IN THE INCOME TAX APPELLATE TRIBUNAL,

MUMBAI BENCH 'F', MUMBAI (SPECIAL BENCH)

Before Shri D. Manmohan, Vice-President, Shri P.M. Jagtap, AM &

Shri N.V. Vasudevan, JM

I.T.A.No. 968/Mum/2007
Assessment Year :2003-04

The Income-tax Officer-22(3)(4), 3rd floor, Tower No.6,Vashi Railway Station Complex, Vashi, Navi Mumbai 400 703.	**Vs.**	United Marine Academy. 407, Vindhya Commercial Complex, Sector 11, Belapur, Navi Mumbai. PAN: AAAFU 7392 P
(Appellant)		(Respondent)

Appellant by : Shri A.P. Singh

Respondent by : Shri Prakash Pandit

O R D E R

PER P.M. JAGTAP, AM :

This Special Bench has been constituted by the Hon'ble President, Income-tax Appellate Tribunal to dispose of the appeal filed by the Revenue against the order of the learned Commissioner of Income-tax (Appeals)-XXII, Mumbai dated 20.11.2006 and to answer the following question, which is arising from the grounds raised therein :

> **"On a proper interpretation of sections 48, 50 & 50C of the Income Tax Act, 1961, was the Assessing officer right in law in applying section 50C to capital assets covered by section 50 (depreciable assets) and in computing the capital gains on the sale of depreciable assets by adopting the Stamp Duty valuation?"**

2. The assessee in the present case is a partnership firm, which is engaged in the business of running a Marine Training Institute. The return of income for the year under consideration was filed by it on 28.11.2003 declaring total income of Rs. 1,86,466/-. In the said year, office building used earlier for its business purpose was sold by the assessee firm for a consideration of Rs. 49,43,525/- As the written down value of the said building after claiming depreciation for the earlier years was the same i.e. Rs. 49,43,525/-, no short-term capital gains was offered by the assessee in its return of income as per the provisions of section 50. During the course of assessment proceedings, it was noticed by the Assessing Officer that the value of the property sold by the assessee as per stamp duty valuation was Rs. 76,49,000/-. According to him, the said value was liable to be taken as full value of the consideration received or accruing to the assessee as a result of transfer as per the provisions of section 50C and after deducting the written down value of the asset adopted as cost of acquisition, the balance amount was chargeable to tax in the hands of the assessee as short term capital gains. The stand taken by the assessee in this regard that section 50C having been introduced in the Statute with effect from 1.4.2003, the same was not applicable in the case of assets transferred prior to 1.4.2003 was not found acceptable by the Assessing Officer in view of Circular No 8 of 2002 issued by the Central Board of Direct Taxes clarifying that the provisions of section 50C are applicable in relation to the assessment year 2003-04 and subsequent years. The Assessing Officer was also of the view that one of the office buildings i.e office no. 101 having a written down value of Rs. 13,14,425/- was not sold by the assesse in the year under consideration. Accordingly, relying on the provisions of section 50 read with section 50C, the difference between sale consideration adopted as per the valuation of Stamp Authority of the building (excluding office no. 101) at Rs. 56,74,000/- and the written down value of the said asset amounting to Rs. 36,29,100/- adopted as cost of acquisition was treated by the Assessing Officer as short-term capital gains and such difference amounting to Rs. 20,44,900/- was

added by him to the total income of the assessee in the assessment completed u/s.143(3) vide order dated 24.02.2006.

3. Against the order passed by the Assessing Officer u/s.143(3), an appeal was preferred by the assessee before the learned CIT(A) challenging therein the addition of Rs. 20,44,900/- made by the Assessing Officer on account of short-term capital gains. It was submitted on behalf of the assessee before the learned CIT(A) that provisions of section 50C cannot be invoked in case of depreciable assets where the provisions of section 50 are applicable. It was submitted that provisions of section 50C are applicable only to capital assets being land or building or both while section 50 is applicable to the depreciable assets forming part of block of assets. It was contended that legal fictions created in section 50 and section 50C are for the definite purpose and they cannot be extended beyond their legitimate field unless it is clearly and expressly provided in the relevant provisions. It was contended that it is not permissible to impose supposition on a supposition of law and the Assessing Officer was not justified in invoking the provisions of section 50C in the case of an assessee wherein section 50 is applicable. It was contended that the addition made by the Assessing Officer on account of short term capital gains, by applying the provisions of section 50C in the case transfer of depreciable assets, is liable to be deleted as it was not in consonance with the intention of the legislature behind enacting the said deeming provision.

4. The learned CIT(A) found merit in the submissions made on behalf of the assessee and deleted the addition made by the assessing Officer on account of short term capital gains by applying the provisions of section 50C in the case of transfer of depreciable assets for the following reasons given in paragraph 2.4 of his impugned order .

> "I have gone through the submissions of the Ld.Counsel of the appellant as well as the contents of the impugned assessment order and the report of the Assessing Officer. I find that the provisions of

section 50 as well a section 50C are mutually disjoint provisions and are special provisions for specific purposes. I also find that the provisions of section 50C are not overriding in nature over provisions of section 50 which are meant for the purposes of taxing the capital gains out of transfer of depreciable assets. On facts, I do not find any dispute that the office premises in question forms part of the depreciable assets and depreciation has been provided thereon in the block of assets. Simply because the block of assets having depreciable assets include the land also, section 50 would not be attracted as such, so long as the land forms part of the depreciable assets covered within the special provisions of section 50. The basic purpose of creating a fiction for the sale consideration of the land at the higher rate based on stamp duty rates prescribed is because of the nature of the land that always appreciates in its value and people tend to disclose not the full amount of its value. But if it forms the part of depreciable asset as in the instant case, it cannot be covered within section 50C in view of the special provisions of section 50 that are meant to cover all the assets in the block of depreciable assets without any exception, as there are no explicit provisions to exclude the land out of the block of depreciable assets within the meaning of section 50 and take it to section 50C. Thus, I have no doubt that in the facts and circumstances of the instant case the provisions of section 50 are applicable and not the provisions of section 50C as perceived by the Ld. Assessing Officer. Hence the Ld. Assessing Officer is directed to apply the provisions of section 50 of the I.T. Act, 1961 for the land on which depreciation is already allowed in past and that forms part of the depreciable asset and assess the Capital Gains, if any, that works out by applying the provisions of section 50 of the I.T. Act, 1961."

Aggrieved by the order of the learned CIT(A), the revenue has preferred this appeal before the Tribunal.

5. The learned Departmental Representative submitted that the provisions relating to mode of computation of capital gains are contained in section 48 and the expressions used therein viz. 'full value of the consideration received or accruing to the assessee as a result of transfer' and 'cost of acquisition' are mainly relevant for the computation of capital gains. He submitted that as per the provisions of section 50 which contain non-obstante clause, the expression "mode of computation" used in section 48 stands modified in respect of computation of capital gains in relation to depreciable asset inasmuch as the same has to be taken as written down value of the relevant bock of assets at the beginning of the year in which depreciable asset is sold. He contended that the other expression 'full value of the consideration received or accruing to the assessee as a result of transfer' used in section 48, however, remains the same and here the provisions of section 50C come into play which lay down that stamp duty valuation is to be adopted or substituted as 'full value of the consideration received or accruing to the assessee as a result of transfer', if it is more than the consideration shown by the assessee. He submitted that section 50C is applicable only in case of transfer of land and building, which is capital asset including the depreciable one. He contended that even after the creation of legal fiction in section 50, the term 'full value of the consideration received or accruing to the assessee as a result of transfer' used in section 48 and section 50 had remained the same and this term has subsequently been extended by the legal fiction created in section 50C. He submitted that there is nothing in the provisions of section 50 to debar the application of the provisions of section 50C. According to him, the scope of fiction created in section 50 as explained by the Hon'ble supreme Court in the case of commonwealth Trust Ltd. Vs. C.I.T. 228 ITR 1 (SC) is confined to modify section 48 by taking the written down value as "cost of acqusition" in case of depreciable assets whereas the fiction created in section 50C operates in a different field, as explained by the Hon'ble Madras High Court in the case of K.R.Palanisamy vs. Union of India (2008) 306 ITR 61 as well as by the

Hon'ble Bombay High Court in the case of Bhatia Nagar Premises Co-operative Society Ltd. (2010) 234 CTR 175. Relying on the Hyden's rule and the Principles of Statutory Interpretation given in the book of G.P. Singh, he contended that true intention of legislature has to be taken into account while interpreting the statutory provisions and harmonious interpretation has to be given to the relevant provisions in order to achieve such legislative intention. He contended that going by the legislative intention, the term "cost of acquisition" used in section 48 has been modified by section 50, whereas section 50C has modified the term "full valuation of consideration". He contended that the provisions of section 50C are very clear in this regard and specify the situation where the same are applicable.

6. The learned Departmental Representative further contended that the fiction created in section 50 has limited applicability as explained in various judicial pronouncements and as held by the Hon'ble Bombay High Court in the case of CIT vs. ACE Builders (P) Ltd. (2006) 281 ITR 210 (Bom), section 54E is applicable even in the case where capital gains are computed in respect of depreciable asset as per the provisions of section 50 as there is no distinction made in section 54E between depreciable and non-depreciable asset. He contended that no such distinction is made even in the provisions of section 50C and the same, therefore, are applicable for computing capital gains in respect of depreciable asset being land and building covered u/s 50. He contended that if harmonious construction is assigned to the relevant provisions, it would follow that section 50C is applicable even in the case of computation of capital gains arising from transfer of depreciable asset being land and building which is covered by the provisions of section 50. He submitted that section 50C has been introduced in the statute after section 50 and despite the fact that the legislature was aware of the legal fiction already created in section 50, it has not put any bar on applicability of section 50C to the cases where section 50 is applicable. As regards the decision of the Tribunal in the case of Pachiram Nahata vs. Jt. CIT 127 TTJ 128 (Cal.) taking a view in favour of the assessee on this issue, he pointed out that

reliance was placed by the Tribunal in the said case on the decision of the Hon'ble Rajasthan High Court in the case of CIT vs. Oil And Natural Gas Commission reported in 255 ITR 413 (Raj.). He submitted that the said decision was rendered by the Hon'ble Rajasthan High Court in the context of section 44BB of the Act, the provisions of which specifically exclude the applicability of section 28. He submitted that it was, therefore, held by the Hon'ble Rajasthan High Court that while applying section 44BB, recourse cannot be taken to section 28. He contended that the provisions of section 50, on the other hand, do not override the provisions of section 50C and there being nothing in the provisions of section 50C to exclude specifically its applicability to section 50, it cannot be said that section 50C cannot be applied in case where section 50 is applicable. In support of this contention, he once again relied on the decision of the Hon'ble Supreme Court in the case of Commonwealth Trust Ltd. (supra). As regards the other decision of the Tribunal in the case of Singer India Pvt. Ltd. (ITA No. 1785/Mum/2007), he submitted that the Deed in that case was an unregistered Deed and it was, therefore, held that section 50C has no application. As regards the other decision of the Tribunal in the case of Inderlok Hotels Pvt. Ltd. 318 ITR (AT) 234 (Mumbai), he submitted that it was a case of transfer of stock in trade which was not a capital asset and it was therefore held that section 50C has no application.

7. The learned counsel for the assessee, on the other hand, explained the concept of "block of assets" and its implication on various related issues with the help of Press Note dated 11.10.1985 issued by the CBDT. He submitted that section 50 and section 50C operate in different fields and both being deeming provisions, provisions of section 50C cannot be extended and applied in the cases which are covered u/s.50 as a result of deeming fiction created therein. As regards the decision of the Tribunal in the case of Mrs. Munira S. Butawala ITA No. 3468/Mum/2007, he submitted that no decision on merit was finally rendered by the Tribunal therein and the issue was restored to the file of the Assessing Officer for deciding the same afresh in

accordance with law. He submitted that the decision of the Calcutta Bench of I.T.A.T in the case of Panchiram Nahata (supra), on the other hand, is on merit of the issue and the same is directly applicable. He contended that section 50C creates a deeming fiction, which is applicable only for the purpose for which it is created. He submitted that section 50C is made applicable in relation to transfer of capital asset being land and building whereas section 50 deals with capital asset forming part of block of assets. He contended that there is a difference in the concept of capital asset and capital asset forming part of block of assets. He contended that it is required to be taken into consideration that the computation of capital gains under section 50 is made entirely in a different manner inasmuch as cost of acquisition is adopted as given in section 50 which is different from one given in section 55. He submitted that even the benefit of indexation is not given for allowing deduction on account of cost of acquisition while computing capital gains u/s. 50. He contended that section 50 thus is a special provision to treat capital gains arising even from transfer of long term capital asset as short term capital gains by creating a deeming fiction and therefore, section 50C creating another deeming fiction cannot be applied in a case where section 50 is applicable. Relying on the decision of the Hon'ble Bombay high Court in the case of Executers and Trustees of Sir Cawasji Jahangir (First Baranet) and others vs. CIT 35 ITR 537(relevant page 548) as well as the other judicial pronouncements, he contended that the imposition of fiction upon a fiction is not permissible.

8. The learned counsel for the assessee then proceeded to raise an altogether new contention as an alternative contention in support of the assessee's case on the issue under consideration. In this regard, he submitted that although the assessee claimed to have sold the entire block of building comprising of office no. 101, 401 to 403 and 407 to 410 to the sons of its partners at the written down value, the Aseesing Officer was of the opinion that sale of office no. 101 was effected only on 17.05.2004 i.e. not in the year under consideration. According to him, the Assessing Officer thus worked

out the capital gain at Rs. 20,44,900/- being the difference between the stamp duty valuation of building excluding office no. 101 and its written down value. He contended that the block of assets i.e. building, according to the Assessing Officer, thus had not ceased to exist in the year under consideration and the same was very much in existence on which the assessee was entitled to claim the depreciation. Relying on the decision of the Division Bench of this Tribunal in the case of ACIT vs. Roger Pereira Communications (P) Ltd. reported in 34 SOT 64, he contended that in so far as the assessee is entitled to depreciation in respect of any block of asset subject to the conditions stipulated in section 32 read with section 43(6), section 50 cannot be applied. He then invited our attention to the definition of the terms "money payable" and "sold" given in Explanation 4 to section43(6)(c). He also referred to Explanation below section 41(4) to point out that "money payable" is defined to mean the price at which the asset is sold. He contended that even if the stamp duty value is adopted for computing the capital gains, written down value as per section 43(6)(c) would still be positive for the purpose of computing depreciation. He contended that there will be thus a conflict between the provisions of section 50 and section 32(1)(ii). Relying on the decision of the Hon'ble Bombay High Court in the case of Hukumchand Mills Ltd. reported in 47 ITR 949, he contended that the assessee is entitled to raise this new plea as an alternative plea despite the fact that the same was not raised before the authorities below. He invited our attention to the statement of facts filed before the learned CIT(A) and submitted that if the facts given in the said statement are contrary to the ground No.2 raised by the assessee before the learned CIT(A) and also to the order of the Assessing Officer giving a finding of fact based on record, the factual position as narrated by the Assessing Officer in the assessment order should preferably be taken into consideration for appreciating the alternative plea of the assessee. He also contended that the assessee can defend the order of the learned CIT(A) on the basis of the record of the assessment proceedings on a different ground. In support of this contention, he relied on the decisions of the Hon'ble Supreme Court in the

cases of Hukumchand Mills Ltd. 63 ITR 232 and Mahalaxmi Textile Mills Ltd. 66 ITR 710.

9. In the rejoinder, the learned Departmental Representative submitted that the provisions of section 50C are applicable in certain cases where transfer of land and building is shown for consideration less than the stamp duty valuation. He contended that section 50C cannot be read in isolation and it has to be read with section 48 which has been specifically referred to in section 50C. He submitted that even section 50 has to be read with section 48 and section 48 cannot be ignored which comes into reckoning when section 50 or section 50C is applicable. He also contended that applicability of section 50C is not excluded in a case where section 50 is applicable and the Court therefore cannot supply causus omissus. In support of this contention, he relied on page 62 of the G.P. Singh's book on Interpretation of Law. He also contended that section 48 is modified for the purpose of section 50 to the limited extent. He contended that the object of section 50C is of prime importance and the same is to curb on-money. According to him, there is no logical basis to say that the said object is not relevant or is not applicable in the cases covered by section 50, where there is a transfer of land and building. He contended that the fiction created in section 50 is a specific one and the same does not alter the expression "full value of consideration". He submitted that similarly the fiction created in section 50C has limited application and since both these fictions operate in different fields, there is nothing to prevent the application of both the legal fictions in a given case. In this regard, he relied on pages 303 to 305 of G.P.Singh's commentary and also on the Hon'ble Supreme Court decision reported in AIR (1959) SC 352.

10. As regards the alternative plea taken by the learned counsel for the assessee, the learned Departmental Representative contended that the assessee as a Respondent has no right to raise an altogether new plea at this stage before the Tribunal. He submitted that the learned CIT(A) has held that section 50 is applicable in the case of the assessee and the assessee has not

challenged this finding by filing a cross appeal or cross objection. Relying on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Tony Electronics Ltd. reported in 185 Taxman 121 and that of Patna High Court in the case of Chatturam Horilram Ltd. Vs. CIT reported in 25 ITR 326, he contended that Assessing Officer's order having already merged with the order of the learned CIT(A) on this issue, the assessee cannot challenge the order of the Assessing Officer now without filing any cross objection or cross appeal. Relying on the provisions of section 2(14), he submitted that the definition of capital asset given therein is wide enough to cover the block of assets. He also referred to the copy of depreciation chart and capital account of the assessee for the relevant period and pointed out that the entire office premises was sold by the assessee in the year under consideration and there was nothing left in that block of assets. He contended that the agreement might have been registered by the assessee in the next year, but transfer of entire block of office building had taken place in the year under consideration as shown by the assessee himself.

11. We have considered the rival submissions and also perused the material on record. We have also gone through the various judicial pronouncements cited by the leaned representatives of both the sides in support of their contentions. First we shall take up the main issue which is raised for consideration and decision of this Special bench i.e. "whether in a case where capital gain arising from the transfer of depreciable asset is computed as per the special provisions contained in section 50, the provisions of section 50C can be applied so as to adopt the value assessed for the purpose of payment of stamp duty to be the full value of the consideration received or accruing as a result of such transfer?". In this regard, it is observed that the provisions relating to computation of income from capital gains are contained in Chapter IV-E of the Income Tax Act, 1961 and section 48 of the said Chapter gives the mode of computation of capital gains. As per the provisions of section 48, the income chargeable under the head "capital gains" has to be computed by deducting from the full value of the

consideration received or accruing as a result of transfer of the capital asset, the expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement therein. The second proviso to section 48 allows the benefit of indexation in certain cases by allowing deduction on account of "indexed cost of acquisition" and "indexed cost of any improvement" instead of "cost of acquisition" and "cost of any improvement". Section 49 of Chapter IV-E stipulates the mode of computation of cost of acquisition with reference to certain modes of acquisition. The provision contained in section 50 as substituted with effect from 1.4.1988 is a special provision for computation of capital gain in the case of depreciable asset and the same being relevant in the present context is reproduced below:

> **50.** Notwithstanding anything contained in clause (*42A*) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :—
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> (*1*) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of the assets during the previous year, exceeds the aggregate of the following amounts, namely :—
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> (*i*) expenditure incurred wholly and exclusively in connection with such transfer or transfers;
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> (*ii*) the written down value of the block of assets at the beginning of the previous year; and
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> (*iii*) the actual cost of any asset falling within the block of assets acquired during the previous year,

such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets;

(*2*) where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short-term capital assets."

12. As is clearly evident from the provisions of section 50, the provisions of section 48 and 49 have been modified to a certain extent for the purpose of computation of capital gains in the case of depreciable assets. The benefit of indexation has also been taken away for computing the capital gains arising from the transfer of depreciable assets. This position has been duly taken note of by the Hon'ble Supreme Court in the case of Commonwealth Trust Limited vs. CIT (supra) wherein it was held that Section 50 has the effect of modifying the provisions of section 48 and 49, inasmuch as, for the assessee in whose case the depreciation allowance has been availed of before the transfer of capital asset, the meaning of cost of acquisition as stated in section 48 and 49 has been modified in the manner stated in section 50. It was held that section 50, in absolute terms, specifically provides for fixing the cost of acquisition in case of depreciable assets only. This position also becomes abundantly clear from a comparison of the provision of section 48 and 50 which respectively gives the mode of computation of capital gains as a result of transfer of capital asset and as a result of transfer of depreciable asset, inasmuch as, what is modified in section 50 for computing capital gain in case of depreciable assets is essentially the "cost of acquisition" and the other important and relevant term used in both these provisions i.e. "the full value of consideration received or accruing as a result of transfer of the asset" has

remained the same. The deeming fiction created in section 50 thus modifies the provision of section 48 giving mode of computation of capital gains only to the extent of modifying the term "cost of acquisition" and the said fiction thus operates in the limited field.

13. The provision of section 50-C which again is a special provision in respect of full value of consideration in certain cases has been inserted in the statute with effect from 1.4.2003 and sub-section (1) thereof being relevant in the present context is extracted below :

> **50C.** (1) 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 **[***or assessable***]** by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed **[***or assessable***]** shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

As already noted by us from the reading of the provisions of section 50 and relying on the decision of the Hon'ble Supreme Court in the case of Commonwealth Trust Ltd. (supra), the deeming fiction created in section 50 has a limited application in as much as it modifies the term 'cost of acquisition' used in section 48 & 49 for the purpose of computing capital gains arising from transfer of depreciable assets. The other term "full value of consideration received or accruing as a result of transfer of the asset", used in section 48, however, has remained unchanged even for the purpose of computing capital gains arising from the transfer of depreciable assets and the deeming fiction created in section 50C comes into play here as it contains a special provision for determining full value of consideration in certain cases. As per the said provision, when the consideration received or accruing

as a result of the transfer by an assessee of capital asset, being land or building or both, is less than the value adopted or assessed by any authority of the State Government for the purpose of payment of stamp duty in respect of such transfer , the value so adopted or assessed shall for the purpose of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer. There are thus now two deeming fictions created in section 50 and section 50C. The first deeming fiction modifies the term 'cost of acquisition' used in section 48 for the purpose of computing the capital gains arising from transfer of depreciable assets whereas the deeming fiction created in section 50C modifies the term "full value of the consideration received or accruing as a result of transfer of the capital asset" used in section 48 for the purpose of computing the capital gains arising from the transfer of capital asset being land or building or both. The deeming fiction created in section 50-C thus operates in a specific field which is different from the field in which section 50 is applicable. The Hon'ble Bombay High Court in the case of Bhatia Nagar Co-operative Society Ltd. (supra) had an occasion to consider the scope of section 50C and it was held by Their Lordships that section 50C is a measure provided to bridge the gap as it was found that the assesees were not correctly declaring the full value of consideration or in other words resorting to the practice of under valuation. As rightly contended by the learned Departmental Representative, if this is the legislative intention behind insertion of the provisions of section 50-C, it does not stand to any logic as to how the same should not be applied in the case of land and building where depreciation has been claimed by the assessee. Moreover, if there was any legislative intention to exclude the applicability of the provision of section 50C to the cases involving transfer of land and building being depreciable assets as covered by section 50, the same could have been provided for in the provisions of section 50C itself as the same was inserted in the statute on 01.04.2003 when the provisions of section 50 were already there in the statute.

14. At the time of hearing before us, the learned counsel for the assessee has mainly contended that section 50C creating a deeming fiction cannot be applied in a case where deeming fiction created in section 50 is applicable since imposition of fiction upon fiction is not permissible. In support of this contention, he has, inter alia, relied on the judgement of the Hon'ble Bombay High Court in the case of Executers and Trustees of Sir Cawasji Jahangir (First Baranet) and others vs. CIT (supra). We have carefully perused the said judgement. It is observed that in the case of Executers and Trustees of Sir Cawasji Jahangir (First Baranet) and others vs. CIT (supra), the facts involved were that the Income-tax Officer had determined " the undistributed portion of the assessable income" of the company viz. M/s. Cawasji Jehanjir & Co. Ltd., of the previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof as follows :

Total income finally determined	. . .	20,63,016
Less : Tax payable	. . .	8,03,115
		12,59,901
Less : Dividend declared by the company		4,34,768
	Rs.	8,25,133

The aforesaid total income of Rs. 20,63,016 included a sum of Rs. 7,86,900 which was taken by the company directly to the general reserves and not to the profit and loss account and no part thereof was distributed as dividend. The said amount was brought to tax in the hands of the company under section 12B as "Capital gains ". Having determined the figure of Rs. 8,25,133 as above, the proportionate share thereof was included by the Income-tax Officer in the total income of each shareholder for the purpose of assessing his total income. As required by the provision of section 16(2), the said proportionate share had to be suitably grossed up. Having done that, the Income-tax Officer computed the total income of each of these shareholders by including a sum of Rs. 6,31,527 as section 23A dividend in the case of the

assessee viz. " the Executors & Trustees of at Sir Cawasji Jehangri, 1st Bart, " and a sum of Rs. 1,26,305 in the case of each of the five shareholders. The contention raised before the Income-tax authorities was repeated before the Tribunal, that the portion of section 23A dividend attributable to capital gain in the hands of the company should be taxed in the hands of the shareholders at the rate appropriate to " Capital gains " as provided by section 17(6) of the Income-tax Act. For its reasons given in the main order passed in I. T. A. No. 6094 of 1956-57, the Tribunal held that section 23A dividend that is included in the total income of an assessee shareholder cannot be dissected for the purpose of determining income-tax and super-tax payable thereon by the said assessee-shareholder. It, therefore, rejected the assessee's contention, the result being that the entire section 23A dividend was held to be liable to be taxed in the hands of the shareholder at the rates applicable to his total income. On these facts, the question which arose for the consideration of the Hon'ble Bombay High Court was " Whether the section 23A dividend of Rs.. 6,31,527 can be dissected into two parts in the ratio of Rs. 7,86,900 : Rs. 20,63,016 for the purpose of determining the amount of income-tax and super-tax payable by the assessee shareholder on his total income and if so, whether that smaller portion of Rs. 6,31,527 is liable to be taxed at the rates applicable to ' capital gains ' as laid down in section 17(6) of the Income-tax Act, 1922. The contention urged before the Hon'ble Bombay High Court on behalf of the assessees in this regard was that under section 23A it is not the income of the company which is deemed to have been distributed among the shareholders but it is the income as computed in the hands of the company that is distributed. This contention was negatived by the Hon'ble Bombay High Court relying inter alia on the judgment of Hon'ble Supreme Court in the case of M. K. Venkatchalam, Income-tax Officer, v. Bombay Dyeing and Manufacturing Co. Ltd.(1) 34 ITR 143. It was held that by the fiction created in section 23A, the dividend income which is not paid to nor received by the shareholders is to be deemed for the purpose of assessment to have been distributed as dividend to the shareholder along with other shareholders and it is to be included in their total income for the purpose of assessing their

total income. It was held that it was not permissible for the shareholder who received dividend in respect of the profits of a company to say that the dividend which he has received is to be split up into a number of heads for the purpose of assessment in arriving at his total income in the absence of remotest suggestion in any relevant section. It was held that the shareholder and the company are separate entities and it was extremely difficult to say that the assessee shareholder himself became chargeable under the head of "capital gains" since there were no profits or gains which could be said to have arisen to the assessees from the sale, exchange or transfer of a capital asset belonging to them. It was held that by the supposition of law in section 23A, a proportionate undistributed income of the company has for this purpose become the dividend income of the assessee and the argument raised on assessee's behalf asking to impose a supposition about capital gains on that was not cogent in the absence of anything in the language of the relevant provisions warranting to subjoin or track a fiction upon a fiction.

15. The situation involved in the present context however is entirely different, inasmuch as, there are two different fictions created by two different provisions, i.e. provision of section 50 and section 50-C and they operate in specific fields which are entirely different. Thus, it is not a case where any supposition has been sought to be imposed on other supposition of law. On the other hand, there are two different fictions created into two different provisions and going by the legislative intentions to create the said fictions, the same operate in different fields and there is nothing in the relevant provisions which prohibit the applicability of these provisions simultaneously. It is well settled position that legal fictions are created only for definite purpose and they are limited to the purpose for which they are created and should not be extended beyond their legitimate filed. As already noted by us, the legal fictions in section 50 and section 50-C are created for definite purposes which are entirely different from each other and by applying the provisions of section 50C in a case where section 50 is applicable, there is no extension of the legal fiction created in the said

provision beyond its legitimate field. Moreover, it is not a case where supposition is sought to be imposed on a supposition of law which is not warranted or supported by the language of the relevant provisions and in any case, the harmonious interpretation of the relevant provisions makes it clear that there is no exclusion of applicability of one fiction in a case where other fiction is applicable. As a matter of fact, there is no conflict in these two legal fictions which operate in different fields and their application in a given case simultaneously does not result in imposition of supposition on other supposition of law which is not warranted or supported by the language of the relevant provisions.

16. In the case of CIT v. ACE Builders Pvt. Ltd. (supra), exemption available u/s.54E in respect of long term capital gains was denied to the assessee where capital gain was computed u/s.50 as short term capital gain on transfer of long capital asset which was deemed to be a short term capital asset being a depreciable asset. The Hon'ble Bombay High Court, however, allowed the exemption claimed by the assessee u/s.54E, inter alia, on the ground that section 54E does not make any distinction between depreciable asset and non-depreciable asset. A perusal of the provisions of section 50C, which has been reproduced hereinabove, also shows that there is no such distinction made between a depreciable asset and a non-depreciable asset and it, therefore, cannot be said that the said provision is not applicable in a case of transfer of depreciable asset which is covered by section 50.

17. As regards the alternative contention sought to be raised by the learned counsel for the assesse on the basis that one of the offices being Office No.101, having not been sold by the Assessee in the year under consideration as held by the Assessing Officer, the relevant Block of Assets had not ceased to exist in the year under consideration and there was thus no question of any capital gain chargeable to tax under Sec.50 of the Act, it is observed that the assessee company itself had considered the entire block of buildings as having been sold/transferred during the year under consideration

in as much as the block of assets of building was shown as nil by the Assessee and no depreciation had been claimed on the said block. Although the AO held that Office No.101 was not sold by the Assessee in the year under consideration, the said finding of the Assessing Officer was challenged by the Assessee during the course of appellate proceedings before the learned CIT(A) by submitting that the entire block of assets of building with its written down value of Rs.49,49,525 was sold during the year under consideration. It was also submitted by the Assessee that the value of said block for the purpose of stamp duty was to the tune of Rs.74,49,000/-. Thus the finding of the AO that Office No.101 had not been sold during the year under consideration was challenged by the Assessee and by allowing the appeal of the Assessee, the said finding of the AO has been reversed by the learned CIT(A). This issue as to whether the entire block of assets was sold by the Assessee in the year under consideration thus has been finally decided by the learned CIT(A) in favour of the Assessee and the Assessee cannot be said to be aggrieved by the said decision so as to challenge the same before the Tribunal. Moreover, the said issue having been decided by the learned CIT(A) in favour of the assessee, it is not permissible for it to raise the same, as a respondent, under Rule 27 of the ITAT rules. The applicability of section 50 in its case thus was never disputed by the assessee before the learned CIT(A) and the relevant finding of the learned CIT(A) that entire block of assets had ceased to exist during the year under consideration having become final, the assessee, in our opinion, can not now dispute the applicability of section 50 at this stage by taking a contrary stand stating that that the said finding is factually incorrect merely because the same is likely to support its alternative contention which is being sought to be raised for the first time as a respondent without filing a cross appeal or cross objection.

18. As regards the decisions of the Hon'ble Supreme Court in the cases of Hukumchand Mills (supra) and Mahalakshmi Textile Mills Ltd. (supra) cited by the learned counsel for the assessee in support of the assessee's case on this issue, it is observed that the same are clearly distinguishable and are

of no help to the assessee's case. In the case of Hukumchand Mills (supra), the subject-matter of the appeal before the Tribunal was the question as to what should be the proper written down value of the buildings, machinery, etc., of the assessee for calculating the depreciation allowance under section 10(2)(vi) of the 1922 Act and Hon'ble Supreme court held that it was certainly open to the department as a respondent, in the appeal filed by the assessee before the Tribunal, to support the finding of the Appellate Assistant Commissioner with regard to the written down value on any of the grounds decided against it. It was argued on behalf of the assessee that the action of the Tribunal in remanding the case was not strictly justified by the language of rule 27 or rule 12. In this context, it was held by the Hon'ble Supreme Court that even assuming that rules 12 and 27 were not strictly applicable, the Tribunal had got sufficient power under section 33(4) of the Act to entertain the argument of the department with regard to the application of paragraph 2 of the Taxation Laws Order and remand the case to the Income-tax Officer in the manner it has done. It was also held that rules 12 and 27 are not exhaustive of the powers of the Appellate Tribunal and the same are merely procedural in character which do not, in any way, circumscribe or control the power of the Tribunal under section 33(4) of the Act. The issue in the case of Hukumchand Mills (supra) as raised in the appeal filed by the assessee before the Tribunal thus was relating to the determination of correct written down value of the buildings, machinery, etc. for calculating the depreciation allowance and Hon'ble Supreme court held that it was certainly open to the department as a respondent, in the appeal filed by the assessee before the Tribunal, to support the finding of the Appellate Assistant Commissioner with regard to the written down value on any of the grounds decided against it. In the present case, the issue raised by the department is relating to the applicability of section 50C in a case where section 50 is applicable which by itself presupposes that applicability of section 50 is not in dispute. As a matter of fact, the applicability of section 50 was never disputed by the assessee before the learned CIT(A) and the finding in this regard to the effect that the entire block of assets was ceased to exist in

the year under consideration having been recorded by the learned CIT(A) accepting the stand taken by the assessee before him, this issue can not be said to be decided against the assessee by the learned CIT(A).

19. In the case of Mahalaxmi Textile Mills Ltd. (supra) cited by the learned counsel for the assessee, the assessee, carrying on the business of manufacture and sale of cotton yarn, had spent Rs. 93,215 in A.Y. 1956-57 for introduction of " Casablanca conversion system " in its spinning plant. Substantially, this involved replacement of certain roller stands and fluted rollers fitted with rubber aprons to the spinning machinery, removal of ring-frames from certain existing parts, introduction, inter alia, of ball-bearing jockey-pulleys for converting the original band-drivers to tape-drivers and other additions and alterations in the drafting mechanism. The Income-tax Officer disallowed the claim of the assessee for Rs. 93,215 because it was not admissible as " development rebate " since the introduction of the Casablanca conversion system did not involve installation of " new machinery ". The Appellate Assistant Commissioner agreed with the Income-tax Officer. In appeal to the Tribunal, besides submitting the claim that expenditure was allowable as development rebate, the assessee urged that the amount laid out for introducing the Casablanca conversion system was in any event expenditure allowable under section 10(2)(v) of the 1922 Act as current repairs. The Tribunal inspected the spinning factory of the assessee and studied the working of the machinery with the Casablanca conversion system in the process of spinning yarn. They also considered the literature published by the manufacturers of Casablanca conversion system and the relevant notification issued by the Ministry of Commerce, Government of India, defining the import policy, and held that as a result of " the stress and strain of production over a long period " there was need for change in the plant and that the assessee had replaced old parts by introducing the Casablanca conversion system. In the view of the Tribunal the expenditure incurred for introducing the Casablanca conversion system, though not admissible as development rebate, was admissible as an

allowance under section 10(2)(v) of the 1922 Act. On reference, one of the questions referred to the hon'ble High Court of Judicature at Madras was whether, on the facts and in the circumstances of the case, the Tribunal had jurisdiction to decide whether the sum of Rs. 93,215 constituted an allowable item of expenditure under section 10(2)(v) of the Act ?.The Hon'ble Madras High Court held that the Tribunal had jurisdiction to permit the assessee to raise a new contention which was not raised before the departmental authorities. On appeal filed by the department with special leave, the Hon'ble Supreme Court held that the subject-matter of the appeal filed before the Tribunal was the right of the assessee to claim allowance for Rs. 93,215 and whether the allowance was admissible under one head or the other of sub-section (2) of section 10, the subject-matter for the appeal remained the same. It was held that the Tribunal having held that the expenditure incurred fell within the terms of section 10(2)(v), though not under section 10(2)(vib), it had jurisdiction to admit that expenditure as a permissible allowance in the computation of the taxable income of the assessee. Hon'ble Apex Court observed that the Tribunal had evidence before it from which it could be concluded that by introducing the Casablanca conversion system the assessee made current repairs to the machinery and plant and these findings had not been challenged by the department. It was also observed that under sub-section (4) of section 33 of the Indian Income-tax Act, 1922, the Appellate Tribunal was competent to pass such orders on the appeal "as it thinks fit" and there was nothing in the Income-tax Act to restrict the Tribunal to the determination of questions raised before the departmental authorities. In the present case, as we have already observed, the subject matter of the appeal before the Tribunal is whether the provision of section 50C is applicable when the capital gain is to be computed under section 50. The applicability of section 50 to its case on the ground that the relevant block of assets had not ceased to exist was not disputed by the assessee before the authorities below. On the other hand, the stand taken by the assessee throughout was that the entire block of building was sold by it during the year under consideration and this stand of the assessee was accepted by the learned CIT(A) giving a

finding in favour of the assessee. In this backdrop, we are of the view that the contention now being sought to be raised on behalf the Assessee that the entire block of assets did not cease to exist and therefore the provisions of Sec.50 were not attracted, cannot be entertained at this stage since the stand so taken is contrary to the stand taken by the Assessee himself and the decision rendered by the learned CIT(A) accepting the said stand. In our opinion, the Assessee is not entitled to take a stand with regard to facts, inconsistent with the stand that he had taken before the revenue authorities to obtain a decision in his favour. He cannot be heard to say that the stand on facts so taken by him is not correct just to raise a new legal plea. We are of the view that in the facts and circumstances of the present case, it would not be appropriate to exercise the discretion to permit the Assessee to put forth such alternate and inconsistent plea.

20. For the reasons given above and on interpretation of the relevant provisions of sections 48, 50 and 50C, we are of the view that there are two deeming fictions created in section 50 and section 50C. The first deeming fiction modifies the term 'cost of acquisition' used in section 48 for the purpose of computing the capital gains arising from transfer of depreciable assets whereas the deeming fiction created in section 50C modifies the term "full value of the consideration received or accruing as a result of transfer of the capital asset" used in section 48 for the purpose of computing the capital gains arising from the transfer of capital asset being land or building or both. The deeming fiction created in section 50-C thus operates in a specific field which is different from the field in which section 50 is applicable. It is thus not a case where any supposition has been sought to be imposed on other supposition of law. On the other hand, there are two different fictions created into two different provisions and going by the legislative intentions to create the said fictions, the same operate in different fields. The harmonious interpretation of the relevant provisions makes it clear that there is no exclusion of applicability of one fiction in a case where other fiction is applicable. As a matter of fact, there is no conflict between these two legal

fictions which operate in different fields and their application in a given case simultaneously does not result in imposition of supposition on other supposition of law. In our opinion, the Assessing Officer thus was right in applying the provision of section 50C to the transfer of depreciable capital assets covered by section 50 and in computing the capital gain arising from the said transfer by adopting the stamp duty valuation. We, therefore, answer the question referred to this special bench in the affirmative i.e. in favour of the Revenue and against the assesse.

21. Before parting, we may clarify that all the judicial pronouncements cited by the learned representatives of both the sides in support of their respective stands have been considered and deliberated upon by us while arriving at our conclusions. Some of them, however, are not specifically mentioned or discussed in the order as `the same have been found to be not directly relevant to the issue or the proposition propounded therein is found to be repetitive which has already been considered by us. We have also not specifically discussed the various decisions of the division benches of the Tribunal referred to by the learned representative of both the sides during the course of their arguments for the reason that this special bench has been constituted to resolve the controversy arising from the different/contrary views expressed therein on the issue which has been referred to this special bench.

22. In the result, the appeal by the Revenue is allowed.

Order pronounced in the open court on this 25th day of April, 2011.

Sd/-	sd/-	sd/-
(N.V.Vasudevan)	(D. Manmohan)	(P.M. Jagtap)
Judicial Member	Vice-President	Accountant Member

Mumbai dated the 25th April, 2011.

Copy to:

1. The Assessee
2. The ITO-22(3)(4), Mumbai
3. The CIT, City XXII, Mumbai
4. The CIT(A)-XXII, Mumbai
5. The DR 'F' Bench, Mumbai

By order
/True copy/

Asst. Registrar, ITAT, Mumbai