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

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

I.T.A. No. 492/Kol/2023
Assessment Year: 2017-18

Anil Kumar Paik C/o S.N. Ghosh & Associates, Advocates 2, Garstin Place, 2nd Floor Suite No. 203 Off Hare Street Kolkata - 700001 **[PAN : AFLPP6567R]**	Vs	**ACIT, Circle-8(1), Kolkata**

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Somnath Ghosh, Advocate
Revenue by :	Shri B.K. Singh, JCIT, Sr. D/R

सुनवाई की तारीख/**Date of Hearing : 01/12/2023**
घोषणा की तारीख /**Date of Pronouncement: 29/02/2024**

आदेश/O R D E R

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 2017-18.

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

"1. FOR THAT the Ld. Commissioner, of Income Tax (Appeals)-N.F.A.C. acted unlawfully in impliedly sustaining; the purported addition of Rs. 1,67.44,907/- 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.

2. 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. 17,45,120/- 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.

3. FOR THAT the Ld. Commissioner of Income Tax (Appeals), NFAC foiled 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. 1,20,47,747/- 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.

4. FOR THAT the Ld. Commissioner of Income Tax (Appeals)-NJFAC acted unlawfully in impliedly upholding the purported addition to the extent of Rs. 67,94,000/- made by the id. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata alleging unexplained cash credits invoking the provisions of s. 68 of the Income Tax Act 1961 in the facts and circumstances of the instant case and the specious finding on that issue is absolutely arbitrary, unwarranted, and perverse.

5. FOR THAT the id. Commissioner of Income Tax (Appeals)-N.F.A.C. erred in upholding the purported addition of Rs. 67,94,000/- made by the id. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata on account of alleged unexplained cash credits being the cash deposits made in Specified Bank Notes during Demonetization Period on extraneous considerations not germane to the issue and totally ignoring the cogent explanation adduced on record and the impugned finding on that issue is completely unfounded, unjustified, and untenable in law.

6. FOR THAT on a true and proper interpretation of the scope of the provisions of s. 145(3) of the Income Tax Act, 1961, the Ld. Commissioner of Income Tax (Appeals)-N.FA,C. was absolutely in error in impliedly upholding the specious estimate to the extent of Rs. 49,11.694/- resorted to by the Id. Assistant Commissioner of Income Tax, Circle 8(1), Kolkata being the alleged gross profit on undisclosed sales earned by the appellant in a convoluted manner without considering the matter in the proper perspective and such specious conclusion reached on extraneous considerations not germane Jo the issue in dispute is totally opposed to law.

7. FOR THAT on a true and proper interpretation of the scope of the provisions of s. 68 of the Income Tax Act, ,1961, the Ld. Commissioner of Income Tax (Appeals)-N.F.A.C. was absolutely in error in impliedly upholding the specious addition of Rs. 1,65,00,000/- resorted to by the Ld. Assistant Commissioner of Income Tax, Circle 8(1). Kolkata without considering the matter in the proper perspective and such spurious conclusion reached on extraneous considerations; not germane to the issue in dispute is totally arbitrary, unwarranted, and perverse.

8. 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 in the sum of Rs. 1,65,00,000/- made by the Ld Assistant Commissioner of Income Tax, Circle 8(1), Kolkata on the manifestly wrong application of the provisions of s. 68 of the Income Tax Act, 1961 basing on considerations not relevant to the issue is wholly illegal, illegitimate, and infirm in law."

3. Brief facts of the case are that the assessee is an individual engaged in business carried out in various fields. Income of Rs. 1,51,05,760/- declared in the e-return for Assessment Year 2017-18 filed on 28/03/2018. Case selected for scrutiny through CASS followed by service of notice u/s 143(2) and 142(1) of the Act. The ld. Assessing Officer observed that the assessee is into the construction business. The ld. Assessing Officer noticed that during the year certain flats have been sold by the assessee. Though the assessee was asked to explain the reason for the said difference, but in absence of proper reply, the ld. Assessing Officer made addition of Rs. 1,67,44,907/- on the ground that Section 43CA of the Act which is a deeming provision is applicable on the assessee and the difference between the market value of the flats as per the stamp valuation authority over the sale consideration disclosed in the books deserves to be added. Further the

ld. Assessing Officer noticed that the assessee had shown less income on the declared sales and estimated the net profit from construction business at 20% as against 7.3% declared by the assessee and made addition of Rs.17,45,120/-. Similarly, the ld. Assessing Officer also estimated high net profit on the liquor sales carried out during the year and made an addition of Rs.1,20,47,747/-. Disallowance of rent deposit of Rs.2,04,000/- was made by not treating it as revenue expenditure. Further the ld. Assessing Officer noticed that the assessee is not maintaining regular books of accounts because they were not produced before the Assessing Officer in spite of granting various opportunities. During the year, subsequent to the announcement of demonetisation scheme by the Central Government, certain cash was deposited for which the assessee could not explain the source and such sum amounting to Rs.67,94,000/- was added to the income. Further the ld. Assessing Officer also estimated the net profit on the pharmaceuticals business carried out by the assessee by observing that there is undisclosed sales amounting to Rs.2,45,58,472/- and on those undisclosed sales, gross profit @ 20% is estimated thus making addition of Rs.49,11,694/-. Further the ld. Assessing Officer observed that there is liability of Rs.1.65 Crores shown in the balance sheet of sole proprietorship concern M/s. S. Paik and Co.. It was submitted by the assessee that this is a loan from M/s. Gitanjali Hotel and Inn Private Limited and transactions have been carried out through banking channels. However, from perusal of the financials of M/s. Gitanjali Hotels and Inn Private Limited, it was seen that no fixed

assets have been sold during the year. The ld. Assessing Officer thus, concluded that this unexplained cash credit in the books of the assessee was liable to be added u/s 68 of the Act and made addition of Rs.1,65,00,000/-. Accordingly, income assessed at Rs.7,40,53,228/-. Aggrieved the assessee preferred appeal before the ld. CIT(A) but failed to succeed.

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

5. The ld. Counsel for the assessee has filed detailed paper book containing 575 pages which contains various details in support of its grounds. The crux of the arguments as appearing in the written submissions are as follows:-

i) No addition u/s 43CA of the Act is called for because though the sale deed of the flats have been registered during the year, but there agreement of sale were executed during FY 2011-12 and part of the consideration was received through account payee cheque and since Section 43CA of the Act has been brought into the statute from 01/04/2014, no addition is called for u/s 43CA of the Act.

ii) As regards estimation of net profit of the business of development of real estate, ld. Assessing Officer has not rejected the book results u/s 145(3) of the Act and the estimation is merely based on surmises and conjectures.

iii) Similar contentions have been made with regard to the estimation of net profit in liquor business where also, without rejecting the book results, the ld. Assessing Officer erred in estimating the profits.

(iv) So far as the addition made for the cash deposited during the demonetisation period, it is submitted that the assessee was having sufficient cash in hand as on 08/11/2016, which was utilized for making the alleged deposits. The ld. Assessing Officer failed to consider the fact that cash books are regularly prepared and assessee is regularly making cash sales.

(v) So far as the addition relating to suppression of sales is considered, it is submitted that the ld. Assessing Officer has erred in making the addition based on the difference of the sales in the VAT return as against sales declared in the book of accounts. Further ld. Assessing Officer failed to consider that the assessee is a clearing and forwarding agent and only record the commission income in books and the actual sales are accounted for in the books of the principal company. However, for the purpose of VAT return, since the assessee is collecting the tax and depositing on behalf of its members the same declared in the VAT return.

(vi) So far as the addition for unexplained cash credit under section 68 of the Act of Rs.1.65 Crores is concerned, he submitted that the assessee has taken a loan from M/s. Gitanjali Hotel and Inn Private Limited (in short GHIPL) and the same has not been transferred during the year. An advance has been received by GHIPL against the sale of the asset from Hotel Mahaprabhu but funds have been received by the director of GHIPL i.e., the assessee on company's behalf. Complete details of the transactions are provided and, therefore, no addition is called for u/s 68 of the Act.

5.1. While concluding, the ld. Counsel for the assessee submitted that most of the issues have been raised by the assessee in its appeal before this Tribunal for Assessment Years 2014-15 and 2016-17 and the facts are almost identical and they have been decided by this Tribunal vide ITA No. 431/Kol/2023, order dt. 08/11/2023 and ITA No. 468/Kol/2023, order dt. 29/11/2023 and the finding of this Tribunal is squarely applicable in the issues raised in the instant appeal.

6. The ld. D/R, on the other hand, vehemently argued supporting the order of both the lower authorities.

7. We have heard rival contentions and perused the material placed before us.

8. Ground No. 1 is against the addition made u/s 43CA of the Act at Rs. 1,67,44,907/-. Perusal of the paper book and the details filed before the lower authorities, proves that the flats sold during the year were originally agreed to be sold during FY 2011-12. Copies of agreement to sell have been filed. Part payment through account payee cheques were made. In support, copies of ledger accounts have been filed. It thus shows that except the registering the sale deed during the year and accounting it in the books, the flats in question have been agreed to be sold during FY 2011-12 alongwith receiving part of the sale consideration through banking channel and, therefore, the valuation as per the stamp valuation authority should be adopted as applicable on the date of agreement to sale. However, since the assets in question are business assets, provisions of Section 50C of the Act have no applicability and Section 43CA of the Act has been

inserted *w.e.f.* 01/04/2014 and, therefore, the same are not applicable on the transactions in question during the year. Similar issue came for our consideration in assessee's own case for Assessment Year 2016-17 and the finding of this Tribunal on this issue reads as follows:-

> *"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 ld. 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:*
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> > *"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."*
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> *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.*
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> *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."*
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> *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."*

9. Respectfully following the above and under the given facts and circumstances, impugned addition is uncalled for as provisions of Section 43CA of the Act are not applicable to the transactions in question which we have been originally agreed to sell during FY 2011-12 and part sale consideration have also been received. Accordingly the finding of the ld. CIT(A) is set aside and Ground No. 1 raised by the assessee is allowed.

10. Ground No. 2 is raised against the estimation of net profit thereby making the addition of Rs.17,45,120/- on the income from real estate business. We notice that the ld. Assessing Officer has not

rejected the book results and provisions of Section 145(3) of the Act has not been invoked. Without rejecting the book results the ld. Assessing Officer cannot estimate the profits of the assessee's business ignoring the fact that books of accounts are duly and regularly maintained and audited. The alleged estimation is merely on surmises and conjectures. We find that similar issue was raised for Assessment Year 2016-17 in Ground No. 3, which has been dealt by this Tribunal observing as follows:-

> *"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 ld. 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 ld. 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.*
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> *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."*

11. Respectfully following the above and under the given facts and circumstances, we delete the addition of Rs.17,45,120/- made by the ld. Assessing Officer estimating higher net profits without rejecting

the books of accounts. Findings of the ld. CIT(A) is set aside. Ground No. 2 raised by the assessee is allowed.

12. Ground No. 3 is against the addition of Rs.1,20,47,747/- made by the ld. Assessing Officer estimating the profits over and above the profits declared by the assessee in the liquor business carried out under the name and style of S.N. Roy Road, C.S. Shop. Undisputedly, the ld. Assessing Officer again failed to reject the book results u/s 145(3) of the Act before estimating the profits of the liquor business declared by the assessee. The estimation has been made by the ld. Assessing Officer mainly on surmises and conjectures without bringing any other evidence on record and such action of the Assessing Officer of assuming jurisdiction u/s 145(3) of the Act without rejecting the book results and without pinpointing the specific defects in the books of accounts regularly maintained and audited, cannot be held to be justified. Similar issue was raised for Assessment Year 2016-17 in case of the assessee for Ground No. 4, wherein the Tribunal held as under:-

> *"13. Ground No. 4 is raised against the addition of Rs. 3,76,28,573/-. The ld. Assessing Officer firstly referred to three business concerns of the assessee, namely, M/s. Gitanjali Enterprises, M/s. Gitanjali Polyclinics & Diagnotics and M/s Gitanjali Chemist & Drugist and referred to the commission income earned from sale of medicine. Thereafter, the ld. 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 ld. 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		*33.90*
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 ld. 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 ld. Assessing Officer has adopted his own theory for making the said addition but it is not supported by proper facts. The ld. 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 Cleanrtg 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."

13. Consistent with the view taken by this Tribunal, we delete the addition of Rs.1,20,47,747/- made by the ld. Assessing Officer estimating the profits over and above the profits declared by the assessee in the liquor business without rejecting the books of accounts and without mentioning any defect in the same. Accordingly, Ground No. 3 raised by the assessee is allowed.

14. Ground Nos. 4 & 5 are against the addition made for unexplained cash deposited during the demonetisation period amounting to Rs. 67,94,000/-. We notice that during the demonetisation period assessee has deposited specified bank notes in

different bank accounts held under different sole proprietorship concerns owned by the assessee amounting to Rs.2,25,000/-, Rs.1,07,000/-, Rs.16,24,000/- and Rs.47,85,000/- in respect of Gitanjali Polyclinic & Diagnostic, Gitanjali Enterprises, one bank account with Oriental Bank of Commerce, Behala Branch and 4, S.N. Roy Road, C.S. Shop, respectively. Before as the assessee has placed copy of the cash book of various concerns and a consolidated chart of cash balance is on 08/11/2016 has been filed. We find that the assessee is carrying out various types of businesses wherein cash is received against the sales/services regularly. It is not a case where all of a sudden assessee has deposited the cash for which no sources available. Assessee is carrying out business of selling goods and providing services regularly and books of accounts of each of the concerns have been maintained. Financial statements are duly audited and profits from each of the concerns are declared. As per the consolidated cash statement as on 08/11/2016, there is a cash balance of Rs.96,34,619/-, which is sufficient enough to explain the source of alleged cash deposit of Rs. 67,94,000/-. Where the nature and source of the cash credit is explained satisfactorily by the assessee and the Assessing Officer fails to find any defect or any inconsistency in such explanation then, provision of Section 68 of the Act cannot be invoked. We, therefore, hold that no addition is called for u/s 68 of the Act at Rs.67,94,000/-. The finding of the ld. CIT(A) is set aside and Ground Nos. 4 & 5 raised by the assessee are allowed.

15. Ground No. 6 is raised against the addition made for estimating the income of Rs. 49,11,694/- for clearing and forwarding agent business. We find that the Assessing Officer has taken the basis of the VAT returns to come to a conclusion that the assessee has suppressed the sales and thereby suppressed a net profit. Both the lower authorities have failed to consider the fact that one of the business of assessee is that of clearing and forwarding agent and he sells the goods of the companies for which he is acting as an agent. Since the assessee is liable to collect and deposit the value added tax, the details of such sales have been mentioned in the VAT return. However, for the purpose of income tax, assessee has to only account for the commission income earned for carrying out such business as a clearing and forwarding agent. Both the lower authorities missed to consider this fact. Assessee has filed complete reconciliation statement depicting that there is no suppressed sales and, therefore, the income estimated by the ld. Assessing Officer is merely on surmises and conjectures and have no legs to stand. The addition of Rs. 49,11,694/- is hereby deleted. Ground No. 6 raised by the assessee is allowed.

16. Ground No. 7 & 8 are against the addition u/s 68 of the Act at Rs.1,65,00,000/-. Facts relevant to this issue are that the ld. Assessing Officer noticed during the year that there is a liability of Rs.1,65,00,000/- standing in the balance sheet of sole proprietorship concern M/s. S. Paik & Co.. When asked by the ld. Assessing Officer, it was submitted that it is a loan from the company, namely, M/s. Gitanjali Hotels and Inn Private Limited. The transaction has been

carried out through banking channel. We find notice that the alleged transaction was basically an advance received for Hotel Mahaprabhu against the sale of land at Tarapith owned by M/s. Gitanjali Hotels and Inn Private Limited. However, since the assessee is a director of M/s. Gitanjali Hotels and Inn Private Limited, advance against sale proceeds of loan was taken by the assessee in his account but the same was on behalf of M/s. Gitanjali Hotels and Inn Private Limited. In short the funds which were actually required to be received in the account of M/s. Gitanjali Hotels and Inn Private Limited, were received by the assessee on behalf of M/s. Gitanjali Hotels and Inn Private Limited. The audited balance sheet of M/s. Gitanjali Hotels and Inn Private Limited has been filed in the alleged transaction has been mentioned therein both on the liability as well as the asset side. Since the asset owned by 'GHIPL' was not transferred during the eyar, the same is duly regulated in balance sheet as on 31/03/2017. As well as the liability is concerned, the same are shown as advance against sale of land and so far as the asset side is concerned it is loan/advance to the assessee which in turn has been shown as liability in the books of the assessee. The complete details of the said transaction has been placed on record. We thus, find that the assessee has successfully explained the nature and source of the alleged sum and has discharged its burden casted u/s 68 of the Act. Since the revenue authorities have failed to bring any contrary material on record, we find it to be a genuine transaction and the identity and creditworthiness of the creditor is not disputed. Thus, the addition of Rs.1.65 Crores u/s 68 of

the Act, is uncalled for and the same is hereby deleted. Ground Nos. 7 & 8 of the assessee are allowed.

17. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 29th February, 2024 at Kolkata.

Sd/-	*Sd/-*
(SANJAY GARG)	**(DR. MANISH BORAD)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Kolkata, Dated 29/02/2024
SC SrPs

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.

आदेशानुसार/ **BY ORDER,**
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata