<u>आयकर अपीलीय अधिकरण, मुंबई "बी" खंडपीठ मे</u>

Income-tax Appellate Tribunal -"B"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं अमरजीत सिंह, न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and Amarjit Singh,Judicial Member

आयकर अपील सं./I.T.A./6076/Mum/2014,**निर्धारण वर्ष /**Assessment Year: 2011-12

M/s. Magmo Textiles Equipment Pvt.Ltd. 8-A, Mehta Estate Andheri Kurla Road, Sakinaka, Andheri (E),Mumbai-400 072. **PAN:AABCM 8794 R**	Vs.	Income tax Officer-8(2)(3) Room No.213, Aayakar Bhavan, M.K. Road, Mumbai-400 020.
(अपीलार्थी **/Appellant**)		(प्रत्यर्थी **/ Respondent)**

राजस्व की ओर से **/ Revenue by:** Shri Suman Kumar-DR

अपीलार्थी की ओर से **/Assessee by:** Shri Manjunath Prabhu

सुनवाई की तारीख **/ Date of Hearing: 02/04/2018**

घोषणा की तारीख **/ Date of Pronouncement: 23/05/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

<u>लेखा सदस्य ,राजेन्द्र के अनुसार -PER RAJENDRA, AM-</u>

Challenging the order dated 03/06/2014 of the CIT(A)-17,Mumbai,the Assessee has filed present appeal.Assessee-company,engaged in the business of manufacturing of textiles,filed its return of income on 30/09/2011 declaring total income at NIL.The Assessing Officer (AO) completed assessment u/s.143(3) of the Act,on 03/01/2014,determining total income at Rs.71. 52 lakhs.

2.First ground of appeal is about confirming the addition of Rs. 62.02 lakhs under the head Short-Term Capital Gains(STCG).During the assessment proceedings,the AO found that the assessee had sold factory building along with land for Rs.80 lakhs,that after reducing the written down value of land and factory gala,as on 01/04/2010, of Rs.13.84 lakhs,it showed profit at Rs.66.15 lakhs,that the profit was further reduced by Rs.44.01 lakhs for the investment made in acquiring a new factory gala,that finally the assessee offered profit on sale of land and factory at Rs.22.14 lakhs,that the asset sold was located at Vapi, whereas the new asset was acquired at Mumbai,that it had paid in advance of Rs.44.01 lakhs to the builder /developer. Referring to the provisions of section 50, 32, 2 (11) 2 (47) of the Act and 53A of the Transfer of Property Act,he held that the assessee had sold depreciable assets,that it had paid Rs.44.01 lakhs for the asset which had not been acquired by it,that the amount paid by the assessee for booking a gala in Mumbai would not fall within the meaning of phrase 'asset had been acquired',as mentioned in section 50(2) for the purpose of computing capital gains. He further held that the new asset would not form part of block of assets,that gala was neither in possession of the assessee nor it was taken/acquired during the year under consideration,

that it was not ready for business use. Referring to the allotment letter dated 12/02/2011, he held that the assessee had paid in advance of Rs.44.01 lakhs out of the total consideration of Rs.76.95 lakhs, that the transaction was neither complete nor possession was taken by the assessee,that in the balance sheets for the AY.s 2012-13 and 2013-14 the disputed amount of Rs.44.01 lakhs had been shown as capital work in progress,that transfer of asset had not taken place,that the allotment letter issued by the developer could not be considered as a legal right.Finally,he disallowed the investment of Rs.44.0 lakhs,made by the assessee,in acquiring new assets, while computing the STCG .

3.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority(FAA) and made detailed submissions.It also relied upon certain case laws.

After considering the available material, he held that the provisions of section 50 had over - riding effect over the provisions of section 48 and 49,that the computation of the capital gains in case of depreciable assets was mandatory in terms of section 50,that the depreciable assets were classified into two broad categories,that if depreciation had not been allowed,the cost of acquisition of the asset was required to be computed u/s.48 and 49 of the Act and not as per the provisions of section 50.He referred to the provisions of section 32,50 and 55 of the Act and held that for claiming depreciation the assessee should own the asset, that it should be used for purpose of the business/profession,that the definition of block of assets was inserted with effect from 01/04/1988.He further observed that the assessee had sold the industrial gala which was the only asset in the block of assets,that the year after it entered into an agreement with a developer/builder for purchase of a new gala,that the new gala was not taken over by the assessee,that the developer had not constructed the gala,that the assessee was issued only allotment letter,that it had paid a part consideration for the property in question,that the balance amount was yet to be paid,that as against Rs.76, 95, 000/- the assessee had paid Rs. 44.01 lakhs only for the year under consideration,that the claim made by the assessee about acquiring a new asset was factually incorrect,that the claim made by it for deducting the amount of investment from the sale price of the asset for the purpose of computation of STCG as per the provisions of section 50 was devoid of any merit,that for claiming deprecia - tion the assessee should own an asset and should use it for the business,that both the conditions should be satisfied together in order to allow any asset to have the benefit of depreciation,that the gala would not fall into the block of assets which ceased to exist due to sale of asset and because no new asset was acquired by the assessee. He referred to the cases

of Sabah Investment (P)Ltd. (60 SOT 173), Liquidators of Pursa Ltd. (25 ITR 265) and held that there was vast distinction between the asset acquired and asset likely to be acquired, that the cases relied upon by the assessee were based on different facts and that same were not relevant to decide the issue.Confirming the order of the AO,he dismissed the appeal filed by the assessee.

4.During the course of hearing before us,the Authorised Representative(AR) stated that during the year under consideration the assessee had acquired rights of office building by paying Rs. 44.01 lakhs,that assessee was issued an allotment letter,that it had entered the disputed assets into the block officer to building,that the only difference in computation of the STCG was about inclusion of cost incurred for new office building,that the departmental authorities said denied the benefit of the assessee on the ground possession of the office premises were not received.He referred to this provisions of section 50 of the Act and stated that while computing gains on sale of depreciable assets the amount incurred for acquiring the new asset falling within the same block had to be allowed, that the office premises of the assessee was tangible asset, that belong to a class of asset for which the same rate of depreciation had been prescribed, that the new office premises formed part of the block of the assets,cthat condition of put to use was not part of the section,that the AO/FAA had brought the provisions of section 32 while interpreting the provisions of section 50,that once asset was acquired it would form part of block of assets even if it was not put to use,that though the asset would form part of block of assets but it would not be entitled to claim depreciation until and unless it was put to use,that for computing capital gains as per section 50 of the Act there was no condition of asset to use. He referred to the cases of Artic (68 ITD 462), Fluorescent Fixtures Ltd. (34 SOT 48),Oceanic Investments Ltd. (507 TTJ 549) and Ansal Properties and Infrastructure Ltd.(44 SOT236).
The Departmental Representative(DR)contended that the assessee had not acquired the asset or nor has put the asset to use,that in the balance sheet it had shown the gala as work in progress,that gala could not be treated as part of the block.

5.We have heard the rival submissions and perused the material before us.We find that the assessee had sold its industrial gala at Vapi, that it had purchased a gala in Mumbai,that it had paid Rs.44.01 lakhs to a developer, that the total amount to be paid by the assessee for the gala was Rs. 76.95 lakhs,that the assessee had claimed that it had acquired asset that would form part of the block of assets, that while calculating the STCG a sum of Rs.44.01 lakhs

should be considered, that the departmental authorities held that the assessee had not acquired the property,that it had not put the asset to use,that they also held that the assessee was not entitled for depreciation,that according to them the claim made by it for claiming deduction of Rs.44.01 lakhs,while computing the STCG, was against the provisions of the Act. In our opinion,there are two issues to be decided. Whether the assessee was right,in claiming depreciation, is the first issue.Secondly,it has to be decided as to whether the acquisition of gala at Mumbai should be included in the block of assets for the year under consideration. As far as claiming of depreciation is concerned,the AR himself had fairly considered that assessee was not entitled to claim depreciation.

Now we would deliberate upon the issue of acquisition of gala at Mumbai and its legal consequences.The undisputed facts are that the assessee was issued an allotment letter and as per the said letter the remaining payment was to be made as under:

A. Rs.44,01,000/- received by 09.02.2011
B. Rs.10,00,000/- on completion of the 1st floor podium slab of the said Crown Business Park
C. Rs.10,00,000/- on completion of the 4th floor slab
D. Rs.10,00,000/- on completion of the 9th floor slab
E. Rs.2,94,000/- on possession

In our opinion,to claim benefit of section 50 of the Act,issuance of an allotment letter from a builder or developer is not sufficient.On 09.02.2011,the assessee had made payment of Rs.44.01 lakhs.Second installment was to paid on completion of first floor.It means at the time of making the payment the asset in question was not existing.It is said that deeming provisions had to be construed strictly.Courts are of the opinion that the language of a taxing statute should ordinarily be read and understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative animation.A taxing statute should be strictly construed common sense approach, equity, logic, ethics and morality have no role to play.Nothing is to be read in, nothing is to be implied ; one can only look fairly at the language used and nothing more and nothing less.Section 50,being a deeming provision,has to be interpreted only for the said issue for which it has deemed and the manner in which the deeming has been contemplated to be restricted in the manner sought to be deemed.In our opinion,the wordings of the section do not indicate in any manner that a mere allotment letter of asset would make the allottee entitled to claim STCG.Therefore,we hold that claim made by the assesee-that an allotment letter from developer is equal to acquisition of an asset-is not tenable,especially when it had not submitted the basic documents like approval of Municipal/ Panchayat authorities approving the plan of the proposed gala or the commencement certificate.Even for the sake of argument,it is presumed that the developer had the requisite

permissions,it would not entitle the assessee to claim benefit of section 50.It has claimed deduction for non-existent asset.So,we hold that order of the FAA does not suffer from any legal infirmity.

Now,we would like to deliberate upon the cases relied upon by the assessee.In the matter of Artic(supra)the Tribunal had held as under:

> *"The basic question to be examined in the light of the persuasive arguments advanced by both the parties before us, is whether it is a requirement of the section that in order to obtain deduction thereunder in respect of the cost of a new asset acquired during the previous year, the assessee should be found to be carrying on some business or the other.*
> *…Though some modifications or changes have been made in the computation of the capital gains on transfer of depreciable assets, the nature and content of the subject- matter of taxation remains the same, viz., capital gains. The rules relating to the computation of business income are not incorporated or worked into the rules relating to the computation of capital gains. The distinction between the income under the heads "Business" and "Capital gains" has been brought out by the Supreme Court in CIT v. Express Newspapers Ltd. (1964) 53 ITR 250.*
>
> *xxxxx*
>
> *It is therefore clear that while examining the applicability of the provisions of section 50, we are not to be influenced by the rules relating to the computation of the business income.*
>
> *xxxxx*
>
> *9. In the absence of any express requirement in the statutory provision or the justification to read into it a built-in requirement, it is not possible to uphold the contention of the learned departmental representative that the assessee should be found to have been carrying on a business in the year in which the new asset is purchased."*

In our opinion,the above matter is of no help to the assessee.The basic question before us is acquisition of asset and not carrying on of a business and purchase of new asset.Similarly, in the case of Fluorescent Fixtures(supra)the Tribunal had decided that use of asset was not a condition precedent for making adjustment in block of assets.The remaining two cases i.e. Oceanic Investments Ltd. (supra) and Ansal Properties and Infrastructure Ltd.(supra)also deal with use of asset.Thus,in all the four cases the issue of existence of asset has not been deliberated upon.Therefore,confirming the order of the FAA,we decide the first ground of appeal against the assessee.

6.Second ground of appeal is about not allowing set off of brought forward losses of Rs.7.75 lakhs.During the assessment proceedings, the AO found that assessee had brought forward business loss of Rs.17,77,990/- of earlier years and had set off the same to the extent of current year's business profit.He directed the assessee to justify the carry forward of business loss in absence of the business activities carried out during the year under consideration. After considering the submission of the assessee,he held that STCG could not be treated as profit and gains of business/profession,that brought forward business losses could not be allowed to be set off against STCG. However the assessees was allowed set off of unabsorbed depreciation of Rs. 7.48 lakhs.

7.During the appellate proceedings,before the FAA,the assessee made detailed submissions to justify the claim of carry forward of losses of earlier years. After considering the assessment order and submissions made by the assessee,he held that section 50 contained a special provision for computation of capital gain in case of depreciable assets, that it was a deeming provision, that only by a legal fiction income from the transfer of otherwise long-term capital asset was treated as capital gains arising from the transfer of short-term capital assets, that a deeming provision could not be extended beyond the purpose for which it was enacted, that the prescription of section 50 was to be extended only up to the computation of capital gains. He referred to the case of Manali Investments (139 TTJ 411) and held that capital gain in the case under consideration had arisen from the transfer of an asset which was held for a period of more than three years,that the disputed amount would retain the character of LTCG for all other provisions and would qualify for set off against the brought forward losses from the long-term capital assets,that as per the provisions of section 74 of the Act brought forward losses from long-term capital asset could be set off only against long-term capital gains, that there was no provision for allowing set off of brought forward losses, arising out of transfer of long-term capital assets,against STCG. Finally,he upheld the order of the AO.

8.Before us,representatives of both the sides agreed that issue of carry forward of loss needs further verification by the AO considering the peculiar facts of the case.So,in the interest of justice,we are remitting back the issue to the file of the AO for fresh adjudication,who will afford a reasonable opportunity of hearing to the assessee.Ground no.2 is decided in favour of the assessee,in part.

As a result,appeal filed by the assessee stands partly allowed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 23rd May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 23 मई, 2018 को की गई।

Sd/-	**Sd/-**
(अमरजीत सिंह **/ Amarjit Singh**)	(राजेन्द्र **/ Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 23.05.2018
Jv.Sr.PS.
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "B" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**,** खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार**/ BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**