



IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAJ KUMAR CHAUHAN, JM

ITA No. 2548/MUM/2024

A.Y.2015-16

Babosa Corporation,
Survey No. 53, Hissa
No.14,
Babosa Industrial
Complex,
Mouje Saravali,
Bhiwandi-421302

Vs.

Income Tax Officer,
Ward-1(1),
Mohan Plaza,
Kalyan - 421301

(Appellant)

(Respondent)

PAN

AAKFB 9103D

Assessee by

Shri Pankaj R. Toprani &
Ms. Krupa P. Toprani

Revenue by

Shri Ashok Kumar
Ambastha, Sr. (DR),

Date of hearing
Date of pronouncement

29th July, 2024
08th October 2024

O R D E R

PER PRASHANT MAHARISHI, AM:

1. This appeal in ITA No. 2548/M 2024 is filed by M/s Babosa Corporation (the assessee/appellant) for Assessment Year 2015 - 16 against the appellate order passed by National Faceless Appeal Centre, (NFAC) Delhi (the learned CIT -



A) for Assessment Year 2015-16 dated 2/4/2024 wherein the appeal filed by the assessee against the assessment order dated 29/12/2017 passed under section 143 (3) of The Income Tax Act, 1961 (The Act) by the Income Tax Officer Ward - 1 (1) Kalyan [the Id. AO] was partly allowed.

2. Assessee has raised following grounds of appeal: -
 - i. The learned CIT (A) erred in law and on facts in invoking the provisions of section 43CA the income tax act, 1961 (the act) while upholding the addition of Rs. 4,010,875/- in respect of for commercial units transferred by the appellant without appreciating that they cannot be equated with building as the occupation certificate from the competent authority was not received when the same were transferred
 - ii. The learned CIT (A) order in law and on facts in not considering the provisions of first proviso to section 43CA of the act inserted with effect from 1/4/2019, which is applicable retrospectively in terms of which the provisions of section 43CA cannot be made applicable where the difference between the stamp duty valuation and the sale consideration is less than 10% of the tolerance limit.
3. Assessee is a partnership firm engaged in the business of Builders and Developers, filed its return of income for impugned assessment year on 4/9/2015 at a total income of Rs. 1,371,280/-. This return was picked up for scrutiny



and notice under section 143 (2) was issued on 28/7/2016.

4. During assessment proceedings the learned assessing officer looked at the column number 17 of tax audit report wherein he found that in case of 4 units of the building sold by the assessee, consideration is less than the government value declared for stamp duty purposes, and the difference of the sale consideration and stamp duty value cumulatively for all these 4 properties is Rs. 4,131,875/-. The assessee was asked about the difference and further the applicability of provisions of section 43CA of the act.
5. The assessee explained that the ready reckoner value of the above stated properties is higher than the prevailing market rate and further there has been a reduction in the prices of the certain units as they have been in the first and second floors and not on the ground floor.
6. The learned AO considered the explanation of the assessee and stated that assessee has also not disputed the stamp duty rates adopted by the state government and could not substantiate the reason for difference and therefore he applied the provisions of section 43CA of the act and made an addition of Rs. 4,171,835/-.
7. Consequently, the total income of the assessee was assessed at Rs. 5,543,115/- against the returned income of Rs. 3,071,280/- by the assessment order passed under section 143 (3) of the act dated 29/12/2017.



8. The learned CIT - A, on appeal, also considered that valuation cell was directed to determine the value of the property which was finally determined on 29/8/2019 of 2 properties at Rs. 3,056,000 -and Rs. 3,182,500/-. The other two properties were not referred for the valuation cell. Thus, out of 4 properties, only two properties were referred for valuation and the difference in the valuation and consideration was found to be Rs. 949,875/- and Rs. 206,000/-. The difference with respect to the other properties was Rs. 252,000/- and Rs. 3000/-. Thus the revised difference was found at Rs. 14,10,875/-. It was confirmed to that extent.
9. Assessee also contended before him that difference between the sale consideration and the government value is less than 10%, a liberal view for a difference may be taken and consequently the addition should not be made. The learned CIT - A held that the proviso to section 43CA was inserted by the Finance act 2018 and is effective from 1/4/2019, thus it is not applicable for assessment year 2015 - 16. Accordingly, the addition of Rs. 14,10,875/- under section 43CA of the act was confirmed.
10. Assessee aggrieved with that is in appeal before us. Assessee has submitted factual paper book containing 384 pages and a legal paper book containing 19 judicial precedents. We have considered each of them and will discuss when appropriate,



11. The learned Departmental Representative vehemently supported the order of the learned lower authorities.
12. We have carefully considered the rival contention and perused the orders of the learned lower authorities. Based on the facts narrated above, the final position with respect to the four properties emerges as under: -

Serial number	Property details	Consideration as per agreement	Stamp duty rates	Valuation as per the DV	difference
1	Building number, A - 6-unit number 2	45,00,000	47,52,000	Not referred	2,52,000
2	Building number, A - 1 unit number 208	22,32,625	45,14,500	31,82,500	9,49,875
3	Building number, A- 1 unit number 4	33,25,000	33,28,000	Not referred	3000
4	Building number,A - 2, unit number 200	28,50,000	44,45,000	30,56,000	2,06,000
	total	1,29,07,625	1,70,39,500		

13. We find that with respect to property numbers 1 and 3, despite objection by the assessee, the learned Assessing Officer did not refer to the valuation cell. Even in case of property at serial no 4, difference is less than 10% of the consideration. Therefore, looking at the beneficial provision of introducing the tolerance band of 10% by the finance act 2018 to obviate the difficulty, though inserted by the finance act 2018 effective from 1/4/2019, should be considered as applicable from the date on which the provisions of section 43CA inserted into the act. Therefore, we consider it is applicable to the assessment year 2015 - 16 also. Accordingly, there could not have been any



addition to the total income of the assessee with respect to property at Serial Nos. 1, 3 and 4. Thus Ground No. 2 is allowed.

14. Now, the arguments raised in ground number 1 would be applicable with respect to determination of the addition with respect to property at Serial No 2.
15. With respect to property at Serial No. 2 the consideration received by the assessee is Rs.2,232,625/- and value of the same determined by the district valuation officer at Rs. 3,182,500/- resulting into the revised the difference of Rs. 949,875/-. The claim of the assessee is that provisions of section 43CA does not apply as on that date the impugned property was under construction and hence it is neither a building nor a land. What is transferred by the assessee to the buyer is merely a right to acquire the building. Therefore, the provisions of section 43CA does not apply. For this proposition he referred to page number 379- 384 of the paper books wherein certificate of completion of the building was obtained on 31st of March 2017. It was further claimed that unless these properties take the final shape of building, provisions of section 43CA could not have been applied. For this proposition he relied upon the decision of the honourable Punjab and Haryana High Court in 330 ITR 157 rendered in context of wealth tax to state that the value of house under construction including investment on construction is not liable to tax because incomplete building does not fall within the ambit of



'assets' under section 2(ea) of the Wealth tax Act. He further referred to the decision of the coordinate bench in 178 ITD 98 in case of Shri Lakshmi Estates private limited wherein it has been held that where the assessee is engaged in construction of commercial projects and what has been transferred by the assessee is only the rights in the flat/office which is under construction and not the property per se therefore the provisions of section 43CA does not apply to such a kind of transfer. It was further pressed that the provisions of section 50C of the act and provisions of section 43CA of the act are Pari Materia same and therefore even in case of section 50 C wherein it is decided that when a right to acquire a flat is transferred, provisions of section 50 C does not apply, similarly provisions of section 43CA should also not apply. For this proposition several judicial precedents were relied upon.

16. Though the Assessee has stated that this plea was not taken before the lower authorities but same can be taken at any stage. There is no quarrel on this issue. But the facts are required to be investigated in this case. The facts which are not before the lower authorities, could not have been entertained by the tribunal. There are also contradictions in the submission of the assessee because as per the tax audit report, in form number 3CD at Para number 17, assessee it says that it has sold a property to which provisions of section 43CA are applicable. Form



number 3CD is prepared by the assessee himself and then in form number 3CB it is certified by the auditor as 'true and correct'. Therefore, the assessee has already taken a stand before the lower authorities that it has transferred a property to which provisions of section 43CA applies. Before us, it has taken an opposite stand saying that that provision does not apply at all and that too based on the several judicial precedents.

17. On careful perusal of the agreement produced before us of the above property, at point number 8 at page number 16 of the agreement (Paper Book Page No. 166), possession of the said unit would be handed over by the developer to the purchaser by August 2014 which falls in Assessment Year 2015 - 16. Therefore, it is not the case of transfer of a right in property during the assessment year which is not land or building as even otherwise the transaction stated by the assessee are completed in the same year.
18. Further it is not shown before us that if it is right to purchase an immovable property being a residential house, which has been transacted by this agreement, when the final sale deed was executed for transfer of actual capital asset being land or building. It was stated that this is the only agreement by which the transaction has taken place. Therefore, it is apparent that for all practical purposes the assessee has sold a capital asset being land or building by this agreement which is registered and subject to stamp duty.



19. Assessee in its books of account has also transferred all the risk and reward of that particular property to the buyer.
20. Provisions of section 43CA of the act is an anti-avoidance provision. If the view of the assessee is accepted, then in that case the provisions of section 43CA becomes redundant and only be applicable when the building receives the completion certificate and after that, the assessee enters into an agreement to sale/sale deed with the buyers. It will lead to a situation that the assessee offers income in year one when it transfers the risk and reward of the property to the buyer and offers income based on agreement to sale and in the subsequent years, the provisions of section 43CA are applied when the property is complete. This could not have been the intention of the legislature and as well as provisions of the law cannot be read in that manner.
21. In this case we do not know when the completion certificate is received with respect to the building as those facts have not been put before us. Completion certificate and the occupation certificate are two different events.
22. Further the various details provided by the assessee as per note number 12 placed at page numbers 28 – 30 of the paper books also says that it has sold the area in several assessment years starting from 2012 – 13 to Assessment Year 2015 – 16. Then is it that that the assessee has sold only the rights to acquire the building



and not the building itself when the assessee records in its books of accounts that it has sold the buildings.

23. Therefore, contradictory facts are available on record as stated above. Therefore, with respect to the determination of total income in building number A – 1 of unit number 208, we restore the issue back to the file of the learned assessing officer with a direction to the assessee to substantiate all these facts as well as legal issues raised. As these facts are not investigated, not even produced before the lower authorities, the legal contentions based on this evidence cannot be examined here. Those must be examined by the lower authorities otherwise it will amount to deciding a factual issue without giving an opportunity to the revenue authorities. Therefore, all circumstantial facts in this case may be put before the assessing officer along with legal contentions raised before us which are left open. This issue is to be decided only with respect to building number A- 1 unit number 208 where the difference is Rs. 949,875/-. Accordingly Ground no 1 of the appeal is allowed with above direction.
24. Thus, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 08/10/2024.

Sd/-
(RAJ KUMAR CHAUHAN)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 08.10.2024

Dragon



Page | **11**

ITA No.2548/M/2024

A Y : 2015-16

Babosa Corporation,

Versus

Income Tax Officer Kalyan

Copy of the Order forwarded to :

The Appellant, The Respondent, The CIT, The DR ITAT & Guard File

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai