आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' B''BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकरअपीलसं./**IT(SS)A No. 264/AHD/2018**
With
C.O. No.113/Ahd/2019
निर्धारणवर्ष/Asstt. Year:2010-2011

A.C.I.T., Central Circle-1(4), Ahmedabad.	Vs.	M/s. Himalaya Darshan Developers (Gujarat) Pvt. Ltd., 2nd Floor,Sarthak Annex, Nr. Fun Republic, Ahmedabad-380015. **PAN: AABCH7354Q**

(Applicant)		**(Respondent)**

Revenue by :	Shri Sanjeev Jain, C.I.TD.R.
Assessee by :	Shri Dhiren Shah, A.R.

सुनवाईकीतारीख/**Date of Hearing : 22/03/2021**
घोषणाकीतारीख/**Date of Pronouncement: 12/04/2021**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal is filed by the Revenue and the CO is filed by the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-11 Ahmedabad, [Ld. CIT (A) in short] dated 13/07/2018 arising in the matter of assessment order passed under s. 143(3) r.w.s. 153C of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 29/03/2016. The assessee has filed Cross Objection in the Revenue's appeals bearing IT(SS)A no.264/AHD/2018 for the Assessment Year 2010-2011.

2. The interconnected issue raised by the Revenue in all the grounds of appeal is that the learned CIT (A) erred in deleting the addition made by the AO for Rs. 16,67,49,036/- under the head capital gain.

3. Briefly stated facts are that the assessee in the present case is a private limited company and engaged in the finance business. The assessee was the owner of 2 plots bearing number 548 and 549 admeasuring 33,612 Sq. mtrs. which were purchased dated 24-08-2007 for a consideration of Rs. 1,45,30,560/- only.

3.1 The assessee subsequently entered into a Banakhat dated 12-03-2008 for the sale of both the plots to M/s SJ Securities Limited (in short 'SJSL') at a consideration of Rs. 2,02,08,750/-. Accordingly, the assessee in its income tax return declared short term capital gain of Rs. 37,18,594/- onlyin the year under consideration with respect to both the sale of plots.

3.2 However, the AO found that there was the search dated 26-10-2012 in the case of 'SJSL' under section 132 of the Act being the buyer of the property against the Banakaht. During the search it was found out that the buyer of the property namely SJSL has sold the aforesaid plots after converting them into small plots for the total consideration of Rs. 14,86,83,000/- during the period November 2009 to March 2010. Out of total sale value of Rs. 14,86,83,000/- an amount of Rs. 1,34,47,750/- was directly transferred to the account of the assessee company (i.e. M/s Himalaya Darshan Developer (Gujarat) Pvt. Ltd). The SJSL in their books of account has declared profit of Rs. 14,27,69,950/- which was set off against the loss generated on the sale of commodities amounting to Rs. 13,85,00,000/- only.

3.3 The AO also found that the director of 'SJSL' namely Shri Lalit K Rathodhas admitted in the statement, furnished dated 26-10-2012 during the search proceedings, under section 132(4) of the Act and also under section 131 of the Act dated 07-05-2012 that the company (SJSL) is engaged in providing

accommodation entries. As such the company namely 'SJSL' was a paper company. This fact was also admitted by another director of SJSL namely Shri Partik R Shah in the statement furnished under section 131(1A) of the Act dated 01-08-2014, whowas also handling other companies which were only paper companies and engaged in providing accommodation entries.

3.4 In view of the above the AO sought clarification from the assessee proposing the entire transaction between the assessee and SJSL as a colorable device used by the assessee for transferring the capital gain on the sale of land to the SJSL which was subsequently set off against the loss on the sale of commodities.

3.5 In response to the notice, the assessee vide letter dated 19-11-2015 submitted that it has transferred both the plot of land to the 'SJSL' vide Banakhat dated 12-03-2008 for a consideration of Rs. 2,02,08,750/- only and against such Banakhat, has received part of the consideration detailed as under:

Cash as on agreement date	Rs. 11,000/-
Cash dated 06-10-2008	Rs. 2,39,000/-
Cash dated 01-04-2009	Rs. 11,000/-
Cheque dated 05-04-2009	Rs. 65,00,000/-
Total	Rs. 67,61,000/-

3.6 The remaining amount of Rs. 1,34,47,750/- was directly received from the actual buyers of the plot of land who purchased from the 'SJSL'. Accordingly the amount of profit on the subsequent sale of the plots by the 'SJSL' to the ultimate buyers belongs to SJSL and not to it (the assessee). As such the 'SJSL' has already accounted such amount of profit in their books of accounts.

3.7 However, the AO found that there was no development expenses incurred by the SJSL for the development of both the plot of land as alleged by the assessee. Furthermore, no prudent businessman will transfer the land at a lower

price by shifting its profit to another party. Accordingly the AO disregarded the contention of the assessee by observing as under:

"9. The reply of the assessee is not acceptable. As per section 50C,

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 (or assessable) by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed (or assessable) 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.

10. The key features of the above provision are as under:-

*a. This section is applicable to **transfer** of a capital asset. The banakhat does not denote transfer of a capital asset.*

*b. This section stipulates value **for the purpose of payment of stamp duty**. The actual transfer took place during the year viz., as per new jantri rate of transfer, the value for the payment of stamp duty ter. This provision mandates adopting jantri rate for the purpose of stamp duty. Stamp duty is paid only when the property is transferred.*

c. The purchaser had paid stamp duty @ Rs 5500 per sq meter in the sale deed.

11. Therefore, the contention of the assessee that the jantri prevailing at the time of execution of banakhat, is not acceptable. The jantri prevailing at the time of transfer and for the purpose of payment of stamp duty, shall be applicable. Therefore, the provisions of section 50C is applicable and the same are invoked.

11.1 Secondly, the total land area of survey No 548 and 549 was 33792 sq meter. The entire land of survey No 548 and 549 has been sold as it no more appears in the balance sheet of the assessee in the subsequent year. When the assessee is selling the entire land at survey no. 548 and 549 and when the land as per balance sheet is exhausted and when the income is worked out under the head Capital Gain, the taxable capital gain is worked out on the entire sale of land of 33792 sq meters. Further, while reducing the cost of acquisition, the same is allowed on the entire land of 33792 sq meters. Therefore, the capital gain u/s 50C is worked out as under:

Sale consideration as per circle rate @ Rs.5,500 per sqm of total land sold 33792 sqm.	*18,58,56,000*
Less : Cost of acquisition (Survey No. 548 and 549)	*1,53,88,370*
Capital gain u/s 50C of the Act.	***17,04,67,630***
Less:- Capital gain as per return	*37,18,594*
Capital gain added to total income	*16,67,49,036*

Therefore a sum of Rs.16,67,49,036/- is added as capital gain u/s 50C of the Act."

3.8 The AO further observed that the circle value of both the plots of land stands at Rs. 18,58,56,000/- @ 5500 per Sq. Mtr., whereas the assessee has transferred the same at much lower value (i.e. Rs. 2,02,08,750/-) than the value declared for the purpose of Stamp duty. Accordingly, the AO proposed to take the sale consideration equal to the value declared for the purpose of stamp duty i.e. Rs. 18,58,56,000/- for working out the capital gain as provided under the provision of section 50C of the Act.

3.9 However the assessee contended that the transfer of the property has taken place dated 12-03-2008 on the basis of Banakhat. The value at that point of time for the purpose of the stamp duty was standing at Rs. 283.5 per Sq. Mtr., whereas the assessee has transferred the land at Rs. 598 per Sq. Mtr. which is much more than the value declared for the purpose of stamp duty.

3.10 However, the AO disregarded the contention of the assessee by observing that the Banakhat is not a transfer of the property. As such the provisions of section 50C of the Act deals with the transfer of the property which has taken place in the case on hand during November 2009 to March 2010 and the stamp duty at that relevant point of time stands at Rs. 5,500 per Sq. Mtr. Accordingly, the AO was of the view that the stamp value should be taken as the sale consideration for the purpose of working out the capital gain as provided under the provisions of section 50C of the Act. Thus the AO made an addition of 16,67,49,036/- to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to the learned CIT (A).

4.1 The assessee before the learned CIT (A) submitted that by virtue of Banakhat dated 12-03-2008 all right and title vested in the property got transferred to 'SJSL' along with possession or right for the enjoyment of property. The SJSL subsequently divided the plot into 23 sub plot for the purpose of residential project namely "Harmony Homes" for which the plan was also

submitted with AMC for approval. The developer 'SJSL' also made part performance of the agreement by paying the part of consideration. The assessee further submitted that in any situation it has to execute conveyance deed in favor of 'SJSL' and in case of failure, 'SJSL' has an option to file suit and compel it to execute conveyance deed. Thus as per the definition of 'transfer' provided under the provision of section 2(47) (ii) and (vi) of the Act, the impugned property was transferred as on 12-03-2008. The assessee in this regard placed reliance on the judgment of the Hon'ble Supreme Court in case of SanjiveLal vs. CIT reported in 365 ITR 389. Accordingly the assessee claimed that considering the date of transfer as on 12-03-2008, there is no violation of the provisions of section 50C of the Act as on that date the stamp value was much lower than the actual consideration received by it.

