**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER**
**&**
**SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.1953/Mum/2020**
(**Assessment Year :2015-16**)
**&**
**ITA No.1954/Mum/2020**
(**Assessment Year :2017-18**)

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| M/s. Sheth Developers Private Limited<br>Ground and 3rd Floor<br>Prius Infinity<br>Paranjape B Scheme<br>Suhash Road,<br>Vile Parle (E), Mumbai-400057 | Vs. | Deputy Commissioner of Income Tax, Central Circle-4(2), Mumbai |
| **PAN/GIR No.AAACS9943H** | | |
| **(Appellant)** | .. | **(Respondent)** |

**ITA No.11/Mum/2021**
(**Assessment Year :2015-16**)
**&**
**ITA No.12/Mum/2021**
(**Assessment Year :2017-18**)

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| Deputy Commissioner of Income Tax, Central Circle-4(2), Mumbai | Vs. | M/s. Sheth Developers Private Limited<br>Ground and 3rd Floor<br>Prius Infinity<br>Paranjape B Scheme<br>Suhash Road,<br>Vile Parle (E), Mumbai-400057 |
| **PAN/GIR No.AAACS9943H** | | |
| **(Appellant)** | .. | **(Respondent)** |

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| Assessee by | Shri K. Shivaram & Shri Rahul Hakani |
| Revenue by | Shri B.K. Bagchi |
| **Date of Hearing** | **08/06/2022** |
| **Date of Pronouncement** | **27/06/2022** |
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## आदेश / O R D E R

***PER BENCH*:**

**ITA No.1953/Mum/2020 & 11/Mum/2021 (A.Y.2015-16)**

These cross appeals in ITA Nos.1953/Mum/2020 & 11/Mum/2020 for A.Y.2015-16 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-52, Mumbai in appeal No.CIT(A), Mumbai-52/10478/2017-18 dated 22/10/2020 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/12/2017 by the ld. Dy. Commissioner of Income Tax, Central Circle 4(2), Mumbai (hereinafter referred to as ld. AO).

**ITA No.1954/Mum/2020 & 12/Mum/2021 (A.Y.2017-18)**

These cross appeals in ITA Nos.1954/Mum/2020 & 12/Mum/2021 for A.Y.2015-16 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-52, Mumbai in appeal No.CIT(A), Mumbai-52/10104/2019-20 dated 15/10/2020 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 16/12/2019 by the ld. Dy. Commissioner of Income Tax, Central Circle 4(2), Mumbai (hereinafter referred to as ld. AO).

Identical issues involved in these appeals and hence, they are taken up together and disposed of by this common order for the sake of convenience.

2. The ld. DR before us requested that appeal for the A.Y.2017-18 may be taken up first. Accordingly, we are taking up the assessee's appeal for A.Y.2017-18 in ITA No.1954/Mum/2020.

2.1. Though the assessee has raised several grounds, the only issue involved in this appeal is whether the ld. CIT(A) was justified in confirming the addition made on account of notional rent from house property in respect of flats held as 'stock in trade' by the assessee in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is in the business of real estate construction and development in India. The ld. AO noted that assessee had certain flats as 'unsold finished stock' in its balance sheet and these represented the house properties owned by the assessee. The details of such unsold finished stock of flats which were shown as 'stock in trade' were furnished by the assessee before the ld. AO together with their cost of construction. The assessee was asked to provide the annual rateable value of those properties by the ld. AO in order to ascertain the annual value of the properties. The assessee contended that it is a builder and had never constructed these houses with the intention of letting them on hire. It was claimed that these flats were constructed for outright sale and the same represents its stock in trade. It was also pleaded that the sale proceeds of these flats were duly reflected as business income in the returns. The ld. AO applied the ratio laid down in the decision of the

Hon'ble Delhi High Court in the case of Ansal Housing Finance and Leasing Ltd., reported in 354 ITR 180 proceeded to determine the deemed income of rent from unsold flats by adopting value of 8.5% of the construction of the property as the fair rent and worked out the taxable income from house property at Rs.35,79,549/- after granting statutory deduction of 30% under the head 'income from house property'. This action of the ld. AO was upheld by the ld. CIT(A).

3.1. It is not in dispute that the unsold flats lying in the balance sheet with the assessee were held as stock in trade by the assessee. It is not in dispute that the sale of flats shall be assessable as business income in the hands of the assessee, being stock in trade. We find that the provisions of Section 23(5) of the Act had been introduced in the statute for taxability of notional rent in respect of properties held as 'stock in trade', has been introduced only from A.Y.2018-19 onwards. Hence, the said provision cannot be made applicable upto A.Y.2017-18. We find that the issue in dispute is no longer res-integra in view of the decision of this Tribunal in the case of Pegasus Properties (P) Ltd., vs. DCIT reported in 193 TTD 514 wherein it was held as under:-

> *5.13. We find that all the decisions relied upon by the Hon'ble Bombay High Court in Mangla Homes Pvt. Ltd., were prior to the decision of the Hon'ble High Court in the case of Chennai Properties referred to supra. This is the background in which all the Tribunal decisions had followed the decision of the Hon'ble Gujarat High Court in the case of Neha Builders reported in 296 ITR 661. We find that the issue in dispute is also covered by the decision of Pune Tribunal in the case of Kumar Properties and Real Estates Pvt. Ltd., vs. DCIT in ITA No.2977/PUN/2017 for A.Y.2013-14 dated 28/04/2021. For the sake of convenience, the entire order is reproduced hereunder:-*
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> > *"This appeal by the assessee is directed against the order passed by the CIT(A)-7, Pune on 01.09.2017 in relation to the assessment year 2013-14.*

*2. The assessee has assailed confirmation of addition of Rs.1,47,65,688/- towards deemed rental income on stock-in-trade of unsold flats/bungalows held by the assessee, as a first major issue. Succinctly, the factual panorama of the case is that the assessee has been engaged in the business of development of properties with the projects `Kumar Infinia' and `Kumar Picasso' ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited having certain unsold flats/bungalows for ready possession at the year end. The AO opined that the assessee ought to have offered deemed notional rental income on such vacant flats/bungalows. The assessee submitted that the flats/bungalows were its stock-in-trade, from which no income could be taxed under the head 'Income from house property'. Relying on judgment of the Hon'ble Delhi High Court in CIT Vs. Ansal Housing Finance and Leasing Company Ltd. (2013) 354 ITR 180 (Del), the AO computed the annual letting value of the unsold flats u/s.23 of the Income-tax Act, 1961 (hereinafter also called `the Act') at Rs.1,47,65,688/- and made addition for the same. The ld. CIT(A) echoed the addition, against which the assessee has approached the Tribunal.*

