

Retrospective Application of Tolerance Band of 10% to Sections 43CA, 50C & 56(2).



Introduction

Recording of property transactions at a value lower than the fair market value is quite prevalent, which causes revenue loss to the Government in form of Stamp Duty as well as of Income Tax.

The legislative intent behind the sections 43CA/50C/56(2) was to plug the cash dealings & under-recording & reporting of sale consideration of immovable properties where actual market rates of immovable properties were substantially higher than their corresponding circle rates.

The aforesaid sections create a deeming fiction wherein both the transferor & transferee of asset are taxed for the same transaction resulting in Double taxation which is also contrary to “real income theory” postulating the taxation of only real & actual income & not notional income.

The Stamp Duty Value (SDV) of the property is an estimate of approximate rate of the property in a locality. This rate may not accurately reflect the market rate as even for the properties in the same locality the rates may vary due to various factors such as size, location, shape of property, nearby public amenities, distressed sale, transportation facilities etc.

Earlier these Sections did not provide for any safe harbour limit w.r.t difference in SDV & actual consideration up to which the said sections would not trigger, which resulted in additions in income even in case of marginal difference in the valuation. Finance Act 2018, came up with a remedial measure by providing a tolerance band of 5% in respect of the difference in Stamp Duty Value & the actual consideration which was further increased to 10% by Finance Act 2020.

Due to this remedial measure, SDV is deemed to be the sale consideration only where the variation between the agreement value & the circle rate exceeds 10% i.e., there is a safe harbour limit of 10%. Simply put, where the difference between the SDV & the actual transaction price is not more than 10%, the above Sections i.e., Sec. 43CA, 50C & Sec. 56(2)(x) would not get triggered & no additional tax would be levied in the hands of either the buyer or the seller.

Why the Safe Harbour Limit of 10% Should be Retrospective?

Legal maxim '**Law Prospicit Non Respicit**' presumes law to be prospective & not retrospective.

However, where the legislation is enacted with a purpose of mitigating undue hardship the provision in such a case has to be given a reasonable & equitable construction & has to be considered to be retrospective in nature so as to make the provisions workable. **The rule of beneficial construction** should apply in such a case.

Hon. Apex Court has followed reasonable construction instead of strict interpretation in the following cases:-

1. **R.B. Jodha Mal Kuthiala vs. CIT 82 ITR 570 (SC) [1971]**
2. **CIT vs. J.H. Gotla 156 I.T.R. 323(SC) [1985]**
3. **Good Year India Ltd. vs. State of Haryana 188 ITR 402 SC [1991]**

In **CIT v. Calcutta Export Company (SC) (2018) 93 taxmann.com 51** The issue before the Hon. Apex Court was whether the amendment to sec 40(a)(ia) by Finance Act 2010 can be considered to be retrospective in nature. The hon. Apex Court after considering the relevant schema of Section 40(a)(ia) & taking into consideration the purpose of the amendment was to mitigate undue hardship held the amendment to be retrospective in nature.

Recently, the Mumbai ITAT in **Maria Fernandes Cheryl ITA No. 4850/Mum/2019 A.Y 11-12 Dated 15.01.2021** held the amendment to Section 50C to be retrospective since its inception.

Facts of the Case (Maria Fernandes Cheryl vs. ITO)

1. During AY 2011-12 a non-resident assessee sold flat for ₹ 75 Lakhs (SDV ₹79.91 Lakhs).
2. Assessee computed capital gains by treating the sale consideration at ₹75 Lakhs.
3. Variation between Sale Price & SDV was 6.55% which exceeded safe harbour limit of 5%.
4. The AO invoked section [50C](#) & computed capital gains on SDV ₹ 79.91 Lakhs.
5. The assessee didn't succeed before the CIT(A) & therefore filed appeal before the ITAT.
6. Hon. ITAT asked the Dept. as to why the assessee not be allowed the benefit of the third proviso to Section 50C(1) as the variation was within the permissible variation of up to 10%.

Contentions of the Department Before the Bench

1. Relaxation w.r.t the 'Third proviso to sec. 50C(1)' was prospectively inserted from 01.04.18.
2. The proviso was further amended by with prospective effect from 01.04.20 & the safe harbour limit of 5% was increased to 10%.
3. The DR relied upon the text of Finance Act 2018 & 2020 & respective explanatory notes.
4. Accordingly, the variation permissible was only 5% & relaxation of 10% would not apply.
5. DR Requested Hon. ITAT that if relief was being provided to assessee then to treat it as a special case & the decision may not be considered as a precedent.

Ruling by the Hon. Mumbai Tribunal

1. CBDT Circular No. 8/2018, which provides reasons for insertion of third proviso to Section 50C(1) reads as follows "It has been pointed out that the variation between stamp duty value & 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".
2. The third proviso to Section 50C(1) was a remedial measure for unintended consequences of the main provision therefore, the third proviso comes into force with effect from the same date on which the main provision itself was brought into effect. There was no good reason for holding the curative amendment to be only as prospective in effect.
3. The intention of the legislature was never to cause any hardship to the genuine taxpayers due to minuscule variation in the consideration vis-a-vis the SDV. Legislature was compassionate to cure the shortcomings & obviate unintended hardships.
4. It is well settled that a curative amendment to avoid unintended consequences is to be treated as retrospective even though it may not state so, the insertion of third proviso must be given retrospective effect from the time when the related legal provision was introduced.
5. W.r.t the retrospective application of enhanced tolerance band to 10%, it was ruled that there was no particular reason to justify any particular time frame for implementing the

enhancement of tolerance band. There was no difference in genuine hardships due to bonafide factors, it was as much valid then as it is now. Therefore, the enhanced tolerance band of 10% therefore was held to be retrospective in effect w.e.f 1st April 2003.

6. Judicial functioning needs to be transparent, predictable and even-handed also what is decided for one litigant must hold good for all other similarly placed litigants as well, therefore the impugned case cannot be treated as special & the request to not treat it as a precedent is against the established principle of 'equality before the law'.

Similar Ruling by Hon. Kolkata Tribunal (Chandra Prakash Jhunjhunwala vs. DCIT)

The Kolkata ITAT in **Chandra Prakash Jhunjhunwala vs. DCIT ITA No 2351/Kol/2017** has also held that the amendment to Section 50C has to be retrospective in nature & considered to be applicable since the insertion of Sec 50C. Relevant Part of the order is reproduced as under

"Accordingly, we hold that the insertion of third proviso to Sec 50C is declaratory & curative in nature. The third proviso to Section 50C relates to computation of value of property as explained by us above, hence it is not a substantive amendment, it is only a procedural amendment therefore the Coordinate Benches of the ITAT used to ignore the variation up to 10%, therefore, the said amendment should be retrospective. Therefore, even when the statute does not specifically state so, such amendments, in the light of the detailed discussions above, can only be treated as retrospective & effective from the date related statutory provisions was introduced. Thus, the third proviso to Section 50C should be treated as curative in nature & with retrospective effect from 1st April 03, the date from which Section 50C was introduced."(Para 12)

Conclusion

1. In both the aforesaid judgements the judiciary took cognizance of the hardships being faced by the taxpayers and took a pragmatic view that where the difference between SDV & actual consideration is less than 10% the same should be ignored.
2. Sections 43CA, 50C & 56(2)(x) are procedural in nature & it is well settled that the amendments to procedural law are considered to be retrospective in nature.
3. The aforesaid rulings are in the series of pronouncements going beyond the literal construction, to interpret the law in a much more logical manner.
4. The amendments made by Finance Act 2018 & Finance Act 2020 in Section 50C, Section 43CA & Section 56(2)(x) are retrospective in nature & hence shall be applicable from the date of insertion of respective section.

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