IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' DELHI
(Through Video conferencing)

BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA NO. 165/DEL/2020
AY : 2015-16

Noida Cyber Park Pvt. Ltd., 301-A, World Trade Tower, Barakhamba Lane, Connaught Place, New Delhi. (PAN: AAACF5292Q)	vs	Income Tax Officer, Ward 18(4), New Delhi.
(Appellant)		(Respondent)

Appellant by: Shri V.K. Aggarwal, AR
Shri B.K. Rai Chaudhary, Advocate
Ms Shweta Bansal, CA
Respondent by: Ms Banita M. Biswas C.I.T. DR

ORDER

PER G.S. PANNU, VICE PRESIDENT

This appeal has been preferred by the assessee against the order of the learned Commissioner of Income Tax(A) dated 14.11.2019, which in turn, has arisen from an order passed by the Assessing Officer under Section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 29.12.2017 pertaining to assessment year 2015-16.

2. The following Grounds have been raised by the assessee in the appeal:-

"1. Under the facts and circumstances of the case learned Commissioner of Income Tax has grossly erred on facts as well as in law in confirming the assessment order which is ex-facie arbitrary, illegal and without jurisdiction being against the provisions of Income Tax Act 1961 and principles of natural justice .

2. The Ld. CIT(A) has grossly erred on facts as well as in law in confirming the addition made by the learned assessing officer under section 50C in spite of the fact that the impugned properties are leasehold properties.

3. The Ld.CIT(A) has grossly erred on facts as well as in law in confirming an addition of Rs. 240,77,29,683/- under section 50C in spite of the fact that the learned AO himself has already completed the assessment at the returned income in the first part of the assessment order on page 2 thereof.

4. The Ld.CIT(A) has grossly erred on facts as well as in law in confirming the assessment order which is passed without waiting for the report from the DVO on the reference made under section 50C(2) in complete violation of the provisions of Income Tax Act 1961, hence leading to the assessment order being ex-facie illegal, arbitrary and without jurisdiction.

5. The learned CIT(A) has grossly erred on facts as well as in law in confirming the addition of Rs. 240,77,29,683/- under section 50C of the Income Tax Act 1961.

6. The learned CIT(A) has grossly erred on facts as well as in law in considering valuation at Rs. 399,97,79,799/- under section 50C in spite of the fact that DVO has determined the valuation under section 50C at Rs. 193,56,67,000/-.

7. The Learned CIT(A) has grossly erred on facts as well as in law in rejecting the DVO report on the basis of recommendations of learned assessing officer.

8. The learned CIT(A) has grossly erred on facts as well as in law in rejecting the valuation of approved valuer without assigning any reason.

9. The Ld. CIT(A) has grossly erred on facts as well as in law in confirming the addition without considering the submissions made by the assessee.

10. The Ld.CIT(A) has grossly erred on facts as well as in law in holding that objections are similar to those raised before they learned assessing officer.

11. The Ld. CIT(A) has grossly erred on facts as well as in law in holding that procedure laid down under section 142 A is not applicable to section 50."

3. Although the assessee has preferred multiple Grounds of Appeal, but essentially the solitary grievance raised by the assessee is with regard to invoking of Section 50C of the Act and making an addition of Rs. 240,91,67,743/- to the returned income by the Assessing Officer.

4. Briefly put, the relevant facts are that the appellant is a company incorporated under the provisions of the Companies Act, 1956 and for the assessment year under consideration, it filed a return of income declaring an income of Rs. 14,38,060/- under the normal provisions of the Act whereas the tax was finally paid in terms of 'Book Profit' determined at Rs. 10,53,55,713/- as per Section 115JB of the Act. The return of income so filed by the assessee was subject to scrutiny assessment, whereby the only point of difference between the assessee and the Revenue is with regard to the computation of Capital Gains on sale of a part of its building in Tower C and D of the Logix Cyber Park located at Noida. In para 5 of the assessment order, the Assessing Officer has enumerated the relevant details of the six properties sold to different parties in the Cyber Park, for a total stated consideration of Rs. 159,20,50,116/-. The Assessing Officer further notes that the value adopted by the 'Stamp Valuation Authority' for the purposes of payment of stamp duty in respect of six

properties in question amounts to Rs. 399,97,79,799/- . Since the consideration received by the assessee as a result of the transfer of the six properties in question was lower than the value adopted by the 'Stamp Valuation Authority' for the purposes of payment of stamp duty, the Assessing Officer required the assessee to show cause as to why Section 50C of the Act be not invoked for the purpose of computation of Capital Gains. Notably, Section 50C(1) of the Act provides that 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, then the value so adopted or assessed or assessable shall, for the purposes of section 48 of the Act, be deemed to be the full value of the consideration received or accruing as a result of the transfer for the purposes of computing Capital Gains thereof. In response, the assessee company resisted the action of the Assessing Officer, as is manifested by the communication addressed to the Assessing Officer dated 26.12.2017, a copy of which is placed at pages 17 to 25 of the Paper Book. The assessee, inter-alia, detailed the transaction in question by filing copies of the sale deeds; it was asserted that the value adopted by the stamp valuation authority exceeded fair market value of the property on the date of transfer; and, that nothing has been received over and above the stated consideration. The assessee-company also furnished a

valuation report from a Registered Valuer in support of its assertions. Apart from other objections, assessee specifically stated that value adopted by the Stamp Valuation Authority could not be taken as the full value of the consideration in terms of section 50C(1) of the Act inasmuch as the value adopted by the stamp valuation authority exceeded the fair market value of the property. The Assessing Officer referred the matter to the Departmental Valuation Officer i..e the DVO for valuation of the property having regard to the provisions of Section 50C(2) of the Act. As the report of the DVO was not received at the time of completion of assessment on 29.12.2017, the Assessing Officer did not accept any of the points raised by the assessee, and, instead, he treated the value assessed by the stamp valuation authority as the full value of consideration, for the purposes of computing capital gains and accordingly, the difference between the consideration stated in the sale deeds and the value adopted by the stamp valuation authority for payment of stamp duty i.e. Rs. 2,40,91,67,743/- was added to the returned income.

5. Aggrieved with the assessment so made, the assessee carried the matter in appeal before the learned Commissioner of Income Tax(A) assailing the action of the Assessing Officer of invoking section 50C of the Act on varied grounds of law and on facts. During the pendency of proceedings before the First Appellate Authority, the valuation report of the DVO dated 21.6.2018 was received, whereby the value of the six properties in question was estimated at

Rs. 193,56,67,000/-, a copy of the report has been placed at pages 29 to 40 of the Paper Book. The various grounds raised by the assessee before the learned Commissioner of Income Tax(A) have been enumerated in detail in the impugned order of the Commissioner of Income Tax(A). The record also, inter alia, reveals that in the remand report submitted by the Assessing Officer during the First Appellate proceedings, the report of the DVO was canvassed to be "*not acceptable on merits*". In view of this, the Commissioner of Income Tax(A) dismissed the appeal of the assessee in toto and confirmed the addition as made by the Assessing Officer, thereby treating the report of the DVO as unmerited. Be that as it may, the assessee is not satisfied with the order of the learned Commissioner of Income Tax(A) and is in further appeal before us on the aforesaid Grounds of appeal.

6. Before us, the first and foremost plea raised by the assessee is that the invoking of section 50C of the Act in the present case is wholly unwarranted inasmuch as the 'capital asset' in question does not fall within the purview of section 50C(1) of the Act. It has been pointed out that Section 50C(1) covers "*a capital asset, being land or building or both*" whereas in the present case, the assessee has transferred merely the leasehold rights in the property inasmuch as the land was available with the assessee only as 'a Lessee', with New Okhla Industrial Development Authority, being the Lessor. It was pointed out that the expression used in section 50C i.e. 'land or building or both" would not include

leasehold right in land or building or both. Elaborating the argument, the learned counsel for the assessee referred to a sample lease deed of one of the properties entered with M/s Hexagon Assets LLP dated 24.2.2015, a copy of which is placed in the Paper Book at pages 91 to 115. It has been explained that the assessee has taken land on lease for a period of 90 years commencing from April 2006 from New Okhla Industrial Development Authority (NOIDA) and constructed Tower C building in question as a Cyber Park out of which a portion has been sub-leased to M/s Hexagon Assets LLP. By referring to the lease deed, it is pointed out that it is a tripartite agreement, whereby NOIDA is the 'lessor', assessee is the lessee and M/s Hexagon LLP is the 'sub-lessee'. Moreover, it is pointed out that it is not a case of perpetual lease deed, and the Ld. Representative for the assessee emphasized that what has been transacted by the assessee is only lease hold right in the land or building, which is quite distinct from the 'capital asset' referred to in Section 50C(1) of the Act. In support of the proposition that Section 50C does not cover lease rights in land and building or both, reliance has been placed on the following decisions:-

i) GVK Industries Ltd. vs ITO (2011) 4SCC36(SC)

ii) Ritz Suppliers Pvt. Ltd. vs ITO 2020-TIOL-307-ITAT-KOL

iii) Shri Kishan Dass vs DIT ITA No.915/Del/2012- ITAT, Delhi

iv) CIT vs M/s Greenfield Hotels & Estates Pvt. Ltd. Appeal No. 735

of 2014 dt. 24.10.2016 Bombay High Court

v) Atul G. Puranik vs ITO (2011) 11 taxmann.com 92 (Mumbai ITAT)

vi) Kancast Pvt. Ltd. vs ITO (2015) 55 taxmann.com 171 (Pune-Tribu)

7. On this point, learned C.I.T. DR has defended the action of the lower authorities, but the factual matrix asserted by the assessee has not been disputed. A significant argument put forth is that the aforesaid aspect was not agitated by the assessee either before the Assessing Officer or the Commissioner of Income Tax(A) and, therefore, it is impermissible for the assessee to raise such a plea before the Tribunal, and, that the Tribunal has to confine itself only to issues arising from the order of the learned Commissioner of Income Tax(A).

8. In reply, the learned representative opposed the stand of the learned DR by pointing out that the assessee has all along assailed the applicability of section 50C of the Act and that the instant argument was based on the facts already on record; and, that the argument is confined to the interpretation of the legal provision which has been specifically invoked by the lower authorities. It was further contended that the issue is very much arising from the subject matter considered by the learned Commissioner of Income Tax(A), i.e., the applicability of Section 50C of the Act. Notwithstanding the aforesaid, the learned representative asserted that even if it was to be taken as a new plea, the

assessee was competent to raise it before the Tribunal inasmuch as it involved interpretation of a legal aspect, for which the necessary facts are already on record; and, in this regard, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co.Ltd. Vs. CIT - 293 ITR 383 (SC).

9. We have carefully considered the rival submissions. As our discussion in the earlier paragraphs show, the sum and substance of the preliminary controversy revolves around the applicability or otherwise of section 50C of the Act to the facts and circumstances of the instant case. Shorn of other details, Section 50C(1) of the Act, in so far as it is relevant for our purpose, prescribes that where the sale 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 value adopted by the Stamp Valuation Authority for the purposes of payment of stamp duty, then the value so adopted by the Stamp Valuation Authority be deemed to be the full value of the consideration received or accruing as a result of the transfer for the purposes of computing Capital Gains in the hands of the seller u/s 48 of the Act. Before us, the case sought to be made out by the assessee is that Section 50C, being a deeming provision, has to be strictly interpreted, a proposition which is quite acceptable; and, according to the assessee, Section 50C(1) covers a capital asset being "*land or building or both*" whereas in the instant case, what is transacted is merely leasehold rights in land

and building, which is a distinct 'Capital Asset'. The distinction sought to be made by the assessee is well-founded, and such distinction can be gauged from the Act itself. In this context, we may refer to section 54D(1) of the Act, whose relevant portion reads as under:-

"Subject to the provisions of sub-section (2), where the capital gain arises from the transfer by way of compulsory acquisition under any law of a capital asset, being land or building or any right in land or building, forming part of an industrial undertaking...."

