

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1549 OF 2014

Commissioner of Income
Tax-5, Mumbai .. Appellant.
Vs.
M/s. Neelkamal Realtors
and Erectors India Pvt. Ltd. .. Respondent.

Ms. S.V. Bharucha for the appellant.
Mr. S. Sriram with Mr.Abhishek Tilak i/b B.V. Jhaveri for the
respondent.

**CORAM : M. S. SANKLECHA &
A.K. MENON, JJ.**

DATED : 28TH FEBRUARY, 2017

P.C. :

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 16th August, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

2. The revenue urges the following questions of law for our consideration :-

“(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in directing the Assessing Officer to delete the addition on account of suppression of sale value of flats, though there was a

gross variation in the sale price of the flats even on the same floor in the same direction ?”

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that stock was not included in stock in trade, although there was no liability towards MHADA on the assessee which the assessee himself confirmed that in subsequent years, said stock had been sold out in open market ?”

3. Regarding question no.(i) :

(a) The respondent - assessee is a builder/developer following the project completion method of accounting. During the previous year relevant to the assessment year the respondent - assessee offered net profit of Rs. 3.63 crores on completion of a project called 'Orchid Towers'.

(b) During the assessment proceedings, the respondent was asked to furnish party-wise details of flats sold with details of name and addresses of the buyers, area of flat sold, total sale consideration, date of agreement, date of receipt of first payment etc. On the perusal of details as furnished, the Assessing Officer concluded that there were variations in prices charged by the assessee to different customers. Therefore, by order dated 30th December, 2011 made addition of Rs.15.22 lakhs on the basis of difference between the rates charged in respect of similar flats. Thereafter as a consequence to rectification application made by

the assessee, the Assessing Officer reduced the addition of Rs.4.45 crores.

(c) Being aggrieved the respondent - assessee filed an appeal to the Commissioner of Income Tax [CIT (A)]. By order dated 11th December, 2012 the CIT (A) sustained the addition to Rs.8.53 crores. This on completely new ground, namely, value of the flats had to be considered not on the basis of consideration received but on application of the provisions of section 50C as well as section 56(2)(vii)(b)(ii) of the Act.

(d) Being aggrieved the respondent - assessee filed a further appeal to the Tribunal. The impugned order of the Tribunal holds that Section 50C of the Act which has been invoked by the CIT (A) would have no application in the facts of the present case. This in view of the fact that section 50C is part of Chapter IV-E of the Act dealing with the head 'Capital gains'. The aforesaid provision is applicable only for purpose of computing the income chargeable under the head 'Capital gains'. It would have no application in determining income under Chapter IV-D of the Act under the head 'Profits and gains of business or profession'. Further, the impugned order holds that section 56(2)(vii)(b)(ii) of the Act would have no application as it applies to an individual or Hindu Undivided Family (HUF). The Assessee here is neither an individual or HUF. Moreover, the impugned order holds that section 56(2)(vii)(b)(ii) of the Act seeks to levy tax in the hands of

the transferee of the flat i.e. purchase of flat without consideration or for consideration which is less than stamp duty value of the property in excess of Rs.50,000/-. In this case section 56(2)(vii)(b) (ii) of the Act is sought to be applied admittedly to a transferor. Moreover, the impugned order records the fact that section 56 of the Act which refers to income from other source i.e. not chargeable under other heads of income. In the present facts the consideration received on sale of flats was offered as income under the head 'Profits and gains of business or profession'. Further, the impugned order also holds that the Assessing Officer without giving any reason did not accept the explanation offered by the assessee for difference in consideration received from different customers with regard to sale of flats in "Orchid Towers" and allowed the appeal of the respondent - assessee.

(e) Ms.Bharucha, learned counsel for the Revenue urges that section 50C of the Act has been correctly invoked to sustain an addition of Rs.8.53 crores. The stamp duty valuation of the flats would correctly reflect the sale consideration being received in respect of all flats.

(f) It is self evident from reading of section 50C of the Act that it would not have any application while determining 'Profits and gains of business or profession'. This is so as its application is only limited to computation of income chargeable under the head 'Capital gains' as is evident from specific reference in sub-

section (1) of section 50 of the Act to section 48 of the Act i.e. mode of computation of capital gains. In fact section 50C of the Act as observed by the impugned order is placed as part of the Chapter IV-E under the head 'capital gains', it can only govern the valuation of the property to determine capital gains and cannot govern valuation of transfer of assets (other than a capital asset) i.e. stock in trade. This view is further strengthened by the fact that section 43CA has been introduced into the Act w.e.f. 1st April, 2014 which governs taking of full value of consideration for transfer of assets other than capital assets on the basis of stamp duty valuation. This section 43CA of the Act finds a place as a part of Chapter IV-D - Profits and gains of business or profession. Therefore, with effect from 1st April, 2014 the stamp duty valuation of assets sold could be taken as full value of consideration. Our above view that section 50C of the Act has no application to value stock in trade is also a view taken by Allahabad High Court in *Commissioner of Income Tax vs. Ken Construction and Colonizers (P) Ltd.* (2012) 208 Taxman 478. Similarly the Madras High Court in *Commissioner of Income Tax vs. Thiruvengadam Investments P. Ltd.* (2010) 320 ITR 345 has also held that section 50C of the Act cannot be invoked to arrive at full consideration of sale of business asset. We see no reason not to adopt the views of the above two High Courts to the present facts.

(g) So far application of section 56(2)(vii)(b)(ii) of the Act is concerned, it is self evident that it only applies to individuals and Hindu Undivided Family. Moreover, it seeks to tax the transferee of the property for having given consideration for which is less than the stamp value by Rs.50,000/- or more for purchase of the property. Thus, the observations of the Tribunal that it has no application is unexceptional.

(h) Lastly, the finding of Tribunal that the Assessing Officer did not deal with explanation offered by the assessee justifying the difference in prices of similar flats, is a finding of fact. This has not been shown to be perverse.

(i) In the above view question (i) as formulated does not give rise to any substantial question of law and thus not entertained.

4. Regarding question No.(ii) :

(a) The respondent - assessee had shown value of unsold flats of Rs.2.03 crores in its balance sheet. The Assessing Officer was of the view that Rs.2.03 crores being value of unsold flats aggregating to 31,414 sq. ft. would give a rate of Rs.647 sq. ft. The Assessing Officer observed that the cost of construction was at Rs.4928 per sq.ft. Consequently, the Assessing Officer called upon the respondent - assessee to justify the value of closing stock at Rs.2.03 crores. In response the respondent - assessee pointed out that as the project was a MHADA (Maharashtra Housing and

Area Development Authority) project, it was required to handover area of 19,355.72 sq. ft. (1797 sq. mtrs.) to MHADA free of cost. Therefore, the cost incurred towards flats to be offered to MHADA could not be taken into account while valuing its closing stock. However, the Assessing Officer did not accept the respondent - assessee's contention on the ground that the respondent - assessee was under obligation to give flats of size of 225 sq. ft. to MHADA. Therefore, arrived at the value of closing stock of 31,414 sq. ft. at Rs.15.48 crores. As Rs.2.03 crores had been declared by the respondent - assessee there was an addition of Rs.13.44 crores to the value of closing stock.

(b) Being aggrieved the respondent - assessee filed an appeal before the CIT (A). However, by order dated 11th December, 2012 the respondent - assessee's appeal was dismissed.

(c) On further appeal, the Tribunal noted the fact that the respondent - assessee was required to handover tenements having an area of 225 sq. ft. aggregating to 1797 sq. mtrs. in its "Orchid Towers" project. However, as the respondent was not able to offer tenement of 225 sq. ft. each, though it was offering the aggregate area of 1797 sq. mtrs. to MHADA. This led to litigation and this Court by the order dated 22nd November, 2011 directed MHADA to consider the respondent - assessee's proposal to either take 1797 sq. mtrs. in same building or permit the respondent - assessee to construct another building

in the same ward. In the above view, the impugned order holds that the approval for MHADA project was granted subject to condition that the flats in aggregate admeasuring 1797 sq. mtrs. were to be handed over to MHADA. Thus, to the above extent the flats comprising an aggregate area of 1797 sq. mtrs. could never be part of the respondent - assessee's closing stock. In the above view the impugned order allows the appeal. However, as there was some dispute with regard to 1797 sq. mtrs. to be computed on the basis of super built up area or on the basis of built up area was restored to the Assessing Officer.

(d) The grievance of the revenue is that liability to handover 1797 sq. mtrs. of area to MHADA was contingent in the previous year relevant to subject assessment year as it was only in 2012 that the respondent - assessee handed over that much area to MHADA. Besides the area of 1797 sq. mtrs. which was allotted to MHADA was in another building. Therefore, unsold area at end of previous year relevant to assessment year will have to be considered as part of closing stock of the respondent - assessee.

(e) The objections of the revenue before us are identical to that raised before the Tribunal. The impugned order of the Tribunal has on the basis of facts available before it held that it is not disputed that the respondent - assessee was obliged to handover 1797 sq. mtrs. of area to MHADA in lieu of permission to develop the project. Therefore, it was obligation of the

respondent - assessee to make aforesaid area available/allotted to MHADA. Consequently, the cost incurred in making this area 1797 sq. mtrs. available to MHADA free of cost would have the effect of reducing the value of its closing stock. Consequently the cost incurred on this area of 1797 sq. mtrs. could not be valued as stock in trade of the respondent - assessee. As observed by the Tribunal, in any view of the matter the area of 1797 sq. mtrs. never belong to the respondent - assessee as it had to be given free of cost to MHADA. In case the above 1797 sq. mtrs. is to be offered in another building, then its cost of such area will reduce its profits from this project because of the existing liability attached to this project.

(f) We note that in the peculiar facts and circumstances arising in this case the impugned order of the Tribunal has taken a possible view. Therefore, the proposed question of law cannot be said to be substantial. Accordingly, the question no.(ii) as proposed is not entertained.

5. Appeal dismissed. No order as to costs.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)