



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"A" BENCH, MUMBAI**  
**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND**  
**SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA no.6023/Mum./2014  
(Assessment Year : 2010-11)

Shri Keshavji Bhuralal Gala  
D/3, Sahyadri Society  
Aarey Road, Goregaon (E)  
Mumbai 400 063 – AACPG2088A

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Range-24(3), Mumbai

..... Respondent

ITA no.4938/Mum./2016  
(Assessment Year : 2012-13)

Shri Keshavji Bhuralal Gala  
D/3, Sahyadri Society  
Aarey Road, Goregaon (E)  
Mumbai 400 063 – AACPG2088A

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Range-24(3), Mumbai

..... Respondent

Assessee by : Shri V. Sridharan a/w  
Shri Prakash Shah  
Revenue by : Shri Rajesh Kumar Yadav

Date of Hearing – 12.10.2017

Date of Order – 08.01.2018

**ORDER****PER SAKTIJIT DEY, J.M.**

Captioned appeals by the same assessee are against two separate orders of the learned Commissioner (Appeals), Mumbai, pertaining to assessment year 2010-11 and 2012-13.

**ITA NO.6023/Mum./2014 – A.Y. 2010-11**

2. The solitary grievance of the assessee in the present appeal relates to addition of an amount of ₹ 1,95,03,678 as perquisite in lieu of salary under section 17(2)(iii) of the Income-tax Act, 1961 (for short "*the Act*").
3. Brief facts relating to the issue in dispute are, the assessee is an individual. For the assessment year under dispute, the assessee filed his return of income on 1<sup>st</sup> April 2011, declaring total income of ₹ 19,23,229. During the assessment proceeding, on the basis AIR information that assessee has entered into transaction relating to purchase of properties, the Assessing Officer called upon the assessee to furnish the necessary details. On a perusal of the details furnished by the assessee, he found that in the relevant previous year, the assessee and his wife as co-owners have purchased certain immovable properties from M/s. Su Yojana Impex Pvt. Ltd., wherein the assessee is also a director. Further, on verifying the details, he

found that as per the stamp duty valuation, the market value of the properties purchased is much higher than the value at which the assessee has purchased the properties. Therefore, the Assessing Officer was of the view that by selling properties at a price lower than the market value the company has given a benefit to the assessee which is in the nature of perquisite as provided under section 17(2)(iii) of the Act. Accordingly, he directed the assessee to explain why the difference between the market value and actual sale value should not be treated as perquisite in lieu of salary given to the assessee. In reply to the query raised by the Assessing Officer, in sum and substance, the assessee submitted that he is not an employee of the company. There being no employer–employee relationship, granting benefit by way of perquisite in lieu of salary under section 17(2)(iii) of the Act is totally untenable. However, the Assessing Officer did not find merit in the submissions of the assessee. He observed, the provision of section 17(2)(iii) of the Act will be applicable to any director of a company irrespective of the fact whether he is a managing director or executive director or a director with a substantial interest. He also observed, since the assessee was appointed as a director for smoothing the process of clearing the tenants from the project site for enabling faster development, the company as an employer has assigned certain works to the assessee as an employee. In turn, the company has provided shops at commercial rate which is in lieu of salary. The Assessing

Officer observed, though, the assessee had not received any benefit from the company by way of salary, however, he has received indirect benefit by getting the shops at lower rates than the prevailing market rate. Accordingly, he treated the difference of ₹ 1,95,03,678 between the stamp duty value and the actual sale value as perquisite in lieu of salary as per section 17(2)(iii) of the Act and added to the income of the assessee. Being aggrieved of such addition made by the Assessing Officer, the assessee preferred an appeal before the first appellate authority.

4. The learned Commissioner (Appeals), however, upheld the view expressed by the Assessing Officer. Of-course, he directed the Assessing Officer to consider assessee's claim that the assessee being joint owner of the property with his wife having 50% share, the entire amount cannot can be added at the hands of the assessee.

5. Learned Counsel, Shri V. Sridharan, appearing for the assessee submitted that the assessee is neither a whole time director of the company nor he is a shareholder of the company. He submitted, the assessee is full time engaged in his own stationery business carried out for the past so many years. He submitted, the assessee became a director of the company to protect his own interest and to keep track of the development of the project so as to protect his own capital investment. He submitted that the assessee had entered into

agreement for purchase of eight shops from the company. It was submitted, the assessee and his wife had paid the entire sale consideration up-front. Further, the developers did not have sufficient standing and experience which required the assessee to keep a vigil on the affairs of the company to ensure completion of the project as per schedule, since, it was a re-development project involving permission from various statutory authorities as well as existing tenants. He submitted, the assessee was not given any salary as per the contract of appointment and there is no employer / employee relationship between the company and the assessee. Further, in the absence of any contract of employment, by merely becoming a director, the assessee does not become an employee of a company. Learned counsel for the assessee submitted, for attracting the provisions of section 17(2)(iii) of the Act the existence of any benefit is a fundamental fact which the Assessing Officer has to positively establish before treating any sum as perquisite. He submitted, merely because there is a difference between the value adopted for payment of stamp duty and actual sale consideration, ipso-facto it cannot be treated as a benefit accruing to the assessee. He submitted, the Assessing Officer has not made any enquiry to bring on record any material to demonstrate that the fair market value of the shops is the value adopted for stamp duty purpose so as to even remotely suggest that the assessee had received any benefit from its alleged employment. He submitted, all

other shops in the re-development project were allotted to the old tenants of the building, except the shops sold to the assessee and his wife. He submitted, as per the settled principle of law, the value of property for payment of stamp duty does not necessarily represent its market value. He submitted, adopting stamp duty value of land or building is a deeming fiction limited to application of provisions of section 50C of the Act for the purpose of computing capital gain, that too, in case of a seller of immovable property. Therefore, such provision cannot be extended to any other provision of the Act and in no case to the buyer of a property. He submitted, the Assessing Officer and the learned Commissioner (Appeals) as a matter of universal application cannot bring in the fiction created under section 50C of the Act for concluding that a benefit has been received by the assessee so as to bring it within the ambit of section 17(2)(iii) of the Act. In support of his submissions the learned counsel for the assessee relied upon a number of case laws including the following decisions:-

- i) CIT v/s Max India Ltd., [2007] 163 taxmand 225 (Del.);*
- ii) Superintendent (DDO) v/s ITO, [2012] 53 SOT 295 (Del.);*
- iii) CIT v/s Sarjan Realities Ltd., [2014] 220 Taxman 112 (Guj.);*
- iv) Mrs. Rekha Agarwal v/s ITO, [2017] 79 taxmann.com 290 (Jai.);*
- v) Atul G. Puranik v/s ITO, [2011] 132 ITD 499 (Mum.).*

6. Learned Departmental Representative relied upon the observations of the Assessing Officer and the learned Commissioner (Appeals).

7. We have patiently and carefully considered rival contentions and perused material on record. We have also applied our mind to the decisions relied upon. It is evident from the factual matrix that the addition made of ₹ 1.95 crore as perquisite under section 17(2)(iii) of the Act was on the reasoning that the assessee has received a benefit in lieu of salary, since, the actual sale consideration received by the assessee is lesser than the value determined for stamp duty purposes. Though, the Assessing Officer in so many words has not referred to the provisions of section 50C of the Act, however, it is manifest, the Assessing Officer importing the fiction created under the deeming provisions of section 50C of the Act has assumed that the fair market value of the property is the value adopted for stamp duty purposes. Hence, he has concluded that the difference between the stamp duty value and actual sale consideration is a benefit given to the assessee as per section 17(2)(iii) of the Act. However, there is nothing on record, either in the assessment proceeding or in the order of the first appellate authority to suggest that the Assessing Officer has made any enquiry to ascertain the fair market value of the property. Even, he has not conducted any enquiry with the company which has sold shops

to the assessee to ascertain the fair market value of the property sold to the assessee. In the absence of any enquiry conducted by the Assessing Officer to demonstrate that the value adopted for stamp duty purpose is the actual fair market value of the properties sold, it cannot be said that a benefit in the nature of perquisite as provided under section 17(2)(iii) of the Act has been given to the assessee by the company.

8. The adoption of stamp duty valuation as the fair market value of an immovable property can be considered only for computation of capital gain arising in case of a seller of immovable property as per the deeming provisions of section 50C of the Act. Without making any enquiry or bringing material on record to demonstrate that the stamp duty value is the actual fair market value of the property, the Assessing Officer cannot make addition in case of a buyer of the property by treating it as perquisite as such deeming provision providing for adoption of stamp duty value as the deemed sale consideration is applicable under specific circumstances and cannot be applied to other provisions of the Act. Further, to treat any sum as a perquisite in lieu of salary as per section 17(2)(iii) of the Act it is necessary and incumbent on the part of the Assessing Officer to establish on record that a benefit in the nature of salary was given by an employer to an employee. In the facts of the present case, the



Assessing Officer has not disputed the fact that neither the assessee is a shareholder of the company nor the whole time director. He was appointed as a director for specific purpose. Even, the Assessing Officer has accepted that the assessee is neither a managing director or executive director or a director with substantial interest. Therefore, merely because the assessee happens to be a director of the company, provisions of section 17(2)(iii) of the Act cannot be applied to the assessee without establishing the fact that the assessee is an employee of the company and the benefit given is in the nature of salary. The Assessing Officer, though, accepts the fact that the assessee has not been given any salary, at the same time he has concluded that by selling the immovable properties at a value lesser than the stamp duty value a benefit in lieu of the salary has been provided to the assessee. In our view, without factually establishing the existence of employer–employee relationship between the company and the assessee it cannot be assumed that the assessee has been given a benefit in lieu of salary, even, in the absence of contract of employment between the company and the assessee. This is so because as per section 17(2)(iii)(a) of the Act, the director to whom any benefit or amenity is granted must be an employee of the company. In this context, we may refer to the following decisions:–

- i) CIT v/s Lady Navajvai R.J. Tata, 15 ITR 8; and*
- ii) CIT v/s Laxmipati Singhania, 92 ITR 598.*

9. Moreover, as observed by us earlier, merely on the basis of the difference between stamp duty valuation and actual sale consideration the Assessing Officer has concluded that a benefit in the nature of perquisite has been given to the assessee by the company. However, there is nothing on record nor any positive finding by the Assessing Officer on the basis of any enquiry to suggest that the fair market value is the value determined for stamp duty purpose. There is no allegation by the Assessing Officer that any consideration over and above the sale value has changed hands. That being the case, the addition made by the Assessing Officer by treating the difference in value between stamp duty valuation and actual sale value cannot be treated as perquisite u/s 17(2)(iii) of the Act. In this context, we may refer to the decision of the Tribunal, Mumbai Bench, in ACIT v/s Sandeep Srivastava, ITA no.6409/Mum./2012 dated 8<sup>th</sup> July 2015. In any case of the matter, the legal fiction created u/s 50C of the Act insofar as it enables the Assessing Officer to adopt the value for stamp duty purpose as the deemed sale consideration cannot be extended to assess the buyer of the immovable properties to tax on the differential amount. In this context, it is profitable to refer to the following observations of the Hon'ble Delhi High Court in CIT v/s Khubsurat Resorts Pvt. Ltd., 28 taxmann.com 93.

*"15. This Court is of the opinion that the express provision of Section 50-C enabling the revenue to treat the value declared by an assessee for payment of stamp duty, ipso facto, cannot be a legitimate ground for concluding that there was undervaluation, in the acquisition of immovable property. If Parliamentary intention was to enable such a finding, a provision akin to Section 50-C would have been included in the statute book, to assess income on the basis of a similar fiction in the case of the assessee who acquires such an asset. No doubt, the declaration of a higher cost for acquisition for stamp duty might be the starting point for an inquiry in that regard; that inquiry might extend to analyzing sale or transfer deeds executed in respect of ITA 776/2011 Page 12 similar or neighbouring properties, contemporaneously at the time of the transaction. Yet, the finding cannot start and conclude with the fact that such stamp duty value or basis is higher than the consideration mentioned in the deed. The compulsion for such higher value, is the mandate of the Stamp Act, and provisions which levy stamp duty at pre-determined or notified dates. In the present case, the revenue did not rely on any objective fact or circumstances; consequently, the Court holds that there is no infirmity in the approach of the lower authorities and the Tribunal, granting relief to the assessee. This question is accordingly answered in favour of the assessee, and against the revenue."*

10. Though, the Assessing Officer has consciously not referred to the provisions of section 50C of the Act, however, there is no room for doubt that applying the deeming fiction of section 50C, the Assessing Officer has adopted the stamp duty value as the deemed sale consideration while making the disputed addition. Therefore, in view of the aforesaid, we hold that the addition made of ₹ 1.95 crore is unsustainable in law. Accordingly, we delete the same.

11. In the result, appeal is allowed.

12. Facts and issues involved in this appeal are more or less identical to the issues raised in ITA no.6023/Mum./2014, decided in the earlier part of the order, except, the fact that in the impugned assessment year the learned Commissioner (Appeals) while upholding the addition made of ₹ 49,72,740 as perquisite in lieu of salary u/s 17(2)(iii) has also upheld the addition on alternative grounds i.e., it is adventure in the nature of trade / business under the head profit and gain of business or profession as per section 28(iv) of the Act. While doing so, he has also enhanced the income of the assessee by concluding that the benefit accruing to a relative of the director should also be treated as income of the director as per section 2(24)(vi) of the Act. Further, he has also observed that the difference between the stamp duty valuation and actual sale value can be added u/s 56(2)(vii)(b) of the Act.

13. We have heard rival submissions and perused material on record in the light of the decisions relied upon. At the outset, we must observe that in view of our decision in ITA no.6023/Mum./2014, the addition made on account of difference in valuation by stamp duty valuation and actual sale consideration deserves to be deleted and the issue relating to applicability of section 28(iv) and 56(2)(vii)(b) have become redundant. However, since arguments were advanced on these two issues also, for the sake of completeness, we propose to

deal with the aforesaid two issues. As far as the applicability of section 28(iv) is concerned, we are unable to agree with the decision of the first appellate authority, since, the transaction relating to purchase of shop rooms has been shown as an investment activity by the assessee in its books. Moreover, in the assessment year 2010-11, the Department has accepted it as an investment activity. So, if at all there is any benefit or perquisite, even assuming the argument of the Department, it cannot be said to be arising from a business or exercise of a profession by the assessee. In any case of the matter, we have already held that the Assessing Officer has failed to establish that by merely the reason of difference between stamp duty valuation and actual sale consideration actually any benefit did arise and accrue to the assessee. That being the case, it cannot be treated as a profit and gain of business or profession u/s 28(iv) of the Act.

14. As far as applicability of section 56(2)(vii)(b) is concerned, on a careful reading of the said provision, it becomes very much clear that as per the said provision applicable to the relevant assessment year, the difference arising out of stamp duty value and actual sale consideration cannot be treated as income of the assessee as the amendment empowering the Assessing Officer to assess the difference in value as income in case of sale of property for a consideration less than the stamp duty value of the property was incorporated into the

statute by Finance Act, 2013 w.e.f. 1<sup>st</sup> April 2014. As per the provision existing prior to the aforesaid amendment, only in a case where any immovable property is transferred without consideration the Assessing Officer could have been able to consider the stamp duty value of the property as the deemed sale consideration. In the facts of the present case, undisputedly, the transfer of shop rooms to the assessee and his wife was not without consideration. Therefore, as per the provisions of section 56(2)(vii) of the Act as it existed in the relevant assessment year, no addition under the said provision can be made. In any case of the matter, the issue is also covered by the decision of the Co-ordinate Bench in case of Sandeep Srivastava (supra). In view of the aforesaid, we delete the addition made by the Assessing Officer and enhanced by the learned Commissioner (Appeals).

15. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 08.01.2018

**Sd/-**  
**G.S. PANNU**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 08.01.2018**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

(Dy./Asstt. Registrar)  
ITAT, Mumbai