[underlined for emphasis by us]

10. Ostensibly, in Section 54D(1) of the Act, the 'capital asset' has been understood to be 'land or building or any right in land or building', thereby supporting the distinction sought to be canvassed before us. On the contrary, the phraseology in section 50C(1) of the Act only covers 'land or building or both' and does not refer to "any right in land or building".

11. Thus, the expression 'land or building' in its coverage is quite distinct from the expression 'any right in land or building'. The legislature, in its wisdom, has used the expression 'land or building or both' in Section 50C(1) of the Act, and not the expression 'any right in land or building'. Therefore, the express use of one expression would exclude the other, a legal premise which is supported by the judgment of Hon'ble Supreme Court in the case of GVK

Industries Ltd. Vs. ITO – (2011) 4 SCC 36 (SC). In this view of the matter, in our considered opinion, the point sought to be raised by the assessee deserves to be upheld. Such a distinction also has found approval of the Hon'ble Bombay High Court in the case of C.I.T. vs Greenfield Hotels & Estates Pvt. Ltd. (supra) and other Tribunal decisions which have been referred to in the earlier part of this order. Apart from that, we find that a recent decision of our Coordinate Bench in the case of of Manish Traders vs ITO in ITA No. 4481/D/2016 dated 22.7.2019 (reported in 2019 (7) TMI 1268 – ITAT Delhi has observed that assessee's leasehold right for a period of 90 years in question is a capital asset to which provisions contained u/s 50C are not applicable.

12. Now, we may turn to the argument of the learned C.I.T. DR that it is impermissible for the assessee to agitate the aforesaid point because the same has not been raised before the lower authorities. We have given our anxious thought to the aforesaid plea and find that the same is untenable as misconceived. Firstly, it is nobody's case that the action of the lower authorities of invoking Section 50C of the Act in the present case is not being resisted by the assessee. In fact, right from the assessment stage, assessee has resisted the same. In fact, the point canvassed by the assessee is directly emanating from the phraseology of section 50C(1) of the Act itself; and, therefore, it cannot be construed to be an issue which was not the subject matter of consideration by the lower authorities. Evidently, Section 50C has been the bone of contention

between both the assessee and the Revenue right from the stage of assessment. However, even if for the sake of argument, it is understood to be a new plea, it does not change the complexion of the dispute, inasmuch as the subject matter of the dispute remains to be the efficacy or otherwise of the action of the Assessing Officer of invoking section 50C of the Act. More importantly, it has to be appreciated that the point of law raised by the assessee is competent to be adjudicated, based on the accepted factual position, which is available on record. In fact, we find that copies of the sale deed/ tripartite lease deed were furnished before the Assessing Officer and the communication of the Assessing Officer to the DVO dated 27.12.2017, a copy of which is placed at page 26 to 28 of the Paper Book reveals that the same has been forwarded by him to the DVO. In fact, the report of the DVO dated 21.6.2018 reveals that the nature of property being 'lease hold', has been specifically noted. Thus, in our considered opinion, there is no merit in the plea of the Ld. C.I.T. DR to prevent the assessee from pursuing the aforesaid argument before us. The defence by the C.I.T. DR, in our view, is misplaced and is hereby negated.

13. In view of the aforesaid factual position and in law, we find that the present transaction of six properties in question does not warrant invoking of section 50C(1) of the Act as the property in question is not of the nature covered by section 50C(1) of the Act. Therefore, on this point itself, we set

aside the order of the ld. Commissioner of Income Tax(A) and direct the Assessing Officer to delete the addition.

14. Since the assessee has succeeded on the above preliminary plea, all other aspects of the dispute manifested in the Grounds of Appeal are rendered academic, and are not being adjudicated for the present.

15. In the result, the appeal of the assessee is allowed as above.

Order pronounced on 12th October, 2020.

Sd/- Sd/-

(SUDHANSHU SRIVASTAVA) **(G.S. PANNU)**
JUDICIAL MEMBER **VICE PRESIDENT**

DATED: 12th October, 2020
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

By Order

Asstt. Registrar
ITAT, New Delhi