Section 50C: Turbulent Safe Harbour!

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Introduction:

Deeming provisions under Income-tax Act have been prevalent since quite some time, and their interpretation is always ridden with litigation. Section 50C is one of the deeming fictions under Capital Gains, and is much relevant as far as the issue of fixing the sale consideration is concerned. Thus, section 50C is a deeming fiction which has been enacted for determining the quantum of income, being the sale consideration.

Background:

Section 50C was inserted in the Income-tax Act by Finance Act 2002 with effect from 1st April, 2003. The heading of the section states that it is a "special provision for full value of consideration in certain cases". It primarily provides that in circumstances where the consideration received for transfer of capital asset, land or building or both, is less than the stamp duty value of such capital asset, the stamp duty value will be deemed to be the sale consideration.

Finance Act 2018 amended section 50C and inserted a proviso with effect from Assessment Year (AY) 2019-20 to provide that stamp duty shall be deemed to be the consideration computation of capital gains, only if it exceeds 105% of the declared consideration.

This amendment sought to "liberalise" capital gains taxation arising from transfer of immovable property, as prior to the amendment there were several decisions with varying percentages for acceptable deviation.

A summary of the same is given as under:

Summary 1:

Sr. No	Caselaw	Citation	Variation %
1	Honest Group of Hotels Pvt. Ltd. v. CIT [2002]	12 Taxman 464 (J&K)	10
2	John Fowler India Pvt. Ltd. v. DCIY	TS-6184-ITAT-2017	10
3	Rahul Constructions Co. v. ITO [2012]	21 taxmann.com 435	10
4	Smt. Sita Bai Khetan v. ITO	88 taxmann.com 377	10
5	Suresh C. Mehta v. ITO	35 taxmann.com 230	15
6	Krishna Enterprises v. Addl. CIT	ITA No. 5402 of 2014	10

Thus, based on these precedents, a deviation ranging from 10% to 15% between the stamp duty value and sale consideration was held as acceptable in these judicial decisions. All the decisions except (1) above are Tribunal decisions.

In view of the amendment made by Finance Act 2018, specifying the acceptable variation at 5%, the above decisions were not longer to be applicable AY 19-20 and onwards. As far as the period upto AY 2018-19 was concerned, the decisions as applicable or a variation of at least 5% ought to be permitted basis the subsequent amendment.

The effect of the amendment of Finance Act 2018 was to ensure that the acceptable variation between the consideration received and the stamp duty value be uniform at 5% and the issue no longer remained open as far as assignment of different acceptable percentages by courts was concerned.

Finance Act 2020 amended this proviso to section 50C and increase the acceptable variation from 5% to 10% with effect from 1st April, 2021, i.e A.Y. 21-22. Thus, post this amendment the stamp duty value is to be adopted as consideration only if it exceeds 110% of the sale consideration.

Thus, "the safe harbour" fixed at 5% by Finance Act 2018 was amended by Finance Act 2020, and it states that the amendment is to take effect from 1st April 2021.

Recent Decisions:

There have been recent Tribunal decisions, which have held that the applicability of this amendment should be considered with retrospective effect, i.e. from the date of introduction of the section.

Summary 2:

Sr. No	Caselaw	Citation
1	Sri Sandeep Patil Vs ITO	ITA No.924/Bang/2019
2	Chandraprakash Jhunjhunwala Vs DCIT	ITA No.2351/Kol /2017
3	Maria Fernandes Cheryl Vs ITO	123 Taxmann. 252/2021/ Mum

The common aspect in all these decisions is the fact that they have held the amendment to section 50C to be curative in nature, and therefore applicable retrospectively.

Para 7 of the decision in case of Maria Fernandes (supra), the Hon'ble Tribunal makes a reference to the Central Board of Direct Taxes (CBDT) Circular (Circular No. 8 of 2018) :

"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."

Further in para 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." (emphasis applied)***

Analysis:

These decisions thus, indicate that the effect of the amendments with respect to acceptable variation in the differences between stamp duty valuation and sale consideration has to retrospective. It is important to recapitulate that prior to the amendment of Finance Act 2018 (which specified the safe harbour at 5%) there were several decisions which indicated at 10% (and in one instance 15%) as acceptable variance limit.

On representations made by taxpayers on account of genuine hardships, Finance Act 2018 introduced the concept of tolerable variation, which was further enhanced by Finance Act 2020. The intention of specifying these tolerance bands was to curb litigation and provide for an uniform acceptable variation. The latest amendment to enhance the safe harbour is in line with majority of the earlier judicial precedents (Summary 1) which decided the same to be at 10%.

Thus, the deeming fiction of section 50C shall now be invoked only if the stamp duty value exceeds 110% of the sale consideration, and this will be considered applicable for the entire period of time for which section 50C has been in the statute.

Conclusion:

There are two aspects about the conclusion to be made. The favourable one being :

As the Hon'ble Tribunals have taken a view that the amendment being curative in nature, should be applied retrospectively, it is likely to help in streamlining litigation.

The other not so favourable aspect could be: Once the statute states that the acceptable variation (between the stamp duty and consideration received) is 10%, and should be considered so (with retrospective effect) it leaves almost no room for any case to be made for considering a higher variation (as facts of certain cases may warrant). However, this was also the case when a safe harbour was initially prescribed by the amendment of Finance Act 2018, and that could be matter for separate deliberation.

In so far as the recent decisions are concerned, about the enhanced safe harbour limit of 10% being retrospective since the introduction of section 50C (AY 2003-04), they are apparently logical and a HC ruling confirming the same should be in the offing soon!