

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. A. K. GARODIA, ACCOUNTANT MEMBER**

ITA No.601/LKW/2011
Assessment Year:2008-09

Asstt. CIT-1 Kanpur	v.	M/s The Upper India Chamber of Commerce 113/47, Swaroop Nagar Kanpur
		PAN/PAN:AAACT5335Q
(Appellant)		(Respondent)

Appellant by:	Shri. Y. P. Srivastava, D.R.		
Respondent by:	Shri. Abhinav Mehrotra, Advocate		
Date of hearing:	19	09	2014
Date of pronouncement:	05	11	2014

ORDER

PER SUNIL KUMAR YADAV:

This appeal is preferred by the Revenue against the order of the Id. CIT(A) on a solitary ground that the Id. CIT(A) has erred in law and on facts in deleting the addition of Rs.43,78,588/- made by the Assessing Officer on account of capital gain arisen out of sale of property at Rs.1,22,58,888/- by applying the provisions of section 50C of the Income-tax Act, 1961 (hereinafter called in short "the Act") without appreciating the facts brought on record by the Assessing Officer during the course of assessment proceedings.

2. During the course of hearing of the appeal, the Id. counsel for the assessee has invited our attention to the fact that the assessee is a society registered under section 12A of the Act. Therefore, provisions of section 50C of the Act cannot be invoked in the case of a society or a charitable

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trust, which is registered under section 12A of the Act. In support of his contention, the Id. counsel for the assessee has placed reliance upon the order of the Tribunal in the case of ACIT vs. Shri. Dwarikadhish Temple Trust, Kanpur in I.T.A. No. 256 & 257/LKW/2011, in which the Tribunal has held that in case the income is to be computed as per sub-section (1A) of section 11 of the Act, if the net consideration for transfer of capital asset of a charitable trust is utilized for acquiring new capital asset, then the whole of the capital gain is exempt. It was further contended that the Id. CIT(A) has adjudicated the issue in the light of the relevant provisions of the Act and also various judicial pronouncements. Therefore, no interference is called for in the order of the Id. CIT(A).

3. The Id. D.R., on the other hand, has placed reliance upon the order of the Assessing Officer.

4. Having given a thoughtful consideration to the rival submissions and from a careful perusal of the orders of the authorities below, we find that undisputedly the assessee is a charitable society and is registered under section 12A of the Act. The question of applicability of provisions of section 50C of the Act on transfer of capital asset in the case of a charitable society was examined by the Tribunal in the case of ACIT vs. Shri. Dwarikadhish Temple Trust, Kanpur in I.T.A. No. 256 & 257/LKW/2011, in which the Tribunal has held that where the entire sale consideration was invested in other capital asset, provisions of section 50C of the Act should not be invoked. The relevant observations of the Tribunal are extracted hereunder:-

"6.1 From the order of CIT(A), we find that the assessee is a charitable and religious trust registered u/s 12A of the Act. It is also noted by the Assessing Officer that the assessee has sold immovable property for total sale consideration of Rs.2.25 lac and the entire sale consideration was invested in other capital asset i.e. fixed asset with

bank. The Assessing Officer invoked the provisions of section 50C of the Act and computed the capital income at Rs.66.38 lac based on the value adopted by stamp duty authorities for stamp duty purposes. We find that the CIT(A) has decided this issue in favour of the assessee by following the Tribunal decision in the case of Gyanchand Batra vs. Income Tax Officer 115 DTR 45 (JP-Trib).

6.2 We also find that it is specifically mentioned in section 50C(1) of the Act that the stamp duty value is to be considered as full value of consideration received or accruing as a result of transfer for the purpose of section 48 of the Act. It is true that the assessee is a charitable trust and the income of the assessee has to be computed u/s 11 of the Act. As per sub section (1A) of section 11 of the Act, if the net consideration for transfer of capital asset of a charitable trust is utilized for acquiring new capital asset, then the whole of the capital gain is exempt. Considering all these facts, we do not find any reason to interfere in the order of CIT(A) on this issue.

6.3 Regarding the reliance placed by Learned D.R. of the Revenue on the judgment of Hon'ble Kerala High Court rendered in the case of Lissie Medical Institutions Vs Commissioner of Income-tax (supra), we find that in that case, it was held by Hon'ble Kerala High Court that claim of depreciation is not allowable on the assets which were considered as application of income at the time of acquisition of assets. In our considered opinion, this judgment is not relevant in the present case.

6.4 As per the above discussion, we find that no interference is called for in the order of CIT(A)."

5. We have also carefully examined the order of the Id. CIT(A) and we find that the Id. CIT(A) has also adjudicated the issue in the light of the

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legal provisions and various judicial pronouncements while holding that section 11(1A) of the Act which lays down a complete system of taxability of capital gains in respect of an institution approved by the CIT under section 12A of the Act is a complete code. The relevant observations of the Id. CIT(A) are extracted hereunder for the sake of reference:-

"The only issue in the appeal is, therefore, whether while taking the Value of Sale of capital Asset being immoveable property in case of an institution registered u/s 12A whether the provisions of section 1(1A) will prevail or deeming provisions of section 50C will apply.

During the course of appellate proceedings Rajiv Mehrotra FCA, counsel for the appellant appeared and argued the case. He also gave the following written submissions:

"As regards why the deemed fair market value (Stamp duty value) of the flats be not considered for the purposes of the calculation of capital gains, it was 'contended by the appellant during the course of the assessment proceedings that the provisions of section 50C of the Income Tax Act, 1961 are not attracted in it's case, as a separate code i.e. section 11(1 A) of the Act exists for taxation of capital gains in case of charitable trusts.

Section 11(1 A) of the Act reads as follows:

"(a) where a capital asset, being property held under trust wholly for charitable or religious purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely:—

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of such capital gain ;

(ii) where only a part of the net consideration is utilised for acquiring the new capital asset, so much of such capital gain as is equal to the amount, if any, by which the amount so utilised exceeds the cost of the transferred asset;

(b) where a capital asset, being property held under trust in part only for such purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the appropriate / fraction of the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely:—

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of the appropriate fraction of such capital gain;

(ii) in any other case, so much of the appropriate fraction of the capital gain as is equal to the amount, if any, by which the appropriate fraction of the amount utilised for acquiring the new asset exceeds the appropriate fraction of the cost of the transferred asset."

Further, 'Net Consideration' and 'cost of the transferred asset' for the purposes of Section 11(1A) of the Income Tax Act, 1961 has been separately defined in the explanation to the said section as under:

"net consideration" means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

"cost of the transferred asset" means the aggregate of the cost of acquisition (as ascertained for the purposes of sections 48 and 49) of the capital asset which is the subject of the transfer and the cost of any improvement thereto within the meaning assigned to that expression in sub-clause (b) of clause (1) of section 55;

It is apparent from the above that though, the cost of transferred assets is computed as per the provisions of section 48 and 49, determination of net consideration for the purposes of the said section has no reference to section 48 and 49. It is computed as defined in explanation to this section"

*He further argued that provision of section 11(1A) are specific provisions whereas provisions of section 50C are general provisions and further that provisions of Section 50C do not start with a non-obstante clause thus as per the rules of interpretation specific provision over ride the general provisions. The principle is *Generalia Specialibus Non Derogant*: General provisions must yield to the special provision Generally speaking, the sections in the Act do not overlap one another and each section deals only with the matter specified therein and goes no further. If a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be assessed under the one, which leaves him with a lighter burden.*

*The literal meaning of the expression 'Generalia Spedalibus Non Derogant' is that general words or things do not derogate from the special. The Courts have held the expression to mean that when there is a conflict between a general and special provision, the latter shall prevail as held in the cases of *CIT vs. Shahzada Nand and Sons* 60 ITR 392 (SC) and *UOI vs. Indian Fisheries (P.) Ltd.* AIR 1966 SC 35, or the general provisions must yield to the special provision.*

Thus by virtue of the above the specific provision whether it applies to taxing of Capital gains is concerned or it applies to the definition of

"Net Consideration" is concerned section 11(1A) being a section enacted specifically for the trusts shall prevail over section 50C.

While justifying the provisions of taxability of trusts and that its assessment has to be done in a totally different manner within the four corners of section 11 to section 13 the Appellant also made the following submissions:

Heads of income under section 14 have no relevance and question of allowing statutory deductions will not arise - The 'income' contemplated by the provisions of section 11 is the real income and not the income as assessed or assessable. Since the income from property held under trust has to be arrived at in a normal commercial manner and when the income from property held under trust as such is excluded, there is no scope of computing the income from property by applying the provisions of section 14 of the Act. Therefore, the question of allowing any statutory deductions as contemplated by the different provisions of the Act dealing with different heads of income in computing the income accumulated does not arise when the, trust loses the benefit of accumulation - Director of Income-tax v. Gsrddharilal Shewnarain Tantia Trust [1993] 199 ITR 215/71 Taxman 150 (Cal.).

"Income" must be understood in commercial sense, and not as 'total income' total assessed - It is not the 'total income' as would be assessed by the ITO that is relevant for the purpose of investing the funds of the trust or assessing the income of the trust. Taking into account the purpose for which the conditions of section 11(1)(a) are imposed, it would be clear that 'income' to be considered will be that which is arrived at in the context of what is available in the hands of the assessee subject to an adjustment of any expenses extraneous to the trust - CIT v. P.S.G. & Sons Charities 1996 Tax LR 477 (Mad.). See also - CIT v. Programme for Community Organisation [1997] 228 ITR 620 (Ker.).

Deemed income (tax deducted at source) must be excluded - CBDT Circular P/LXX-6 dated 19-5-1968 makes it clear that the word 'income' in section 11 (1)(a) must be understood in a commercial sense. Thus, deemed income (i.e. tax deducted at Source) is not to be taken into account for determining the 'application' or 'accumulation' of income – CIT v. Jayashree Charity Trust [19861159ITR 280 (Cal.)

The provisions of section 50C create a limited fiction to the effect that the full Value of consideration shall be substituted in the provisions of section 48 by the amount taken by the sub-registrar for registration purposes. In other words, the fiction contained in section 50C could be applied only for the purpose of computation of capital gains under section 48 and not beyond the said provision. Thus, the same cannot be applied for the purpose of calculating the gain u/s. 11(1A). In view of this, what is relevant for the purpose of section 11(1A) is the reinvestment of the net amount actually realized and not any notional amount as may be adopted by virtue of sec. 50C.

5. The sale proceeds of the capital asset have duly been utilized for the purposes of Investment in FDR's within the prescribed time which has, altogether, not been seen, challenged or commented upon by the AO. Who has not given the credit for the same. We rely on the following judgments:

Deposit in public sector company is an eligible investment - The contention of the revenue that the investment by way of deposit in the public sector company cannot be treated as a new asset acquired with the net consideration, in terms of section 11(1A), is not tenable - CIT v. East India Charitable Trust [1994] 206 ITR 152/73 Taxman 380 (Cal.).

Investment of sale proceeds of shares in fixed deposits is permissible - Investment in fixed deposit made in previous year

relevant to the assessment year 1981-82 out of sale proceeds of shares of companies, amounted to acquiring of another capital assets in terms of section 11(1A) - CIT v. Hindusthan Welfare Trust [1993] 70 Taxman 93/[1994] 206 ITR 138 (Cal.).

Reinvestment in fixed deposits of any duration is permissible - CBDT Circular dated 24-9-1975, declaring that deposits for a period of six months or more could be considered as capital assets for the purpose of section 11(1A), is not in consonance with the general principles of law and it cannot hold the field. Once a deposit is accepted to be an asset, the larger or lesser duration of the term is an immaterial consideration - CIT v. Hindusthan Welfare Trust [1993] 70 Taxman 93/[1994] 206 ITR 138 (Cal.).

Without prejudice to what has been stated above it is further mentioned that even if, the AO applies the provisions of section 50C then also there would have been not liability to income tax. A corollary can be taken from section 54F where also the section while defining the "net consideration" and "Cost of transferred asset" identical wordings have been used as in section 11(1A) and the Jaipur Bench of ITAT in the decision in the case of Gyan Chand Batra vs. ITO (2010) 45 DTK 41 / 133 TTJ 482 (JP)(Trib.) / (Tax World) Vol. XLEV P 89 (August, 2010) has held that

"For the purpose of deduction under section 54F full value of consideration shall be the value as specified in the sale deed for the purpose of computation of capital gains. Provision of section 50C cannot be applicable as it contains only deeming provision. Full value of sale consideration as mentioned in other provisions of the Act is not governed by the meaning of full value of consideration as contained in section 50C of the Act."

Further, in a very recent decision of Shri Gouli Mahadevappa v. ITO [2011] 128 ITO 203, the Hon'ble ITAT, Bangalore Bench has held "Deeming fiction created by virtue of section 50C in determining the 'capital gain' cannot be extended to section 54F as section 54F is a

complete code in itself. Thus, the capital gains arising from transfer of any long term capital asset for purpose of section 54 F has to be worked out by applying section 48 without imposing section 50C into it."

Thus by virtue of interpretation arising out of the above the question of applicability of Section 50C does not arise while working out the "net consideration" from sale of an immoveable asset and thus the action of the Ld AO is bad in law.

SUM UP:

- 1. Heads of income under section 14 have no relevance and question of allowing statutory deductions will not arise - The 'income' contemplated by the provisions of section 11 is the real income and not the income as assessed or assessable in view of the above judgments. Assessment of Trusts is a separate code in itself once an institution has been granted registration u/s 12A.*
- 2. It is abundantly clear that the 'income' occurring in the Act for the purpose of a Trust should be considered what is available in the hands of the assessee i.e. TRUST subject to an adjustment of any expenses extraneous to the trust.*
- 3. Section 11(1A) in itself is a separate specific section which governs the overall taxability of capital gains in a trust and being a specific section it shall prevail over section 50C which is a general section and does not start with a non-obstante clause.*
- 4. In the case of a Trust and for the purpose of Sec. 54F where question of utilization of the funds in case of sale of an asset arises it would be the available funds with the assessee and not the deemed income. This is on the ground that what is, not available with the assessee can never be invested.*
- 5. Section 11(1A) is a complete code in itself and since it is a complete code in itself, the computation of eligible exemption is to be worked out within its framework as far as, far as possible. Being an*

exemption provision, beneficial interpretation is to be given. However, in any interpretation, the maxim 'ut res magis valeat quam par eat' should be kept in mind. The construction that would reduce the legislation to a futility should be avoided, and the alternative that will introduce uncertainty, fiction or confusion into the working of the system should be rejected. An interpretation which leads to unworkable results and absurdity should be avoided.

6. It is further being submitted that deeming fiction contained in any other provision cannot be brought into section 11(1A) being an exemption section. Only the plain meaning of the language has to be construed for the operation of the exemption provisions. The deeming fiction created by virtue of section 50C in determining the capital gain cannot be extended to section 11(1A). Section 11(1A) has to be applied for definite or limited purpose for which it is created. However, the Ld. A.O. without considering the facts of the case and submissions and averments made by the appellant stated that the provisions of section 50C are deeming provisions and misapplied the same in the instant case.

7. Even otherwise the language used in section 54F and 11(1A) regarding the meaning of "net consideration" is same and it has been held that it shall prevail over provisions of section 50C.

8. Ld CIT (A) -2, Kanpur in the case of Dwarikadheesh Temple Trust has deleted the addition when the appellant had invested the net consideration actually received and not the deemed consideration arrived as per the provisions of section 50C. (Order enclosed) .

Thus, the appellant has rightly computed income of the year and Sec. 50C of the Act has no application to the facts of the case.

I have gone through the averments of the appellant. Section 11(1A), which lays down a complete system .of taxability of Capital Gains in respect of an institution approved by the CIT under section 12A, is a complete code. While computing the Capital Gains in this section the

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trust is not entitled to benefits like cost inflation indexation etc. as per section..... whereas while working out capital gain and applying the provisions of section 50C an assessee is entitled to such benefits. Furthermore the section 11(1A) has specifically defined the meaning of "net consideration" for the purposes of capital gains and so the same shall prevail over the deemed sale consideration as provided u/s 50C."

6. Since the Id. CIT(A) has adjudicated the issue in accordance with law, no interference is called for therein. Accordingly we confirm the order of the Id. CIT(A).

7. In the result, appeal of the Revenue stands dismissed.

Order was pronounced in the open court on the date mentioned on the caption page.

Sd/-
[A. K. GARODIA]
ACCOUNTANT MEMBER

Sd/-
[SUNIL KUMAR YADAV]
JUDICIAL MEMBER

DATED: 5th November, 2014

JJ:1710

Copy forwarded to:

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

Assistant Registrar