4.2 The assessee also submitted that the AO's allegation that 'SJSL' is a paper company is based on his surmise and conjuncture. The assessee claimed that none of the person in their statement have given any adverse comment about the genuineness of the transaction of transfer of land through Banakhat dated 12-03-2008. As such, the AO himself found that out of total sales receipt from ultimate buyer Rs. 13,52,35,250/- were received by the 'SJSL' and the assessee company received only an outstanding amount of Rs. 1,34,47,750/- in pursuance to the Banakhat dated 12-03-2008. This fact was also accepted by the ultimate buyer whose statement was recorded by the department. The assessee also submitted that the AO's observation that the 'SJSL' does not have land property in balance sheet is misplaced. As such 'SJSL' acquired the said land as business asset and not as capital assets, therefore no question is arising to disclose the same in balance sheet.

4.3 The assessee further submitted during the course of search there was no incriminating material found from the premises of 'SJSL' belonging to it (the assessee) suggesting undisclosed income in its (the assessee) hand. The director of 'SJSL' in his statement also did not make any adverse remark against the

assessee company. The assessee also submitted that its normal assessment under section 143(3) was also completed vide order dated 22-02.2012 i.e. before the date of search. Accordingly, the assessee contended that, without having any incriminating material belonging to assessee, unabated year cannot be reopened for making assessment under section 153C of the Act.

4.4 The learned CIT(A) after considering the fact in totality deleted the addition made by the AO on legal ground and as well as on merits by observing as under:

> *"From verification of the assessment order, the AO has not identified any of the incriminating seized material found during the course of search proceedings in the case of S.J. Securities Ltd and also not referred to any of the statements of the directors of S.J. Securities Ltd or any other relevant person that the sales consideration of 23 plots sold by S.J. Securities Ltd and received the aggregate sales consideration of Rs, 13,52,35,250/- from actual buyers has been remitted transferred back to the appellant company in cheque or in cash. Therefore, as theregular assessment proceedings for A.Y. 2010-11 has already been completed in*
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> *the case of the appellant company before the search took place in the case of S.J. Securities Ltd on 04.09.2013 and there was no incriminating material found during the course of search proceedings in the case of S.J. Securities Ltd and even in theassessment proceedings, the AO not brought on record any cogent material and/or independent evidences that sales consideration of Rs. 23 plots sold by S.J. Securities Ltd to actual buyers and received the aggregate consideration of Rs. 13,52,35,250/- which has been gone back to the appellant company by cheque or cash and the appellant company is the ultimate beneficiary of the said amount, such concluded assessment cannot be disturbed by the A.O for making an addition by invoking deeming provision u/s. 50C of the Act in the case of the appellant] In view of the aforesaid facts, in absence of any incriminating material found during the course of search proceedings in the case of S.J. Securities Ltd and in absence of any incrementing material and/or independent evidences being brought on record by the AO in the assessment proceedings against the appellant has worked out undisclosed income in the case of appellant by invoking deeming provision u/s. 50C and made addition of short term capital gain of Rs. 16,67,49,036/- in the case of appellant is not justified in view of the of the judicial pronouncement of the **Hon'ble jurisdictional Gujarat High Court in the case of Pr. CIT-4 vs. Saumya Construction Pvt.Ltd f20171 387 ITR 529,**other High Courts and Hon'bleAhmedabad Tribunal as well as other Tribunals.*
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> *From verification of the assessment order and relevant party's statements reproduced in the assessment order of various persons, none of the persons has stated anything against the appellant and also the oral statements of various persons, nothing has been stated about the said land acquired by SJ. I Securities Ltd vide agreement to sale dated 12.03.2008 from the appellant company which was sub-divided into 23 sub-plots and sold to 23 actual buyers and the sales consideration received by S.J. Securities Ltd aggregating to Rs. 13,52,35,250/- has j been given back in cheque or in cash to the appellant company as an ultimate beneficiary. The AO's observation in the assessment order that SJ Securities Ltdhas not shown the said amount as fixed assets in its balance sheet is contrary*

