Section 50C, 43CA of the Income Tax Act and Safe Harbour Rule thereof

The idea to write this piece came to my mind while I was going through the capital gain provisions and a recent judgment of Mumbai ITAT, pronounced on 15.01.2021 in the matter of Maria Fernandes Cheryl came to my notice and my first reaction after reading the aforesaid judgment was, how the law can be interpreted in this manner and this judgment can not stand in the eyes of law at higher authorities or what if the judgment stands in the higher authorities as well.

Let's understand the Section 50C and the pandora of litigation opened by the latest judgment

Section 50C History and new litigation: This section of the Income Tax Act, 1961 was introduced by the Finance Act, 2002

'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 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 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.

(2) Without prejudice to the provisions of sub-section (1), where–

(a) the assessee claims before any Assessing Officer that the value adopted or assessed by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(b) the value so adopted or assessed by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court, the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A,

clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957, shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation.–For the purposes of this section, "Valuation Officer" shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957.

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessed by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.

The memorandum explaining the finance bill stated that where the assessee claims that the value adopted or assessed for stamp duty purposes exceeds the fair market value of the property as on the date of transfer, and he has not disputed the value so adopted or assessed in any appeal or revision or reference before any authority or Court, the Assessing Officer may refer the valuation of the relevant asset to a Valuation Officer in accordance with section 55A of the Income-tax Act. If the fair market value determined by the Valuation Officer is less than the value adopted for stamp duty purposes, the Assessing Officer may take such fair market value to be the full value of consideration. However, if the fair market value determined by the Valuation Officer is more than

the value adopted or assessed for stamp duty purposes, the Assessing Officer shall not adopt such fair market value and will take the full value of consideration to be the value adopted or assessed for stamp duty purposes.

It is also proposed to provide that if the value adopted or assessed for stamp duty purposes is revised in any appeal, revision or reference, the assessment made shall be amended to recompute the capital gains by taking the revised value as the full value of consideration.These amendments will take effect from 1st April, 2003 and will, accordingly, apply in relation to the assessment year 2003-2004 and subsequent years.

The section inserted the new provision for computation of capital gain on transfer of immoveable property under section 45 wherein the sale consideration is deemed to be the stamp duty value as assessed by the Stamp duty authority for the computation of capital gain and tax thereon. However, the taxpayer had a right to dispute the value assessed by the stamp duty authority and the assessing officer may refer the case to the Valuation officer for the purpose of computing the Capital Gain. This section has been amended several times leading to various litigations including but not limited to double taxation of difference amount in the hands of recipient and transferor after the amendment of section 56 and the capital gain in the hands of transferor.

However, this article is not on those amendments and discussion thereof this judgment and article is inclined towards the new pandora of litigation which has arisen from the above-stated judgment hence, let’s move forward to discuss the judgment and litigation.

The Finance Act, 2018 inserted the third proviso to section 50C of the Income Tax Act allowing a safe harbor rule of 5% of the difference in the sale consideration.

“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.**”**.

Memorandum explaining the finance bill stated **“**In order to minimize hardship in case of genuine transactions in the real estate sector, it is proposed 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 percent of the sale consideration**”**.

After reading the provisions of the Act along with memorandum explaining the finance bill, a person can draw the conclusion the government by introducing the third proviso to the section have given a relief to the genuine taxpayers and simultaneously tried to minimize the litigation arising in the genuine transactions wherein the underlying property actually had market value less than the stamp duty value but within the range of 105% of the sales consideration.

We all know the situation of real estate sector which was going from the last 5-6 years, builders were piled up with unsold inventories and the buyers were not willing to buy the properties as the prices of properties were going nowhere even these were declining in most of the Tier -I cities, if not in nominal monetary terms, then surely in real monetary terms considering the property had

been purchased on loans. The sector was witnessing it's worst phase in last decade and then only COVID-19, Corona Virus arrived and the persons who were giving the thought to purchase the property dropped the idea.

Considering the above situation of the sector the Finance Minister vide Finance Act, 2020 amended the proviso and Safe Harbour Rule raised to 10% from 5% w.e.f 1.4.2021.

The Judgment and new pandora of Litigation

This is the most important aspect of this piece, the recent judgment as stated above, Maria Fernandes Cheryl v. Income Tax Officer, (International Taxation), 2(3)(1), Mumbai, pronounced by the Mumbai ITAT, herein the bench had stated that the

"Once legislature very graciously accepts, by introducing the legal amendments in question, that there were lacunas in the provisions of section 50C 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."

Yes, the bench had stated the amendment is curative in the nature and shall apply retrospectively w.e.f 1.4.2003.

New Pandora of Litigation

1. If the government grants any benefit to the sector and public is deemed to be curative amendments in nature then why all other amendments beneficiary to the assesses can also not be deemed to be curative amendments in nature?

2. If the safe harbor rule is curative amendments in nature then will it apply to Other sections 43CA, 50 CA Rule 11 UA also wherein the land is transferred as inventory or the company shares which are transferred have land or building in it's balance sheet, and if yes, will it apply retrospectively?

3. If the government doesn't challenge the ruling due to the amount of Tax involved in the case, will this set a new precedence for litigation?

4. If such amendments are deemed to be curative amendments in nature and shall have a retrospective in nature then why the government should pass such amendments and loss the revenue for the preceding financial years as well?

Concluding Remarks: In my view, the judgment passed by the ITAT of Mumbai, is not in line with the intent of the Finance Act, and memorandum explaining the Finance Bill, this judgment shall not stand at the higher authorities, along with that if the view drawn in this judgment by the law is accepted by the higher authorities as well then the Finance Minister will have no choice except to insert a clarification/ amendment in the Finance Act, stating Safe Harbor Rule provided

for this section and other sections are not curative in nature and are in nature of Prospective amendments only.