आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, 'A' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA Nos. 475/JP/2019
निर्धारण वर्ष/Assessment Year :2008-09

Shri Banwari Lal Sharma 45B, Santosh Sagar Colony, Bharampuri, Jaipur	बनाम Vs.	The Income Tax Officer, Ward 1(5), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AKEPS1038A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA Nos. 558/JP/2019
निर्धारण वर्ष/Assessment Year :2008-09

The Income-tax Officer, Ward-1(5), Jaipur	बनाम Vs.	Shri Banwari Lal Sharma 45B, Santosh Sagar Colony, Bharampuri, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AKEPS1038A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Manish Agarwal (CA)
राजस्व की ओर से/ Revenue by : Smt Monisha Choudhary (Jt.CIT)

सुनवाई की तारीख/ Date of Hearing : 25/3/2021
उदघोषणा की तारीख/Date of Pronouncement: 14/06/2021

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are the cross appeals filed by the assessee and by the Revenue which are directed against the order of ld. CIT (A), Kota dated 02.01.2019 pertaining to A.Y. 2008-09.

2. In ITA No. 475/JP/2019, the assessee has taken the following grounds of appeal:-

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming the assessment (set-aside) u/s 144 r.w.s 147 of the Income Tax Act, 1961 passed by ld. AO in the individual capacity of assessee as against "representative assessee of Smt. Pamela Jean Colleco", which is in violation of the direction of Hon'ble ITAT and therefore, the impugned assessment order deserves to be quashed.

2. On the facts and in the circumstances of the case and in law, ld. CIT(A) has grossly erred in confirming the addition to the tune of Rs.29,51,572/- out of addition made by ld. AO. Appellant prays addition confirmed by ld. CIT(A) deserves to be deleted."

3. In ITA No. 558/JP/2019, the Revenue has taken the following grounds of appeal:-

"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was justified in allowing certain concessions in value of the property as against the valuation made by the DVO who is an expert in the field and has taken into consideration all the aspects of the properties particularly the situation of the properties in question?"

4. The ld. AR submitted that in this case, an order was initially passed u/s 163 of the Income Tax Act, 1961 dated 24.03.2011 wherein the assessee was held as Representative Assessee (within the meaning of section 160 of the I.T. Act, 1961) of Smt. Pamela Colleco, a non-resident. The assessee was appointed as the power of attorney holder by Smt. Pamela Colleco in respect of her immovable property situated at 55-A and 55-B, Opp. Central Jail, Agra Road, Jaipur in terms of specific power of attorney made and executed on 21.03.2005. The assessee on the basis of such power of attorney had executed two separate sale deeds on 26.05.2007 for the transfer of the immovable

property under reference and sold the subject property to Shri Vivek Gupta and Shri Ashish Gupta, i.e. one plot to each of the two purchasers.

5. The Ld. AO however, issued notices u/s 163 of the Act by alleging that Smt. Pamela Colleco being a non resident has not paid due taxes on her income from sale of above property, thus assessee (Sh. Banwari Lal Sharma) should be treated as her agent. Thereafter, without giving proper opportunity of hearing to the assessee, the Ld. AO proceeded to pass order u/s 163 of the Act, thereby holding assessee as representative assessee/ agent of Smt. Pamela Colleco. Further, separate orders u/s 163 were also passed in the case of both the purchasers i.e. Sh. Vivek Gupta and Sh. Ashish Gupta.

6. Aggrieved by the aforesaid orders u/s 163, the assessee as well as both the purchasers i.e. Sh. Vivek Gupta and Sh. Ashish Gupta preferred appeals before the Ld. CIT(A), who allowed the appeals of Sh. Vivek Gupta and Sh. Ashish Gupta, however dismissed the appeal of assessee. Thus, Ld. CIT(A) upheld the action of Ld. AO in treating assessee as the agent of Smt. Pamela Colleco, however, held that Sh. Vivek Gupta and Sh. Ashish Gupta could not have been treated as her agents.

7. Aggrieved by the said orders of Ld. CIT(A), the assessee as well as department filed appeal before the ITAT, Jaipur Bench, Jaipur which were clubbed and decided together as ITA Nos. 890, 952, 958/JP/2012 vide order dated 05.03.2014, wherein, all the three appeals were dismissed as a result of which Assessee was held as the representative assessee for Smt. Pamela Colleco.

8. Simultaneously, the proceedings in the hands of the assessee were re-opened u/s 147 as representative assessee for Smt. Pamela Colleco and the

assessment for the subject assessment year was completed u/s 144/147 of the Income Tax Act, 1961 vide orders dated 29.12.2011 wherein addition on account of long term capital gain at Rs. 6,34,62,356/- was made in the hands of the assessee on protective basis by invoking the provisions of section 50C of the Income Tax Act, 1961. On the other hand, in the case of purchasers i.e. Sh. Vivek Gupta and Sh. Ashish Gupta, assessments were completed u/s 147 / 143(3) of the Act and addition on account of capital gain of Rs. 6,34,62,356/- was made on substantive basis.

9. Against the order of Ld. AO, the assessee preferred an appeal before the Ld. CIT(A), who after holding the assessee as representative assessee of Smt. Pamela Colleco, sustained the addition made on account of long term capital gain on substantive basis in the hands of the assessee.

10. Aggrieved by the said order of Ld. CIT(A), assessee preferred an appeal before the ITAT, Jaipur bench. The ITAT vide its order dated 05.03.2014 set-aside the matter to the Assessing Officer with the directions to refer the matter to valuation officer for determination of the Fair Market Value of the subject property.

11. In compliance of the said directions of the ITAT, the Ld. AO referred the matter to Valuation Officer u/s 55A of the Act for the purpose of determination of FMV of the subject property. Thereafter, by misinterpreting the valuation done by the Valuation Officer, the Ld. AO passed the impugned assessment order u/s 147/143(3)/(set-aside) of the Act and made addition of Rs. 2,83,94,600/- on account of capital gains in the hands of assessee by taking the full value of consideration u/s 50C at Rs. 6,00,00,000/- in respect of both the plots.

12. Aggrieved by the said assessment order, the assessee preferred appeal before ld. CIT(A), which was decided vide order dated 02.01.2019, wherein ld. CIT(A) directed the ld. AO to consider value of each house at Rs.1,72,78,488/- as against Rs.3,00,00,000/- originally valued by the DVO and adopted by the by ld. AO.

13. In the aforesaid factual background of the matter, the ld AR submitted that in ground no. 1 , the assessee has challenged the action of ld. CIT(A) in confirming the assessment (set aside) u/s 144 r.w.s.147 of the Income Tax Act passed by ld. AO in his "Individual capacity" as against "representative assessee of Smt. Pamela Jean Colleco".

14. It was submitted that as narrated above, the final outcome after the orders of ITAT remained that, the action of Ld. AO in treating the assessee as representative assessee of Smt. Pamela Jean Colleco was upheld, however, the matter was set-aside to the file of Assessing Officer with the clear direction to pass fresh assessment order and compute capital gains in the hands of assessee, after properly determining the Fair Market Value (FMV) of the subject property by referring the matter to Valuation Officer and to give proper opportunity of hearing to the assessee.

15. Further, our reference was drawn to the first page of the impugned assessment order which carries the following narration and particulars about the assessee:

1. Assessee's name is shown as : Shri Banwari Lal Sharma
2. Assessee's status has been shows as : Individual
3. Nature of assessee's business is shown as : Salary & Capital gain

16. It was submitted that the above narration and particulars of the assessee would show that the assessment order so passed is prima facie illegal and without the authority of law. It must be noted that the original assessment in the hands of assessee was completed in the name of – "Shri Banwari Lal Sharma (As representative assessee of Smt. Pamela Jean Colleco)" thereby showing that the assessee is being assessed in the capacity of representative assessee of Smt. Pamela Jean Colleco. Further, in the original assessment, the status of assessee was shown as "As representative assessee of Smt. Pamela Jean Colleco" and the nature of business was shown as "N.A.". It is thus evident that, when the original assessment was set-aside by the Hon'ble ITAT to the file of Ld. AO with the direction to complete assessment de novo, the same could have been done only in the hands of the assessee in the capacity of representative assessee of Smt. Pamela Jean Colleco and not as an individual. However, the fresh assessment order so passed does not show assessee as representative assessee of Smt. Pamela Jean Colleco, but as an individual. This action of Ld. AO is clearly bad in law and renders the entire assessment order null and void. On appeal, ld. CIT(A) also upheld the validity of Assessment order so passed in "Individual capacity" of assessee by treating the same as mistake curable u/s 292BB of the Act.

17. It was submitted that in the instant case, no income in the shape of capital gain has accrued to the assessee, and therefore, he cannot be assessed with an income which has not accrued to him. Accrual or receipt of income is the basis for charging tax on such income by assessee in his individual capacity. In the instant case however**,** by way of the original assessment order, the assessee was taxed by virtue of a legal fiction created by section 160 of the Act, with effect of which assessee was assessed as representative assessee of Smt. Pamela Jean Colleco. In other words, by way of this legal fiction, assessee

was required to pay tax in respect of the income accrued to and received by Smt. Pamela Jean Colleco.

18. It was submitted that tax can be charged from a person only by the authority of law, and not as per the diktat or convenience of the Assessing Officer. It is submitted that in the set-aside assessment order, the Ld. AO has flouted the basic provisions of the Income Tax law and imposed tax liability in his individual name, in respect of an income which never accrued to the assessee, nor received by the assessee. Therefore, the action of Ld. AO is clearly bad in law and the assessment order so passed, deserves to be quashed.

19. It was submitted that the action of the Ld. AO amounts to illegality and a substantive error and cannot be said to be mere clerical and therefore is not able to be cured u/s 292B of the Act. It must be noted that not just in the subject matter of Assessment Order, but also in the entire body of the assessment order, the Ld. AO has not mentioned the assessee as representative assessee of Smt. Pamela Jean Colleco, rather has assessed him as individual only.

20. At this juncture, provisions of section 292BB of the Act are reproduced herewith for the sake of convenience:

292BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—

(a) not served upon him; or

(b) not served upon him in time; or

(c) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.]

21. It was submitted that section 292BB is an exclusive definition and specifically provides that a notice shall be deemed to be served in a situation that assessee has cooperated/ attended / participated in assessment/ re assessment proceedings and no objection regarding non receipt of notice was filed during assessment stage. In other words, section 292BB cures only procedural infirmities that too specifically relating to service of notice. In fact, there are various judicial pronouncements which hold that if a validly issued notice is served to unauthorized person or at a wrong address, such defects are not curable and render entire proceedings null and void even though the intention of AO may not be that. Similarly, notice u/s 148 issued in the name of dead person, even though served on legal representative (even if all subsequent notices issued in the name of Legal representative) of such deceased renders entire proceedings bad in law even though intention of assessing officer may be to assess legal representative of deceased. Your honours would appreciate that passing assessment order in the "Individual capacity" as against in "Representative capacity of Non resident" is as good as passing assessment order in the name of some other person which is a serious error and not curable. It was accordingly submitted that the order of Ld. AO may please be declared illegal /void and be quashed accordingly.

22. In her submissions, the ld DR vehemently opposed the contentions advanced by the ld AR and submitted that the order passed by the AO in the

set-aside proceedings was to give effect to the directions of the Tribunal in the original proceedings and thus, has to be read in continuation of earlier proceedings and the order has been passed in the capacity of representative capacity only. It was further submitted that the fact that the AO mentioning the status of the assessee as individual is merely a nomenclature issue and is a curable defect u/s 292B. It doesn't change the substance of the order and clearly doesn't render the order so passed as null and void as so contended by the assessee. Further, she has relied on the findings of the ld CIT(A) which read as under:

> *"On a perusal of a series of earlier orders in the matter, it is apparent that in its order dt. 05.03.2014, the ITAT Jaipur partly allowed the appeal of the assessee setting aside the same to the A.O. with a direction to refer the matter to appropriate authority for determination of the FMV of the property on the date of sale. It was also settled that the assessee being a representative or agent as a POA holder of Ms Pamela Colleco, the capital gain was to be assessed substantively in his hands. The A.O. in the 'set aside' proceedings referred the matter to the valuation officer u/s 55A & passed the order u/s 147/ 143(3) based on the report by making an addition of Rs.2,83,94,600/- on account of capital gains in the hands of the assessee as an individual by taking the full value of consideration u/s 50C of Rs.6 crores in respect of both the plots.*
>
> *The appeal of the I.T. Department against the order of the ITAT was dismissed by the Hon'ble Rajasthan High Court stating that the Tribunal holding S. Banwari Lal Sharma to be representative agent of land owner Ms. Pamella Colleco was not required to be interfered & the two buyers were not to be treated as representative assessees.*

From the orders of the higher authorities, it is clear that the addition under capital gains was required to be made on a 'Substantive basis' in the hands of the assessee being an agent or representative. The liability towards tax was to be met by him. The A/R has raised an additional legal ground no. 5 & 5.1 in this regard. In my opinion, once the liability of assessee was crystallized towards capital gains on the land sold, the only issue was towards the valuation of the land & assessment of the capital gains thereon instead of the capacity in which the liability was to be paid being a representative or an individual.

There is no inherent preference for assessment directly on the principal and the only limitation on the assessment vis-a-vis these two parties, i.e., agent and the principal, are concerned, that once an assessment is made on one of them, the assessment for the same income thereafter cannot be made on the other.

The fact that there was no evidence of the assessee having transferred any amount of the sale consideration to his alleged "principal" Pamella Colleco, made him liable for capital gains in his capacity as an individual & I see nothing wrong in the said assessment accordingly once the direction of the superior court was clear that the liability of capital gains was assessable on "Substantive" basis in hands of the assessee. The initial dispute was only in regard to the assessee's denial that as power of attorney holder of Pamella Colleco he should be liable for capital gains tax & should only be a representative assessee u/s 163 of the I.T. Act. Now the A.O. assessing the said amount in his hands substantively cannot cause any prejudice towards the directions given by ITAT in my opinion because the important aspect of those directions in the set aside order was getting FMV assessed of the sold

property for capital gains tax recovery purposes which had been the other main grievance of the assessee. This was therefore purely a 'nomenclature' issue & did not have any effect on the assessment of capital gains related income.

As per Section 292B- No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in. such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

High Court of Allahabad in Commissioner of Income-tax v. Vinod Kumar 38 taxmann.com 172 (Allahabad) opined that-

Whether non-mentioning of status of assessee would not invalidate notice under section 158BC, as it is only a mistake, which is curable- Held, yes.

Thus, I am not convinced in favour of the assessee on this Ground because the primary intent of the A.O was to bring the Income from Capital Gains to tax and merely mentioning the assessee's status as Individual instead of Representative of the assessee was a curable mistake and did not change the taxability of the Capital Gains income in his hands.

The order does not require any interference on this Ground & this ground is therefore being dismissed."

23. We have heard the rival submissions and purused the material available on record. In this ground of appeal, the assessee has challenged the action of the AO in passing the impugned assessment order in the individual capacity of the assessee as against in the capacity of representative assessee of Smt. Pamela Jean Colleco, a non-resident. In this regard, it is noted that the present assessment proceedings have its origin way back in year 2011 where the assessee was held as an agent u/s 163(1)(c) of Smt. Pamela Jean Colleco in respect of capital gains on sale of two immoveable properties by virtue of order u/s 163 dated 24.03.2011 passed by the AO and thus a representative assessee u/s 160(1)(i) of the Act. The assessee unsuccessfully contested the matter before the ld CIT(A) and thereafter, before the Tribunal where the Tribunal vide its order dated 5.03.2014 confirmed the action of the AO in treating the assessee as representative assessee of Smt. Pamela Jean Colleco. Admittedly, this matter has attained finality in absence of any further appeal by the assessee and the action of the AO in treating the assessee as representative assessee therefore carries all the necessary consequences and implications in terms of section 160, 161 and 162 of the Act. As part of the same, the AO initiated the proceedings u/s 147 by issue of notice u/s 148 dated 25.03.2011 to the assessee as representative assessee of Smt. Pamela Jean Colleco and the proceedings were thereafter completed by passing of the assessment order u/s 147/144 dated 29.12.2011 where long term capital gains on sale of the two properties was assessed in the hands of the assessee as representative assessee of Smt. Pamela Jean Colleco on protective basis which on appeal by the assessee, was converted into substantive basis by the ld CIT(A). The assessee as well as Revenue carried the matter in further appeal before the Tribunal. The Tribunal vide its order dated 5.03.2014, following its order of even date 5.03.2014, held the assessee as representative assessee of Smt. Pamela Jean Colleco, and didn't find any merit and rejected the ground of appeal taken by the assessee wherein he has again challenged that there has

been no action taken by the AO in issuing any notice to Smt. Pamela Jean Colleco and making any efforts to tax the income in her hands. The Tribunal also rejected the ground of appeal taken by the Revenue wherein it has challenged the action of the ld CIT(A) in holding the assessee as sole representative of Smt. Pamela Jean Colleco and in converting the assessment from protective to substantive basis. The relevant findings of the Tribunal read as under:

"2.6 The Grounds No. 1 and 2 of the assessee's appeal and Ground No. 1 & 2 of revenue's appeal pertain to the issue of addition of Rs. 6,34,62,356/- made as long term capital gain in the hands of the assessee by treating the assessee as a representative assessee for Smt. Pamela Colleco, the real and actual owner of the property on substantive basis. While deciding the appeal of the assessee in ITA No. 890/JP/12 we have already held that Shri Banwari Lal Sharma, the assessee, as the agent u/s 163(1)(c) of the Act and a 'representative assessee' of Smt. Pamela Colleco, within the meaning of section 160 of the Act. Thus, by following the reasons given therein, we find no merit in the grounds raised by both the parties. Accordingly, the ground Nos. 1 and 2 of the assessee's appeal and ground Nos. 1 and 2 of the Revenue's appeal are dismissed."

24. Thereafter, the appeal filed by the Revenue against the order of the Tribunal was rejected by the Hon'ble Rajasthan High Court and as noted from the order of the ld CIT(A), the Hon'ble High Court vide its order 18.09.2017 held that the findings of the Tribunal that Shri. Banwari Lal Sharma to be representative agent of land owner Smt. Pamela Jean Colleco was not required to be interfered & the two buyers were not to be treated as representative assessees and has also taken note of order passed by the AO on remand by the Tribunal for determination of the fair market value. There is apparently no further appeal against the order of the Hon'ble High Court and therefore, as far

as the matter treating the assessee as representative assessee of Smt. Pamela Jean Colleco is concerned, it has attained finality with passing of the order of Hon'ble High Court and the order of the AO passed u/s 147/144 has since merged with the order of the Hon'ble High Court in so far as treating the assessee as representative assessee of Smt. Pamela Jean Colleco is concerned and the same carries the necessary consequences and implication in terms of section 160, 161 and 162 of the Act.

25. Now, coming to the impugned order passed by the AO u/s 147/144/set-aside dated 9.03.2016, we find that the same is pursuant to directions of the Tribunal vide the aforesaid order dated 5.03.2014 wherein the matter was restored to the file of the AO with the following directions:

"3.3 The ld. DR also supported the arguments advanced by the AR of the assessee and submitted that the matter should have been referred to the valuation officer to determine the fair market value of the subject property since the assessee has not accepted the value adopted by the stamp authorities and has challenged it before the competent authority.

3.4 After carefully considering the rival submissions on this issue and after relying on the relevant decisions relating to the issue, we are of the considered opinion that the action of the AO is not legal and for computing the fair market value of the property as on the date of transfer, he should have referred the matter to the valuation officer as provided in section 50C(2)(a) of the Act when the assessee has objected and claimed that the value adopted or assessed by the stamp valuation authorities exceeded the real time fair market value of the property as on the date of transfer. It is a well established law that where the assessee objects to the value adopted or assessed by stamp authorities for the purpose of payment of stamp duty in respect of such transfer, the AO is required and as a matter of law bound to refer the matter to Valuation Officer for

determination of fair market value of such property as on the date of transfer. The Jodhpur bench of ITAT in the case of Meghraj Baid v. ITO, (2008) 114 TTJ Jodh 841, where one of us was constituted in that Bench, has expressed similar view. Thus, by respectfully following the decisions of various Benches of ITAT, in our considered opinion the matter should be restored back to the file of the AO with the direction that the 'valuation issue should be referred for valuation to the departmental valuer in terms of sub-section (2) of section 50C for the determination of the fair market value of this property sold. Therefore, the matter is set aside to the file of the AO with the directions as stated above. Accordingly the Ground No. 3 is disposed off for statistical purposes."

26. We find that the matter was restored by the Tribunal to the file of the AO for the limited purposes of determination of fair market value of the properties so sold by referring the matter to the DVO in terms of section 50C(2) of the Act. Besides the fact that the Tribunal has confirmed the taxability of the assessee in the status of representative assessee as we have noted above, there was no other direction or findings of the Tribunal as far as any remaining matter emanating from the order originally passed by the AO u/s 144/147 of the Act is concerned. Therefore, the impugned order so passed by the AO is clearly not an independent and standalone or denovo order rather it is an order in continuation of earlier order passed u/s 147/144, proceedings in respect of which were initiated by issuance of notice u/s 148 and also pursuant to directions of the Tribunal, in order to give effect to such directions, such an order has been passed and not on account of any fresh jurisdiction acquired by the AO. The order so passed therefore have to be read and understood accordingly and not otherwise and what needs to be seen is as to whether the directions so given by the Tribunal has been complied with or not by the AO while passing the impugned order and which we find has been duly followed by

the AO by referring the matter to the DVO and taking into consideration the valuation report so submitted by him, determination of fair market value. In fact, if we look at the body of the order so passed in the set-aside proceedings, it refers to the order of the Tribunal and directions so given and also the past history of the case and infact, towards the end, it does provide that "Since the assessee has failed to make payment of Long Term Capital Gain tax on account of transfer of capital assets which were sold by the assessee as representative assessee of the foreigner, whereon tax @ 20% on 2,83,94,600/- as capital gain was required to be paid by the seller and since seller did not pay the capital gain tax, it was duty of the assessee as an agent and representative assessee of the seller which assessee failed to make payment of tax." which in effect, demonstrate consistent application of and in continuation of the earlier orders passed in the capacity of the representative assessee. Further, as rightly pointed out by the ld CIT(A), mere mentioning the assessee's status as "Individual" instead of representative assessee of Smt. Pamela Jean Colleco is a curable defect in terms of section 292B of the Act as the assessment order so passed is in substance and effect has been passed in the status of representative assessee in conformity with and to give effect to the directions of the tribunal and thus, according to the intent and purpose of this Act. In light of aforesaid discussions, we are of the considered view that the order so passed by the AO in the impugned set-aside proceedings u/s 147/144/set-aside has been passed in the capacity of the assessee as representative assessee of Smt. Pamela Jean Colleco and continues to carry the same consequences and implication in terms of section 160, 161 and 162 of the Act as the original order passed u/s 147/144 except for the variation of the fair market value which the assessee has challenged and we shall be dealing while adjudicating the subsequent ground of appeal. In the result, we donot find any merit in the ground so taken by the assessee and the same is hereby dismissed.

27. Now, coming to the merits of the case, we refer to assessee's ground of appeal No. 2 and department's ground of appeal wherein the assessee has challenged part addition of Rs.29,51,572/- sustained by ld.CIT(A) out of addition of Rs. 2,83,94,596/- made by AO, whereas department has challenged the relief of Rs 2,54,43,024/- granted by ld.CIT(A).

28. It was submitted by the ld AR that in the original proceedings, on appeal by the assessee, the Tribunal had set-aside the matter relating to determination of the Fair Market Value of the two properties to the file of the AO. It was submitted that during the course of set-aside assessment proceedings, the Ld. AO issued a letter dated 27.08.2014 to the Valuation Officer, requesting him to provide valuation report in respect of the aforesaid two plots. The Valuation Officer issued notices to the assessee seeking his submissions and in response to the same, the assessee submitted detailed submissions/objections before the Valuation Officer vide letter dated 21.05.2015 and complete details as required by the Valuation Officer were also supplied by the assessee. However without considering the objections raised by assessee against the proposed valuation, the Valuation Officer provided his valuation report vide letter dated 28.08.2015 wherein the value of each of the plots was wrongly assessed at Rs. 3.00 crores.

29. It was submitted that before the Valuation Officer as well as the AO, it was submitted by the assessee that the plots in question are absolutely of residential nature and use and therefore, cannot be valued on the basis of commercial rates. However, ld. Valuation officer valued the subject properties by holding 40% Commercial and 60% Residential. Moreover, a completely hypothetical rate of 82,500/- per sq mtr was adopted for valuing such alleged commercial component (even when Valuation Officer himself had computed per sq. mtr. rate of commercial property at Rs.41,214/-per sq mtr) and thus

Valuation was made at Rs.3,00,00,000/- for each property and consequently addition was made by ld.AO to the tune of Rs 2,83,94,596/-

30. It was submitted that aggrieved of the addition so made by the AO, the assessee preferred appeal before ld. CIT(A), who though confirmed the property as 40% Commercial and 60% Residential, however, rate per sq. mtr. was confirmed at Rs.41,214/-. Accordingly, valuation of each property was restricted to Rs. 1,72,78,488/- as against Rs. 3,00,00,000/- as determined by Valuation Officer. Thus, in present appeal, assessee has challenged the part addition of Rs. 29,51,572/- confirmed by ld. CIT(A).

31. In this regard, it was submitted that it would be useful to refer to the detail history of the subject plots as submitted before ld. Valuation Officer vide letter dated 03.11.2014 is reproduced as under:

> *"That a piece of land totaling to 11005 sq. yds. was originally allotted by the Jaipur State (as had existed before independence) to Captain James Alexander in terms of the letter of allotment dated 21.01.1933, copy enclosed. Further the executive officer of Municipal Board of Jaipur State granted permission for construction of house on the said piece of land. Thereafter Captain James Alexander constructed house and used the same for his own residence. After the death of Captain James Alexander, the subject property was distributed amongst his heirs as per his WILL and the property under reference being part of the total piece of land comes in the ownership of Mr. T.H. Alexander, son of Captain James Alexander who enjoyed the said property for his own use. Mr. T.H. Alexander in terms of lease deed dated 8th December, 1958 had given the front portion of the said land to one Shri Ramditta Mal Sethi, Prop. Of M/s Sethi Transport Co., copy of rent deed and rent receipts issued from time to time are enclosed for ready reference. Thereafter Mr. T.H. Alexander further allowed Shri Ramditta Mal Sethi to open showroom for tyres, oils etc. on the leased premises and accordingly Shri Sethi remained occupant of the front portion of the land. After the death of T.H. Alexander his daughter Pamela Colleco became the owner of the subject property*

and the possession of the lease premises remained with the Sethi family, who regularly occupied the same for their own usage and purposes. Because of the non-co-operative attitude of Sethi family who was having physical possession of not only the leased premises but also spread their possession to the premises not under lease. Repeated requests were made to Sethi family to vacate the premises, however, they were not ready to vacate their occupancy.

As submitted above, the main front of the subject property was in the possession of Sethi family, therefore, the approach to the remaining portion of the plot was almost impossible as the only entrance was under the possession of the tenant. Further due to the reason that the actual owner of the property i.e. Pamela Colleco was not residing nor in the position to look after the said premises some Anti-Social elements had taken illegal and unauthorized possession on the remaining portion as a result of which even the sale of the subject property became almost impossible.

It is further submitted that due to the existence of the Central Jail just opposite to the subject property, construction could not be permitted for more than two floors above the ground floor and therefore any commercial establishment in the shape of commercial complex is not viable on the property. Further one side of the subject property is occupied by Government quarters of jail employees who use to dump their garbage in the property, therefore it has become almost a dump yard.

That at the back side of the property the heritage wall of Jaipur City exists and as per Government norms the same cannot be altered / modified nor any gate could be opened. As submitted above, one side is covered by the Government quarters and other side is surrounded by the neighbouring occupants, thus the property under reference did not remained attractive for any kind of buyers.

The previous owner i.e. Smt. Pomela Colleco was in the need of funds and due to the adverse circumstances as narrated above, it was also impossible for her to sell the property at a good price and the occupants i.e. the tenant and the other illegal and unauthorized trespassers were dissuading the prospective buyers, therefore Smt. Colleco had decided to sale the property under distress. After

serious efforts made by Shri Banwari Lal Sharma i.e. the power of attorney holder and assessee before your goodself in the capacity of representative assessee of Smt. Pomela Colleco arranged the buyers i.e. Shri Vivek Gupta and Shri Ashish Gupta who agreed to buy the property for a total consideration of Rs. 1.50 crore each. Looking to the disadvantages attached to the property the buyers decided to use it for residential purposes and had paid the price which could be fairly possible for a residential piece of land as the DLC rate for residential property in the area was in parity with the consideration agreed between the parties.

That on being inquired upon, it came to the knowledge that the buyers had moved an application before the Jaipur Municipal Corporation for granting permission to construct a residential house, necessary copy of application and copy of map submitted in this regard are enclosed herewith for ready reference and in support of the contention that the land under question was in use for residential purpose and would be used by the buyers for their own residential purposes.

Under the circumstances, it is submitted that the fair market value of the subject property as on the date of sale was in parity with the consideration on which the sale transaction was actually executed and therefore the same be considered as the fair market value. An affidavit of Shri Banwari Lal Sharma is enclosed in confirmation to the facts narrated herein above."

32. It was submitted that in light of above, following facts were apparent and were submitted before the Ld. Valuation Officer for the purpose of determination of FMV of the subject properties:

1. That, the assessee has already disputed the valuation adopted by the Stamp Valuation Authorities before the appropriate appellate authorities. Copy of relevant papers of such litigation as submitted before Valuation officer**.**

2. That, the subject properties are purely residential prior to sale as well as post sale period and the land use has not been converted by the prospective buyers of the land.

3. The Municipal Corporation, Jaipur has already certified the said properties as 'residential' and a Certificate issued by the Municipal Corporation to such effect has already been submitted before the Ld. Valuation Officer, which is placed on record.

4. That, the buyers namely, Sh. Vivek Gupta and Sh. Ashish Gupta had applied for obtaining approval of construction of residential house on the said land which further proves the fact that the land in no case could be characterized as commercial land and therefore, the same should be valued by taking the land use as residential and not a 'commercial' as has been done in the Valuation Report. A copy of application made by the buyers i.e. Shri Ashish Gupta and Shri Vivek Gupta before the competent authorities i.e. Municipal Corporation, Jaipur for the approval of maps for the construction submitted before Valuation Officer are placed on record.

5. That, for the purpose of determining Fair Market Value, comparable instances / sales of the adjoining / same area are necessary to be taken into consideration. Before the Ld. Valuation Officer, all the possible comparable instances / sales for the period from 2004 to 2008 of the lands in the neighborhood or adjoining localities were submitted, copies of registered documents as were submitted before Ld. Valuation Officer are placed on record. Also, the guidelines rates issued by local authorities were submitted. All those instances are related to the M.I. Road which is the area adjoining to the area where the property under reference is situated and therefore, are fully comparable. The details of the properties are as under :

Description	Date of registry	Agreed consideration	Valuation by Stamp Authority	Difference in terms of %
Petrol Pump, Near Hotel Jayesh, M.I. Road, Jaipur	19.04.2005	3,50,00,000.00	10,29,56,980.00	294% Higher
H-19, Kala Bhawan, M.I. Road, Jaipur	06.08.2005	26,99,999.00	66,35,442.00	245.75% higher
H-1/32, M.I. Road, Jaipur [Part portion]	12.12.2006	75,00,000.00	1,75,88,384.00	235% Higher
H-1/32, M.I. Road, Jaipur [Part portion]	12.12.2006	75,00,000.00	1,80,31,364.00	240% Higher
Bar Ki Bagichi, Opp. Laxmi Motor Co., M.I. Road, Jaipur	31.07.2008	2,04,00,000.00	5,86,37,636.00	287% Higher

From perusal of the chart above, you would observe that in the neighboring localities, the valuation done by the stamp authorities is higher by more than 235% to 294% of the agreed consideration and the situation is very much similar with the case of the assessee where against the agreed consideration of Rs. 1,50,00,000/- the valuation has been taken by stamp authorities at Rs. 4,75,26,460/-, thus the claim of the assessee that the fair market value in the same locality is similar to the value at which the assessee has sold the property under reference deserves to be accepted.

6. That, in addition to the aforesaid sale instances, the assessee has also submitted some more sale instances which are of the commercial shops auctioned by Jaipur Development Authority in nearby / adjoining area of

commercial property which were required to be considered for determination of fair market value of the property under reference. Those sale instances are as under:

S.No	Address of Property	Date of sale	Area (in sq. mtrs)	Minimum selling price	Auction rate	Auctioned amount	Estimated rate per sq. metr)
1.	Plot No. 02, Subhash Chowk, Nala Pannigran	24.08.2006	42.82	10,00,000	-	10,21,000	23,844
2.	Plot No. 01, Fateh Singh Ki Dharmshala	03.10.2006	145.82	12,000	24,250	35,36,135	24,250
3.	Plot No. 5, Subhash Chowk, Nala Pannigran	29.09.2006	42.82	10,00,000	-	10,31,000	24,077
4.	Plot No. 6, Subhash Chowk, Nala Pannigran	29.09.2006	42.82	10,00,000	-	10,30,000	24,054
5.	Plot No. 8, Subhash Chowk, Nala Pannigran	29.09.2006	42.82	10,00,000	-	10,81,000	25,245
6.	Fatehsingh Ki Dharmshala	20.01.2007	1672	25,000	37,000	6,18,64,000	37,000
				Average Rate			26,411.66

The details of abovementioned auctions and the respective rates have been obtained from the official website of the Jaipur Development Authority and a copy of the relevant snapshots has been submitted before the Ld. Valuation Officer and are placed on record.

7. That, all the above mentioned properties are situated in the same locality as that of subject property and therefore amount to comparable cases for the purpose of valuation of the subject property. From the above table, it can be seen that the average rate on which the properties in vicinity have been sold is

Rs. 26,411.66. The value of subject property if calculated at this rate comes at Rs. 1,92,54,100/- which is quite close to the value declared by assessee.

33. It was further submitted that the Ld. Valuation Officer in Annexure III of his valuation report has made following observations:

"As per the actual status at the site, following observations are made:

1. The adjacent land has residential quarters for the jail staff.

2. The other side has industrial shed/workshops, and most structures on the road stretch adjacent to jail boundary are temporary in nature, with height not exceeding single storey. Only the telephone exchange is the proper building on the stretch.

3. While on one property under consideration has 30% area under the industrial shed, the other 70% was still being used as open area and for residential houses.

4. The property under consideration has 50% area under the industrial shed, the other 50% was still being used as residential."

From the above observations of the Valuation Officer, it is clear that he has clearly admitted the fact that a major portion of the subject property is being used for residential purposes. Also, he has not alleged that the remaining small portion is being used for commercial purposes, rather he has merely mentioned that the remaining area is under industrial shed. Here, it is submitted that the valuation of the property is required to be done in accordance with the actual use to which a particular property is put. Also, the Valuation Officer has admitted that the locality/adjoining areas are also not commercial.

34. The Ld. Valuation Officer has assessed the value of the subject property at Rs. 3.00 crores for each plot. For the purpose of this valuation, the Ld. AO

has treated the property as being in use partly for residence and partly for commercial i.e. 40% - Commercial (front portion) and 60% - residential (back portion). In this regard it is submitted that the Ld. AO has ignored a very vital fact that the entire property was being used solely for residential purpose and no part of it was being used for commercial purposes. The Ld. Valuation Officer has recorded a wrong finding of fact that the factual use of 40% property was commercial. It must be noted that he has not supported this observation with any single evidence which could show that the property was being used for commercial purposes. On the other hand, the Ld. Valuation Officer himself has admitted that certain portion of the property is only falling under industrial shed, and there is no observation to the effect that the said part was being put to use as commercial property. Further, the Ld. Valuation Officer himself has accepted that the adjacent land has residential quarters for the jail staff, and that the most structures on the road stretch adjacent to jail boundary are temporary in nature. All these facts show that the Ld. Valuation Officer has on one hand admitted that the adacent areas were residential, while on the other hand has not brought any evidence on record to show that any part of the property was being put to commercial use in whatever manner.

35. It was submitted that a bare perusal of the valuation report (Annexure – III) show that the valuation of the property, if done as "residential', then the valuation would come at Rs. 1.21 crores only, which is in fact less than the consideration show in the sale deeds at Rs. 1.5 crores. In view of above, it was submitted that, since the entire property is residential, the Fair Market Value thereof, as assessed by the Valuation Officer, should be accepted at Rs. 1.21 crores only. It is requested before your honours that the value declared in the sale deeds is the actual consideration and the same has been shown at a value much higher than the Fair Market Value so determined and therefore value declared by assessee deserve to be accepted as such.

36. In her submissions, the ld DR submitted that during the course of set aside/re-assessment proceeding, as per direction of the Hon'ble ITAT & also to follow the terms of the provisions of section 50C(2)(a) of the Income tax Act, 1961, the AO has called for the valuation report and in compliance thereto, the Valuation Officer has sent his Valuation report wherein FMV of the property situated at Plot No. 55A & 55B, Near Central Jail, Agra Road, Jaipur as on May, 2007 has been determined at Rs. 3,00,00,000/- per plot and thus determining the total value of two plots at Rs. 6,00,00,000/-. Subsequently, copy of valuation report alongwith notice u/s 142(1) of the Income tax Act, 1961 was shared with the assessee and basis the report of the valuation officer who has carried out physical inspection of the properties and his report being binding on the AO, the latter considered the Fair Market Value of the property as on 30.5.2007 as Rs. 3 crore for each plot of land.

37. It was further submitted by the ld DR that the Valuation officer has clearly held the whole of property as commercial and has applied the commercial rates on the basis of the rates provided by the assessee though after carrying out certain adjustments on account of size, location, etc. and there is thus no basis for the ld CIT(A) to considering part of the property as residential and part commercial and apply differential rates and provide relief to the assessee. It was accordingly submitted that the findings of the ld CIT(A) should be set-aside and that of the AO/DVO should be upheld.

38. We have heard the rival contentions and perused the material available on record. The assessee is challenging the findings of the ld CIT(A) for considering part of property as residential and part commercial, and submitted that entire property is residential and should therefore be valued at Rs 1.21 crores each as alternatively determined by the DVO in his valuation report. The

Revenue is equally challenging the findings of the ld CIT(A) for considering part of property as residential and part commercial and at the same time, submitted that entire property be treated and valued as commercial property as done by the DVO and should therefore be valued at Rs 3.00 crores each as determined by the DVO in his valuation report.

39. On perusal of the DVO report, it is noted that the DVO has valued both the properties after modifying/adjusting the value of other sale instances of the properties situated on MI road and other adjoining areas which have similar or higher circle rates of commercial properties. In other words, the two properties have been treated and valued as commercial properties by the DVO apparently guided by the fact that these two properties also lie on the main agra road in front of Central jail, Jaipur and the fact that the stamp duty authorities have also adopted the commercial rates. Further, by making certain adjustments to these comparable cases, the DVO has worked out and applied the adjusted rate of Rs 41,214 per sq. mtr to the two properties measuring 729 sq. mtrs each, and has arrived at the value of Rs 3,00,00,000/- for each of the two properties.

40. Further, it is noted that on appeal by the assessee, the ld CIT(A) again examined the report of the DVO and has recorded his findings wherein he has stated that there were certain encumbrances on the property and construction for commercial exploitation beyond a certain height was not possible due to nearness to the Central jail and other heritage concerns which were not considered by the DVO. Further, the ld CIT(A) has stated that the land use of the two properties have not been officially changed in the Municipal records & these properties continued as residential properties and the buyers had also applied for obtaining permission for construction of residential house on the land so there was no 'commercial' intention in the purchase as well. It was accordingly held by the ld CIT(A) that the DVO has ignored all the supporting

evidences which categorized the property towards 'Residential usage" like JDA checklist for purchaser to construct residential house upto 2 storeys, municipality letter certifying its residential use, bills of electricity showing residential consumption, house tax receipts showing residential valuation & subsequent payment, and the fact that in all the adjacent constructed area, the DVO himself has noted residential usage like quarters constructed for jail staff, 70% residential & open space in one adjacent property & 50% in another one. The ld CIT(A) accordingly held that the valuation so done by the DVO is in complete disregard to the available evidences and it would be fair and reasonable where the property is considered as of mixed use taking 40% land as commercial and 60% as residential and then, applying the rate of Rs 41,214 per sq. mtr for commercial property and Rs 12,000 per sq mtr for residential property, has arrived at the value of Rs 172,78,488/- for each of the two properties.

41. As far as the findings of the ld CIT(A) that various documentary evidences in support of property being residential in nature have not been considered by the DVO while determining the fair market value of the property, the Revenue has failed to demonstrate as to how the said findings of the ld CIT(A) are perverse and not borne out of material available on record. As we have observed earlier, the two properties have been treated and valued as commercial properties by the DVO apparently guided by the fact that these two properties also lie on the main agra road in front of Central jail, Jaipur and the fact that the stamp duty authorities have also adopted the commercial rates. The same become more clear if we read the findings of the DVO where he has stated in Para 10 of his valuation report that "the assessee was informed that the Circle Rates are for commercial use and this office has no jurisdiction regarding the land use and the calculation done in Annexure III." In our view, the determination of circle rate is clearly not within the jurisdiction of the DVO,

at the same time, while determining the fair market value of the property, the DVO is expected to examine factors impacting the value of the property and which clearly includes the usage of such property whether for residential or commercial purposes.

42. Having said that, we find that the ld CIT(A) has gone ahead and considered the two properties as part residential and part commercial and apparently guided by the physical inspection of the two properties as carried out by the DVO and the findings of the DVO at Annexure III of his report wherein he has stated that he has physically inspected the property on 30.09.2014 and basis such inspection, he has recorded his findings which read as under:

> *"As per the actual status at the site, following observations are made:*
>
> *1. The adjacent land has residential quarters for the jail staff.*
>
> *2. The other side has industrial shed/workshops, and most structures on the road stretch adjacent to jail boundary are temporary in nature, with height not exceeding single storey. Only the telephone exchange is the proper building on the stretch.*
>
> *3. While on one property under consideration has 30% area under the industrial shed, the other 70% was still being used as open area and for residential houses.*
>
> *4. The property under consideration has 50% area under the industrial shed, the other 50% was still being used as residential."*

43. The DVO therefore in his report has stated clearly that in respect of one of the property, 70% is still used for residential purposes and remaining 30% is under industrial shed (commercial) and in respect of second property, ratio between residential and commercial is 50:50. To our mind, both the documentary evidences and the actual usage of the property have their own

relevance and importance and need to be considered while determining the fair market value of the property. At the same time, where there are visible and demonstrable variations in the actual usage or part usage of the property, the same have to be necessarily considered and cannot be ignored for the purposes of valuation. Therefore, on face of such findings, we fail to appreciate why the DVO has not considered the property part residential and part commercial and has applied purely commercial rates. Therefore, the findings of the ld CIT(A) to this extent that the land is under mixed land use and not entirely residential or commercial is hereby confirmed. The said fact is also corroborated by two sale deeds where there is a clear assertion, at pages 12 and 23 of assessee's paperbook, that a part of the property has been given on rent to M/s Sethi Transport and also as per assessee's own submissions before us wherein it has been stated as under:

> *"Mr. T.H. Alexander in terms of lease deed dated 8th December, 1958 had given the front portion of the said land to one Shri Ramditta Mal Sethi, Prop. Of M/s Sethi Transport Co., copy of rent deed and rent receipts issued from time to time are enclosed for ready reference. Thereafter Mr. T.H. Alexander further allowed Shri Ramditta Mal Sethi to open showroom for tyres, oils etc. on the leased premises and accordingly Shri Sethi remained occupant of the front portion of the land."*

44. Therefore, the fact that a part of the property at the time of execution of sale deed was under commercial usage cannot be denied especially where there is a clear assertion and acknowledgment by both the parties executing the sale deeds. Infact, it is the assessee's claim that there were disputes relating such possession by Sethi family and the buyers of the properties have written to the competent authorities. Therefore, in the entirety of facts and circumstances, taking into consideration the contents of the sale deed as well

as physical inspection of the property, we are of the considered view that both the properties are under usage for residential as well as commercial purposes and therefore, the fair market value should reflect such usage as part residential and part commercial at the time of execution of the sale deed.

45. Now, to what extent the two properties were under commercial and residential usage, it is noted that in respect of first property, the DVO has estimated 70% for residential purposes and remaining 30% under commercial purposes and in respect of second property, ratio between residential and commercial is estimated at 50:50 and basis such estimation, an overall ratio has been arrived at as 60% towards residential purposes and 40% towards commercial purposes. However, we don't find any evidence on record to support such estimation and allocation. To our mind, a better methodology of determining the same is the actual measurement of the property towards residential and commercial usage rather than percentage and that too, at the execution of the sale deed and we find the same is clearly apparent from the two sale deeds where there is clear description and measurement of property under industrial shed (commercial) and other residential built up area. Therefore, taking the actual measurement into consideration, and rate of Rs 41,214 per sq mtr towards commercial property and Rs 12,000 per sq mtr towards residential property as determined by the DVO, the valuation of the two properties is arrived at as under:

First property:

Commercial: 244.10 Sq.mtr. X 41,214/-	=	*Rs. 1,00,60,337/-*
Residential: 484.93 Sq.mtr. X 12000/-	=	*Rs. 58,19,160/-*
Total value		*Rs. 1,58,79,497/-*

Second property:

Commercial: 254.00 Sq.mtr. X 41,214/-	=	*Rs. 1,04,68,356/-*
Residential: 475.03 Sq.mtr. X 12000/-	=	*Rs. 57,00,360/-*
Total Value		*Rs. 1,61,68,716/-*

46. The next question that arises for consideration is whether value of the first property so arrived at Rs 1,58,79,497 which is merely higher by 5.86% as compared to declared sale consideration of Rs 1,50,00,000/- as per the sale deed should be substituted and considered as fair market value or can such difference being less than 10% of the declared sale consideration be ignored and declared sale consideration be accepted. Similar is the position in respect of the other property where difference comes to 7.79% of the declared sales consideration. The assessee has raised the contention to this effect though in context of value of Rs 1,92,54,100/- where he says that the same being quite close to the declared sale consideration of Rs 150,00,000/- and the same thus may be ignored and actual sale consideration may be considered for the purposes of arriving at the fair market value. Given that there is a downward revision in the value so arrived at Rs 1,58,79,497/- and Rs 1,61,68,716/- as against the declared sale consideration and difference has further narrowed down, we deem it necessary to examine the said contention.

47. In this regard, it is noted that the legislature has inserted third proviso to Section 50C(1) of the Act, as per which, where the difference between stamp value and the actual consideration is 5% or less, the same shall be ignored w.e.f. 1.4.2019. The limit of 5% has since been increased to 10% w.e.f. 1.4.2021. The various Benches of the Tribunal are taking a consistent view that

the third proviso to section 50C should be treated as curative in nature and will apply retrospectively from 1.4.2003 i.e. from the date of insertion of section 50C in the Statute and therefore, the limit of 10% should also be read retrospectively. In this regard, we refer to a decision of the Mumbai Benches of the Tribunal in case of **Maria Fernandes Cheryl vs. Income Tax Officer International Taxation 2(3)(1), Mumbai** *(ITA No. 4850/Mum/2019 dated 15.01.2021)* wherein it was held as under:

> *"7. ….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 Vs ACIT [(2014) 45 taxmnann.com 555 (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 Vs Ansal Landmark Township Pvt Ltd [(2015) 61 taxmann.com 45 (Del)], has approved this approach and observed that "(t)he 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 Dharmashibhai Sonani Vs ACIT [(2016) 161 ITD 627 (Ahd)] which has been approved by Hon'ble Madras High Court in the judgment reported as CIT Vs Vummudi Amarendran [(2020) 429 ITR 97 (Mad)]. 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(Revenue).

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."

48. Even if we look at the situation prior to the introduction of third proviso to section 50C(1) of the Act, various Coordinate Benches have held that where there is difference of less than 10%, the same shall be ignored. In this regard, we refer to decision of the Jaipur Benches of the Tribunal in case of **Smt. Sita Bai Khetan Vs. ITO** *(ITA No.823/JP/2013 dated 27.7.2016)* wherein it was held as under:

"4.2 We have heard rival contentions and perused the material available on record. We find that the Hon'ble Coordinate Bench in ITA No. 1.543/PN/2007 in the case of Rahul Constructions Vs. DCIT (Supra) has held as under:-

"We find that the Pune Bench of the Tribunal in the case of Asstt. vs. Harpreet Hotels (P) LTd. Vide ITA No. 1156-1160/Pn/2007 and relied on by the learned counsel for the assessee had dismissed the appeal filed by the Revenue where the CIT(A) had deleted the Unexplained investment in house construction on the ground that

the difference between the figure shown by the assessee and the figure of the DVO is hardly 10 per cent. Similarly, we find that the Pune Bench of the Tribunal in the case of ITO vs. Kaaddu Jayghosh Appasahebh, following the decision of the J&K High Court in the case of Honest Group of Hotels (P) Ltd. Vs, UT (2002) 177 CTR (J&K) 232 had held that when the margin between the value as given by the assessee and the Departmental valuer was less than 10 per cent, the difference is liable to be ignored and the addition made by the AO cannot be sustained.

Since in the instant case such difference is less than 10 per cent and considering the fact that valuation is always a matter of estimation where some degree of difference is bound to occur, we are of the considered opinion that the AO in the instant case is not justified in substituting the sale consideration at Rs. 20,55,000/- as against the actual sale consideration of Rs. 19,00,000 disclosed by the assessee. We, therefore, set aside the order of the CIT(A) and direct the AO to take Rs. 19,00,000/- only as the sale consideration of the property. The grounds raised by the assessee are accordingly allowed"

In the instant case, the difference between the valuation adopted by the Stamp Valuation Authority and declared by the assessee is less than 10%. Therefore, respectfully following the decision of the Hon'ble Coordinate Bench, we hereby direct the AO to adopt the value as declared by the assessee. This ground of the assessed is allowed".

49. In view of the aforesaid discussions, in the instant case, we note that the revised valuation as so determined in respect of both the properties works out to less than 10% of the actual sale consideration as declared by the assessee and considering the fact that valuation is always a matter of estimation where

some degree of difference is bound to occur which even the legislature has lately recognized and has introduced the tolerance limit of 10% which have consistently been held by various Benches as curative in nature, such a difference needs to be ignored and declared sale consideration be accepted. We accordingly direct the AO to accept the sale consideration as declared by the assessee as per the two registered sale deeds. For the reasons stated above, the ground of appeal taken by the assessee is allowed and the ground of appeal taken by the Revenue is dismissed.

In the result, both the appeals filed by the assessee and Revenue are disposed off in light of aforesaid directions.

Order pronounced in the Open Court on 14/06/2021.

Sd/-	Sd/-
(संदीप गोसाई)	(विक्रम सिंह यादव)
(Sandeep Gosain)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 14/06/2021
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Banwari Lal Sharma, Jaipur
2. प्रत्यर्थी/ The Respondent- The ITO, Ward 1(5), Jaipur
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA Nos. 475 & 558/JP/2019}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar