

IN THE INCOME TAX APPELLATE TRIBUNAL

“D” BENCH, MUMBAI

BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

ITA No.698/Mum./2014
(Assessment Year : 2009–10)

Income Tax Officer, Ward–20(2)(1)
701, Piramal Chambers
7th Floor, Lalbaug, Mumbai 400 012

..... Appellant

v/s

Legal Heir of Shri Durgaprasad Agnihotri
A–8, Manik Moti, Yari Road
Versova, Andheri (E), Mumbai 400 061
PAN – AACPA1267H

..... Respondent

Revenue by : Shri Love Kumar
Assessee by : Shri Sunil T. Vankawala a/w
Shri Subhash Chhaied

Date of Hearing – 09.07.2015

Date of Order – 14.10.2015

ORDER

Per Sanjay Arora, A.M.:

The present appeal preferred by the Revenue is directed against the impugned order dated 29th November 2013, passed by the learned Commissioner of Income Tax (Appeals)–31, Mumbai, for the assessment year 2009–10. The sole, effective ground raised by the Revenue is reproduced below:–

“1. The learned CIT(A) has erred on the 54EC of the I.T. Act, 1961, on short term capital gain u/s 50 of the Act on depreciable assets of shops following the decision in the case of CIT v/s Ace Builder Pvt. Ltd., 281 ITR 210, as facts of the case is different.”

2. The solitary issue involved in this appeal filed is with regard to claim of the assessee made under section 54EC of the Income Tax Act, 1961 (for short ‘the Act’) which was rejected by the Assessing Officer but was allowed by the learned CIT(A).

3. The brief facts are that the assessee is an individual engaged in the business of photography. During the year under consideration, the assessee earned income from business as well as income from other sources. The assessee also earned long term capital gain, which was claimed exempt under section 54EC. The assessee sold one shop and earned capital gain on the sale of the said shop. The assessee made investment of Rs.25,50,000, in capital gain bonds of National Highway Authority of India and claimed exemption under section 54EC of the Act against the aforesaid capital gain earned. The Assessing Officer denied the benefit of exemption under section 54EC on the ground that the shop was a depreciable asset and the resultant gain was a short term capital gain whereas the exemption under section 54EC was available only on long term capital gain (LTCG).

4. Being aggrieved, the assessee filed appeal before the first appellate authority wherein the learned CIT(A) allowed the claim of the assessee. The operative para of the learned CIT(A) while allowing the appeal is reproduced below:–

“5.3 In the present case, it is not disputed that the shop sold by the appellant was a long term capital asset. As elaborated by the Jurisdictional High Court in the above cited order, although as per section 50 the profit arising from the transfer of depreciable asset is deemed to be gain arising from the transfer of short-term capital asset, the provisions do not deem, the long-term capital asset so transferred is to be considered a short-term capital asset. In other words, the nature of the asset does not change, only the gains arising from the transfer thereof are to be treated in a specified manner i.e. as short-term capital gains. In the decision cited above, the Court ruled in a case where exemption had been sought u/s 54E but on the same analogy benefit under section 54EC shall be available to an assessee in the case of depreciate asset, if it is held for more than 36 months. The exemption provisions in Section 54E / 54EC / 54F etc. are not linked to section 50. Therefore, if the assessee complies with conditions necessary under section 54E, he will be entitled to the benefit envisaged in section 54EC, even on transfer of depreciable assets held for more than 36 months. In the impugned order, the A.O. has noted the decision of the Bombay High Court in the case of CIT Vs ACE Builders (cited supra), but has observed that the said decision was not accepted in principle by the Department and the SLP against

the decision was not filed by the Department due to the smallness of the tax effect involved. However, as per judicial principles in such a situation, the decision of the jurisdictional High Court is binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. For these reasons, I delete the disallowance of exemption u/s 54EC made by the A.O. and the ground raised by the appellant is allowed.”

Aggrieved by the aforesaid order passed by the learned CIT(A), the Revenue is in appeal before the Tribunal.

5.1 Before us, the learned Departmental Representative argued that the Assessing Officer was justified in rejecting the claim of the assessee in-as-much as the capital gain on the sale of shop, a depreciable asset, is deemed as a short-term capital gain (STCG) u/s.50, while exemption u/s. 54EC is allowed only on LTCG, i.e., which is, by definition, not STCG.

5.2 The Id. counsel for the assessee would submit that the issue under reference is covered in favour of the assessee by the decision of the Hon'ble jurisdictional High Court in *CIT vs. Ace Builders (P.) Ltd.* [2006] 281 ITR 210 (Bom).

6. We have heard the rival contentions and perused the relevant material on record.

The capital asset sold by the assessee during the year is a shop, comprising of land (or rights therein) as well as building or the super-structure thereon, which are separate and distinct assets under the Act (refer: *CIT v. Alps Theatre* [1967] 65 ITR 377 (SC) and *CIT v. Citi Bank N.A.* [2003] 261 ITR 570 (Bom)). The super-structure being a depreciable asset, on which depreciation had been allowed, as noted by the Id. CIT(A) (refer para 3 of the impugned order), the capital gain arising on its transfer would be, in terms of section 50 of the Act, a short-term capital gain (STCG), to be computed in the manner prescribed therein. To this extent, there is no dispute. The assessee, however, claims that the building having been held for a period in excess of

three years, it would by definition qualify to be a long-term capital asset (LTCA) u/s.2(29A), and the capital gain arising on its transfer eligible for exemption u/s. 54EC.

We, next, consider the aspect of allowance of deduction u/s.54EC on the capital gains arising u/s.45 r/w s. 50. Section 50 clearly applies notwithstanding anything contained in section 2(42A) of the Act, which defines short-term capital asset (STCA) with reference to its holding period, i.e., period for which it stands held by the assessee prior to its disposal/transfer by him. Section 2(29A) defines LTCA negatively to mean an asset which is not a STCA. Section 50, thus, overrides both section 2(42A), as explicitly stated therein and, by implication, section 2(29A). Accordingly, by virtue of the deeming provision of section 50, cost of a long-term capital asset (LTCA), i.e., as per section 2(29A), where depreciable, forming part of a block assets on which depreciation stands claimed, the capital gain on its transfer would have to be computed in terms thereof, i.e. by treating the WDV of the relevant block of assets (or, as the case may be, the relevant asset) as its cost of acquisition. The second deeming per the provision of section 50 is *qua* the nature of such capital gains, i.e., as capital gains arising from the transfer of a STCA. Section 54EC is available on capital gain arising on the transfer of a LTCA, i.e., which is not a STCA by definition. The same shall, therefore, not apply to capital gains computed u/s.50.

The rationale for this far is not far to seek. Depreciation on a capital asset represents the consumption of an asset to that extent. A depreciable asset gets exhausted on its deployment and user for the purpose of business/profession over its useful life. The depreciation allowed represents the depletion of an asset to that extent, i.e., over the holding period, so that it signifies its consumption to that extent. How could its cost, thus, remain constant? The constancy of cost, i.e., as crystallized, is the premise for deducting the cost of acquisition of a capital asset on its transfer in computing the capital gains. Further, the user for business purposes, as in the instant case, forms the basis of the charge against business profits. Though, therefore, by definition a capital expenditure, depreciation, which is amortization of the cost over a definite period is allowed as expenditure where the asset is

employed for the purposes of business or profession, toward recouping its' cost, so as to make available the necessary funds with the business for the replacement of the asset at the end of its' useful life, enabling the business to in the process, maintain the capital of the firm. Income, by definition, is accretion to capital, so that only the excess, i.e., over cost, including the cost of depletion of capital, would be income, both in economic and accounting theory. The charge of depreciation, thus, has a sound basis thereto, well accepted in taxing statutes. Reference in this regard be made to the decisions in *CIT vs. Badiani (PK)* [1970] 76 ITR 369 (Bom) and *CIT vs. Society of Sister of St. Anne* p1984] 146 ITR 28 (Kar), explaining the rationale of depreciation on a depreciable asset. It is for this reason that the WDV of the relevant (block of) asset, representing its un-depreciated or the unutilized life/value, is taken as its cost of acquisition for the purpose of computation of capital gains in-as-much as it is only this, depreciated asset, that stands transferred, fetching a value corresponding with its' balance life. This would, in our view, also explain or bring forth the prescription of a separate computation mechanism for capital gain on transfer of capital assets that are depreciable (per s. 50), and also not extending thereto the indexation benefit, to adjust for the inflation factor, per s. 48, for such assets even where held for long-term. Why, the WDV of an asset, which u/s.50 substitutes for its' cost, is itself not determinable, i.e., where depreciable, forming part of a block of assets, even as held by the Hon'ble Courts. *Section 50 is thus a self contained code for determining the nature and the quantum of the capital gain arising on the transfer of depreciated assets.* The deeming of section 50, even otherwise separately provided for (per s. 50(2)), would thus prevail. We, therefore, find merit in the contention of Id. DR with regard to this aspect of the matter.

So, however, the Hon'ble jurisdictional High Court, even as noticed by the Id. CIT(A), has in *Ace Builders (P.) Ltd.* (supra), clearly held deduction u/s.54EC to be available on the capital gains computed u/s.50 of the Act. The said authority, as well as we are bound by the said case law. No difference in facts, as claimed, has been brought forth by the Revenue for the non-applicability of the said decision in the instant case. We, therefore, respectfully following the same, uphold his decision

in the matter. We decide accordingly. The foregoing discussion, which represents our humble opinion in the matter, is only to project the view point of the Revenue, for the consideration of the Hon'ble Court in appropriate proceedings.

7. In the result, Revenue's appeal stands dismissed.

Order pronounced in the open court on October 14, 2015

Sd/-
D. Manmohan
(Vice President)

Sd/-
Sanjay Arora
(Accountant Member)

MUMBAI, DATED: 14.10.2015

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai