A dozen of issues on section 50C

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1.0 Introduction

Black money has been one of the prime problems in the country. To tackle the problem of black money in real estate sector which has been regarded as the best destination for black money, in the original I-T Act, section 52 was inserted under the head capital gains. This provision was quite similar to section 50C as existing today. Section 52 provided that the sale consideration shall be treated as the market value of the immovable property transferred. However, this section was read down in *K.P. Verghese 131 ITR 597 (SC)*, where it was held that unless there is evidence with the department that black money is invested, no addition can be made u/s. 52, as there was no mechanism for the assessee to rebut the contention that the transaction was done at lower price than the market price.

After *K.P. Verghese 131 ITR 597 (SC)*, section 52 was deleted and a new Chapter XXA was introduced, which was further modified as Chapter XXC. These provisions empowered the Central Government to initiate Certificate proceedings for acquiring/ auctioning the property in case the property was sold below market price. Again the practical difficulties faced by government in acquisition of the properties and the long-drawn procedure in the acquisition and auctioning of properties led to the repeal of those provisions.

Thereafter from 01.04.2003 i.e. A.Y. 2003-04, section 50C was introduced under the provisions of Capital Gains. This provision, after its introduction from A.Y. 2003-04 has been subjected to recent amendment by Finance (No. 2) Act, 2009. This amendment provides that even if the stamp duty is not "assessed" or "adopted", but is assessable or adoptable, still section 50C will be attracted.

The provision is still premature as not much of research has been done by the judiciary on this provision. One can say that only 7 A.Ys. have gone by since the provision was inserted.

In this article, I have tried to compile some of the decisions on this most controversial provision.

2.0 Some latest decisions on section 50C

2.1 Whether section 50C is constitutionally valid?

The rigors of constitutional validity of section 50C have been upheld by various High Courts. The High Courts have held that section 50C provides a mechanism for assessee to rebut the presumption raised therein, therefore, the provision is constitutionally valid. If assessee wants to challenge the stamp valuation, assessee has got the remedy u/s. 50C(2). *[Palaniswamy, K.R. & ors, vs UOI 219 CTR 323 (Mad.); Bhatia Nagar Premises Co-operative Society Ltd. 234 CTR 175 (Bom.)]*

2.2 Whether section 50C applies to the head Capital Gains or does it apply even to the head "Income under the head Business or Profession"?

Section 50C is provided under the head Capital Gains only, it does not apply to the head *"Income under the head Business or Profession"*. Therefore, even if the builder sells the property below guideline value, his sale consideration shall be actual consideration and not guideline value. [*Inderlok Hotels P Ltd. 122 TTJ 145: 32 SOT 419 (Trib. Mum.); CIT vs Thiruvenqadam Investments P Ltd. 320 ITR 345 (Mad.); ACIT vs Excellent Land Developers P Ltd. (2010) 1 ITR (Trib.) 563 (Del.);*]

At this juncture, I may quote from *McGee, Robert W., The Philosophy of Taxation and Public Finance, page 246* where he has said that *it cannot be said that our representatives act in our own interest, since it has been proved conclusively that they act in their own interest, ofter to the detriment of the general public.*

2.3 Whether addition u/s. 50C in the hands of the seller, means that the buyer has paid "on-money" and addition u/s. 69 for unexplained investment shall be made in the hands of the buyer?

Section 50C creates a deeming fiction and provides that the guideline value shall be treated as the full value of consideration in the hands of the seller. It is a settled principle of law that a deeming fiction cannot be stretched beyond its context. No presumption can be made against the buyer that he paid "on-money". Unless the AO has evidences against the buyer that he has paid "on-money", no addition can be made in his hands. *[CIT vs Chandani Bhuchar 229 CTR 190 (P & H); CIT vs Smt. Shweta Bhuchar 192 Taxman 67 (P & H); Sangam Tower 130 TTJ 104 (Jp.);ITO vs Fitwell Logic System P Ltd. (2010) 1 ITR (Trib.) 286 (Del.); ITO vs Harley Street Pharmaceuticals Ltd. 38 SOT 486 (Ahd.); ITO vs Smt. Anshu Jain 36 SOT 263 (Jp.); .Optic Disc Mfg 11 DTR 264 (Chd.)]*

2.4. Why the new clause "assessable" or "adoptable" was introduced u/s. 50C by the Finance (No.2) Act, 2009 and what is the impact of this new clause?

Prior to the amendment by Finance (No. 2) Act, 2009, it was argued in one of the cases that section 50C does not apply to a case where the transfer of property is not registered. Section 50C used the words "adopted or assessed". Value is adopted or assessed at the time the documents are presented for registration. Thus, it was held that section 50C applied only where sale deed is registered. [*Navneet Kumar Thakkar 110 ITD 525 (Jodh)(SMC); Carlton Hotel P Ltd. (2009) 122 TTJ 515 : 35 SOT 26 (Luck.)]*.

Thereafter by Finance (No. 2) Act, 2009, section 50C was modified. The amended clause provides that even if the value is "assessable", section 50C would apply. The word "assessable" has been defined as under:

"Explanation 2.—For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty."

The notes to clauses explained the provision as under: -

"Clause 25 of the Bill seeks to amend section 50C of the Income-tax Act relating to special provision for full value of consideration in certain cases.

Under the existing provisions contained in the said section where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

It is proposed to amend the said section so as to substitute the words "or assessed" wherever they occur in the said section by the words "or assessed or assessable". It is also proposed to insert an Explanation after the existing Explanation so as to define the expression "assessable" as the price which the stamp valuation authority would have adopted or assessed, if it were referred to such

authority for the payment of stamp duty notwithstanding anything to the contrary contained in any other law for the time being in force.
This amendment will take effect from the 1st October, 2009."

The amendment was made effective from 01.10.2009. The amendment was explained by CBDT Circular as follows: -

*"**23. Provisions for deemed valuation in certain cases of transfer***
***23.1** The existing provisions of section 50C provide that where the consideration received or accruing as a result of the transfer of a capital asset, being land or building or both, is less than the value adopted or assessed by an authority of a State Government (stamp valuation authority) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of consideration received or accruing as a result of such transfer for computing capital gain. However, the present scope of the provisions does not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney.*
***23.2** With a view to preventing the leakage of revenue, section 50C is amended, so as to provide that where the consideration received or accruing as a result of transfer of a capital asset, being land or building or both is less than the value adopted or assessed or assessable by an authority of State Government 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 consideration received or accruing as a result of such transfer for computing capital gain.*
***23.3** Further, Explanation 2 has been inserted in the sub-section (2) of the section 50C, so as to clarify the meaning of the term "assessable".*
***23.4** Applicability - These amendments have been made applicable with effect from 1st October, 2009 and will accordingly, apply in relation to transactions undertaken on or after such date."*

The following things become important here: -

(a) The provision applies only to transfers on or after 01.10.2009. Therefore for transactions prior to this date, this amendment is not applicable.
(b) The amendment was introduced to over-rule *Navneet Kumar Thakkar (supra) and Carlton Hotel P. Ltd. (supra)*. This amendment provides that even if the value is assessable, section 50C would apply.
(c) Although the amendment and its objective make it clear that it will apply to transactions where sale deed is not registered. However, some people argue that this amendment will not apply to power of attorney sales, but to cases where sale deed is presented for registration.

2.5 Whether section 50C is mandatory? How can assessee prevent himself from the rigors of section 50C?

Assessee may sell his property below the guideline value for various reasons, some of which are: -

1. Title is disputed.
2. Land has inherent problems like it is on slope or inner side of colony etc.
3. Surroundings are not palatable; there is a nearby railway line or high-tension line or hospital or a factory etc.
4. Urgent need of funds.

In such a case, the question becomes important whether section 50C would be still applicable. U/s. 50C(2), assessee has two defenses against the application of section 50C: -

(a) Assessee can challenge the stamp valuation before the Stamp valuation authority;

<u>*or in alternative,*</u>

(b) Assessee can apply to the AO for making a reference to the District Valuation Officer (DVO). On such application by assessee, the AO ***may*** make a reference to DVO.

In determining the Fair Market Value (FMV), the DVO shall follow the provisions of sections 16A(2) to (6), 23A(1)(i), 23A(6) and 23A(7), 24(5), 34AA, 35 and 37 of Wealth-tax Act, 1957.

It has been held in *N. Meenakshi 226 CTR 625 (Mad.)* that once the assessee applies to AO for making reference to DVO u/s. 50C, "may" becomes "shall". Therefore, if assessee applies, AO shall make reference to DVO. It is not optional for AO to make reference to DVO. It was held that right of assessee u/s. 50C is a valuable statutory right available to protect his interest against arbitrariness which may creep in while fixing the value of capital gain and it is the safeguard given to the assessee. The said right is more effective in cases where the parties to the document have not taken any steps to defend or to initiate proceedings under Stamp law. [*Jitendra Mohan Saxena 117 TTJ 974 (Trib. Luck.)]*

Further, in *Jitendra Mohan Saxena 117 TTJ 974 (Trib. Luck.)*, it was held that both the remedies u/s. 50C are alternative. If guideline value has been challenged before the stamp valuation authority, same cannot be again challenged before the AO. In other words, assessee can challenge the guideline value before AO only if he has not challenged the same before stamp valuation authority. *[Mohd. Shoib 127 TTJ 459 (Luck.)]*

2.6 Assessee sold his property below the guideline value. Assessee asked the AO to make valuation of property. DVO valued the property at a figure more-or-less similar to what was the guideline value. Whether still section 50C would be attracted?

Although not much research has been done on this aspect, I may submit that in an array of decisions in respect to section 55A and 142A, it has been held that Report of the DVO is not sacrosanct. It is only estimation.

It has been held in *Santosh Kumar Dalmia 208 ITR 337 (Cal.)* that valuation is only a matter of opinion and valuation differs from valuer to valuer, depending on the facts and circumstances of each case. The valuer's report is after all a statistical hypothesis that leaves wide room for error on either side. [*Bhola Nath Majumdar (1996) 221 ITR 608 (Gau.); Kamalam Rajendran 129 Taxman 840 (Mad.); Abdul Mazid 178 ITR 616 (MP)]*

Therefore assessee can give report of his Authorised Valuation Officer (AVO) and can also challenge the valuation on merit. This view further finds support by a direct decision in *Waqf Alal Aulad (2010) 37 SOT 58 (Del.)* the DVO had given deduction of 33% on account of encumbrances in tenancy while computing Market Value u/s. 50C. Matter was remanded back to AO to allow proper time to assessee to rebut the DVO's report. See also *Ravi Kant (2007) 110 TTJ 297 (Del.),* where the DVO made the valuation at Circle rates, which are not indicative of market rates. It was held that such an approach will render exercise u/s. 50C(2) a meaningless ritual and an empty formality. In such a case, the DVO's report should be based on consideration stated in the registration documents for comparable transactions, as also factors such as inputs from other sources about the market rates.

Further, one can argue that if there is an acceptable margin, say upto 15% in the actual consideration and valuation of DVO, same should be ignored and no addition should be made. *[Rahul Construction 38 DTR 19 (Pune)]*. Reliance is further placed on *C.B. Gautham 199 ITR 530 (SC)*.

2.7 Assessee sold a land for Rs. 10 lacs. However, u/s. 50C, the Full Value of Consideration was treated as Rs. 19 lacs. Whether, for claiming exemption u/s. 50F, assessee should invest Rs. 10 lacs or Rs. 19 lacs?

As per the latest decision in *Gyan Chand Batra 133 TTJ 482 (Jp.)*, the "full value of consideration" for section 50C shall be the guideline value. Section 50C creates a fiction and replaces the "full value of consideration" u/s. 48 with the guideline value. Such fiction cannot be extended to section 54F. Reinvestment u/s. 54F shall be done only of actual consideration. In given example, assessee shall only invest Rs. 10 lacs. The decision needs to be highly appreciated, as the assessee may not be in a position to reinvest Rs. 19 lacs since he received only Rs. 10 lacs.

2.8 Compare the provisions of section 50C with section 56(2)(vii).

As on date, section 50C and section 56(2)(vii) operate in a totally different fields:

a. Section 50C will apply to seller, if he transfers an immovable property (being capital asset) without adequate consideration. This transfer may be to a relative or to a non-relative. For the buyer, the cost is actual cost of acquisition and not the guideline value.
b. Section 56(2)(vii) apply to a buyer, if he receives an immovable property (being capital asset) without consideration. This is taxable only if it is received from a non-relative. For the buyer, the cost is the guideline value considered for the purpose of section 56(2)(vii). *[One may note that this is in contradiction to section 49, whereby in case of asset received under a gift, the cost is cost of previous owner]*

2.9 Assessee becomes a partner of the firm. He gives his house as capital contribution to firm. Value recorded in books of firm is Rs. 30 lacs. Guideline value is Rs. 45 lacs. Section 45(3) states that full value of consideration for the partner shall be the value recorded in the books. However, section 50C states that the full value of consideration shall be guideline value. Whether section 45(3) or section 50C would be attracted?

This issue came for consideration in a latest decision in *Carlton Hotel P Ltd. (2009) 122 TTJ 515 : 35 SOT 26 (Luck.)*. In that case, it was held that in such situation, section 50C would override section 45(3). Section 45(3) is a general provision and section 50C is a special provision which would override section 45(3) if the sale deed is sought to be registered by paying stamp duty. Hence, in the given case, the partner transferring his house to the firm would be subjected to capital gain by taking sale consideration at Rs. 45 lacs.

2.10 Assessee sold a building which was depreciable asset. Can section 50C be applied.

As held in *ACIT vs Roger Pereira Communications P Ltd. 34 SOT 64 (Mum.)*, section 50C cannot be applied as section 50 is a special provision for computation of depreciable assets which are covered by block of assets concept. *[see also Panchiram Nahata 127 TTJ 128 (Kol)]*

2.11 Assessee sold the immovable property by way of transfer u/s. 53A of Transfer of Property Act, 1882, on 10.03.2010. At that time the guideline value was Rs. 40 lacs. Subsequently, the property is registered on 12.05.2013. On that date, the guideline value becomes Rs. 150 lacs. Whether sale consideration shall be Rs. 40 lacs or Rs. 150 lacs?

One may note that transfer of a capital asset is taxable under the head Capital Gains on the date of transfer. Section 50C is merely a computation provision. Section 50C shall apply to compute the income under the head capital gains. Section 50C therefore applies at the time of transfer. Therefore,

in my view, guideline value on the date of transfer shall be applicable. Registry is a post-transaction event. The same should not have value for computation of capital gains u/s. 50C.

One may note that such an issue was for consideration in one of the cases in *Smt. Meera Somasekaran (2010) 4 ITR (Trib) 271 (Chennai)*. In this case, it was held that assessee should bring evidence on record to show that all the conditions of section 53A of Transfer of Property Act are satisfied at the time of agreement.

Further, in *Kaushik Sureshbhai Reshamwala 39 SOT 357 (Ahd.)*, assessee transferred agricultural land in March 2006 u/s. 53A of Transfer of Property Act, but the registration could be done only in F.Y. 2007-08. AO adopted the market value instead of stamp value u/s. 50C. It was held that section 50C applies only to computation of capital gains in real estate transaction. Therefore, even on the date of transfer u/s. 53A, section 50C would apply and AO cannot adopt a higher figure on the plea that registry was done belatedly. It was further held that AO had no evidence otherwise to adopt a higher value than the guideline value.

In *M. Siva Parvathi 129 TTJ 463 (Visakha),* the issue was whether section 50C would apply to transfers which were entered into prior to insertion of section 50C, but registry was done after the insertion of section 50C. It was held that section 50C shall not be applicable. This decision can be taken as a help for argument that "transfer" is different from section 50C, which is merely computation provision; and the computation is done at the time of transfer.

2.12 Whether addition u/s. 50C would necessarily mean that assessee has "concealed" the income or "furnished inaccurate particulars thereof" and therefore penalty u/s. 271(1)(c) should be levied?

As held in *ACIT vs N. Meenakshi (2009) 125 TTJ 856 (Chennai)*, penalty cannot be levied in such a case, as there is no 'concealment or furnishing of inaccurate particulars'. Also see *Prakash Chand Nahar 110 TTJ 886 (Jodh.); Balkrishna Waghere & Others, July/ Aug, 2010, BCAJ, 3 (Pune).*

3.0 **Conclusion**

To sum up, section 50C is a specific section creating a deeming fiction. The section is only for the purposes where there is underhand dealing. The section should be applied only with reference to the context for which it was introduced.