IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Saktijit Dey (Judicial Member)]

ITA No. 4850/Mum/2019
Assessment year: 2011-12

Maria Fernandes Cheryl ……………….………**Appellant**
Flat No. 602, Casablanca, 6th floor,
13th Road, Chembur, Mumbai 400 071 [PAN: AAEPF6910E]

Vs.

Income Tax Officer
International Taxation 2(3)(1), Mumbai ……………………**Respondent**

Appearances by
None *for the appellant*
Vijaykumar G Subramanyam *for the respondent*

Date of concluding the hearing : January 14, 2021
Date of pronouncement : January 15, 2021

O R D E R

Per Pramod Kumar, VP:

1. This appeal, filed by the assessee, calls into question the correctness of the order dated 28th May 2019 passed by the learned CIT(A) in the matter of assessment under section 143(3) read with section 147 of the Income Tax Act, 1961, or the assessment year 2011-12.

2. One of the grievances raised in this appeal is as follows:

> **The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not appreciating that the difference between sale consideration and value adopted for the purpose of stamp duty was only 6.55%, and therefore addition under section 50C of the Act is not justified.**

3. When this appeal was called out for hearing, it was noticed that the variation in the sale consideration as disclosed by the assessee vis-à-vis the valuation adopted by the Stamp Duty Valuation authority is only 6.55%, and it was put to the learned Departmental Representative as to why the assessee not be allowed the benefit of the third proviso to Section 50C(1) as the variation is much less than the prescribed permissible variation of up to 10%. Learned Departmental Representative pointed out to us that the third proviso to Section

50 C (1) is applicable, by virtue of Finance Act 2018, only with effect from 1st April 2019, and, as for the permissible variation of 10% as against variation of 5% originally enacted the third proviso to Section 50C, this enhancement in permissible variation, by virtue of Finance Act 2020, is effective from 1st April 2021. It was submitted that the insertion of the third proviso to Section 50C could not be treated as retrospective in nature, as there is a specific date, as set out in the related amendment itself, from which the amendment in law is effective. We then requested the learned Departmental Representative to address us on the question as to whether these amendments by the Finance Act, 2018 and Finance Act, 2020 could be said to be retrospective in effect and could be treated as relating back to the time when the legal provision, which this amendment seeks to modify, was introduced. We have heard the learned Departmental Representative on this issue and have also benefited from the detailed submissions made by him, on this point, by way of a written note filed later in the day. It is in this background that we deem it fit and proper to first deal with the implications of insertions of third proviso to Section 50C(1)- as also amendments thereto. We have heard the learned Departmental Representative on this point, perused the material on record, and duly considered facts of the case in the light of the applicable legal position.

4. To adjudicate on this issue, only a few material facts need to be taken note of. The assessee before us is non-resident assessee. During the relevant financial period, she sold her flat, being flat no. 101 in Casablanca Building at Chembur, for a consideration of Rs 75,00,000, even though the valuation of this property, for the purpose of charging stamp duty, was Rs 79,91,500. The capital gains were thus computed by treating the sale consideration at Rs 75,00,000, and, accordingly, offered to tax. The Assessing Officer, however, was of the view that in view of the provisions of Section 50 C, the assessee has to be adopt the Stamp Duty Valuation, which was Rs 79,91,500, for the purpose of computing the capital gains. The completed assessment was reopened in this backdrop, and the capital gains were computed on the basis of sale consideration being adopted at Rs 79,91,500. Aggrieved, the assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

5. It is, at this stage, important to take note of certain important legislative amendments by the Finance Act 2018 and Finance 2020. By Finance Act, 2018, the third proviso to Section 50 C(1) was inserted, and this proviso provided that "**Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five percent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration**". This proviso was further amended by the Finance Act 2020, inasmuch as the tolerance band of 5% was increased to 10% by substituting the words "**does not exceed <u>one hundred and five percent of the consideration</u> received or accruing" with "does not exceed <u>one hundred and ten percent of the consideration</u> received or accruing".** The net result of this amendment is that where the variation in actual sale consideration vis-à-vis the

stamp duty valuation does not exceed 10%, the fiction of Section 50C will not come into play, and, therefore, capital gains will have to be computed with reference to the actual sale consideration only- disregarding the stamp duty valuation.

6. Learned Departmental Representative contends that the amendments can only be prospective in nature as the law states so specifically. The relevant submissions, in his written note, are as follows:

> **The Honourable Member directed the undersigned to submit a note on the larger question of retrospective applicability of third proviso of Section 50C whereby a variation of 5% wef 1.4.2019 [10% wef 1.4.2021 as Act no. 12 of 2020] is permissible in the sale consideration vis-a-vis valuation adopted by Stamp valuation authorities.**
>
> **In this regard, it is humbly submitted that the Finance Act 2018 specifically mentions that the third proviso will come into force prospectively from 1.4.2019 and likewise the Act No 12 of 2020 enhancing the variation from 5% to 10% also specifically states that the enhanced variation will be effective from 1.4.2021. The relevant amendments and explanatory notes are reproduced below for ready reference :**
>
> **The Finance Act 2018 inserted Second proviso to section 50C as under:**
>
> **Amendment of section 50C.**
>
> **20. In section 50C of the Income-tax Act, in sub-section (1), after the second proviso, the following proviso shall be inserted with effect from the 1st day of April, 2019, namely:—**
>
>> **"Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.".**
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> **The amendment to Section 50C is explained in Circular 8 of 2018 titled Explanatory Notes to the provisions of The Finance Act 2018 as under :**
>
>> **16. Rationalization of section 43CA, section SOC and section 56**
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>> **16.1 Before amendment by the Act, for computing income from business profits (section 43CA), capital gains (section SOC) and other sources (section 56) arising out of transactions in immovable property, the higher of sale consideration or stamp duty value was adopted. The difference was taxed as income both in the hands of the purchaser and the seller.**
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>> **16.2 It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location.**
>>
>> **16.3 In order to minimize hardship in case of genuine transactions in the real estate sector, section 43CA, section 50C and section 56 of the Income-tax Act have been amended to provide that no adjustments shall be made in a case**

where the variation between stamp duty value and the sale consideration is not more than five per cent of the sale consideration.

16.4 Applicability: These amendments take effect from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20 and subsequent assessment years

Explanatory Notes to Finance Act 2020

Increase in safe harbour limit of 5 per cent. under section 43CA, 50C and 56 of the Act to 10 per cent..

Section 43CA of the Act, inter alia, provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (i.e. "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 purpose of computing profits and gains from transfer of such assets, be deemed to be the full value of consideration. The said section also provide that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.

Section 50C of the Act provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by 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 be deemed to be the full value of the consideration and capital gains shall be computed on the basis of such consideration under section 48 of the Act. The said section also provides that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.

Clause (x) of sub-section (2) of section 56 of the Act, inter alia, provides that where any person receives, in any previous year, from any person or persons on or after 1st April, 2017, any immovable property, for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration shall be charged to tax under the head "income from other sources". It also provide that where the assessee receives any immovable property for a consideration and the stamp duty value of such property exceeds five per cent of the consideration or fifty thousand rupees, whichever is higher, the stamp duty value of such property as exceeds such consideration shall be charged to tax under the head "Income from other sources".

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> **Thus, the present provisions of section 43CA, 50C and 56 of the Act provide for safe harbour of five per cent.**
>
> **Representations have been received in this regard requesting that the said safe harbour of five per cent may be increased.**
>
> **It is, therefore, proposed to increase the limit to ten per cent..**
>
> **This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.**

Thus, the safe harbour limit of 5% is applicable upto AY 2020-21 and 10% is specifically from AY 2021-22 onwards.

It is humbly submitted that in the present case the variation is 6.55% which is more than specified safe harbour limit of 5%.

It is further humbly submitted that

> **a) The value determined by Valuation officer is statutorily required to be adopted u/s 50C(2) of Act and in the present case, the AO has already referred the matter to valuation officer and the same is awaited. Hence, it is humbly submitted that deemed sale consideration may be taken as determined u/s 50C(2) of the Act**
>
> **b) the third proviso is applicable prospectively especially as retrospective effect is neither mentioned in the provisions of section 50C nor in the Explanatory Notes to Finance Act 2018 issued vide Circular 8/2018 …**
>
> **c) the variation permissible is only 5% as on date and the enhanced variation of 10% is applicable only from 1.4.2021.**

Lastly it is also submitted that in case the Honourable Tribunal is not inclined to accept the submissions, it is requested that it may kindly be mentioned that relief is being provided as a special case and this decision may not be considered as a precedent.

7. These submissions, however, do not impress us. As noted by the Central Board of Direct Taxes circular # 8 of 2018, explaining the reason for the insertion of the third proviso to Section 50C(1), has observed that "**It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location"**. Once the CBDT itself accepts that these variations could be on account of a variety of factors, essentially bonafide factors, and, for this reason, Section 50C(1) should not come into play, it was an "unintended consequence" of Section 50(1) that even in such bonafide situations, this provision, which is inherently in the nature of an anti-avoidance provision, is invoked. Once this situation is sought to be addressed, as is the settled legal position- as we will see a little later in our analysis, this situation needs to be addressed in entirety for the entire period in which such legal provisions had effect, and not for a specific

time period only. There is no good reason for holding the curative amendment to be only as prospective in effect. Dealing with a somewhat materially identical situation in the case of **Rajeev Kumar Agarwal Vs ACIT [(2014) 45 taxmnann.com 555 (Agra)]** wherein a coordinate bench was dealing with the question whether insertion of a proviso to Section 40(a)(i) to cure intended consequence could have retrospective effect, even though not specifically provided for, and speaking through one of us *(i.e. the Vice President),* the coordinate bench had, after a detailed analysis of the legal position, observed that, "**Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, <u>such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced</u>**". Referring to this decision, and extensively reproducing from the same, including the portion extracted above, Hon'ble Delhi High Court, in the case of **CIT Vs Ansal Landmark Township Pvt Ltd [(2015) 61 taxmann.com 45 (Del)],** has approved this approach and observed that "**(t)he Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance**". The same was the path followed by another bench of this Tribunal in the case of **Dharmashibhai Sonani Vs ACIT [(2016) 161 ITD 627 (Ahd)]** which has been approved by Hon'ble Madras High Court in the judgment reported as **CIT Vs Vummudi Amarendran [(2020) 429 ITR 97 (Mad)].** The question that we must take a call on, therefore, is as to what is the rationale behind the insertion of the third proviso to Section 50C(1), and if that rationale is to provide a remedy for unintended consequences of the main provision, we must hold that the third proviso to Section 50C(1) comes into force with effect from the same date on which the main provision, unintended provisions of which are sought to be nullified, itself was brought into effect. Let us understand what the nature of the provisions of Section 50C is. In terms of this provision, if the property is sold below the stamp duty valuation rate, which is often called circle rate, this stamp duty valuation report is assumed as sale consideration for the property in question, and, accordingly, capital gains tax is levied. This deeming fiction to substitute apparent sale considerations by notional consideration computed on the basis of a stamp duty valuation rate, was thus to address the issue with respect to potential evasion of taxes by understating the sale consideration amount in a sale deed. As noted by the CBDT, while explaining the justification for insertion of Section 50 C, "*(t)*he **Finance Act, 2002, has inserted a new section 50C in the Income-tax Act to make a special provision for determining the full value of consideration in cases of transfer of immovable property**". Section 50C, thus, on a conceptual note, is a provision to address capital gains tax evasion on account of understatement of the consideration. Of course, the law provides, under section 50C(2), that wherever an assessee claims that the actual market rate is less than the stamp duty valuation, he can have the matter referred to a Departmental Valuation Officer for the ascertainment of the market value, but then it is a

cumbersome procedure and, at the end of the day, every valuation, whether by the departmental valuation officer or under the stamp duty valuation notification, is an estimate, and there can always be bonafide variations, though to a certain limited extent, in these estimations. Unless, therefore, some kind of a tolerance band or a safe harbour provision, in respect of such bonafide variations, is implicit in the scheme of law, the assessees are bound to face undue hardships. The mechanism under section 50C proceeds on the assumption that when the sale consideration is less than the stamp duty valuation, the sale consideration is to be treated as understated. This assumption is, however, laid to rest when the variations between the stated consideration and the stamp duty valuation figure are treated as explained. The insertion of the third proviso to Section 50C(1) provides for this tolerance band with respect to a certain degree of variations between the stamp duty valuation and the stated consideration of an immovable property. In other words, as long as the variations are within the permissible limits, the anti-avoidance provisions of Section 50C do not come into play. As we have noted earlier, the CBDT itself accepts that there could be various bonafide reasons explaining the small variations between the sale consideration of immovable property as disclosed by the assessee vis-à-vis the stamp duty valuation for the said immovable property. Obviously, therefore, disturbing the actual sale consideration, for the purpose of computing capital gains, and adopting a notional figure, for that purpose, will not be justified in such cases. On a conceptual note, an estimation of market price is an estimation nevertheless, even if by a statutory authority like the stamp duty valuation authority, and such a valuation can never be elevated to the status of such a precise computation which admits no variations. The rigour of Section 50C(1) was thus relaxed, and very thoughtfully so, to take these bonafide cases of small variations between the stated sale consideration vis-à-vis stamp duty valuation, out of the scope of adjustments contemplated in the computation of capital gains under this anti-avoidance provision. In our humble understanding, it is a case of a curative amendment to take care of unintended consequences of the scheme of Section 50C. It makes perfect sense, and truly reflects a very pragmatic approach full of compassion and fairness, that just because there is a small variation between the stated sale consideration of a property and stamp duty valuation of the same property, one cannot proceed to draw an inference against the assessee, and subject the assessee to practically prove his being truthful in stating the sale consideration. Clearly, therefore, this insertion of the third proviso to Section 50C(1) is in the nature of a remedial measure to address a bonafide situation where there is little justification for invoking an anti-avoidance provision. Similarly, so far as enhancement of tolerance band to 10% by the Finance Act 2020, is concerned, as noted in the CBDT circular itself, it was done in response to the representations of the stakeholders for enhancement in the tolerance band. Once the Government acknowledged this genuine hardship to the taxpayer and addressed the issue by a suitable amendment in law, the next question was what should be a fair tolerance band for variations in these values. As a responsive Government, which is truly the hallmark of the present Government, even though the initial tolerance band level was taken at 5%, in response to the representations by the stakeholders, this tolerance band, or safe harbour provision, was increased to 10%. There is no particular reason to justify any particular time frame for implementing this enhancement

of tolerance band or safe harbour provision. The reasons assigned by the CBDT, i.e., "**the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location,"** was as much valid in 2003 as it is in 2021. There is no variation in the material facts in this respect in 2021 vis-à-vis the material facts in 2003. What holds good in 2021 was also good in 2003. If variations up to 10% need to be tolerated and need not be probed further, under section 50C, in 2021, there were no good reasons to probe such variations, under section 50C, in the earlier periods as well. We are, therefore, satisfied that the amendment in the scheme of Section 50 C(1), by inserting the third proviso thereto and by enhancing the tolerance band for variations between the stated sale consideration vis-à-vis stamp duty valuation to 10%, are curative in nature, and, therefore, these provisions, even though stated to be prospective, must be held to relate back to the date when the related statutory provision of Section 50C, i.e. 1st April 2003. In plain words, what is means is that even if the valuation of a property, for the purpose of stamp duty valuation, is 10% more than the stated sale consideration, the stated sale consideration will be accepted at the face value and the anti-avoidance provisions under section 50C will not be invoked.

8. Once legislature very graciously accepts, by introducing the legal amendments in question, that there were lacunas in the provisions of Section 50 C in the sense that even in the cases of genuine variations between the stated consideration and the stamp duty valuation, anti-avoidance provisions under section 50C could be pressed into service, and thus remedied the law, there is no escape from holding that these amendments are effective with effect from the date on which the related provision, i.e., Section 50C, itself was introduced. These amendments are thus held to be retrospective in effect. In our considered view, therefore, the provisions of the third proviso to Section 50C (1), as they stand now, must be held to be effective with effect from 1st April 2003. We order accordingly. Learned Departmental Representative, however, does not give up. Learned Departmental Representative has suggested that we may mention in our order that "relief is being provided as a special case and this decision may not be considered as a precedent". Nothing can be farther from a judicious approach to the process of dispensation of justice, and such an approach, as is prayed for, is an antithesis of the principle of "equality before the law," which is one of our most cherished constitutional values. Our judicial functioning has to be even-handed, transparent, and predictable, and what we decide for one litigant must hold good for all other similarly placed litigants as well. We, therefore, decline to entertain this plea of the assessee.

9. We have noted that as against the stated consideration of Rs 75,00,000, the stamp duty valuation of the property is Rs 79,91,500. The difference is just Rs 4,91,500, which is about 6.55% of the stated sale consideration. As the difference between the stated consideration vis-à-vis the stamp duty valuation is admittedly less than 10% of the stated consideration in this case, and in the light of the above discussions, we are of the considered view that Section 50C will have no application in the matter. The enhancement in capital gain

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computation, as made by the Assessing Officer, thus stands disapproved. The assessee gets the relief accordingly.

10. As we have decided the appeal on the short issue regarding the retrospective effect of the third proviso to Section 50C(1), as elaborated above, we see no need to deal with other issues raised in the appeal before us. As of now, those issues are infructuous and do not call for any adjudication at this stage.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 15th day of January 2021.

Sd/-	Sd/-
Saktijit Dey	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 15th day of January 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order etc.

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai

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