*3. We have heard the rival submissions through Virtual Court and gone through the relevant material on record. Indisputably, the assessee has been engaged in the business of development of properties. Certain flats/bungalows out of the two buildings were unsold as at the year end. The authorities below have canvassed a view that annual letting value of such unsold flats/bungalows lying as stock-in-trade at the end of the year is income chargeable to tax under the head `Income from house property'. Section 22 is the ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited charging section of Chapter IV-C, `Income from house property', which reads as under:-*

*`The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".' (emphasis supplied by us)*

*4. This section states that the annual value of property (buildings or land appurtenant thereto) held by the assessee as an owner shall be chargeable as `Income from house property'. However, an exception has been carved out, which provides that any such property or its part, which is occupied by the assessee for the purposes of any business or profession carried on by him, the profits of which are chargeable to income-tax, shall be excluded. Thus, in order to fall in the exclusion clause, the following conditions must be satisfied:*

*i. The property or its part should be occupied by the assessee as an owner.*

*ii. Any business or profession should be carried on by the assessee-owner.*
*iii. Occupation of the property should be for the purpose of business or profession iv. Profits of such business or profession should be chargeable to income-tax.*
*ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited*

*5. Only when the above four conditions are cumulatively satisfied that the property or its part goes outside the ken of section 22, not requiring computation of the annual letting value therefrom. Let us see if the above conditions are satisfied in the instant case ad seriatim.*

*6. The first condition is that the property or its part should be occupied by the assessee as an owner. The assessee is engaged in the business of developing buildings. Admittedly, the assessee is owner of the flats/bungalows lying unsold at the year end. Now the question is whether these flats etc. can be said to be `occupied' by the assessee? The term `occupy' has neither been defined in section 2 (general definitions under the Act) nor section 27 (definitions relating to income from house property). Rather it is defined nowhere in the Act. In such a scenario, we will have to understand its connotation in common parlance. The term `occupation' (in land law) has been defined in the Oxford Dictionary of Law to mean `the physical possession and control of land'. Thus, occupation of a property means having its physical possession coupled with dominion rather than the physical possession coupled with actual use. Once a property is in physical possession and control of a ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited person, it is said to be in his occupation, even if it is not actually used by him. Adverting to the facts of the extant case, we find it not to be a case of the AO or that of the ld. DR that the unsold flats etc. were not in the physical possession and control of the assessee. In fact, there is no one other than the assessee having physical possession and control over such flats, thereby making the assessee solely in their `occupation'. Thus the first condition is fulfilled as the flats etc. were occupied by the assessee-owner.*

*7. The second condition is that any business or profession should be carried on by the assessee-owner. Obviously, the assessee is engaged in the business of property development and has returned income from such business.*

*8. The third condition is that the occupation of the property should be for the purpose of business or profession. Crucial words used in the provision linking occupation of property with are `for the purpose of business'. If the property is occupied for the purpose of business, the condition gets satisfied. The expression `for the purpose of business' is of wide amplitude. To fall within its purport, what is essential is that there*

*should be some nexus with the business. Even remote connection with the business satisfies the test ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited of `for the purpose of business'. Section 37(1) of the Act, granting other deductions, also uses similar expression - `for the purposes of the business or profession'. This has been interpreted to be wider in its scope vis-à-vis the expression `for the purpose of making or earning such income' as used in section 57(iii), providing deduction under the head `Income from other sources'. Reverting to section 22, we find that the legislature has used a wider expression: `for the purpose of business' with occupation of the property rather than any narrower expression indicating that the business must be carried on from such property or something like that as a sine qua non for exception. If the intention of the legislature had been to provide exception in a limited manner, it would have used a suitable constrained expression. Coming back to the factual scenario prevailing in the instant case, we find that the purpose of occupation of the flats is to hold them either for readying them for final sale or during the interregnum from the ready stage to sale stage, which satisfies the test of `for the purpose of business'.*

*9. The last condition is that profits of such business or profession should be chargeable to income-tax. It is indisputable that the ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited profits of the business of property development by the assessee are chargeable to income-tax.*

*10. On a bird's-eye view, we find that that flats/bungalows are occupied by the assessee owner; business of property development is carried on by the assessee; the occupation of the flats etc. is for the purpose of business; and profits of such business are chargeable to income-tax. Ergo, all the four conditions for exclusion from section 22 of the Act are cumulatively satisfied in the present case.*

*11. The authorities below have canvassed a view that the annual letting value of flats/bungalows is income chargeable to tax as `Income from house property' by relying on Ansal Housing Finance and Leasing Company Ltd. (supra). There is no doubt that the Hon'ble Delhi High Court in the said case has held that Annual letting value of unsold flats at the year end is chargeable to tax under the head 'Income from house property'. At the same time, we find that the Hon'ble Gujarat High Court in CIT Vs. Neha Builders (Pvt.) Ltd. (2008) 296 ITR 661(Guj) has held that income from the properties held as stock in trade can be treated as Income from business and not as `Income from house property. Our attention has been drawn towards certain Tribunal decisions including ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited Cosmopolis Construction, Pune vs. ITO dated 18.06.2018 (ITA NO. 230 & 231/PUN/2018), wherein, after taking note of both the above judgments and finding none of them from the*

*jurisdictional High Court, a view has been canvassed in favour of the assessee by holding that no income from house property can result in respect of unsold flats held by a builder at the year end. Similar view has been reiterated by the Pune Bench of the Tribunal in Mahanagar Constructions VS. ITO (ITA NO.632/PUN/2018) vide its order dated 5.9.2019.*

*12. At this juncture, it is relevant to mention that the Finance Act, 2017 has inserted sub-section (5) of section 23 w.e.f. 01.04.2018 reading as under:-*

