

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER**

ITA No.484/Del/2024, A.Y.2011-12)

Shivdeep Tyagi H. No. 701, Deovdar Tower Shipra Srishti, Indirapuram, Ghaziabad U.P, 201301 PAN: AECPT8926L	Vs.	ITO, Ward-2(3), Ghaziabad
(Appellant)		(Respondent)

Appellant by	Shri Sahil Sharma, Advocate and Shri Sanjay Parashar, Advocate
Respondent by	Sh. Anuj Garg, Sr. DR

Date of Hearing	28/05/2024
Date of Pronouncement	18/06/2024

ORDER

PER AVDHESH KUMAR MISHRA, AM

The instant appeal of the assessee is filed against the order dated 19.01.2024 of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (in short 'NFAC'), New Delhi [In Short, the 'CIT(A)'].

2. The appellant/assessee, vide five grounds of appeal, challenged the impugned order on two core issues; the reopening of the assessment under section 147 of the Income Tax Act, 1961 (In short, the 'Act') and quantum addition made by the Assessing Officer (In Short, the 'AO').

3. The relevant facts giving rise to this appeal are that the assessee, a salaried employee, filed his Income Tax Return (In short, the 'ITR') of the relevant assessment year 2011-12 on 17.02.2012 declaring income of Rs.5,06,850/- which was processed under section 143(1) of the Act. Later on; the AO, based on the AIR information that the assessee who sold a leasehold property for Rs.60,00,000/- did not offer the capital gains derived thereon for tax in the relevant year, reopened the case. Since the appellant/ assessee did not file any proof of cost of acquisition of the leasehold property during the assessment proceedings, therefore, the consequential reopened assessment was completed at income of Rs.75,94,850/-, under section 147/143(3) of the Act on 10.12.2018, by taxing the entire sale consideration of Rs.75,94,850/- for stamp duty purposes as against the actual sale consideration of Rs.60,00,000/-. The appellant/assessee did not succeed in first appeal. Therefore, he filed this appeal before the Tribunal.

4. On legal issue, the Ld. Counsel, placing emphasis on the copy of the reasons recorded by the AO wherein the entire sale consideration was treated as income, submitted that the AO did not apply his mind while reopening the case as entire sale consideration, per se, could not be taken as income without giving credit of the cost of acquisition while working out the income/capital gains. Further, the Ld. Counsel submitted that the Ld. CIT(A) did not adjudicate the issue of validity of reopening of the assessment raised vide Ground Nos. 1-4 as per Form-35 though after filing the detailed submission in this regard. The Ld. Counsel prayed for decision on the legal matter/reopening of the assessment.

5. The Ld. Counsel, placing emphasis on the following decision; Atul G. Puranik [132 ITD 499 (Mum.), Ritz Suppliers (P.) Ltd.182 ITD 227, Sowmya Sathyan [2021] 124 taxmann.com 74/187 ITD 149, Noida Cyber Park Pvt. Ltd. (ITA No. 165/Del/2020), Bharat Bhushan Jain (ITA No. 316/Del/2020), M/s. Envair Electrodyne Ltd. (ITA No. 611/Pun/2018) Shri Kadir Ahmed (ITA No. 418/Del/2020) and Damyanti Mundhra (ITA No. 1722/Del/2019), submitted that the Section 50C of the Act, being a deeming provision, was not applicable in case of transfer of leasehold rights. The Ld. Counsel drew out attention to the provisions of section 50C of the Act, wherein it has

been specifically mentioned that this Section is applicable to those capital assets only which are land or building or both.

6. The Ld. Senior Departmental Representative (In short, the 'Sr. DR'), placing emphasis on the finding of the AO and the CIT(A), prayed for dismissal of the appeal. However, on specific query, he admitted that there is no judicial pronouncement holding that the provisions of Section 50C of the Act is applicable on the leasehold property.

7. We have heard both the parties at length and have perused the material available on the record. Since the issue of validity of reopening of the assessment has not been adjudicated by the CIT(A); therefore, we are refraining ourselves from adjudicating this issue. Therefore, in the interest of justice and considering all the afore-stated observations, we are of the considered opinion that the CIT(A) should adjudicate the issue of validity of reopening of the assessment. In view thereof, without offering any comment on merit of the issue of validity of reopening of the assessment, we deem it fit to set aside this issue to the file of the CIT(A) to decide this issue afresh after affording reasonable opportunity of being heard to the appellant/assessee. Accordingly, we order so and restore this matter/of validity of reopening of the assessment to the file of the CIT(A) to decide it afresh.

8. It is axiomatic that the leasehold right in a plot of land are neither 'land or building or both' as such nor can be included within the scope of 'land or building or both'. The distinction between a capital asset being 'land or building or both' and any 'right in land or building or both' is well recognized under the Act. Section 54D of the Act deals with certain cases in which capital gains on compulsory acquisition of land and building is charged to tax. Section 54D(1) of the act opens with: "*Subject to the provisions of sub-section (2), where the capital gain arises from the transfer by way of compulsory acquisition under any law of a capital asset, being land or building or any right in land or building, forming part of an industrial undertaking.....*". Thus, it is palpable from section 54D of the Act that 'land or building' is distinct from 'any right in land or building'.

9. The Hon'ble Supreme Court in the case of Amarchand N. Shroff 48 ITR 59 has held that a deeming provision cannot be extended beyond the purpose for which it is enacted. Similar view was reiterated by the Hon'ble Supreme Court in the case of Mother India Refrigeration Industries (P.) Ltd. 155 ITR 711 by laying down that "legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond their legitimate field". In view of the above decisions of the Hon'ble Supreme Court, it is clear that a deeming provision can be applied

only in the scope of the law and not beyond the explicit mandate of the section. Hence, the provisions of Section 50C of the Act is applicable only in respect of 'land or building or both'. If the capital asset under transfer cannot be described as 'land or building or both', then Section 50C of the Act will not apply.

10. Considering the fact that we are dealing with special provision for full value of consideration in certain cases under section 50C of the Act, which is a deeming provision, the fiction created in this section cannot be extended to any asset other than those specifically provided therein. As section 50C of the Act applies only to a capital asset, being land or building or both, it cannot be made applicable to lease rights in a land.

11. The Hon'ble Bombay High Court in the case of Greenfield Hotels & Estates (P.) Ltd. 77 Taxmann.com 308 held that Section 50C of the Act would not be applicable while computing capital gains on transfer of leased hold rights in Land and buildings. The Hon'ble Delhi ITAT in the case of Noida Cyber Park (P.) Ltd., 123 Taxmann.com 213, held that Section 50C of the Act covers only capital asset being land or building or both; it would not cover transfer of leasehold rights in land and building.

12. The relevant portion of Section 50C of the Act reads as under:

“50C.(1) *Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed [or assessable] shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.”*

13. On-going through the above provisions of section 50C of the Act, it transpires that where the full value of consideration shown to have been received or accruing on the transfer of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by stamp valuation authority, the value so adopted etc. shall, for the purposes of Section 48 of the Act, be deemed to be full value of consideration received or accruing as a result of such transfer. It is a deeming provision and it covers land or building or both. It is manifest that a deeming provision has been incorporated to substitute the value adopted or assessed or assessable by stamp valuation authority in place of consideration received or accruing as a result of transfer, in case the latter is lower than the former. It, therefore, follows that only if a capital asset being land or building or both is transferred and the consideration received or accruing as a result of such transfer is less than the value adopted or assessed or

assessable by the stamp valuation authority, the deeming fiction under sub-sec. (1) of Section 50C of the Act shall be activated to substitute such adopted or assessed or assessable value as full value of consideration received or accruing as a result of such transfer in the given situation.

14. In view of the above and following decision of the coordinate bench in the case of Noida Cyber Park Pvt. Ltd. (ITA No. 165/Del/2020), it is held that the section 50C of the Act, being deeming provision inserted by the Finance Act 2002 w.e.f. 01.04.2003, is not applicable in this case. However, the AO may compute capital gains as per the Act without invoking the provisions of section 50C of the Act.

15. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in open Court on 18th June, 2024

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

Sd/-

**(AVDHESH KUMAR MISHRA)
ACCOUNTANT MEMBER**

Dated: 18/06/2024
Binita, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. PCIT
4. CIT(Appeals)
5. Sr. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI