee are not correct and are not complete to the satisfaction of the Assessing Authority, he has to assign reasons for such assumption and thereafter, resort to an estimate of income as contemplated in the provisions of s. 144 of the Act. In other words, the statutory prescription contained in the provisions of s. 145(3) of the Act requires the Assessing Authority to reject the books of accounts maintained by an assessee by recording plausible reasons. Therefore, rejection of books of accounts is a condition precedent for invoking the power and estimation of income is the subsequent condition. Accordingly, unless the books of accounts are rejected by the Assessing Authority and such a rejection is based on sound and cogent reasons, the Assessing Authority does not have the jurisdiction to estimate the profits. Where the books of accounts produced were not rejected nor even a single voucher was found unverifiable, the gross profit cannot be estimated as the books were taken into account [*SWADESHI COMMERCIAL CO. LTD. -VS- C.I.T. (I.T.A. NO. 219 OF 2001 DATED 18-12-2008) (CAL)*]. In such an event, the estimation of income by the Ld. Assessing Officer is ultra vires the scope of s. 145(3) of the Income Tax Act, 1961 as the Ld. Assessing Officer had not rejected the books of account of "Gitanjali Enterprises" maintained by the appellant with cogent reasons. Since the books of accounts were not rejected, there cannot be any estimation of profits as resorted to by the Ld. Assessing Officer in the present case. It is thus

axiomatic that the prescription contained in the provision of s. 145(3) of the Income Tax Act, 1961 were not satisfied in the present context; therefore, action inviting the rigors of such provisions does not arise in the circumstances of the case and the Ld. Assessing Officer misread the essence of the statute in this regard and the Ld. Commissioner (Appeals) erred in upholding such impugned estimate made without rejecting the books of account and has thus misconstrued the law which is not in consonance with the legal position in this respect.

15. In view of the above decisions and considering the facts that the ld. Assessing Officer has not rejected the book results u/s 145(3) of the Act, nor any discrepancy has been noticed in the purchase and sales and expenses claimed and just certain figures have been jumbled up but the conclusion drawn by the Assessing Officer reaches nowhere and thus the impugned addition is purely based on a guess work and surmises and conjectures and deserves to be deleted. Thus, Ground No. 4 raised by the assessee is allowed.

16. In the result, appeal of the assessee is allowed partly for statistical purposes.

Order pronounced in the Court on 29th November, 2023 at Kolkata.

Sd/-

**(SANJAY GARG)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 29/11/2023

**SC Sp/2*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

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TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
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