*`Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil.'*

*13. A close scrutiny of the provision inducted by the Finance Act, 2017, transpires that where a property is held as stock-in-trade which is not let out during the year, its annual value for a period of ITA No.2977/PUN/2017 Kumar Properties and Real Estate Private Limited one year, which was later enhanced by the Finance Act, 2019 to two years, from the end of the financial year in which the completion certificate is received, shall be taken as Nil. The amendment has been carried out w.e.f. 1.4.2018 and the Memorandum explaining the provisions of the Finance Bill also clearly provides that this amendment will take effect from 01.04.2018 and will, accordingly apply in relation to the assessment year 2018-19 and subsequent years. Obviously, it is a prospective amendment. The effect of this amendment is that stock-in-trade of buildings etc. shall be considered for computation of annual value under the head 'Income from house property' after one/two years from the end of the financial year in which the certificate of completion of construction of the property is obtained on and from the A.Y. 2018-19. Instantly, we are concerned with the assessment year 2013-14. As such, the amendment cannot apply to the year under consideration. In the absence of the applicability of such an amendment, no income can be said to have accrued to the assessee from unsold flats available as stock-in-trade. We, therefore, overturn the impugned order on this score and delete the addition of Rs.1.47 crore sustained in the first appeal."*

*5.14. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that no addition on account of deemed rental income could be made in respect of unsold stock of flats held as 'stock in trade' upto A.Y.2017-18. However, the amendment has been brought in the statute in Section 23(5) from A.Y.2018-19 providing a*

*moratorium period of two years. Hence, no addition could be made even for A.Y.2018-19 also.*

*5.15. Accordingly, the ground raised by the assessee for all the three years in respect of addition made on account of deemed rental income of unsold stock of flats as 'stock in trade' are allowed."*

3.2. Similar view was also taken by the Co-ordinate Bench of this Tribunal in the case of DCIT vs. Bengal Shapoorji Housing Development Pvt. Ltd., vs. DCIT in ITA No.2927/Mum/2019 dated 13/05/2021.

3.3. Respectfully following the same, we delete the addition made in the sum of Rs.35,79,549/- towards deemed notional rental income in respect of unsold flats held as 'stock in trade'. Accordingly, the addition made in the sum of Rs.35,79,549/- towards notional rent is hereby directed to be deleted both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act.

3.4. In the result, appeal of the assessee for A.Y.2017-18 is allowed.

**ITA No.12/Mum/2021 (A.Y.2017-18) Revenue Appeal**

4. The first ground raised by the Revenue is challenging the deletion of addition of Rs.3,88,500/- made u/s.43CA of the Act holding that the difference in value between the stamp duty authority and the consideration reported by the assessee is less than 10%. During the year under consideration, the assessee sold a property to Mr. Sushil Somany in Athena 'B' wing for Rs.49,36,500/-. The stamp duty value of this property on the date of sale was Rs.53,25,000/-. It is not in dispute that the assessee had held all these properties as 'stock in trade'. The difference between the stamp duty value in terms of Section 43CA of the Act and the full value of consideration reported by the assessee was Rs.3,88,500/-

We find that the difference in value in percentage terms is less than 10%. The ld. AO by applying the provisions of Section 43CA of the Act proceeded to make an addition of Rs.3,88,500/- in the assessment. We find that there is a proviso introduced in Section 43CA of the Act wherein it has been stated that if the difference between the consideration value and the stamp duty value is less than 10%, then no addition is required to be made. This proviso is inserted w.e.f. A.Y.2019-20 onwards. Now, the short point that arises for our consideration is whether this proviso could be given retrospective effect so as to confer benefit to the assessee in the instant case. We find that this issue is no longer res integra in view of the decision of this Tribunal in the case of Maria Fernandes Cheryl vs. Income Tax Officer reported in 187 ITD 738 wherein the third proviso inserted in Section 50C of the Act has been held to be retrospective in operation from 01/04/2003 onwards. Though this decision has been rendered in the context of Section 50C of the Act for a capital asset, the same analogy could be drawn for Section 43CA also for asset held as 'stock in trade'. For the sake of convenience, the relevant operative portion of the said judgement is reproduced hereunder:-

> ***"4.*** *To adjudicate on this issue, only a few material facts need to be taken note of. The assessee before us is non-resident assessee. During the relevant financial period, she sold her flat, being flat no. 101 in Casablanca Building at Chembur, for a consideration of Rs. 75,00,000, even though the valuation of this property, for the purpose of charging stamp duty, was Rs. 79,91,500. The capital gains were thus computed by treating the sale consideration at Rs. 75,00,000, and, accordingly, offered to tax. The Assessing Officer, however, was of the view that in view of the provisions of section 50C, the assessee has to be adopt the Stamp Duty Valuation, which was Rs. 79,91,500, for the purpose of computing the capital gains. The completed assessment was reopened in this backdrop, and the capital gains were computed on the basis of sale consideration being adopted at Rs. 79,91,500. Aggrieved, the assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.*
>
> ***5.*** *It is, at this stage, important to take note of certain important legislative amendments by the Finance Act 2018 and Finance 2020. By Finance Act, 2018,*

*the third proviso to section 50C(1) was inserted, and this proviso provided that "Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five percent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration". This proviso was further amended by the Finance Act 2020, inasmuch as the tolerance band of 5% was increased to 10% by substituting the words "does not exceed one hundred and five percent of the consideration received or accruing" with "does not exceed one hundred and ten percent of the consideration received or accruing". The net result of this amendment is that where the variation in actual sale consideration vis-à-vis the stamp duty valuation does not exceed 10%, the fiction of section 50C will not come into play, and, therefore, capital gains will have to be computed with reference to the actual sale consideration only- disregarding the stamp duty valuation.*

***6.*** *Learned Departmental Representative contends that the amendments can only be prospective in nature as the law states so specifically. The relevant submissions, in his written note, are as follows:*

> *The Honourable Member directed the undersigned to submit a note on the larger question of retrospective applicability of third proviso of Section 50C whereby a variation of 5% wef 1-4-2019 [10% wef 1-4-2021 as Act no. 12 of 2020] is permissible in the sale consideration vis-a-vis valuation adopted by Stamp valuation authorities.*
>
> *In this regard, it is humbly submitted that the Finance Act 2018 specifically mentions that the third proviso will come into force prospectively from 1-4-2019 and likewise the Act No 12 of 2020 enhancing the variation from 5% to 10% also specifically states that the enhanced variation will be effective from 1-4-2021. The relevant amendments and explanatory notes are reproduced below for ready reference:*

*The Finance Act 2018 inserted Second proviso to section 50C as under:*

*Amendment of section 50C.*

*20. In section 50C of the Income-tax Act, in sub-section (1), after the second proviso, the following proviso shall be inserted with effect from the 1st day of April, 2019, namely:—*

> *"**Provided also** that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.".*

*The amendment to Section 50C is explained in Circular 8 of 2018 titled Explanatory Notes to the provisions of The Finance Act 2018 as under:*

*16. Rationalization of section 43CA, section 50C and section 56*

*16.1 Before amendment by the Act, for computing income from business profits (section 43CA), capital gains (section 50C) and other sources (section 56) arising out of transactions in immovable property, the higher of sale consideration or stamp duty value was adopted. The difference was taxed as income both in the hands of the purchaser and the seller.*
*16.2 It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location.*
*16.3 In order to minimize hardship in case of genuine transactions in the real estate sector, section 43CA, section 50C and section 56 of the Income-tax Act have been amended to provide that no adjustments shall be made in a case where the variation between stamp duty value and the sale consideration is not more than five per cent of the sale consideration.*
*16.4 Applicability: These amendments take effect from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20 and subsequent assessment years*
*Explanatory Notes to Finance Act 2020*
*Increase in safe harbour limit of 5 per cent. under section 43CA, 50C and 56 of the Act to 10 per cent.. Section 43CA of the Act, inter alia, provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (i.e. "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 purpose of computing profits and gains from transfer of such assets, be deemed to be the full value of consideration. The said section also provide that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.*

*Section 50C of the Act provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by 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 be deemed to be the full value of the consideration and capital gains shall be computed on the basis of such consideration under section 48 of the Act. The said section also provides that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.*

*Clause (x) of sub-section (2) of section 56 of the Act, inter alia, provides that where any person receives, in any previous year, from any person or persons on or after 1st April, 2017, any immovable property, for a consideration which is*

*less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration shall be charged to tax under the head "income from other sources". It also provide that where the assessee receives any immovable property for a consideration and the stamp duty value of such property exceeds five per cent of the consideration or fifty thousand rupees, whichever is higher, the stamp duty value of such property as exceeds such consideration shall be charged to tax under the head "Income from other sources".*
*Thus, the present provisions of section 43CA, 50C and 56 of the Act provide for safe harbour of five per cent.*
*Representations have been received in this regard requesting that the said safe harbour of five per cent may be increased.*
*It is, therefore, proposed to increase the limit to ten per cent..*
*This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.*

*Thus, the safe harbour limit of 5% is applicable upto AY 2020-21 and 10% is specifically from AY 2021-22 onwards.*

*It is humbly submitted that in the present case the variation is 6.55% which is more than specified safe harbour limit of 5%.*

*It is further humbly submitted that—*

*(a)* *The value determined by Valuation officer is statutorily required to be adopted u/s 50C(2) of Act and in the present case, the AO has already referred the matter to valuation officer and the same is awaited. Hence, it is humbly submitted that deemed sale consideration may be taken as determined u/s 50C(2) of the Act.*

*(b)* *the third proviso is applicable prospectively especially as retrospective effect is neither mentioned in the provisions of section 50C nor in the Explanatory Notes to Finance Act 2018 issued vide Circular 8/2018 ...*

*(c)* *the variation permissible is only 5% as on date and the enhanced variation of 10% is applicable only from 1-4-2021.*

*Lastly it is also submitted that in case the Honourable Tribunal is not inclined to accept the submissions, it is requested that it may kindly be mentioned that relief is being provided as a special case and this decision may not be considered as a precedent.*
***7.*** *These submissions, however, do not impress us. As noted by the Central Board of Direct Taxes circular # 8 of 2018, explaining the reason for the insertion of the third proviso to Section 50C(1), has observed that "It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same*

*area because of a variety of factors, including the shape of the plot or location". Once the CBDT itself accepts that these variations could be on account of a variety of factors, essentially bonafide factors, and, for this reason, Section 50C(1) should not come into play, it was an "unintended consequence" of Section 50(1) that even in such bonafide situations, this provision, which is inherently in the nature of an anti-avoidance provision, is invoked. Once this situation is sought to be addressed, as is the settled legal position- as we will see a little later in our analysis, this situation needs to be addressed in entirety for the entire period in which such legal provisions had effect, and not for a specific time period only. There is no good reason for holding the curative amendment to be only as prospective in effect. Dealing with a somewhat materially identical situation in the case of Rajeev Kumar Agarwal v. Addl. CIT [2014] 45 taxmann.com 555/149 ITD 363 (Agra) wherein a coordinate bench was dealing with the question whether insertion of a proviso to Section 40(a)(i) to cure intended consequence could have retrospective effect, even though not specifically provided for, and speaking through one of us (i.e. the Vice President), the coordinate bench had, after a detailed analysis of the legal position, observed that, "Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced". Referring to this decision, and extensively reproducing from the same, including the portion extracted above, Hon'ble Delhi High Court, in the case of CIT v. Ansal Landmark Township (P.) Ltd. [2015] 61 taxmann.com 45/234 Taxman 825/377 ITR 635 (Delhi), has approved this approach and observed that "the Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance". The same was the path followed by another bench of this Tribunal in the case of Dharamashibhai Sonani v. Asstt. CIT [2016] 75 taxmann.com 141/161 ITD 627 which has been approved by Hon'ble Madras High Court in the judgment reported as CIT v. Vummudi Amarendran [2020] 120 taxmann.com 171/429 ITR 97]. The question that we must take a call on, therefore, is as to what is the rationale behind the insertion of the third proviso to section 50C(1), and if that rationale is to provide a remedy for unintended consequences of the main provision, we must hold that the third proviso to section 50C(1) comes into force with effect from the same date on which the main provision, unintended provisions of which are sought to be nullified, itself was brought into effect. Let us understand what the nature of the provisions of section 50C is. In terms of this provision, if the property is sold below the stamp duty valuation rate, which is often called circle rate, this stamp duty valuation report is assumed as sale consideration for the property in question, and, accordingly, capital gains tax is levied. This deeming fiction to substitute apparent sale considerations by notional consideration computed on the basis of a stamp duty valuation rate, was thus to address the issue with respect to potential evasion of taxes by understating the sale consideration amount in a*

*sale deed. As noted by the CBDT, while explaining the justification for insertion of section 50C, "(t)he Finance Act, 2002, has inserted a new section 50C in the Income-tax Act to make a special provision for determining the full value of consideration in cases of transfer of immovable property". Section 50C, thus, on a conceptual note, is a provision to address capital gains tax evasion on account of understatement of the consideration. Of course, the law provides, under section 50C(2), that wherever an assessee claims that the actual market rate is less than the stamp duty valuation, he can have the matter referred to a Departmental Valuation Officer for the ascertainment of the market value, but then it is a cumbersome procedure and, at the end of the day, every valuation, whether by the departmental valuation officer or under the stamp duty valuation notification, is an estimate, and there can always be bonafide variations, though to a certain limited extent, in these estimations. Unless, therefore, some kind of a tolerance band or a safe harbour provision, in respect of such bonafide variations, is implicit in the scheme of law, the assessees are bound to face undue hardships. The mechanism under section 50C proceeds on the assumption that when the sale consideration is less than the stamp duty valuation, the sale consideration is to be treated as understated. This assumption is, however, laid to rest when the variations between the stated consideration and the stamp duty valuation figure are treated as explained. The insertion of the third proviso to Section 50C(1) provides for this tolerance band with respect to a certain degree of variations between the stamp duty valuation and the stated consideration of an immovable property. In other words, as long as the variations are within the permissible limits, the anti-avoidance provisions of Section 50C do not come into play. As we have noted earlier, the CBDT itself accepts that there could be various bonafide reasons explaining the small variations between the sale consideration of immovable property as disclosed by the assessee vis-à-vis the stamp duty valuation for the said immovable property. Obviously, therefore, disturbing the actual sale consideration, for the purpose of computing capital gains, and adopting a notional figure, for that purpose, will not be justified in such cases. On a conceptual note, an estimation of market price is an estimation nevertheless, even if by a statutory authority like the stamp duty valuation authority, and such a valuation can never be elevated to the status of such a precise computation which admits no variations. The rigour of Section 50C(1) was thus relaxed, and very thoughtfully so, to take these bonafide cases of small variations between the stated sale consideration vis-à-vis stamp duty valuation, out of the scope of adjustments contemplated in the computation of capital gains under this anti-avoidance provision. In our humble understanding, it is a case of a curative amendment to take care of unintended consequences of the scheme of Section 50C. It makes perfect sense, and truly reflects a very pragmatic approach full of compassion and fairness, that just because there is a small variation between the stated sale consideration of a property and stamp duty valuation of the same property, one cannot proceed to draw an inference against the assessee, and subject the assessee to practically prove his being truthful in stating the sale consideration. Clearly, therefore, this insertion of the third proviso to Section 50C(1) is in the nature of a remedial measure to address a bonafide situation where there is little justification for invoking an anti-avoidance provision. Similarly, so far as enhancement of tolerance band to 10% by the Finance Act 2020, is concerned, as noted in the CBDT circular itself, it was done in response to the*

*representations of the stakeholders for enhancement in the tolerance band. Once the Government acknowledged this genuine hardship to the taxpayer and addressed the issue by a suitable amendment in law, the next question was what should be a fair tolerance band for variations in these values. As a responsive Government, which is truly the hallmark of the present Government, even though the initial tolerance band level was taken at 5%, in response to the representations by the stakeholders, this tolerance band, or safe harbour provision, was increased to 10%. There is no particular reason to justify any particular time frame for implementing this enhancement of tolerance band or safe harbour provision. The reasons assigned by the CBDT, i.e., "the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location," was as much valid in 2003 as it is in 2021. There is no variation in the material facts in this respect in 2021 vis-à-vis the material facts in 2003. What holds good in 2021 was also good in 2003. If variations up to 10% need to be tolerated and need not be probed further, under section 50C, in 2021, there were no good reasons to probe such variations, under section 50C, in the earlier periods as well. We are, therefore, satisfied that the amendment in the scheme of Section 50 C(1), by inserting the third proviso thereto and by enhancing the tolerance band for variations between the stated sale consideration vis-à-vis stamp duty valuation to 10%, are curative in nature, and, therefore, these provisions, even though stated to be prospective, must be held to relate back to the date when the related statutory provision of Section 50C, i.e. 1st April 2003. In plain words, what is means is that even if the valuation of a property, for the purpose of stamp duty valuation, is 10% more than the stated sale consideration, the stated sale consideration will be accepted at the face value and the anti-avoidance provisions under section 50C will not be invoked.*

***8.*** *Once legislature very graciously accepts, by introducing the legal amendments in question, that there were lacunas in the provisions of section 50C in the sense that even in the cases of genuine variations between the stated consideration and the stamp duty valuation, anti-avoidance provisions under section 50C could be pressed into service, and thus remedied the law, there is no escape from holding that these amendments are effective with effect from the date on which the related provision, i.e., Section 50C, itself was introduced. These amendments are thus held to be retrospective in effect. In our considered view, therefore, the provisions of the third proviso to Section 50C (1), as they stand now, must be held to be effective with effect from 1st April 2003. We order accordingly. Learned Departmental Representative, however, does not give up. Learned Departmental Representative has suggested that we may mention in our order that "relief is being provided as a special case and this decision may not be considered as a precedent". Nothing can be farther from a judicious approach to the process of dispensation of justice, and such an approach, as is prayed for, is an antithesis of the principle of "equality before the law," which is one of our most cherished constitutional values. Our judicial functioning has to be even-handed, transparent, and predictable, and what we decide for one litigant must hold good for all other similarly placed litigants as well. We, therefore, decline to entertain this plea of the assessee.*

