Sec. 50C & Leasehold Property Transfers - HC Ruling & the Unanswered Questions!

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A recent judgment of the Hon'ble Bombay High Court (Nagpur bench) in the case of **Vidarbha Veneer Industries Ltd Vs ITO [TS-363-HC-2025(BOM)],** has held that the provisions of Sec 50C will also apply to the transfer of '**a property held in leasehold right**". In holding so, Their Lordships have departed from the stand taken by their coordinate bench as indeed from every other judicial precedent available on this issue. It is an erudite, succinct, straightforward and *prima facie* convincing judgment. However, a careful look at this judgment and the judicial developments leading to this litigation raises many interesting questions and shows different shades of the case.

The backdrop:

Significantly, as it appears from a plain reading of the judgment dated 1st April 2025, this judgment adjudicates upon correctness of the Tribunal's order dated 24/03/17, on a miscellaneous application, declining to deal with the question whether the provisions of Sec 50 apply to the transfer of leasehold rights in a building on the short ground that no such issue was specifically raised before the Tribunal in the grounds of appeal. When one sees the original order passed by the Tribunal under section 254(1), there is not even a whisper of a plea or argument against the applicability of Section 50C on the transfer of leasehold property. The assessee then moved a rectification petition pointing out that '**that in the compilation the assessee has referred to Mumbai ITAT decision in the case of Atul G. Puranik vs. ITO which has been ignored by the Tribunal in its order** ". The Tribunal rejected this plea by observing that, '**We find that in the ground of appeal the assessee has no where contested that provisions of section 50C were not applicable on leasehold properties**". Aggrieved, the assessee approached the Hon'ble High Court. The Hon'ble High Court has categorically noted that '**The appeal questions the order dated 24/03/2017 (Pg.72), passed by the learned Tribunal in MA No.07/Nag/2016, whereby the claim of the appellant of non-applicability of Section 50C of the Income Tax Act, 1961 (for short "IT Act") to a property held in leasehold right has been negated by dismissing the appeal**".

The substantial questions of law as admitted by the Hon'ble Court, vide order dated 30/08/23, (https://indiankanoon.org/doc/90848701/) were as follows:

(i) Whether failure on the part of the Income Tax Appellate Tribunal to consider the appellant's contentions based on non- applicability of Section 50-C of the Act of 1961 as raised in paragraph 1 and especially paragraph 1.6 of the written submissions in support of the appeal which was thereafter also sought to be urged in the Miscellaneous Application filed by the appellant vitiates the consideration of the appeal by the Income Tax Appellate Tribunal to that extent ?

(ii) Whether in the light of the decision in Atul G. Puranik Vs. Income Tax Officer [TS-197-ITAT-2011(Mum)-O] of the Income Tax Appellate Tribunal, the provisions of Section 50-C of the Act of 1961 could have been applied in the matter of transfer of leasehold rights?

While it is difficult to understand how does the second question, which was on merits anyway, arises from the Tribunal's order https://indiankanoon.org/doc/125024237/ on the miscellaneous application seeking rectification of mistake which only seeks an adjudication on merits, the Hon'ble High Court proceeded to decide this very substantial question of law and the matter on merits by observing that '**the claim of non-applicability of Sec 50 C…..to a property held in leasehold right was negated by dismissing the appeal**". There was no discussion on the first substantial question of law at all in the final order.

That is where, in my humble opinion, the path taken by the Hon'ble Court is not entirely free from doubt inasmuch as the first substantial question of law, duly admitted by the Hon'ble High Court, remains unanswered, and the answer to the second question is based on a stand which the revenue was disentitled from taking owing to some peculiarities of the case which I will elaborate upon as we go along. Of course, there is an alternative approach on the merits of what has been decided by the Hon'ble High Court, and that alternative approach, at least prima facie, also seems sustainable in law.

Procedural Issues In Entertaining the Grievance On Merits:

It appears that what was treated as negation of a claim was in fact not dealing with a claim which was not formally raised before the Tribunal. As the order on the rectification petition would show, the assessee's submission that Atul Puranik order was duly filed, as a part of the compilation of papers before the Tribunal, was noted and brushed aside on the ground that the grounds of appeal did not raise any specific ground of appeal with respect to the same. This approach may be seen as too pedantic an approach, as undoubtedly the Tribunal has powers, under rule 11 or the ITAT Rules, to go beyond '**the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule**", subject to the rider that "**the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground** ". It is also a well-settled legal position that whenever law confers any powers in any public authority, such a public authority has the corresponding duty to exercise these powers when circumstances so justify or warrant. As the Tribunal observed in the case of **Sabnis Ashok Anant v. Asstt. CIT [TS-5346-ITAT-2008(Pune)-O]**, "**All the powers of someone holding a public office are powers held in trust for the good of the public at large. There is, therefore, no question of discretion to use or not to use these powers. It is so for the reason that when a public authority has the powers to do something, he has a corresponding duty to exercise these powers when circumstances so warrant or justify—a legal position which has the approval of Hon'ble Supreme Court** ". In the case of **L. Hirday Narain v. ITO [TS-5042-SC-1970-O]**, Hon'ble Supreme Court has observed that "**If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for the exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen"** . In light of this legal position, let us look at the facts of this case. Here is an assessee who cites a decision of the coordinate bench before the Tribunal, makes written submissions on that point, and the appeal can be disposed of by taking up the foundational aspect of the matter taken up in the coordinate bench decision. Yet, the Tribunal does not exercise the powers vested in rule 11 or even flag this procedural shortcoming in the assessee's case- a shortcoming which

could have been made good by the Tribunal itself by acting proactively for the larger cause of justice and fair play, which is its hallmark anyway. While it is undoubtedly the fault of the not to raise the specific ground, even the Tribunal's inertia in not taking up the relevant aspect of the matter and not flagging this procedural shortcoming prior to the disposal of the appeal may not deserve judicial approval either. The cause of substantial justice must not be allowed to suffer because of purely technical lapses, even if that be so, of the parties or their legal teams.

Be that as it may, the claim in question was not adjudicated upon by any of the authorities at any stage- whether in assessment, in appeal or in the rectification petition. Assuming that the claim of the assessee was indeed required to be adjudicated upon on merits, and to that extent plea of the assessee was indeed found admissible, ideally the matter should have been remitted the Tribunal for adjudication on merits, and, if that was to happen, the matter was covered by the Hon'ble jurisdictional High Court in favour of the assessee. The legitimate interests of the assessee have thus been substantially affected by the approach adopted by the Hon'ble High Court.

Given this backdrop, the question arises whether it is really an ideal course of action for the Hon'ble high Court to take up a fresh issue for adjudication on merits for the first time, and that too when all that is assailed before the Hon'ble High Court is a dismissal of a miscellaneous application seeking Tribunal's adjudication on that point. Such an approach is rather rarely seen in actual practice.

There is one more proposition worth being put to the test. The non-disposal of the first substantial question of law, admitted for adjudication by the Hon'ble High Court itself, also seems to have seriously prejudiced the legitimate interests of the assessee. If this question were to be decided in favour of the assessee, the second question would have been infructuous as the matter was then required to be remitted back to the Tribunal. If this question were to be adjudicated against the assessee, the second question could not have been taken up anyway. Whichever way one looks at it, the non-disposal of the first ground of appeal is something which deserves invoking judicial remedies.

Was Revenue's Grievance A Bit Too Late?

The next interesting facet of this case is a reference, in Vidarbha Veneer case *(supra),* to the Hon'ble Bombay High Court's earlier judgment in **Greenfield Hotels case [TS-6112-HC-2016(Bombay)-O].** Their Lordships had noted that "**all that has been said *(in that case)*, is that since the Tribunal did not challenge its earlier view, it was binding upon it".** It was for this reason that the said judgment was not treated as a binding judicial precedent. The approach so adopted is also little unusual. It is not for the Tribunal to challenge or not to challenge its views, nor can it do so. The critical factor is that the revenue did not challenge the view taken by the Tribunal and it was for this reason that it was binding upon the revenue- see **UoI Vs Kaumidini Naryan Dalal [TS-5110-SC-2000-O],** and **Berger Paints India Ltd Vs CIT [TS-5005-SC-2004-O]** and a series of judgments on that point by a large number of decisions by the Hon'ble Tribunal, the Hon'ble High Courts at different places and by the Hon'ble Supreme Court. It is by now well settled in law that once revenue accepts an appellate decision in case of one assessee, or otherwise take a conscious call to accept an interpretation in favour of the assessee, as they did in Atul Puranik's case, it is not really open to it to take contrary stand in the cases of the other assesses.

The Decision On Merits:

On merits then, a lot of emphasis is placed on incorrectness of the Tribunal's approach in Atul Puranik's case, which has attained finality anyway, on the ground that "**does not address the issue altogether, neither does it consider the position, that mode of holding of a property, cannot be equated with the property itself, as against**

which what Sec 50C r.w.s. 2(14) of the IT Act speaks about, is the property ". Their Lordships have held that "**A perusal of the definition of 'Capital Asset' as contained in Section 2(14) of the IT Act would indicate that it includes property of any kind, "held by an assessee". What is material to note is, that the expression is "held by an assessee" and not owned by an assessee. Insofar as the immovable property, i.e. land or building is concerned, there are number of ways, in which it can be held. The holding can be either as an owner, lessee, sub-lessee, allottee, tenant, licensee, gratuitous licensee or any other mode, permissible or recognized by law. The expression "held by an assessee" therefore does not restrict the manner in which the land or building can be held** ." As a corollary to the above, the conclusion arrived at by the Hon'ble Court was that the provisions of Section 50C will be equally applicable in respect of the transfer of the leasehold land or buildings.

An Alternative Approach:

An alternative approach to this analysis could be that in coming to these conclusions, what Their Lordships have overlooked is that Sec 50C applies only on transfer of "**a capital asset, being land or building or both** " and therefore an asset fulfilling the description of 'capital asset' *per se* is not sufficient; the capital asset should be such that it fits the description of "land or building or both". A property by way of an interest in, as leasehold interest inherently is, "a land or building or both" is certainly a capital asset, but that capital asset is qualitatively a step below such a capital asset "being land or building or both". Undoubtedly, a leasehold right in a building is a capital asset but it is not a "land or building or both" and unless this condition is fulfilled, Sec 50C has no application. One could possibly contend that there is a difference between "an interest in a land or building" and "a land and building", even though both of these constitute 'capital asset' under section 2(14).

The question thus arises whether Sec 50C apply to the capital asset "with respect to" land or building or both, or to the capital assets which "constitute" 'land or building or both'? Can the expressions "with respect to" and "being" be used interchangeably, and, if not so, would the expression "being a land or building or both' also cover interests in, or capital assets relating to, "land or building or both"? In the times to come, the Hon'ble Courts will also have to consider these questions.

The Impact of Vidarbha Judgment:

Let us pause and consider the impact of this judgment in practical terms. Does it really have an adverse impact on the other cases on the same point? The following analysis may offer a ray of hope.

On the factual aspect, it is an undisputed position, as noted by the Hon'ble Bombay High Court, in the case of Greenfield Hotels (supra), '**the Revenue has not preferred any appeal against the decision of the Tribunal in Atul Puranik's case ..(and) thus it could be inferred that has been accepted** ". In this case, Their Lordships have also noted "**the salutary principle that where Revenue has accepted the decision of the Court/Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged** " –particularly when "**it is not even the Revenue's case before us that there are any distinguishing features either in facts or in law in the present appeal**...".

On the legal principles, in **Kaumudini Narayn Dalal's case *(supra)***, the Hon'ble Supreme Court has held that "**it is not open to the revenue to accept the judgment in the case of an assessee in that case, and challenge the correctness of that decision in the case of the other assessee's without a just cause** ". On a similar note, the Hon'ble Supreme Court, in ***Berger Paints' case (supra),*** had observed, "**In view of the judgments of this Court …., the principle established is that if the**

revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the revenue to challenge its correctness in the case of other assessees, without just cause".

The undisputed legal position is that when revenue does not file an appeal on a point in one case, it cannot file an appeal on the same point in another case as well (without a just or reasonable cause, e.g., the appeal not having been filed on account of the monetary threshold for filing appeals or a material difference in law or in facts). The underlying proposition in all these judicial precedents is that once revenue takes a conscious call to accept a particular judicial interpretation in favour of the assessee in one case, it is no longer open to the revenue to take a contrary stand in the cases of the other assessee. This principle, unanimously and consistently accepted by the Hon'ble Supreme Court all along, must indeed be justifiably taken to its logical conclusion. Viewed thus, despite this decision in favour of the revenue authorities, they cannot take a stand that the Atul Puranik case *(supra) ratio* is not sustainable in law or a stand contrary to the same. On the correct legal position being thus followed by the field authorities, the success of the revenue authorities may turn out to be hollow and of no practical use. In reality, however, the present state of confusion and divergence of opinion in the judicial thought process can only add to more litigation on the issue.

The Road Ahead:

A bit too ambitious as it may sound at the first sight, a legally sustainable narrative can thus indeed be built that in spite of a favouable judgment in Vidarbha Veneer case *(supra),* it is not open to the revenue authorities to contest the applicability of Sec 50C in respect of transfer of leasehold rights in land and building. Whether the field officers are impressed with this line of argument or not, this issue, which looked like an open and shut issue in favour of the assessee at least till the Vidarbha Venner judgment came to light, must be kept alive for adjudication, even on merits, before a competent forum unrestrained by this judicial precedent.

It will surely be interesting to see how the other Hon'ble Courts take a call on this issue on merits and, on a more fundamental note, whether, in view of the Atul Puranik decision *(supra)* having been accepted by the revenue authorities, the Hon'ble Courts would permit the revenue authorities to contend that the provisions of Section 50C will also apply to the transfer of leasehold interests.

One hopes that the matter does travel to the Hon'ble Supreme Court, and the tax certainty, one way or the other, is restored. This will also be the occasion to have the benefit of higher wisdom of the Hon'ble Supreme Court and normative effect on its jurisprudence on this issue, on the manner in which non adjudication of a point by the Tribunal is to be addressed in the process of judicial remedies by the Hon'ble High Courts, and the manner in which the Tribunal has to exercise its powers under section 254(2) read with rule 11 of the Income Tax Appellate Tribunal Rules 1963, when a party raises an issue without specific ground of appeal to that effect. It is a proposition worth testing that when any of the parties raises a plea before the Tribunal, which merits acceptance but for not specifically raising that ground of appeal, it is not open to the Tribunal to disregard the same without specifically flagging that procedural discrepancy and affording the affected party an opportunity to remove that deficiency. An early clarity on these issues, including mainly the core issue of application of Section 50C on transfer of leasehold assets, will certainly pre-empt many otherwise inevitable litigations.