



आयकर अपीलीय अधिकरण "एस एम सी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "SMC" :: PUNE

BEFORE MS.ASTHA CHANDRA, JUDICIAL MEMBER
AND
DR.DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.1345/PUN/2025

निर्धारण वर्ष / Assessment Year: 2016-17

M/s.Om Shriniwas Developers, Off No.2 & 3, Vastusadan Bldg, 743, Guruwar Peth, Pune – 411042. Maharashtra.	V s	The Income Tax Officer, Ward-6(3), Pune.
PAN: AABFO7491G		
Appellant/ Assessee		Respondent / Revenue

Assessee by	Shri Bhuvanesh Kankani – AR
Revenue by	Smt. N C Shilpa – Addl.CIT(DR)
Date of hearing	01/07/2025
Date of pronouncement	24/07/2025

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by Assessee against the order of
ld.Commissioner of Income Tax(Appeal)[NFAC] passed under
section 250 of the Income Tax Act, 1961 for the A.Y.2016-17 dated
14.05.2025, emanating from order u/s.147 r.w.s 144 of the Income
Tax Act, 1961, dated 09.05.2023. The Assessee has raised
following grounds of appeal :

“1. On the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the addition made u/s 43CA of the Act is incorrect and not in accordance with the provisions of that section. Accordingly, the addition so made be kindly deleted and Appellant be granted just and proper relief in this respect.

2. Without prejudice to other grounds and on the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the Ld. AO has not taken requisite sanction u/s 151 r.w.s 148A(d) r.w.s 148 of the Act. Accordingly, the assessment proceedings so initiated be kindly quashed and the Assessment so made be kindly annulled and Appellant be granted just and proper relief in this respect.

3. Without prejudice to other grounds and on the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the case so re-opened is against the provisions of section 149(1)(b) of the Act since the income alleged to have been escaped from assessment is below Rs.50,00,000/-. Accordingly, the assessment proceedings so initiated be kindly quashed and the Assessment so made be kindly annulled and Appellant be granted just and proper relief in this respect.

4. Without prejudice to other grounds and on the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the notice issued u/s 148 of the Act is time barred. Accordingly, the assessment proceedings so initiated be kindly quashed and the Assessment so made be kindly annulled and Appellant be granted just and proper relief in this respect.

Without prejudice to other grounds and on the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the assessment proceedings initiated beyond 4 years is not in accordance with provisions of section 147 r.w.s 149 of the Act. Accordingly, the assessment proceedings so initiated be kindly annulled and Appellant be granted just and proper relief in this respect.

6. Without prejudice to other grounds and on the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the Ld. AO has erred in completing the Assessment Proceedings u/s 144 of the Act. Accordingly, the assessment so completed be kindly annulled and appellant be granted just and proper relief in this respect.

7. Without prejudice to other grounds and on the facts and circumstances prevailing in the case and as per provisions and scheme of the Income-tax Act, 1961 ('the Act') it be held that the notice u/s 148A(b), order u/s 148A(d) and Notice u/s 148 of the Act issued/ passed by jurisdictional AO are in violation of the provisions of sec. 1448 r.w.s 151A of the Act since the same ought to have been issued/ passed by faceless AO. Accordingly, the assessment proceedings so initiated be kindly annulled and Appellant be granted just and proper relief in this respect.

8. The appellant prays to be allowed to add, amend, modify, rectify, delete, raise any grounds of appeal at the time of hearing.”

Submission of Id.AR :

2. Ld.AR for the Assessee submitted one factual paper book and one legal paper book. Ld.AR submitted that the order u/s.148A(d) is bad in law as all the information was submitted during the original assessment, hence, it is nothing but change of opinion. Ld.AR invited our attention to the case laws.

2.1 Ld.AR submitted that Assessing Officer has invoked provisions of Section 43CA of the Act. However, the difference is less than 5% and therefore, within the allowable limit. Ld.AR relied on the following case laws :

“M/s Nisarg Developers Vs. DCIT Circle 7, Pune (ITA No. 744/Pun/2024)- AY 2017-18

Ms/ V K Developers Vs DCIT Circle 3, Pune (ITA No. 923/Pun/2019)- AY 2016-17

M/s. City Corporation Limited Vs. DCIT Circle 1(1), Pune (ITA No.619/PUN/2020)- AY 2015-16

M/s Buttepatil Properties Vs. ITO Ward 3(1), Pune (ITA No. 682/PUN/2018)- AY 2014-15

M/s Sai Bhargavanath Infra Vs. SCIT Circle 6, Pune (ITA No. 1332/PUN/2019)- AY 2015-16

M/s. OM Siddhakala Associates Vs. DCIT (Bombay HC- WP No. 14178 of 2023) as a matter of judicial discipline Ld.CIT was required to follow Appellate authorities order- in context of retrospective applicability of tolerance limit u/s 43CA.”

Submission of ld.DR :

3. Ld.DR for the Revenue relied on the order of the AO and ld.CIT(A).

Findings & Analysis :

4. We have heard both the parties and perused the records. In this case, Assessee had filed Return of Income for A.Y.2016-17 on 15.10.2016. Assessee’s case was selected for scrutiny, accordingly,

notice u/s.143(2) was issued on 12.07.2017. The Assessee filed all the necessary details. Assessee is a partnership firm, engaged in the business of builders and developers. As per the notice u/s.143(2), the assessee's case was selected for scrutiny for following reasons :

- “i. Whether income from real estate business has been correctly offered for tax.*
- ii. Whether sundry creditors are genuine.*
- iii. Whether deduction claimed on account of interest expenses is admissible.”*

5. Accordingly, the Assessee had made an elaborate submission vide his letter dated 09.10.2018. The Assessing Officer-ITO, Ward-6(3), Pune passed an order u/s.143(3) on 19.12.2018 accepting the Return of Income. In para 5 of the said assessment order, Assessing Officer has stated as under :

“05. In the course of assessment proceedings, the assessee submitted the details as per the reasons for selection of case under limited scrutiny, which have verified and placed on record.”

6. The Assessing Officer – ITO, Ward-6(3), Pune issued a notice u/s.148 on 28.06.2021 for A.Y.2016-17. As per the order u/s.148A(d) of the Act, the reasons for issuing notice u/s.148 were as under :

“Scrutiny assessment in the case of assessee for A.Y. 2016-17 has been completed u/s 143(3) of the Act on 19/12/2018. On perusal of case records, it is seen that the assessee firm has sold four flats out of which two flats has been sold below Market Price during F.Y. 2015-16 relevant to A.Y. 2016-17. The assessee has sold two flats below market rate. In this case the provisions of section 43CA of the Act attracts for the transaction performed by assessee.

During the course of assessment proceedings, the details were verified by the then Assessing Officer. The assessment in this case was completed on 19.12.2018 and the income was assessed at Rs.6,14,720/-. From the perusal of the return of income for the A.Y. 2016-17 filed by the assessee on 15/10/2016, it is seen that the assessee has sold four flats during F.Y. 2015-16 relevant to A.Y. 2016-17. Out of the four flats sold, two flats i.e. Flat No. 101, was sold at transaction value of Rs. 23,00,000/- as against its Market Price of Rs.23,90,595/-. Further, flat no. 202, was sold at transaction value of Rs.27,10,100/- whereas its Market price is of Rs.28,38,000/-.”

7. During the proceedings u/s.148A of the Act, Assessee submitted that only two flats have been sold at a price which is less than stamp duty value. However, the difference is less than 5%. The chart submitted by the assessee is reproduced by the Assessing Officer in the order u/s.148A(d), which is as under :

Flat No.	Agreement Value	Market Price	Difference	% Difference
101	23,00,000	23,90,595	90,595	3.93%
202	27,10,100	28,38,000	1,27,900	4.72%
Total			2,18,495	

8. However, Assessing Officer rejected the contention of the assessee and held that Income chargeable to tax of Rs.2,18,495/- has escaped assessment. Accordingly, notice u/s.148 was issued.

9. In this case, admittedly, the Assessing Officer had issued notice u/s.148A based on the documents submitted by the Assessee during the original assessment proceedings. During the original assessment proceedings, the ITO, Ward-6(3), Pune had verified all these documents and passed the assessment order accepting the returned income. Therefore, issuing notice u/s.148 and 148A based on the same facts, documents is nothing but change of opinion. The Assessing Officer has not brought on record any new fact before issuing notice u/s.148A of the Act. In these facts and circumstances of the case, we agree with the submission of Id.AR that change of opinion is not permitted.

9.1 Hon'ble Bombay High Court in the case of First Source Solutions ltd v/s ACIT **438 ITR 139 (Bom)** has held as under :

Quote, "11. Therefore, when the assessment is sought to be reopened after the expiry of period of four years from the end of the relevant year, the proviso to section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. This stipulation does

not govern a notice for reopening within a period of four years. In the case at hand, as noted earlier, there is not even a whisper about what fact was not disclosed. In our view, therefore, the notice to reopen under section 148 of the said Act itself was issued without jurisdiction. Consequently, the order passed also cannot be sustained. ” Unquote

10. Similarly, Hon’ble Bombay High Court in the case of Mira Bhavin Mehta Vs. ITO in Writ Petition No.3246 of 2022 vide order dated 13.02.2024 has held as under :

“8 In our view, it is clear case of change of opinion. We say this because the issue as to whether there was a short term capital gain with respect to the said flat, was the subject matter of consideration during the assessment proceedings. It is settled law that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. In fact, the AO in the assessment order dated 28th April 2021 has noted that the issue of investment in immovable property and capital gain / income on sale of property was considered under limited scrutiny assessment and in view of the material on record no addition on the issue is made. The information relied upon while issuing notice under Section 148A(b) of the Act also relates to the said flat and entirely contradictory view is taken in the impugned order that the asset sold was short term capital asset and gain arising on transfer of the said flat is short term capital gain. In our view, the reopening of the assessment is purely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings. This change of opinion does not constitute justification for assuming that income chargeable to tax has escaped assessment.”

11. Respectfully following Hon'ble Bombay High Court, we hold that notice u/s.148 is bad in law. Accordingly, Ground No.5 raised by the Assessee is allowed.

12. We have observed that in the order u/s.148 dated 09.05.2023 Assessing Officer has made an addition of Rs.2,18,495/- u/s.43CA of the Act. The difference between the Stamp Duty Value and agreement value as mentioned by the Assessing Officer is as under :

Flat No.	Agreement Value	Market Price	Difference	%Difference
101	23,00,00	23,90,595/-	90,595/-	3.93%
202	27,10,100/-	28,38,000/-	1,27,900/-	4.72%
TOTAL			2,18,495/-	

13. Thus, it can be observed that the difference is less than 5%. ITAT Pune in the case of V.K.Developers Vs. ACIT in ITA No.923/PUN/2019 has held as under :

“4. We find no merit in the Revenue’s instant arguments as the legislature has incorporated similar tolerance margin(s) of 5 and 10% in section 50C(1), third proviso by the very Finance Act, 2020 w.e.f 01.04.2021. Case law [2021] 187 ITD 738 (Mum) Maria Fernandes Cheryl Vs. ITO holds the same as having retrospective effect since curative in nature. We wish to clarify the only difference between section 43CA and section 50C is that the former is applicable in case of transfer of assets other than capital assets whereas the latter provision comes into play in case of transfer of a capital asset in the specified circumstances, respectively.

5. Faced with the situation, we accept the assessee's instant sole substantive grievance to delete the impugned section 43CA addition of Rs.12,50,490/-. Ordered accordingly.

14. Similar view has been taken by ITAT in following cases :

“M/s Nisarg Developers Vs. DCIT Circle 7, Pune (ITA No. 744/Pun/2024)- AY 2017-18

Ms/ V K Developers Vs DCIT Circle 3, Pune (ITA No. 923/Pun/2019)- AY 2016-17

M/s. City Corporation Limited Vs. DCIT Circle 1(1), Pune (ITA No.619/PUN/2020)- AY 2015-16

M/s Buttepatil Properties Vs. ITO Ward 3(1), Pune (ITA No. 682/PUN/2018)- AY 2014-15

M/s Sai Bhargavanath Infra Vs. SCIT Circle 6, Pune (ITA No. 1332/PUN/2019)- AY 2015-16

M/s. OM Siddhakala Associates Vs. DCIT (Bombay HC- WP No. 14178 of 2023) as a matter of judicial discipline Ld.CIT was required to follow Appellate authorities order- in context of retrospective applicability of tolerance limit u/s 43CA.”

15. Respectfully following the decision of ITAT, we hold that the margin of 5% variation is applicable for A.Y.2016-17 also. Accordingly, we direct the Assessing Officer to delete addition of

Rs.2,18,495/-. Accordingly, Ground No.1 raised by the Assessee is allowed.

16. Since we have allowed the Ground No.1 of the Assessee, the Ground No.2, 3, 4, 6 and 7 are left open as unadjudicated. Accordingly, Ground No.2, 3, 4, 6 and 7 are dismissed.

17. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open Court on 24 July, 2025.

Sd/-
MS.ASTHA CHANDRA
JUDICIAL MEMBER

Sd/-
Dr.DIPAK P. RIPOTE
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 24 July, 2025/ SGR

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, “एस एम सी” बेंच, पुणे / DR, ITAT, “SMC” Bench, Pune.
6. गार्डफाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.