> ***9.*** *We have noted that as against the stated consideration of Rs. 75,00,000, the stamp duty valuation of the property is Rs. 79,91,500. The difference is just Rs. 4,91,500, which is about 6.55% of the stated sale consideration. As the difference between the stated consideration vis-à-vis the stamp duty valuation is admittedly less than 10% of the stated consideration in this case, and in the light of the above discussions, we are of the considered view that section 50C will have no application in the matter. The enhancement in capital gain computation, as made by the Assessing Officer, thus stands disapproved. The assessee gets the relief accordingly.*
> ***10.*** *As we have decided the appeal on the short issue regarding the retrospective effect of the third proviso to section 50C(1), as elaborated above, we see no need to deal with other issues raised in the appeal before us. As of now, those issues are infructuous and do not call for any adjudication at this stage."*

4.1. Respectfully following the same, we hold that the ld. CIT(A) had rightly deleted the addition made in the sum of Rs.3,88,500/- u/s.43CA of the Act both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. In any case, this sum does not fall within the ambit of Explanation to Section 115JB (2) of the Act and hence, the same can never be added back in the computation of book profits u/s.115JB of the Act. Accordingly, the grounds raised by the Revenue in this regard are dismissed.

5. The ground No.3 raised by the Revenue is challenging the action of the ld. CIT(A) in deleting the addition made on account of deemed notional rent in the sum of Rs.35,79,549/- and addition made u/s.43CA of the Act in the sum of Rs.3,88,500/- while computing book profits u/s.115JB of the Act.

5.1. We have heard rival submissions and perused the materials available on record. We have already held that the notional income of Rs.35,74,549/- cannot be added even under normal provisions of the Act vide assessee's appeal for the A.Y.2017-18 supra. Hence, automatically the said sum would have to be deleted while computing book profits u/s.115JB of the Act also.

5.2. Similarly, we have already deleted the addition made u/s.43CA of the Act in the sum of Rs.3,88,500/- supra. Hence, the said sum would have to be deleted while computing book profits u/s.115JB of the Act. In any case, both these items would not fall within the ambit of Explanation 1 to Section 115JB(2) of the Act as the item eligible for addition to book profit u/s.115JB of the Act. Hence, the ld. CIT(A) had rightly deleted the same. Accordingly, the ground No.3 raised by the Revenue is dismissed.

6. The ground No.2 raised by the Revenue is challenging the action of the ld. CIT(A) in allowing the claim of the assessee to carry forward losses on sale of redeemable non-convertible zero coupon bonds, which was neither claimed by the assessee in the original return of income u/s.139(1) of the Act nor in the revised return filed u/s.139(5) of the Act but claimed during the course of assessment proceedings.

6.1. We have heard rival submissions and perused the materials available on record. We find that assessee had subscribed to 276 redeemable non-convertible zero coupon bonds of Rs.1 Crore each aggregating to Rs.276 Crores on 24/08/2010 issued by M/s. Neepa Real Estate Pvt. Ltd. These bonds are redeemable on or before the expiry period of 10 years. The assessee, however, based on the business performance of M/s. Neepa Real Estate Pvt. Ltd and on the basis of market valuation report of Arihant Capital Market Ltd, a registered merchant banker, during the relevant assessment year, proceeded to sell the bonds for a consideration of Rs.88 Crores thereby incurring a loss of Rs.188 Crores (Rs.276 Crores – Rs.88 Crores). This loss is duly reflected in Note No.25 as loss on sale of investment under the head 'other expenses' in the financial statements of the assessee. We find that assessee had however not claimed this loss as

long term capital loss either in the original return of income or revised return of income, due to inadvertence. However, we find that assessee vide its letter dated 14/11/2019 made a fresh claim before the ld. AO seeking for carry forward of this long term capital loss of Rs.188 Crores before the ld. AO. The assessee duly filed a copy of agreement entered into with M/s. Neepa Real Estate Pvt. Ltd together with the valuation report of Arihant Capital Markets Ltd., to justify this claim. The ld. AO did not allow this claim of carry forward of long term capital loss of Rs.188 Crores on the ground that the same was not claimed in the return of income by the assessee and hence, by placing reliance on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd., reported in 284 ITR 323, the assessee is not entitled for carry forward of the same. The assessee however, succeeded on this issue before the ld. CIT(A) who by placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., reported in 349 ITR 336 and also by placing reliance on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd., referred to supra stating that the claim of carry forward of loss of Rs.188 Crores could be allowed by the ld. CIT(A) even though it is not claimed in the return of income by the assessee. The ld. CIT(A) also observed that the restriction placed by the Hon'ble Supreme Court in the case of Goetze India Ltd., relied upon by the ld. AO does not apply to appellate authorities and the same applies only to the ld. AO. Accordingly, he directed the ld. AO to allow the long term capital loss after examining the correctness of its computation.

6.2. We find that the genuinity of the claim of this loss was not doubted by the lower authorities in the instant case. Even the ld. CIT(A) had merely directed the ld. AO to ascertain the correctness of the computation of loss claimed by the assessee. It is a fact that assessee had actually

incurred a loss of Rs.188 Crores in the instant case on sale of non-convertible zero coupon bonds. In view of the decision of Hon'ble Jurisdictional High Court in the case of Pruthvi Share Brokers referred to supra, the loss even though not claimed by the assessee in the return of income would be eligible for carry forward to subsequent years. In any case, the law is very settled that there is no estoppel against this statute and Revenue cannot take undue advantage of the ignorance of the assessee and that Article 265 of the Constitution clearly mandates that no tax shall be collected except by an authority of law. Hence, it is obligatory on the part of the ld. AO to educate the assessee of its legitimate rights and duties. Accordingly, we do not find any infirmity in the action of the ld. CIT(A) granting relief to the assessee in this regard. Accordingly, the ground No.2 raised by the Revenue is dismissed.

6.3. In the result, appeal of the Revenue for A.Y.2017-18 is dismissed.

**ITA No.1953/Mum/2020 (A.Y.2015-16) Assessee Appeal**

7. The only effective issue raised in assessee's appeal is as to whether the assessee is entitled for reduction of Rs.5,51,89,912/- towards an item which is mentioned as an audit qualification in the statutory audit report, while computing book profits u/s.115JB of the Act.

7.1. We have heard rival submissions and perused the materials available on record. We find that assessee had filed its original computation of book profits u/s.115JB of the Act at Rs.14,12,86,867/- together with audit report in form No.29B dated 28/11/2015. Subsequently it had filed its revised book profits at Rs.8,60,96,955/- by filing revising form No.29B dated 30/11/2015 wherein the assessee had reduced an amount of

Rs.5,51,89,912/- under the head 'provision'. This sum represents the reduction as per accounting policy and audit qualification issued by the statutory auditor. This sum represents provision made for expenditure with respect to property tax demand raised by the GMMC with respect to assessee's fixed assets. During the F.Y.2014-15, the assessee had incurred expenses in the capital assets and accordingly, the provision made for this property tax demand also was capitalised by the assessee, however, the auditor was of the view that such expenses towards provision for property tax demand would be revenue in nature and hence, the same ought to have been debited in the profit and loss account. This is the ultimate essence of the audit qualification made by the statutory auditor in the statutory audit report. Now, the moot point is whether the said audit qualification is also to be considered while computing the book profits u/s.115JB of the Act ? We find that this issue is no longer res integra in view of the Co-ordinate Bench decision of this Tribunal in the case of Mukand Ltd., vs. ITO reported in 174 ITD 605 wherein it was held as under:-

> ***"15.*** *We find that in the case of the assessee before us the auditors had by way of notes' at Para 3(vi)(9) and Para 3(vi)(11) of Auditors Report qualified the financial statements and had specifically mentioned that the benefit of waiver of loan on OTS with the lenders had been credited to the profit & loss account of the company prior to the fulfilment of the conditions of the settlement, and that such credit has not yet accrued to the assessee. It is stated by the auditors that taking of such credit which had not yet accrued' to the company had translated the loss to the extent of Rs. 162,30,33,516/-into profit, and the same had an equivalent effect to the reserves and surpluses of the company. Further, the assessee company had in its revised return of income categorically claimed that the waiver of principal and interest amount under OTS with the lenders amounting to Rs. 162,30,33,516/- was not liable to be included in the total income for the purpose of computing the book profit' as per Sec. 115JB of the Act. It is thus a matter of record that the auditors of the assessee company had at the very initial stage disclosed all the particulars, and by way of qualification notes' to the auditors report had mentioned that the benefit of the OTS made with the lenders resulting in waiver of principal and interest had been credited by the assessee company to the profit & loss account prior to the accrual of the same to the assessee company. In our considered view by virtue of sub-section (6) of Sec. 211 of the*

*Companies Act, 1956 the reference to the balance sheet or the profit & loss account of a company shall include the notes' to the accounts giving information required under the said Act. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Delhi in the case of CIT v. Sain Processing and Wvg. Mills (P.) Ltd. [2009] 176 Taxman 448/[2010] 325 ITR 565 (Delhi). The Hon'ble High Court of Delhi in its aforesaid judgment observing that notes' to the accounts form part of the P & loss account by virtue of sub-s. (6) of s. 211 of the Companies Act, 1956, held as under:*

> *"4.8 Having said that, the issue still remains as to whether notes to accounts form part of the accounts, and whether the fact that the current year depreciation which has not been debited to the P&L a/c would in any way deprive the assessee of its claim for the deduction from the 'net profit' in arriving at the figure of "book profit" for the purposes of s. 115J of the Act.*
>
> *4.9 The answer to this poser is found in sub-s. (6) of s. 211 of the Companies Act, which provides that except where the context otherwise requires any reference to a balance sheet or P&L a/c shall include the notes thereon or documents annexed thereto, giving information required to be given and/or allowed to be given in the form of notes or documents by the Companies Act. As already noted it is obligatory under cl. 3(iv) of Part II of Sch. VI to Companies Act to give information with regard to depreciation, which has not been provided for along with the quantum of arrears. According to us, once this information is disclosed in the notes to the account it would clearly fall within the ambit of the Explanation to s. 115J of the Act which defines "book profit" to mean 'net profit' as 'shown' in the P&L a/c for the relevant assessment year.*
>
> *4.10 To our minds, as long as the depreciation which is not charged to P&L a/c but is otherwise disclosed in the notes of the accounts, it would come within the ambit of the expression 'shown' in the P&L a/c, as notes to the account, form part of the P&L a/c by virtue of sub-s. (6) of s. 211 of the Companies Act, 1956. This is quite evident if the provisions of sub-s. (6) of s. 211 of the Companies Act, are read in conjunction with, sub-s. (1A), as well as, the Explanation to s. 115J of the Act."*

*Still further, the coordinate bench of the Tribunal i.e ITAT, Pune in K.K Nag (supra) observing that in view of Sec. 211 of the Companies Act, 1956 the net profit' as shown in the profit and loss account for the purpose of Explanation 1 of the second proviso to Sec. 115JB was to be understood with reference to the notes' to accounts accompanying the annual accounts, has held as under:*

> *"12. In our view, the aforesaid parity of reasoning is squarely applicable in the present situation also, inasmuch as the provisions of section 115J of the Act and 115JB of the Act which are before us, are pari materia in so far as it relates to the obligation on a corporate assessee to prepare its Profit & Loss account for the relevant previous year in accordance with the provisions of Part II & III of Schedule VI to Companies Act, 1956. Therefore, having regard to the aforesaid parity of reasoning, once it is clear that the information towards incremental liability of leave*

> *encashment, which has not been provided in the Profit & Loss account, is otherwise disclosed in the Notes to the accounts, it would clearly fall within the ambit of Explanation 1 to the second Proviso to section 115JB of the Act which defines "book profits" to mean "net profit" as "shown" in the Profit & Loss account for the relevant previous year prepared under sub-section (2) of section 115JB of the Act. Notably, sub-section (2) of section 115JB of the Act imposes an obligation on every assessee to prepare a Profit & Loss account in the relevant previous year in accordance with the provisions of Part II & III to Schedule VI of Companies Act, 1956. At this stage, it would also be pertinent to emphasis the provisions of sub-section (6) of section 211 of the Companies Act, which were referred to by the Hon'ble Delhi High Court in the aforesaid judgment. Subsection (6) of section 211 provides that any reference to a Balance Sheet or Profit & Loss account shall include any Notes thereon giving information required by this Act or is allowed by this Act to be so given. Therefore, in view of the aforesaid statutory provision contained in Companies Act 1956, the impact is that the net profit as shown in the Profit & Loss account for the purposes of Explanation 1 to the second Proviso to section 115JB of the Act is to be understood with reference to the Notes to accounts accompanying the annual accounts also. In this view of the matter, the use of the expression 'net profit' in Explanation 1 to the second Proviso to section 115JB of the Act makes it clear that the impugned incremental liability towards leave encashment not debited to the Profit & Loss account but otherwise disclosed in the Notes to Accounts will have to be taken into account while determining the "book profits" under section 115JB of the Act. In other words, the liability of Rs 8,35,447/- towards leave encashment has to be considered to determine net profit as the information was disclosed in the Notes appended to accounts, which have been held to be part of the accounts of the assessee company. Therefore, we find ample force in the plea of the assessee which, in our opinion, is allowable having regard to the parity of reasoning laid down by the Hon'ble Delhi High Court in the case of Sain Processing & Weaving Mills P. Ltd (supra)."*

*We thus in the backdrop of our aforesaid deliberations on the facts and the settled position of law, are of the considered view that the A.O while determining the book profit' under Sec. 115JB had erred in failing to consider the notes' to the accounts, wherein it was clearly mentioned by the auditors that by crediting the benefit of the amount of waiver of loan' which had not yet accrued' to the company the loss to the extent of Rs. 162,30,33,516/- was translated into profit and the same had an equivalent effect to the reserves and surpluses of the company. In our considered view, now when the auditors of the assessee company had disclosed all the particulars and had qualified the crediting of the amount of Rs. 162,30,33,516/- in the profit & loss account by way of notes' to the accounts, therefore, it was obligatory on the part of the A.O to have considered the same while determining the book profit' under Sec. 115JB of the IT Act. We are unable to persuade ourselves to subscribe to the reading of the profit & loss account in isolation by the A.O, de hors qualification of the same by way of notes' of the auditors to the financial statements. We thus in all fairness are of the considered view that as the A.O had failed to consider the crediting of the waiver of the loan of Rs. 162,30,33,516/- in the profit & loss account in the backdrop of the*

*qualification of the auditors by way of notes' to the accounts in context of the same, therefore, the matter requires to be restored to his file for fresh adjudication. The A.O shall in the course of the set aside' proceedings readjudicate the claim of the assessee that the waiver of loan of Rs. 162,30,33,516/- was not liable to be included while determining the book profit' under Sec. 115JB of the IT Act after taking cognizance of the aforesaid qualifications of the auditors. Needless to say, the A.O shall in the course of the set aside proceedings afford a reasonable opportunity of being heard to the assessee, who shall remain at a liberty to substantiate its claim before him. The Ground of appeal No. 1 is allowed for statistical purposes.*

7.2. We also find that the financial statements prepared in accordance with part II & part III of the Schedule-VI of the Companies Act, 1956, should be read together with notes on accounts and the audit qualifications for the purpose of computing the book profits u/s.115JB of the Act. In our considered opinion, this conjoint reading of financial statements together with notes on accounts and audit report alone would be in full compliance with the provisions of Section 211 of the Companies Act, 1956. Section 115JB mandates that the accounts of the assessee company should be prepared as per the mandate provided in Section 211 of the Companies Act. Hence, we hold that audit report together with the audit qualification and notes on accounts should be read together with the balance sheet and profit and loss account for the purpose of determination of book profits u/s.115JB of the Act. Hence, the adjustment made by the statutory auditor in the revised form No.29B while computing revised book profits u/s.115JB of the Act is in order. Accordingly, we direct the ld. AO to grant deduction of Rs.5,51,89,912/- while computing book profits u/s.115JB of the Act. Accordingly, the grounds raised by the assessee are allowed.

7.3. In the result, appeal of the assessee for A.Y.2015-16 in ITA No.1953/Mum/2020 is allowed.

**ITA No.11/Mum/2021 (Revenue Appeal) A.Y.2015-16**

8. The ground No.1 raised by the Revenue is exactly identical to ground No.1 raised by the Revenue for A.Y.2017-18. Hence, the decision rendered for A.Y.2017-18 shall apply with equal force for A.Y.2015-16 also except with variance in figures and name of the party to whom property is sold.

8.1. Accordingly, the ground No.1 raised by the Revenue is dismissed.

9. Ground No.2 raised by the Revenue is challenging the action of the ld. CIT(A) in deleting the addition made on account of deemed notional rent in the sum of Rs.34,47,883/- and addition made u/s.50C of the Act in the sum of Rs. 3,13,68,213/- while computing book profits u/s.115JB of the Act. We find that the addition made on account of deemed notional rent in the sum of Rs 34,47,883/- was deleted by the ld. CIT(A) under normal provisions of the Act, against which order, the revenue is not in appeal before this tribunal. Hence automatically the said addition would be liable to be deleted in the computation of book profits u/s 115JB of the Act also. To this extent, the Revenue's appeal in ground No.2 is dismissed.

9.1. Similarly, we have already deleted the addition made u/s.50C of the Act in the sum of Rs.313,68,213/- supra in the normal provisions of the Act. Hence, the said sum should have been deleted while computing book profits u/s.115JB of the Act. In any case, this item would not fall within the ambit of Explanation-1 to Section 115JB (2) of the Act as the item eligible for addition to book profit u/s.115JB of the Act. Hence, the ld. CIT(A) had rightly deleted the same. Accordingly, this part of ground No.2 raised by the Revenue is dismissed.

10. In the result, appeal of the Revenue in ITA No.11/Mum/2021 for A.Y.2015-16 is dismissed.

**11. In the result, appeals filed by the Assessee for A.Y.2015-16 & 2017-18 are allowed and appeals filed by the Revenue for A.Y.2015-16 & 2017-18 are dismissed.**

Order pronounced on 27/ 06/2022 by way of proper mentioning in the notice board.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(RAHUL CHAUDHARY)** | **(M.BALAGANESH)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai; Dated 27/06/2022
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
**ITAT, Mumbai**