to the facts available on record before the AO. From the audited balance sheet and profit and loss account of SJ Securities Ltd, the said company acquired the rights in the said land from appellant company for its business purpose and the said land was sub-divided into 23 plots which has been subsequently sold by SJ Securities Ltd to the actual buyers and realized the sales consideration of the said 23 plots and shown in the audited Profit & Loss Account as its trading receipts, therefore, the question of showing the said amount in fixed assets in the balance sheet of SJ / Securities Ltd does not arise at all. As it was agreed upon between the appellant company and SJ Securities Ltd in the agreement to sale dated 12.03.2008 that SJ Securities enjoyment of said land for its business purpose, which SJ Securities Ltd has exercised its rights by sub-dividing the said land into 23 sub- plots and sold to the actual buyers and directed the appellant company to execute the conveyance deed in favour of actual buyers wherein, SJ Securities Ltd as a developer has become the confirming party and received the amount of sales consideration of 23 sub-plots by SJ Securities Ltd from the actual buyers! On the basis of the facts as discussed above and the evidences available on record, the observation made by the AO in the assessment order in Para 11 that Jantri prevailing at the time of execution of "Banakaht" (agreement to sale) is not acceptable and the Jantri prevailing at the time of transfer and for the purpose payment of stamp duty, shall be applicable and therefore, the provisions of section '• 50C is applicable and the same being invoked is not justified. I hold that the AO has wrongly invoked the deeming provision of section 50C in the case of appellant in respect of 23 sale deeds executed by SJ Securities Ltd in favour of actual buyers and the addition made by the AO on account of short term capital gain u/s. 50C of the Act for an amount of Rs. 16,67,49,036/- is not justified. Hence, ***deleted.***

4.2.3. It is a fact that the plots of land under consideration were sold by "Banakhat" dated 22.03.2008 for Rs.2,02,08,750/- and on the date of the "Banakhat", Jantri rate was Rs.283.50 sq. mtr, whereas. The appellant had executed "Banakhat" @ Rs.598A sqmtr., which is more than the jantri rate on the date of "Banakhat". Provisions of section.50C have been amended by finance Act 2016 w.e.f. 01.04.2017. Two provisos inserted which contain that where the date of the agreement fixing the amount of cons/deration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purpose of computing full value of consideration for such transfer. It is further provided that the first proviso shall apply only in a case where the amount of consideration or part thereof has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account on or before the date of agreement for transfer. In the case of the appellant date of agreement fixing the amount of consideration is 12.03.2008 and Rs.65,00,0007- were received through cheques by the appellant company on05.10.2009 i.e before the date of agreement for transfer. Thus, the appellant's case is covered by these amended provisions of section 50C, as the Hon'ble ITAT, Ahmedabad has held in series of order that these amended provisions of section 50C are effective retrospective being beneficial provisions, hence the appellant's case is covered by the binding order of the Hon'ble ITAT, Ahmedabad in the case of Dharmsinhbhai Sonami reported in ITA No. 1237/Ahd/2013.

As discussed above, the appellant's case is found covered by the order of the Hon'ble ITAT, Ahmedabad. The additions made by the A.O in this cae u/s.50C are not sustainable, therefore, ***deleted****. This ground of appeal is* ***allowed.***

5. Being aggrieved by the order of the ld. CIT-A, the Revenue is in appeal before us.

6. The ld. DR before us contended that the assessee has carried out the transaction for the sale of the lands in dispute by adopting the colourable device through SJSL and diverted its income under the head capital gain. The learned DR vehemently supported the order of the AO.

7. On the other hand, the ld. AR before us filed a paper book running from pages 1 to 558 and contended that there was no incriminating document found during the search belonging to the assessee and therefore the assessment framed under section 153C of the Act in itself is invalid. Furthermore, the regular assessment was framed under section 143(3) of the Act wherein all the details for the sale of the properties were duly disclosed which were admitted by the AO.
The learned AR also contended that the AO has not afforded the opportunity of the cross-examination to the assessee of the statements recorded during the search proceedings despite repeated requests were made by the assessee.

The learned AR further claimed that the agreement for sale of the lands in dispute were made on 12 March 2008 at a price which was more than the registered value declared for the purpose of stamp duty. The learned AR vehemently supported the order of the learned CIT (A).

8. We have heard the rival contentions of both the parties and perused the materials available on record. The 1st controversy that arises before us for the adjudication is as to whether the proceedings initiated under section 153C of the Act are valid and sustainable in the eyes of law in the given facts and circumstances. In this regard we note thatprior to amendment by Finance Act 2015 *i.e.* before 1-06-2015, section153C(1) provided that if any valuable assets (any money, bullion, jewellery or other valuable article or thing) or books of accounts or documents found and seized/requisitioned during the search and AO of the person searched (PS, in short) is satisfied that such valuable assets or books of accounts or documents seized/requisitioned belongs or belong to a person other than person searched (other person or OP in short).Then the AO of

the PS will hand over the valuable assets/books of accounts/documents to the AO of the OP after recording satisfaction to that effect. The AO of the OP after receiving the search material records his satisfaction to the effect that the material seized/ requisitioned have bearing on the income of the assessee i.e. OP before proceeding with section 153C of the Act. Thus, the very first criteria to invoke the provision of section 153C is that there should be material seized/requisitioned during search 132/132A and such material belongs or belong to the OP, thereafter the AO of OP have to reach to the conclusion that weather the search material have any bearing on the income of the assessee or not.

8.1 Now it is important to understand the concept of 'belong or belongs to'. In what situation and circumstances material found during search can be called as belong to OP. In common parlance, the expression "Belongs to" is used in sense of indicating "to be property of", or "to be a part, ". Thus, in Section 153C(1) of the Act it would indicate that "assets/documents" are property of "other person". In other words, it indicates ownership of "other person". Mere reference of "other person" in the documents is not enough to hold them as belonging to him. Therefore, "record maintained by a person for his own purpose, though referable to the assessee, cannot be said to be belonging to the assessee within the meaning of s. 153C of the Act. For example any document is prepared by the PS for his own record would not mean that such document belong OP, even though it may contain the name of OP. In the case of hand, on perusal of the assessment order, it was found that the AO has made reference to the documents found during the search by observing as under:

> *4.1 On perusal of the seized (seized from the office of Sarang Chemicals Limited) profit and loss accounts of one M/s.S.J. Securities Ltd (SJSL), tally books of "SJSL (mayank)" was found which showed that M/s. SJSL had earned profit on sale of land aggregating to Rs.14,27,69,950/-. No land was purchased by it during the relevant year no was any land recorded in its fixed assets in its balance sheet.*

8.2 From the above, we note that it was the document of 'SJSL' wherein it has shown the transactions of sales of the lands which was purchased in the earlier

assessment year through Banakhat. The 'SJSL' on such purchase and sales has shown a profit amounting to Rs. 14,27,69,950 in its books of accounts. In other words, the 'SJSL' has shown purchases of the lands from the assessee which was subsequently sold to the other parties. The corresponding entries of the sales by the assessee to 'SJSL'were duly disclosed by the assessee company in its accounts and accordingly the income under the head capital gain was offered to tax.

8.3 The 1st question that arises for our adjudication whether the document in the form of tally and Balance sheet as discussed above found during the course of search belong to the assessee. To our mind, the documents found during the search in the given facts and circumstances, were of the 'SJSL' where the transactions for the impugned land were recorded. Thus, these were the documents which were not belonging to the assessee but to M/s SJSL. Hence, in the absence of any document found belonging to the assessee, the proceedings under section 153C of the Act cannot be initiated against the assessee. In holding so we draw support and guidance from the judgment of Hon'ble jurisdictional High Court in case of Anil Kumar Gopi Kishan Agarwal vs. ACIT reported in 418 ITR 25, where the Hon'ble court held as under:

> *In the facts of the present case, the search was conducted in all the cases on a date prior to 1-6-2015. Therefore, on the date of the search, the Assessing Officer of the person searched could only have recorded satisfaction to the effect that the seized material belongs or belong to the other person. In the present case, the hard disc containing the information relating to the petitioners admittedly did not belong to them, therefore, as on the date of the search, the essential jurisdictional requirement to justify assumption of jurisdiction under section 153C in case of the petitioners, did not exist.*

8.4 Besides the above, the AO has also made reference to the statement of the director of 'SJSL' namely Shri Lalit K Rathod recorded under section 132(4) of the Act and statement of another director namely Partik R Shah under section 131(1A) of the Act wherein it was admitted that the company namely 'SJSL' is engaged in providing accommodation entries. Thus the same is a paper company. On perusal of the statement recorded under section 133(4) reproduced by the AO in his order we do not find any remarks made by such director to the effect that material/document seized during the search does not belong to the PS i.e. 'SJSL',

or belong to the assessee company. In this regard, we also note that there were no incriminating material against OP was found in the search. Further section 153C emphasize that there should be material or document seized which belong to the OP. As such statement recorded during search is not a material or document found and seized. Therefore the statement recorded under section 132(4) cannot be construed as material/document for invoking proceeding under section 153C of the Act specially, in the circumstances where no material of incriminating in nature found belonging to OP. In this regard we find support and guidance from the order Mumbai Tribunal in case of DCIT vs. National Standard India Ltd. reported in 85 taxmann.com 87 where it was held as under:

> *Further, the Statement of 'AL' recorded under section 132(4) in the course of search and seizure proceedings conducted in the case of 'L' group cannot be construed as a 'seized document', therefore, the reliance placed by the Assessing Officer on the same to justify the validity of jurisdiction assumed under section 153C in the hands of the assessee company, cannot be accepted. Even otherwise as the disclosure of additional income made by AL in his statement recorded under section 132(4), in the hands of the assessee-company is relatable to Assessment year 2011-12, and does not pertain to any of the years in respect of which jurisdiction had been assumed by the Assessing Officer under section 153C in the case of the assessee company, therefore, the same on the said count also shall in no way go to confer validity to the assumption of jurisdiction by the Assessing Officer under section 153C. [Para 12]*

8.5 Without prejudice to the above, we note that the purpose of the search or seizure operation is to unearth the undisclosed or unaccounted income. Normally during the search proceeding different types of material or document seized and requisitioned by the search party and information collected. Thereafter those information collected and seized materialsare examined weather the same is having bearing on the income which is not disclosed. Accordingly assessment proceeding under section 153A or 153C of the Act as the case may carried out by the Revenue.

Now the question arises what could be documents having bearing on the determination of the total income of the person searched or other person. The documents/ any fact/evidence which could suggest that the documents/transactions claimed or submitted in any earlier proceedings were not

genuine, being only a device/make belief based on non-existent facts or suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute the documents sufficient to make assessment for the purposes of the Act. The Hon'ble courts have referred such documents as an 'incriminating material'. While going through a large number of the decision rendered in the context of search assessment, it was observed that the word 'incriminating material' has been used very often, but the point here is that what is the meaning of 'incriminating material' or in other words what meaning can be attributed to 'incriminating material', as the same is the main bone of contention while framing the search assessment order U/s 153A/C of the Act and the same has not been defined under the Act. Therefore, it is imperative to understand the meaning of the word 'incriminating material'. Practically stating it can be stated that the 'incriminating material' can be in any form such as a document, content of any document, entry in the books of accounts, an asset etc.

8.6 In short, any fact/evidence which could suggest that the documents/transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/make belief based on non-existent facts or suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute an 'incriminating material' sufficient to make assessment for the purposes of the Act.

8.7 In the light of the above stated discussion, the question that arises for our adjudication whether the document in the form of tally and balance sheet found during the course of search is an incriminating document in nature. In our considered view such document are not an incriminating material, as such those documents are part of the books of account maintained by the 'SJSL' wherethe transactions for the purchase and sales of the lands were duly disclosed. Likewise, the corresponding entries in the books of accounts of the assessee and corresponding capital gain was offered to tax in the income tax returns. Thus the impounded documents were belonging to the 'SJSL' and not the assessee

company where all the material facts were disclosed. Hence the same cannot be termed as incrimination document found against the assessee company. Furthermore, there is no ambiguity to fact that in case of the assessee normal assessment under section 143(3) of the Act was already completed vide order dated 22-02-2012. Thus the year under consideration is unabated assessment year which can be disturbed only based on incriminating document against the assessee found during the course of search as held by the Hon'ble jurisdictional High Court in the case of Pr. CIT vs. Saumya Construction reported in 387 ITR 529. The relevant extract of the judgment is reproduced as under:

> *Section 153A bears the heading 'assessment in case of search or requisition'. From the heading of section 153, the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. Thus, while in view of the mandate of sub-section (1) of section 153A in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, the earlier assessment would have to be reiterated.*

8.8 In view of the above and after considering the facts in totality, we are of the view that the proceedings initiated under section 153C of the Act without having any incriminating materials belonging to the assessee which have bearing on its income is not sustainable for the reason as detailed above.

8.9 The next question arises whether the stamp duty as applicable on the date of agreement (Banakhat) i.e. 12 -03-2008 should be taken as sales consideration or the actual date when the properties were actually transferred to the ultimate buyer i.e. November 2009 to March 2010. In this regard, we find pertinent to refer the provisions of section 50C(1) of the Act which reads as under:

> ***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 or assessable 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 or assessable 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 :*

The above provisions requires to take the sale consideration not less than the value declared for the purpose of Stamp duty on transfer of the property being land or building or both. What relevant here is the date of transfer of the property in order to determine the sale consideration not less than the value declared for the purpose of the stamp duty. Now the question arises on which date the property in dispute got transferred in pursuance to the provision of the Act?Whether thedate of agreement to sale made by the assessee for transferring the land in dispute with the buyer dated 12-03-2008 is the date of transfer in the given facts and circumstances. In this regard, we note that the assessee by virtue of the agreement to sale dated 12-03-2008a right in favour of SJSL was created which gives a right to the buyer (SJSL) to enjoy the property. This fact can be established from the finding of the learned CIT (A) which has been reproduced as under:

> *"On verification of one of the sale deed / conveyance deed in respect of one of the residential plot sold by SJ Securities Ltd. to the actual buyer wherein the appellant company is also party to the said conveyance deed, which has been compiled as per Exhibit – V, Page No. 70 to 86 of the Synopsis of Arguments dated dated 06.09.2017 along with English Translation as per Exhibit – VI Page No. 87 to 107, it is very clear from the clauses of the conveyance deed that after acquiring the rights in the said land by agreement to sale dated 12.03.2008, SJ Securities Ltd. divided the said land into sub-plots as per the plan submitted with Ahmedabad Municipal Corporation and in respect of such sub-divided plots of the said land into 23 plots, SJ Securities Ltd. gave the name of the scheme as "Harmony Homes" and in the sale deed, the reference of title clearance certificate of Shantilal & Co., Advocates & Solicitor, dated 08/10/2009, has also been referred to. From verification of the title clearance certificate of Shantilal & Co, Advocates & Solicitor dated 08.10.2009, the Solicitor has also confirmed in the title reports, the agreement for sale in favour of SJ Securities Ltd.*

From the above it is transpired that the buyer of the land has applied for the sanction of its plan of residential housing in the name and style 'Harmony House' with the concerned authorities. For that purpose the buyer of agreement to sale i.e. SJSL divided the property into 23 subplots which implies that buyer was enjoying the property taken from the assessee vide agreement dated 12-03-2008. The clause (vi) of the provisions of section 2(47) of the Act has a direct bearing on the issue on hand which reads as under:

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

The above provisions provides that the word transfer in relation to capital asset includes any transaction by way of agreement which has the effect of transferring or enabling the enjoyment of any property. Indeed, the buyer of the property is enjoying the property in the given facts and circumstances. Thus in our considered view the conditions as specified under clause (vi) of the section 2(47) of the Act has been satisfied. Thus the property was transferred on 28-03-2008. Accordingly in such circumstances the value of the stamp duty as applicable on the date of agreement i.e. 12-03-2008 shall be taken as the sale consideration for working out the capital gain.

We also note that the right of the assessee got extinguished by virtue of agreement to sale with respect to the property in dispute. After entering into the agreement of sale a right in personam has been created in favour of the buyer and the assessee was bound to execute the conveyance deed as per the direction of the buyer i.e. SJSL, therefore such agreement of sale should be treated as the date of transfer of the property.

In holding so we draw support and guidance from the judgement of Hon'ble Apex court in the case of Sanjeev Lal Vs. CIT Chandigarh reported in [2014] 365 ITR 389 (SC) where the Hon'ble court held as under:

The question to be considered by this Court is whether the agreement to sell which had been executed on 27-12-2002 can be considered as a date on which the property i.e. the residential house had been transferred. In normal circumstances by executing an agreement to sell in respect of an immovable property, a right in personam is created in favour of the transferee/vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been sold at the time when an agreement to sell is entered into. In normal circumstances, the aforestated question has to be answered in the negative. However, looking at the provisions of section

2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred. [Para 20]

In this regard we also draw support and guidance from the order of the Bangalore tribunal in case of N.A. Haris vs. Addl. CIT range 12 Bangalore reported in [2021] 124 taxmann.com 354 (Bangalore-Trib) where the Hon'ble bench by following the order of the Co-ordinate Bench of ITAT Bangalore in the case of Prakash Chand Bethala v. DCIT in ITA No. 999/Bang/2019 dated 28-1-2021, held as under:

61. The contention of the learned DR is that this provision is only prospective and not retrospective and cannot be applied to the assessment year 2012-2013. As discussed earlier, the sale agreement actually entered in the financial years 2006-2007 and 2007-2008. In such circumstances, the guideline value prevailing in the financial year 2011-2012 could not be applied to the agreement entered into earlier assessment years. In all fairness, the guideline value prevailed in the relevant assessment year to be considered as a consideration so as to bring the capital gains into taxation. Since there is no dispute regarding the fact that the agreement for sale of flats were entered into the financial years 2006-2007 and 2007-2008, right over such flat has been transferred from the assessee to the respective purchasers. The only pending was the actual registration of sale deed. In other words, by way of sale agreement, the right in persona is created in favour of the purchaser. When such a right is created in favour of the purchaser and the assessee is refrained from selling such flats to someone else because the purchaser of the flat in whose favour right in persona is created, has legitimate right to enforce such specific performance on the agreement if the assessee-vendor have some reason or other reason has not executed the sale deed. Thus, by virtue of agreement to sale, the same right is given to the respective buyers by the assessee, being the vendor. There is encumbrance created over the flats in favour of the respective flat purchasers. Since there is a gap between the date of execution of sale agreement and sale deed and if the guideline value changes, the10/04/2021 www.taxmann.com 17/18 guideline value as on the date of agreement has to be considered as the full value of the consideration of the capital gains. In the present case, since enforceable agreement was entered in the financial years 2006-2007 and 2007-2008 and for the purpose of computation of capital gains in the hands of the assessee, the A.O. has to be adopted the guideline value as on the date of sale of the agreement and not on the date of sale deed.

In view of the above discussion and in the light of above orders we do not find any infirmity in the order of the learned CIT (A). Accordingly we dismiss grounds of appeal raised by the Revenue on this count also.

8.10 Before parting we find that the learned CIT (A) alternately also held that by virtue of first provisoinserted in the provision of section 50C (1) vide finance Act 2016, the assessee will get relief due to the fact that consideration was decided

along with agreement to sale i.e. before the execution of sale deed and also received part payment. In this regard we note that the2nd proviso clearly stipulates that the stamp duty to be taken as the sale consideration of the agreement date where the amount of consideration or a part thereof has been received by an account payee cheque or by account payee bank draft or by use of electronic clearing system through the bank account on or before the date of agreement for transfer. Admittedly in the case on hand, the assessee has received a sum of ₹11,000 in cash at the time of agreement. The cheque payment was received by the assessee 1st time dated 05-10-2009 for Rs. 65,00,000/-. In other words the conditions as stipulated under the 2nd proviso to section 50C of the Act in order to enjoy the benefit of 1st proviso was not complied with by the assessee. Therefore we are of the view that the finding of the learned CIT (A) to this extent is not correct.

8.11 In the result, the appeal filed by the Revenue is hereby **dismissed.**

Now Coming to CO No.113/Ahd/2019 in (IT(SS)A No.264/Ahd/2018) for A.Y. 2010-11 filed by the assessee

9. The assessee raised following grounds in CO:

All the grounds in this Cross Objections are mutually exclusive and without prejudice to each other:-

1. *The Ld. CIT (A) after carefully considering the facts of the case, submission of the Respondent and various judicial pronouncements relied upon by the Respondent Company particularly the decision of Hon'ble Gujarat High Court in the case of Pr. CIT-4 vs. Saumya Construction Pvt.Ltd [2017] 387 ITR 529 has held that in absence of any incriminating material being brought on record by the AO, the concluded assessment cannot be disturbed by the AO for making an addition by invoking the provisions of section 50C of the Act in the case of the Respondent while making the assessment u/s. 143(3) r.w.s. 153C of the Act.*

2. *The Ld. CIT (A) after carefully considering the facts of the case, submission of the appellant as well as various judicial pronouncements relied upon by the Respondent on merits, held that in the case of the appellant, date of agreement fixing the amount of consideration is 12.03.2008 and Rs. 65,00,000/- was received through cheques by the appellant company on 05.10.2009 i.e. before the date of transfer and thus the Respondent's case is covered by the amended provisions of section 50C and as the amended provisions of section 50C are effective retrospectively being beneficial provisions, the Respondent's case is covered by the binding orders of the Hon'ble ITAT Ahmedabad in the case of Dharmsinhbhai Somani ITA No. 1237/Ahd/2013 and the Ld. CIT (A) has*

correctly deleted the addition made by the AO of Rs. 16,67,49,036/- u/s. 50C of the Act on account of Short Term Capital Gain.

Your Respondent craves right to add, amend, alter, modify, substitute, delete or modify all or any of the above grounds of cross objection.

10. At the outset we find the ground raised by the assessee in the CO is supporting the order of the learned CIT (A). Therefore we do not find any reason to adjudicate the same. Accordingly we dismiss the CO of the assessee being infructuous.

10.1 In the result, the CO filed by the assessee is dismissed as infructuous.

11. In the combined results, the appeal of the Revenue is **dismissed** and the cross objection filed the assessee is also **dismissed as infructuous.**

Order pronounced in the Court on 12/04/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 12/04/2021

Manish/Tanmay ***TRUE COPY***

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, अहमदाबाद / ITAT, Ahmedabad