

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'F', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

Before Shri Shamim Yahya, AM & Shri Sandeep Gosain, JM

ITA No.6992/Mum/2008 : Asst.Year 2003-2004

M/s.BSI Securities International Ltd. 34-A, Nariman Bhavan 227 Nariman Point Mumbai – 400 021. PAN : AAACB1930D.	बनाम/ Vs.	The Income Tax Officer Ward 4(1)(1) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : **Shri Paresh Saparia**

प्रत्यर्थी की ओर से /Respondent by : **Ms.Pooja Swaroop**

सुनवाई की तारीख / Date of Hearing : 25.05.2017	घोषणा की तारीख / Date of Pronouncement : 07.07.2017
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आदेश / ORDER

Per Shamim Yahya, AM

This appeal by the assessee is directed against order of learned CIT(A) dated 29.09.2008 and pertains to assessment year 2003-2004.

2. The grounds of appeal read as under:-

I DISALLOWANCE OF APPELLANT'S CLAIM OF RS. 48,15,8637- FOR BAD DEBTS/BUSINESS LOSS :

1. *The Learned C1T(A) erred in confirming disallowance of appellant claim for Bad Debts/Business Loss of Rs.48,15,863/-.*
2. *The Learned CIT(A) ought not to have confirm disallowance of appellant claim for Bad Debts/Business Loss of Rs.48,15,863/- .*

II COMPUTATION OF CAPITAL GAINS U/S 50C OF Rs.51,96,190/- INSTEAD OF Rs.42,90,190:

1. *The Learned CTT(A) erred in confirming computation of capital gains u/s 50C at Rs.51,96,190/- instead of Rs.42,90,190/-.*

2. *The Learned CFT(A) ought not to have confirmed computation of capital gains at Rs.51,96,190/- instead of Rs.42,90,190/-.*

The appellant craves leave to add, amend, alter or modify his ground or grounds of appeal before the hearing.”

3. *Apropos disallowance of assessee’s claim for bad debts / business loss.*

4. *Brief facts of the case are as under:-*

4.1 *The assessee has debited Rs. 48,15,863 as bad debt. The assessee was asked to furnish the details of same along with the party wise breakup of debts, details of margin money collected, copy of ledger account of bad debt parties and how it fulfilled the conditions of s.36(1)(vii) r.w.s 36(2). The assessee submitted as under through letter 23.8.05.*

"The assessee owned an office at Nariman Point. In the course of business of carrying on the NSE Card, the assessee had taken a deposit of Rs.10,00,000/- from The BSI Ltd against furnishing of collateral security to Bank "Credit Agricole Indosuez" (Previously known as Banque Indosuez) for the facilities enjoyed by BSI Ltd (formerly The Bhopal Sugar Industries Ltd). The said deposit was utilized in the course of carrying on the NSE business and was repaid on closure of NSE business.

The BSI Ltd has defaulted in repaying the said credit facility -and therefore Bank had filed the suit no.4460 of 1997 in High Court against The BSI Ltd and the assessee was also made the defendant. As per the order .of the Court dated 12.02.1998 the

High Court appointed a Court Receiver for the said premises and the physical possession was taken over by the Court Receiver for adjusting against the loan facility of BSI Ltd.

The said premises were sold to Modisons Metals Ltd for consideration for Rs.46,80,000/- and the consideration was adjusted towards the bank liability by the Court Receiver. The SI Ltd. had not only defaulted in making payments to the above bank but was declared a sick unit and was under BIFR, copy of the letter from Board for Industrial and Financial Reconstruction dated 17.06.1988 is enclosed herewith for registering the company. The debts had become bad, hence written off in the books of accounts.

<i>Opening Balance</i>	<i>Rs.863</i>
<i>Add : Legal charges for contesting the Court matter paid to M/s.BSI Ltd. on 8.7.2002 by cheque</i>	<i>Rs.1,35,000</i>
<i>Add : The amount receivable on sale of office premises (adjusted by Bank on 15.01.2003)</i>	<i>Rs.46,80,000</i>
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<i>Debit as per books – Bad Debts</i>	<i>Rs.48,15,863</i>
	<i>=====</i>

4.2 Further, the assessee referred to its Memorandum and Articles of Association and claimed that mortgage of the property was its business also. Considering the assessee's submissions, the Assessing Officer passed an elaborate order dismissing the assessee's claim as under:-

"1.3 I have gone through the submission of the assessee. The Memorandum contained "Main objects of the Company", "Objects incidental or ancillary to main objects" and "Other objects". The Memorandum nowhere refers to providing /standing collateral security to third party for financing the sister concern as business activity of the assessee. If that be the case

of the assessee there should have been any revenue recognized from this activity. The Clauses in Memorandum talk of mortgage of the assets of the company for revenue generation in its business. Merely there is an unclear reference in Memorandum and Association to mortgage of asset of the company for revenue generation in its business, it can not be accepted that the assessee was carrying on such business during the year since the conduct of assessee does not show any business activity of or revenue recognition from the nature claimed by assessee. The assessee has not shown any income there from. The deposit of Rs.1000000/- was directly taken to balance sheet. In any way providing collateral security to a third party for arranging finances to sister concern is not a business activity unless the assessee recognizes revenue/income from this activity. Even in such a case the loss of asset for default of sister concern to repay the loan does not fulfill the conditions of allowability of bad debt. Assessee has not furnished any other reasons for the same to be treated as business activity. It is also worth noting that a company in need of finance is claimed to have given deposit of Rs. 10 lacs to the assessee.

1.4 The provisions of s.36(l)(vii) which permits deduction of 'bad debt' state that 'subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year⁹. Thus allowability of bad debt is subject to s.s.(2), The relevant provisions of Sub-section(2) states that no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee'. The assessee is not into money lending business, Thus for bad debt to be allowed as deduction, that debt should have been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year. The debt of Rs. Rs.48,15,863/- is not a trading debt. It has not passed

through the credit side of P&L account of any year. This debt has not been taken into account in computing the income of the assessee of this previous year relevant, to AY 2003-04 or of an earlier previous year. Hence the claim of bad debt of Rs.48,15,863/- failed .the primary litmus test of allowability for deduction as bad debt and hence is not allowable. However the claim of assessee is examined in detail herein after for the correctness of conclusion.

1.5 The common understanding of the bad debt is the debt which is worthless or the debt which is not worthy of being recovered. Thus, if a debt is bad in nature, the chances of its recovery are bleak and remote. As per Black law Dictionary, the meaning of term bad debt is a debt that is uncollectible and that may be deductible for tax purposes. A debt is created in the books of accounts either by way of credit sales or by giving loans or advances in the normal course of business by a lending / finance company. In the case of credit sales, if mercantile system of accounting is followed, the sale is credited in the books of account in the trading account and forms a part of computation of income. This results into creation of debt in the books. However, in the case of cash system of accounting, sale is offered for taxation at the year of receipt of sale consideration and nothing is included in the computation of income at the time of sale.

1.6 The question of bad debts does not arise in the cash system of accounting. In the case of mercantile system of accounting, a sale is taxed a and when it is affected whereas the money against sale will be realised ii future. However, the debt against credit sale may or may not be realised in tilt future. Therefore, the legislature has allowed the claim of debt as bad debt is not recovered in the future. In the honest judgment of the assessee, if the debt has become bad or not worthy of being recovered, the same can be claimed as deduction. Therefore, provisions of Sec, 36(1) (vii) starts with the word 'any bad debt or part thereof' and it does not start with the term 'any debt or part thereof'. Thus, the first requirement under this section is that debt claimed as irrecoverable should be bad and not good.

What can be written off in the books of accounts as irrecoverable should be the debt which has become bad or worthless. It is not the intention of the legislature to allow deduction in respect of good debt in the guise of bad debt. The allowability of claim on account of bad debt pre-supposes the existence of debt being bad in nature. Once it is proved or established that the debt is bad in nature, the discretion lies with the assessee to write off in the books of account in any previous year. This discretion is the prerogative of the assessee. Once a bad debt (and not a good debt) is written off in the books of accounts, in a particular previous year, there is no discretion with the A.O as regards the year in which it should be allowed.

1.7 It is not sufficient to claim the debt to be bad merely on the basis of writing it off in the books of accounts. If one looks at the provisions of Sec.36(l)(vii) of the Act, it is abundantly clear that the word "bad" had been used in conjunction with the word "debt" and the legislature has not used the word 'debt'-only in the operating section. Therefore, in order to take recourse to section 36(l)(vii) of the Act before writing it off in the books of accounts, the assessing officer has to be convinced that the debt has become bad. The bonafide assessment by the assessee himself to the fact that the realisation of debt is not possible is definitely to be provided before writing it off in the books of account by the assessee.

1.8 In the circular No. 551 dated 23.1,1990, the Central Board of Direct Taxes has explained the provisions of Direct Tax Laws (Amendment) Act, 1987. The relevant amendment is explained in para 6,6 of the Circular which is also reported I 183 ITR (Statutes) page 37. The relevant portion of the Circular reads as under:-

“Amendments to section 36(1) (vii) and 36(2) to rationalise provisions regarding allowability of bad debts. The old provisions of clause (vii) of sub-section (1) read with sub-section (2) of the section laid down conditions necessary for allowability of bad debts, it was provided that the debt must be established to have become bad in the previous year. This led to enormous litigation

on the question of allowability of bad debt in a particular year, because the bad debt was not necessarily/ allowed by the Assessing Officer in the year in which the same had been written off on the ground that the debt was not established to have become bad in that year. In order to eliminate the disputes in the matter of determining the year in which a bad debt can be allowed and also to rationalise the provisions, the Amending Act, 1987, has amended clause (vii) of sub-section (1) and clause (i) of sub-section (2) of the section to provide that the claim for bad debt will be allowed in the year in which such a bad debt has been written off as irrecoverable in the accounts of the assessee.”

1.9 As per the above explanation, the above amendment was brought in only to eliminate the dispute in the matter of determining the year in which a bad debt can be allowed. Before this amendment the assessee was to prove that the debt has become bad in the relevant previous year. Requirement of proving that the debt has become bad thus stays as it was earlier.

1.10 The allowability of claim u/s.36(l)(vii) is further governed by the Sec. 36(2) of the I, T. Act. Section 36(2) provides that unless such debt or part thereof have been included in the computation of income of previous year or earlier previous years it can not be allowed as bad debt u/s.36(i)(vii)

*1.11 Thus, the moment the assessee's asset were sold on behalf of the client by bank, a debt is created in the books of the assessee in the name of the client. This part of the debit balance pertains to loan given to sister concern. It is, thus, amply clear that amounts not recovered or treated as not recoverable from sister concern can not be allowed u/s.36(l)(vii) as bad debt since the ..debt is not in respect of any unrecovered revenue receipt. Since the income which has taken into consideration in computing the total income did not include any such debts till date, there is no deductible bad debt. Thus, in case the sister concern not repaying, the debt can not partake the nature of *bad debt' allowable u/s.36(l)(vii) as this amount of debt has not*

been included in the computation of income as required u/s.36(2). Since the" debt is not collectible trading debt from the client, it does not fall under the ambit of sec.36(2), and it remains outside the purview of sec.36(l)(vii).

1.12 The income falling under the head 'Profits and Gains of Business' is chargeable to tax u/s 28'. As per Sec.29, income chargeable to tax u/s 28 is to be computed in accordance with the provisions of Sec.30 to 44D. The said Sections fully encompass all types of allowable deductions while computing the Income. As per Sec. 145 income u/s 28 is to be computed as per the regular method of accounting followed by assessee. In the mercantile method bad debt is allowable. Bad debt is also narrated as one of the permissible deductions u/s 36(1)(vii) r.w.s 36(2). Bad debt is a normal business/commercial incidence which is a listed item of debit to P&L A/c under accountancy. However the same is allowable as deduction only under s.36(l)fvii) r.w.s 36(2). Thus, but for the compliance of provisions of Sec.36(l)(vii), deduction of bad debt would not be allowable while computing the income chargeable under the head 'Profits & Gains of Business' as the general provisions of the Act is not applicable where specific provisions are enacted.

2. Allowability of Bad Debts as Loss from Surety or Guarantor

2.1 A perusal of the events as narrated by the assessee shows that the premises at Nariman Point, was originally belonging to Mr. Chander Kumar Bhatia which was transferred to the Company, M/s Sanrose Investment Company. The company was later on. renamed as M/s BSI Securities International Ltd. The premise was mortgaged as collateral security for the loan availed by sister concern, M/s BSI Ltd with M/s Indosucz Bank. Since that company defaulted in paying the loan back, the Bank through the Court Receiver agreed for releasing the mortgage and selling the property to M/s Modison Metals Ltd, the sale proceeds being adjustable against the outstanding dues from M/s BSI Ltd to the Bank.

2.2 Providing guarantee to the bank for raising finance for sister concern is not a business activity of the assessee, if assessee does not have any commercial revenue interest in such an act. Assessee has not declared any income from the business activity of providing guarantee or collateral security to financing to sister concern or any third party. Hence loss of asset for giving collateral security to bank for arranging finance to sister concern is not a loss but a loss capital in nature.

3. Allowability of Bad Debts as Business Loss

The provisions of the I.T Act, 1961 is a self contained code fully narrating the criteria for chargeability of receipts to tax, the method of computation of Income chargeable to tax, machinery provision for assessment, machinery provision for assessment...etc. Computation of total income as defined in s.2(45) in the IT Act involves various steps as below:

Step 1. Identification and quantification of receipts chargeable to tax as is referred in s.5 .

Step 2 Classification of such receipt in the proper head of income

Step 3 Identification of legally permissible outflows

Step 4 1 minus 2 = Income in one head of income .

Step 5 Application of clubbing provisions

Step 6 Aggregation of income and set off losses .

Step 7 Gross total income

Step 8 Ded. under Chap.VIA in respect certain income and payments

Step 9 .Total income

3.2 Hence the bad debt claimed by assessee does not fit into any of the items of deduction referred above and is not an allowable deduction otherwise u/s 37(1) or u/s 28 as 'business loss', as the purpose of enacting Sec.36(l)(vii) would be defeated. Further this loss is incurred for an activity which is not the business activity of the assessee. The income falling under the head 'Profits and Gains of Business is chargeable to tax u/s 28. As per Sec.29, income . ' chargeable to tax u/s 28 is to be

computed in accordance with the provisions of Sec.30 to 44D. There is no item called business loss allowable under any of the sections from s.30to 43D. The interpretation that after amendment, bad debt is allowable as and when assessee writes off the debt in the books of account is not acceptable as any assessee who had substantial income as on year end can write off debt from available sundry debtors to the extent of profit and claim deduction of bad debt, thus offering nil income, on the ground that on realization of debt in subsequent year, such income will be offered for tax u/s 41(1). Obviously this interpretation fails to follow logic and legislative intention. Allowance of any amount as deduction as 'Business Loss' from the income chargeable u/s 28 is subject to the condition that the said loss is incidental to the business, it is related to the business, the loss springs out of the business, the loss is inseparable from the business operation and the debt should be a trading debt.. In this case, the debt of the assessee is not a trading debt as the trading debt.. If the assessee chose to do provide collateral security, the same is a voluntary act of loss and business loss. The said debt became the liability of the assessee only because of non-commercial non-trading activity. The burden of proving that bad debt is allowable as business loss rests with the assessee showing that the same is a trading loss arising out of the revenue side of the business of the assessee. Hence, in view of the foregoing discussion, the bad debt can not be allowed as business loss.

3.3 The judicial decisions relied on by assessee's are not relevant directly as the facts in those cases were not identical to the instant case. However the decision in the case of T.J.Lahvani vs CIT 78 ITR 176 (Bom) is found to be worth discussing. Assessee in that case financed another's business by giving loans and bank guarantee to protect assessee's business. Issue decided in that case was whether the applicant is entitled to claim a deduction of Rs. 1,90,000 under s. 10(1) and/or s. 10(2)(xi) and/or s. 10(2)(xv) of the IT Act, as a bad debt or as a trading loss in the assessee's business or on general principles of accounting in ascertaining profits and gains of a business concern under s. 10(1) of the IT Act, The case was decided in

favour of assessee on the reasoning that no evidence was available for the finding recorded by the Tribunal that the loss in question had not been incurred by the assessee in the course of his business so as to be deductible. In the case of assessee, financing another's business is not the business of assessee. The bank guarantee given to the bank is not to protect assessee's business. Hence assessee can not rely on the said case as the assessee has shown the receipt of Rs.1000000/- from sister concern as security deposit and has directly taken the same to balance sheet as confirmed by the authorized representative through order sheet entry dated 21.10.2005. If standing bank guarantee is assessee's business it should have shown revenue there from as income.

3.4 The assessee's reliance on memorandum of understanding, and article of Association to substantiate the claim that the bad debt is trading debt of, business financing and money lending clearly shows that the same is ill placed as the same provides for only "...and to deal in...mortgages, obligations...issued or guaranteed by Government' as the main object and the act of standing guarantee for loan to sister concern does not fit into these clauses. Even though clause 10 states of disposing of any property of the Company and financing of purchase of any article, the same states that it has to be by way of :-, loans or by way of hiring after purchase. Hence the objects incidental or 'ancillary to the attainment of main objects also do not help the case of assessee. The facts and circumstances of each case are the basic parameters which determine what the business of a company is. Courts have also taken this view. It was observed by the Supreme Court in Laxminarayan Ramgopal &, Sons Ltd. vs Govt. of Hyderabad (1954) 25 ITR 449 (SQ that when a company is incorporated, it may not necessarily come into existence for the purpose of carrying on a business . The objects of an incorporated company/ association are certainly not conclusive of the question whether the activities of the company amount, to carrying on of businesses. In the case of Narain Swadeshi Weaving Mills vs Commissioner of Excess Profits (1954 26 ITR 765) business was defined by the Supreme Court as 'some real,

substantial and systematic or organised course of activity or conduct with a set purpose'. The Supreme Court has applied following tests to determine what constitutes main or 'principal or primary business in the case of CIT vs Distributors (Baroda) Put. LTD, 83 ITR 377 (SC). Regarding the object clause in the memorandum, of association the Supreme Court observed "The objects of the assessee-company are manifold. The object of carrying on the business of "dealing in or holding of investments" is only one of them. Hence, the memorandum of association does not assist us in deciding whether the business of the assessee-company "consists of wholly or mainly in the dealing in or holding of investments".

Hence, the claim of bad debt is found not deductible as 'business loss' against income chargeable under s.28 of the Act."

5. Upon assessee's appeal, the learned CIT(A) confirmed the assessee's action. Against this order assessee is in appeal before us.
6. We have heard both the Counsel and perused the records. The learned Counsel of the assessee reiterated the submissions that it was a business loss to the assessee and place reliance upon the decision of the Hon'ble Karnataka High Court in the case of CIT v. Rudra Industrial Commercial Corporation [(2011) 244 CTR 304 (Kar.)].
7. Per contra, the learned Departmental Representative relied upon the orders of the authorities below.
8. Upon careful consideration, we find that the assessee owned an office premises at Nariman Point. The assessee had taken a deposit of Rs.10,00,000 from BSI Limited against furnishing of collateral security to the bank for credit to the said company. The BSI Limited defaulted in repaying

the said credit facility. Thereafter, upon bank's filing suit, the assessee was also made defendant before the Hon'ble High Court. Furthermore, as per Court order, a Receiver was appointed for the said premises. The premises was sold for a consideration of Rs.46,80,000. The said sum was adjusted towards bank liability by the Court Receiver. The said BSI Limited not only defaulted in making payment to the above bank, but was also declared as a sick unit.

9. In these circumstances, the assessee claimed the loss of Rs.48,15,863 as above as bad debt and in the alternative business loss. Both the claims of the assessee were rejected by the Assessing Officer by a cogent and elaborate order as reproduced above. The assessee's claim is that putting its property in mortgage is the business of the assessee, hence the loss should be allowed. By no stretch of imagination providing the property for mortgage can be said to be a business of the assessee as it entails no income. When the business does not provide for any income by no stretch of imagination it can be considered as business of the assessee. The Memorandum and Articles of Association of the company provide by means of various clauses, various actions of the company to be permitted. This by no stretch of imagination can lead to the claim of the assessee for income tax purposes that giving its property on mortgage is its business activity. The facts of the case clearly indicate that there is a loss of office premises of the assessee. This is in the field of capital asset. Loss on account of capital asset cannot be allowed as a revenue loss. It is only the written down value of the property that is reduced from the block of assets in case of loss of asset. By no stretch of imagination the sale value can be claimed to be a bad

debt or business loss. The A.O. is very correct in holding that the amount involved does not fall within the definition of business loss and that it cannot be allowed as a bad debt. Hence, as regards the claim of bad debt / business loss of Rs.46,80,000 is concerned, the same has rightly been rejected by the authorities below.

10. Now we note that a part of the assessee's claim of loss is also legal charges for contesting Court matters amounting to Rs.1,35,000. In this regard, we note the decision of Hon'ble Karnataka High Court in CIT v. Rudra Industrial Commercial Corporation. The brief facts of this case are as under:-

Certain property owned by assessee was offered as a security to a bank for the loan borrowed by assessee's sister concern. The said sister concern became a sick industry and was unable to discharge the loan. Therefore, the bank filed a suit for recovery of the amount against the principal debtor and the assessee who was the surety. In respect of the very same property, the assessee had entered into an agreement of development with 'U' Ltd. and had undertaken in the agreement to convey a clear and marketable title to the intending purchasers of the flats to be constructed thereon. Therefore, the assessee paid to bank an amount as interest claimed by the bank, got back the property and, thus, made good the marketable title in favour of the purchasers of the flats in terms of the said agreement. The said payment of interest was claimed by it as business expenses under section.

10.1 In these circumstances, the Hon'ble High Court had held as under:-

"Held that under the terms of the development agreement, the assessee had undertaken to convey a marketable title to the purchasers of the flats to be built on the said property. If the property had been sold jeopardizing the assessee, he would have committed a breach of the terms of the contract. It would have a cascading effect having regard to the value of the property, the amount of loan, the interest payable thereon and the value of the property which the assessee was to get in the

development agreement and to see that the assessee was not accused of a breach of contract. If the assessee thought it fit to discharge the loan to the bank and get the property which was mortgaged, released, thus, making good the title in terms of the development agreement and in the process if he had to pay an amount towards interest, it was an expenditure which was incurred by the assessee in the course of the business. He was under a legal obligation to discharge the debt due to the bank. It was in pursuance of the legal obligation, without giving room for a decree being passed and the property being brought to sale in public auction, he fulfilled the said claim by way of a compromise, paid the money and got the property released. Therefore, as a prudent businessman, he incurred this expenditure to discharge a debt borrowed by the sister concern and thus, saved the property which he had offered as security and in turn was able to make out a marketable title in terms of the development agreement. It could not be said that the payment of the said amount did not constitute business expenditure.”

10.2 The above decision was relied upon by the learned Counsel of the assessee for the whole claim, but in our considered opinion, the said decision is applicable only with reference to the legal charges incurred by the assessee to save the property of the assessee. As already held by us the loss of the office premises was in the capital field hence this decision of the Hon'ble High Court does not help in that case. In this case it is not at all the case that by payment of certain amount the assessee has been able to recover the property. Hence, the sum of Rs.46,80,000 is not at all allowable as business expenditure. However, as regards the claim of Rs.1,35,000 being legal charges for contesting the Court matter, the said expenditure can be said to be related to the efforts by the assessee to save the property. Hence as per the ratio emanating from the above case law, the said expenditure is allowable as business expenditure.

11. Apropos computation of Capital Gain:

11.1 On this issue the Assessing Officer has made following observations:-

“1. Details of computation of income from business shows that the assessee had added back Profit on sale of depreciable assets (R&.46,80,000 -Rs.3,89,810) of Rs.42,90,190/- u/s 50 of the I.T Act, 1961. Assessee claimed set off of business loss of Rs.52,32,984/- computed by them against the Short Term Capital gain being profit on sale of depreciable assets of Rs.42,90,190/-and the net business loss is offered at Rs.9,42,794/-.

2. Examination of the details .of the Profit on sale of depreciable assets offered as Short Term. Capital gain reveals that the same is on account of transfer of building premises at Nariman Point to M/s Modisons Metals Ltd. As per the Purchase agreement of this asset, the said asset was purchased by the company for Rs.15,60,000/- through agreement dated 23.08.1986. The assessee has shown it as Block of Assets forming part of depreciable assets, being building and has claimed depreciation on the same u/s 32(l)(ii) on the prescribed percentage on the Written Down Value of the Block of Assets. The W.D.V of the Block of Assets which included the value of this asset stood at Rs.3,89,810/-. The assessee has transferred the said asset to M/s Modisons Metals Ltd and has offered Short Term Capital Gain at Rs.42,90,190/- being the difference between the sale price and the W.D.V of the Block of Assets. The computation of depreciation as per I T Act and details of Fixed asset shows that « the written down value of entire block of assets of Office Premises has become .J nil and there is no asset in the block. The computation of the assessee, being in accordance with Sec.50(2), the income offered as Short Term Capital Gain is accordingly assessed as Short Term Capital Gain chargeable to tax under Sec.50 of the I.T Act, 1961 subject to the following modification.

3. *The immovable property situated at Nariman Point has been transferred by the assessee during the year to M/s Modisons Metals Ltd for a consideration of Rs.46,80,000/- as per the sale deed dated 15.01.2003 between assessee and M/s Modisons Metals P.Ltd. It is seen from the documents produced and the deed of sale of the said property that the market price of the said property for the purpose of determination of stamp duty has been valued at Rs.68,99,500/-on which the stamp duty was paid by the transferee without raising any objection to the valuation. As per s.SOC of the Act where the value adopted for stamp duty is higher than the sale consideration, the capital gain is to be computed with reference to value adopted for Stamp duty assessment.”*

11.2 Thereafter the Assessing Officer referred to the provisions of section 50C and CBDT Circular No.8 dated 27.08.2002 clarifying the provisions of section 23. The Assessing Officer concluded as under:-

“The assessee sought to invoke s.50C(2), as fair market value is less than the value adopted for stamp duty and the said valuation has not been disputed and hence a reference to the Valuation Officer is made on 25.11.2005. The Report of valuation Officer was received on 13.3.2006 determining the fair market value of the property at Rs, 55,86,000/-. A notice dated 13/03/2006 was issued to assessee asking as to why full value of consideration should not be taken at Rs.55,86,000/- and capital gain recomputed accordingly as below;

‘In connection with the assessment proceedings pending for assessment year 2003-04 and in continuation of your submissions in response to notice u/s H3(2J), the Valuation Officer-1, S.T Department, Mumbai -12 has submitted the report of valuation of the property at 31, 3"1 Fir, Nariman Point, 227, JVariman Point, Manibai - 21 through his report dated 10.03.2006 a copy of which has also been endorsed to you.

In continuation of the pending assessment proceedings, you are hereby required to furnish/ produce or cause to be produced either in person or through authorised representative the balance information and you are also hereby given an opportunity to show cause before me at my office at the above address within 3 days of receipt of this notice as to why the Capital gain taxable u/s 50 r.w.s 50C should not be re-computed taking the sales consideration at the amount of Rs.55,86,000/- as computed by the valuation officer in his report, referred above.'

Even though the receipt of valuation report is acknowledged, the 'assessee objected to the same relying on the hon'ble apex court decision in the case, of K.P. Vargheese vs. ITO 131 ITR 597 and sought that sale proceeds as declared by assessee be accepted. I have gone through assessee's contention. The decision of the hon'ble apex court decision in the case of K.P. Vargheese us. ITO 131 ITR 597 was with reference to the provisions of s.52(2) which read as below;

"52(2) Without prejudice to the provisions of sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital asset by an amount of not less than fifteen per cent of the value so declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its-fair-market value on the date of its transfer."

The provision of s.50C is different from s.52(2) and hence the reliance on the decision of K.P. Vargheese vs. ITO 131 ITR 597 is not acceptable as the facts and provisions of law are different in this case. The assessee also produced copy of a valuation report dated 16.12.2005 from Mr, Ashok Kelkar, a valuer

wherein the value is shown at Rs.49,41,170/-. However in the report of Valuation Officer it is specifically mentioned no valuation report is given by assessee. Hence the report from Mr. Ashok Kelkar though of earlier date, provided by assessee can not be taken for any reference, Further the contention of assessee is found to be against the clear provisions of the Act as discussed above and hence the statutory dictate is followed and short term capital gain recomputed accordingly as given below. The consideration received or accruing as a result of the transfer (Rs.46,80,000/-) by an assessee of a capital asset being building, is less than the value adopted or assessed by any authority Rs.68,99,500/-) s.50C is squarely applicable. Since the value adopted or assessed for stamp duty purposes(Rs.68,99,500/-) exceeds the fair market value of the property as on the date of transfer (Rs.55,86,000/-) and the fair market value determined by the Valuation Officer (Rs.55,86,000/-) is less than the value adopted for stamp duty purposes(Rs.68,99,500/-),the Assessing Officer is statutorily bound to take such fair market value Rs,55,86,000/-) to be the full value of consideration.

Full value of consideration	Rs.55,86,000
Less: The W.D.V of the Block of Assets	Rs. 3,89,810

Short term capital gain u/s 50	Rs.51,96,190

Since the returned Short Term Capital Gain on transfer of immovable property is found not correctly computed in compliance to the statutory-requirement of s.50C, the claim of Short Term Capital Gain on transfer of immovable property is recomputed as above complying to statutory requirement of s.50C and the total income is enhanced by the difference. Penalty proceedings u/s 271(l)(c) is initiated for furnishing inaccurate particulars of income and also for concealment of income in terms of Explanation 1 to Sec.271(1) in respect of addition of Rs.9,06,000/- as short term capital gain u/s 50 of the I.T.Act.”

11.3 Against the above order, the assessee appealed before the learned CIT(A). In the appellate order, the learned CIT(A) reproduced the submissions of the assessee. The learned CIT(A) concluded as under:-

"2.5 Vide letter dated 04-04-2007 the objections were sent by 1TO-4(1)(1) to the District Valuation Officer - 1 to obtain his comments. The A.O., vide letter dated 03-03-2008 sent his report stating that:

"1. No proper and reasonable opportunity was given to the distinguish the valuation made by the departmental valuer. : The assessing officer vide letter dted.13.3.2006 provided an opportunity of being heard with regard to adopting the value of 55,86,000/- as the sales consideration as computed by the Valuation officer, for the purposes of computing the Capital Gain.

In response, the assessee representative vide letter dated 17.3.2006 stated the facts and submitted legal arguments in support of its claim. However, the assessee has not raised any objection with regard to time allowed to it for making its submissions. Accordingly, the AO proceeded to finalise the assessment on 20.3.2006 through a speaking order. Hence, the objection raised on this issue is not factually correct. Perhaps, had the

2. Objections with regard to General Point, Specific Con and Specific Points of Distinguishment : The issues raised referred to the Valuation Officer for his comments. The V.O. vii dt.28.2.2008 has furnished his comments on all the objections ; the assessee. The VO states that all relevant factors raised assessee were considered while arriving at the valuation of ti property. The VO has stated that the furniture and A.C. have m considered to finalise the rate but it is an important observation as date of inspection. With regard to the WC & Bath, the VO states tf assessee had not furnished any

documentary evidence in support objection that the same were constructed subsequently. The WC & Bath were very well available as on the date of the inspection and deduction was allowed for WC & Bath.

It is apparent that the Valuation Officer has not increased the rate considering the furniture and AC but they were only mentioned observation. On the contrary, the VO has definitely not allowed deduction with regard to WC & Bath, in the absence of documentary evidence.

In view of the above facts, the value determined by the Valuation officer is correct and accordingly the AO has adopted the said value for the purposes of determining the Capital Gain".

2.6. The Remand Report was sent to the appellant for its comments in which the A.O, stated that the A.O, in his Remand Report has not given any reasons on the valuation report of Mr. Ashok Kelkar and the DVO's valuation is based on sale of larger areas flat which were more than double the area of the appellant. The appellant relied upon 3 case laws of Supreme Court.

2.7. The DVO, in his report dated 28-02-2008 has clearly mentioned that in his valuation report dated 10-03-2006 the appellant may make any objection before the DVO and as the case was time barring, it was expected that the objection would reach on 31-03-2006, but no objection was made by the appellant till that date. The DVO discussed the general points and specific comparison and commented in his letter dated 28-02-08 that the rates adopted by the Valuation officer is "reasonable; correct and fair." (End of Para 2 of the letter]

2.8. After going through the objections of the appellant and report of the A.O., DVO and comments of the appellant, I am of the considered opinion that the valuation as per Departmental Valuer at Rs.55,86,000/- is required to be adopted for computation of Capital Gains on account of the following:-

(i) The provisions of section 50C(1J clearly states that where the consideration as a result of transfer by an assessee of his capital asset being land or building or both is less than the value adopted by Stamp Valuation Authority, the value adopted for the purposes of payment of Stamp Duty shall be adopted for the purpose of Section 48.

(ii) Further, the sub section (2) of Sec.SOC provides that if an assessee /aims before A.O, that the value adopted or assessed by Stamp Valuation Authority exceeds the fair market value then the A.O. may refer the valuation of the capital asset to the Valuation officer as referred in section 2(r] of the Wealth-tax Act. Section 2(r) refers to a Valuation Officer appointed as a District Valuation Officer, Thus, in the present case, the A.O. on the objection by the appellant on Stamp Duty Valuation, referred the matter to the DVO and in accordance with the provisions of section 50 C, sub-section (3J adopted the value assessed by DVO as statutorily provided. The A.O. has clearly mentioned this fact at Para 6, page 10 of the order.

(iii) The appellant has been given adequate opportunity in the appeal proceeding, i.e. to furnish its comments on the value adopted by DVO. The matter who referred to DVO, has again after looking into the objections of the appellant commented that the valuation given by the DVO were reasonable; correct and fair.

(iv) When the consideration received or accruing on transfer of land and building is less than the value adopted for payment of Stamp Duty, the case clearly comes within the purview of special provision of section 50C. When valuation has been done DVO, in view of objection of adopting the value of Stamp Valuation Authority, the objection, if any, may only be examined by the DVO. The District Valuation officers, who are Civil Engineers of the C.P.W.D posted on deputation to Income-tax Department are experts in the field of valuation of land and building. It is not open for the A.O. or any appellate authority to examine and substitute the value adopted by an expert,

2.9. In view of the above, it is held that the value adopted by DVO is required to be adopted as clearly provided in section 50C, which the A.O. has done. Ground No.2 is, therefore, dismissed.”

11.4 Against the above order, the assessee is in appeal before the ITAT.

12. We have heard both the Counsel and perused the records.

13. The learned Counsel of the assessee submitted that the impugned property was not at all sold by the assessee. It was sold by the Court Receiver, who was appointed by the High Court. Hence the learned Counsel of the assessee claimed that deeming fiction of section 50C cannot be applied in this case. He submitted that since the sale was made by the Court Receiver on behalf of the bank, the deeming provisions cannot be applied to the assessee. The assessee was only under legal obligation to sign the sale deed, as it had mortgaged its property.

14. Per contra, the learned Departmental Representative relied upon the orders of the authorities below.

15. We find that section 50C provides as under:-

“50C.Special provision for full value of consideration in certain cases

(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 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 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.

(2) Without prejudice to the provisions of sub-section (1), where

(a) the assessee claims before any Assessing Officer that the value adopted or assessed by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(b) the value so adopted or assessed by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,

the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to-such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation.—For the purposes of this section, "Valuation Officer" shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under subsection (2) exceeds the Value adopted or assessed by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer."

16. We find that section 50C(1) provides as deeming fiction in cases where consideration is received or accrued as a result of transfer by an assessee of a capital asset. In this case, we note that assessee's plea is that the transfer was not by the assessee on its own. Rather it was done by the Court Receiver on behalf of the bank, to secure whose debts, the property was sold. In these circumstances, it is the plea of the learned Counsel of the assessee that the deeming fiction cannot be applied to the assessee. He claimed that deeming provision cannot again be deemed. That it will cause double prejudice to the assessee.

17. Upon careful consideration, we find that this limb of the argument by the learned Counsel of the assessee was never before the authorities below. Before the authorities below the assessee never objected to this, rather it wanted the matter to be referred to the Valuation Cell and also submitted report by its own Valuer. However, in our considered opinion, this is an important issue and goes to the root of the matter. Hence, we deem it appropriate to remit this issue to the file of the Assessing Officer. The Assessing Officer shall consider the issue afresh in the light of the submissions of the assessee after giving the assessee property opportunity of being heard.

18. In the result, this appeal filed by the assessee stands partly allowed for statistical purposes.

Order pronounced on this 07th day of July, 2017.

Sd/-
(Sandeep Gosain)
JUDICIAL MEMBER

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 07th July, 2017.
Devdas*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A), Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai