

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA No. 1744/Mum/2012
(निर्धारण वर्ष / Assessment Year:2005-06)

Amar Kanayalal Nagpal, B-206, 2 nd Floor, Pioneer Residency-II, Daulat Nagar, Mumbai-400 054.	बनाम/ Vs.	ITO, Ward-19 (2)(3), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN No. AACPN3585B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Nitesh Joshi, A.R
प्रत्यर्थी की ओर से / Respondent by	:	Shri Rajesh Kumar Yadav, D.R

सुनवाई की तारीख / Date of Hearing	:	19.03.2018
घोषणा की तारीख / Date of Pronouncement	:	30.05.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-30, Mumbai, dated. 05.12.2011, which in itself arises from the order passed by the A.O under Sec. 143(3) r.w.s. 263 of the Income Tax Act, 1961 (for short 'Act'), dated. 16.12.2010, for A.Y. 2005-06. The assessee had assailed before us the order of the CIT(A) by raising the following grounds of appeal:

- “1. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in upholding the additions made by the Income Tax Officer.
2. The learned Commissioner of Income Tax (Appeals) upheld the additions made by the Income Tax Officer without considering the facts of the case and ignoring the various documents produced and various explanation offered to him during the course of hearing.
3. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in not allowing Exemption u/s 54EC for Long Term Capital Gain amounting to Rs. 9,00,000/-.
4. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in not allowing unabsorbed Depreciation and Business loss brought forward from earlier years.
5. The appellant hereby prays that the additions made by the Income Tax Officer may kindly be deleted.
6. Appellant craves to add, alter, amend or modify any of the above grounds of appeal till the final disposal of appeal.

The assessee had further raised before us, vide an application dated 22.02.2013 the following additional grounds of appeal :

- (i) The learned commissioner of income tax (Appeals) ought to have quashed the order of the A.O as the said order was against the principles of natural justice since no reasonable opportunity was given before passing the order and moreover the order was passed without considering the facts of the case in proper perspective.
- (ii) The learned commissioner of income tax (Appeals) failed to consider the holding period of the asset from the date of dissolution and not from the original date of acquisition. In the income tax law a firm is treated as a separate assessable entity. However under the general law of partnership a firm name is a compendious mode of designate the partners. It is well settled that property of the firm is property of partners and the use by the firm is the use by the partners.
- (iii) The learned commissioner of income tax (Appeals) failed to consider submission of the appellant even though referring the same in his body

of the order in para 3.4 pg. 7 regarding giving benefit of cost to the appellant on the date of dissolution.”

Still further, the assessee had vide its another application dated 10.12.2014, raised before us the following additional grounds of appeal :

- a) *The learned Income Tax officer was not justified in passing the set aside order in accordance with the directions of Ld. CIT as per order under sec. 263 of the Act. The Ld. CIT had very categorically agreed with the reliance of the appellant on Guwhati High Court Judgment. The Ld. CIT only wanted the A.O to examine the figures of unabsorbed depreciation for its set off against short term capital gain.*
- b) *The appellant submits that the Ld. ITO never had the jurisdiction to travel further and frame the assessment totally afresh by raising certain new issues which were never the bone of contention before.”*

2. We shall first advert to the additional grounds of appeal raised by the assessee before us. The Learned Authorised Representative (for short 'A.R') for the assessee at the very outset referring to the additional grounds of appeal dated 22.02.2013, submitted that he was not pressing the additional ground of appeal No. 1. The **additional ground of appeal No. 1** is thus dismissed as not pressed. We shall now consider the admissibility of the remaining additional grounds of appeal raised by the assessee before us. The Ld. A.R. submitted that as the assessee by raising the additional grounds of appeal had sought adjudication of certain legal issues based on the facts available on record, thus the same may be admitted. Per Contra, the Learned Departmental Representative (for short 'D.R.') objected to the admission of the additional grounds of appeal. We have perused the additional grounds of appeal raised by the assessee before us and are of the considered view that as our indulgence has been sought by the assessee for adjudication of certain issues involving question of law based on the facts available on record, therefore, in the backdrop of the judgment of the

Hon'ble Supreme Court in the case of CIT Vs. National Thermal Power Co. Ltd. (1998) 229 ITR 383 (SC), the same are admitted.

3. Briefly stated, the facts of the case are that the assessee had filed his return of income on 31.08.2005, declaring total loss at Rs. 1,61,829/-. Assessment under Sec. 143(3) of the act was completed on 11.07.2007, determining total loss at Rs. 1,51,829/-. Subsequently, proceedings under Sec. 263 were initiated by the CIT-19, Mumbai and the latter vide his order dated 25.11.2009 set aside the order of the A.O and directed him to finalize the assessment afresh. The A.O while framing the assessment in compliance to the directions of the CIT made the following additions/disallowances:

- (i) The A.O observed that the assessee was a partner in a registered partnership firm i.e. M/s Printpals. The said firm stood dissolved on the death of one of the two partners on 16.05.2003. The surviving partner, i.e the assessee, on the refusal of the legal heirs of the deceased partner to step into the shoes of the deceased partner, took over the assets of the firm and continued the business as a sole proprietor under the same name and style, viz. Printpals. In the backdrop of the aforesaid facts the A.O held a conviction that out of the total unabsorbed depreciation of Rs. 7,42,775/- only an amount of Rs. 27,422/- pertained to the period from 17.05.2003 to 31.03.2004. Hence, the A.O on the basis of his aforesaid deliberations restricted the entitlement of the assessee to set off of the unabsorbed depreciation of Rs. 27,422/- only as against its business income for the year under consideration.
- (ii) The A.O observed that the assessee had taken over the assets of the aforementioned partnership firm, viz. M/s Printpals on 16.05.2003. The assessee had thereafter sold the assets, vide an agreement for sale dated 04.07.2004 and had claimed the profit/gain emerging therefrom as long term capital gain (for short 'LTCG'). As against the LTCG, the assessee claimed deduction

under Sec. 54EC by making investments in REC Bonds. The A.O being of the view that as the assessee had taken over the assets from the partnership firm on 16.05.2003 and had sold the same on 04.07.2004, therefore, keeping in view the period of holding of one year and two months, the same could not be held as a long term capital asset under Sec. 2(29A) of the Act. In the backdrop of the aforesaid deliberations, the A.O concluded that the assessee had wrongly claimed exemption under Sec. 54EC in respect of Short term capital gain (for short 'STCG') arising on sale of depreciable assets under Sec. 50 of the Act.

The A.O on the basis of his aforesaid observations assessed the income of the assessee under Sec. 143(3) r.w.s. 263 of the Act at an amount of Rs. 17,87,707/-.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating at length on the contentions advanced by the assessee before him, was however not persuaded to subscribe to the same. The CIT(A) found himself to be in agreement with the view taken by the A.O that the entitlement of the assessee towards claim of unabsorbed depreciation stood restricted to Rs. 27,422/- i.e. for the period 17.05.2003 to 31.03.2004. Still further, the CIT(A) concluded that as the assessee had acquired the assets only after the dissolution of the firm on 16.05.2003, which thereafter were sold on 04.07.2004, therefore, the assessee had held the same only for a period of one year and two months. The CIT(A) on the basis of his aforesaid observations concluded that as the sale of the aforesaid assets resulted into STCG in the hands of the assessee, thus the A.O had rightly held that the assessee was not entitled for exemption under Sec. 54EC in respect of the said amount of STCG. The CIT(A) on the basis of his aforesaid deliberations dismissed the appeal.

4. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The Ld. A.R. taking us through the facts of

the case submitted that the assessee was a partner in the firm i.e. M/s Printpals since 01.04.1974. It was submitted by the Ld. A.R. that the firm as on 04.05.1984 had acquired the ownership of an Industrial unit No. 307, 3rd Floor of Wadala Udyog Bhawan, 8, Naigaum Cross Road, Wadala, Bombay. The aforesaid partnership firm due to certain retirements/deaths of some of the partners was finally left with two partners in the year 2001. On 16.05.2003 one of the partner expired and the firm stood dissolved due to operation of law. As the legal heirs of the deceased partner declined to be admitted as a partner in place of the deceased, therefore, the surviving partner i.e the assessee took over the business of the assessee firm with all its assets and liabilities and thereafter continued the same as a sole proprietor. It was submitted by the Ld. A.R. that the assessee had sold the aforesaid unit on 04.07.2004 for a consideration of Rs. 20 lac and offered the difference of Rs. 8,69,109/- as STCG in view of the provisions of Sec. 50 of the Act. The aforesaid STCG of Rs. 8,69,109/- was set off by the assessee against the brought forward business loss of Rs. 9,94,764/-. It was submitted by the Ld. A.R. that though Sec. 50 deems the capital gain to be short term, but the same does not deemed the asset to be a short term capital asset. It was the contention of the Ld. A.R. that in the backdrop of the aforesaid facts, the capital gain which was though deemed as STCG as per the fiction under Sec. 50 for the purpose of computing the capital gain under Sec. 48 and Sec. 49 of the Act, would however continue to be eligible for exemption under the relevant section, where so ever exemption was available against LTCG. The Ld. A.R. in support of his aforesaid contention took support of the judgment of the High Court of Guwahati in the case of CIT Vs. Assam Petroleum Industries (P) Ltd. (2003) 262 ITR 587 (Gau). It was averred by the Ld. A.R. that the assessee was duly entitled for deduction under Sec. 54EC of the Act, and the A.O while framing the assessment under Sec. 143(3) r.w.s. 263 had erroneously declined the same. It was further submitted by Ld. A.R that the A.O while framing the consequential assessment under Sec. 143(3) r.w.s. 263 had traversed beyond the directions given by the CIT in his order passed under Sec. 263 of

the Act. Alternatively, it was submitted that even if the order passed by the A.O was found to be within the realm of the directions of the CIT, still the period of holding of the property under consideration was to be construed from the date on which the same was acquired by the firm i.e. M/s Printpals. The Ld. A.R. further took us through the 'Show Cause' notice (for short 'SCN') issued by the CIT under Sec. 263 of the Act. The Ld. A.R. drew our attention to the objection raised by the CIT at Sr. No. 2 of the SCN in context of the entitlement of the assessee towards exemption under Sec. 54EC. The Ld. A.R. further took us through the order passed by the CIT under Sec. 263 of the Act. The Ld. A.R. referring to the order passed by the A.O under Sec. 143(3) r.w.s. 263, submitted that the A.O had clearly traversed beyond the directions given by the CIT in his order under Sec. 263 of the Act. The Ld. A.R. taking us through the 'Agreement' dated 04.05.1984 on the basis of which the property under consideration was acquired by the firm i.e. M/s Printpals, submitted that as the assessee who at the relevant point of time was a partner of the firm, and as such a party to the said agreement, was thus duly entitled for claiming the period of holding of the said property from the date of the aforesaid agreement, viz. 04.05.1984. The Ld. A.R submitted that in the backdrop of the aforesaid facts, it could safely be concluded that the property which was held by the firm since 04.05.1984, was as a matter of fact held by the partners. In support of his aforesaid contention the ld. A.R relied on the judgment of High Court of Madras in the case of CIT Vs. M.K Chandrakanth & Ors (2002) 258 ITR 14 (Mad). It was further submitted by the Ld. A.R that as the partnership firm finally stood dissolved on 16.05.2003, therefore, for the purpose of computing the capital gains the market value of the property under consideration has to be looked into in reference to the said date. The Ld. A.R in order to buttress his aforesaid contention relied on the judgment of the High Court of Madras in the case of Francis Valla Barayar Vs. CIT, Madras (1960) 40 ITR 426 (Mad) and High Court of Rangoon in CIT, Burma Vs. Solomon & Sons (1933) 1 ITR 324 (Rangoon). Per contra, the Ld. D.R. relied on the orders of the lower authorities.

5. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the additional ground of appeal raised by the assessee that the A.O while passing the consequential order had traversed beyond the directions given by the CIT in his order passed under Sec. 263 of the Act. We have perused the order passed by the CIT under Sec. 263, dated 25.11.2009 (Page 23-24 of APB) and are not persuaded to subscribe to the contention of the assessee that the A.O while passing the order in pursuance to the directions of the CIT had exceeded his jurisdiction and adjudicated on certain issues which never formed the subject matter of the order passed by the CIT. We are of the considered view that as the order passed by the A.O under Sec. 143(3) r.w.s. 263, dated 16.12.2010 is well in conformity with the directions given by the CIT in his order passed under Sec. 263, therefore, the aforesaid contention so raised by the assessee cannot be accepted. The **additional Grounds of appeal No. (a) & (b)** raised by the assessee on 10.12.2014 are thus dismissed in terms of our aforesaid observations.

6. We shall now advert to the additional grounds of appeal no. (ii) & (iii) raised by the assessee before us on 22.02.2013. We find that it is the claim of the assessee that as under the general law of partnership a firm is a compendious mode to designate the partners, and the property of the firm and its use is to be construed as the property of the partners being used by them, therefore, the CIT(A) had erred in considering the holding period of asset in the hand of the assessee from the date of dissolution of the firm and not from the original date of acquisition of the same by the partnership firm. To be brief and explicit, the claim of the assessee is that the period of holding of the Industrial unit No. 307, 3rd Floor of Wadala Udyog Bhawan, 8, Naigaum Cross Road, Wadala, Bombay, which was acquired by the assessee on the dissolution of the firm on 16.05.2003 on the death of the other partner, was not to be construed from the said date, but rather from 04.05.1984 i.e. the date on which the said asset was acquired by the firm,

viz. M/s Printpals in which the assessee at the relevant time was a partner. The assessee had tried to impress upon us that the date of holding of the aforesaid property in his hands was to be reckoned from 04.05.1984, as a result whereof on the sale of the same on 04.07.2004, it would clearly be in the nature of sale of a Long Term Capital asset by the assessee.

7. We have given a thoughtful consideration to the aforesaid contention advanced by the assessee and are unable to persuade ourselves to accept the same. We find that *Explanation 1* of Sec. 2(42A) contemplates the period for which any capital asset is held by an assessee. We find from a perusal of the aforesaid statutory provision, that it is nowhere provided that where an individual assessee takes over the business of a firm in which he was a partner, the period of holding of the assets so acquired by him is to be reckoned from the date on which the partnership firm had acquired the same. We may herein observe that *Explanation 1(i)(b)* of Sec. 2(42A) of the Act, provides that in certain cases where a capital asset had become the property of the assessee in the circumstances mentioned in Sec. 49(1) of the Act, there shall be included the period for which the asset was held by the previous owner referred to in the said section. However, a perusal of Sec. 49(1) nowhere covers a situation as that of the assessee before us, specifically for the year under consideration. We thus are of the considered view that though we find ourselves to be in agreement with the claim of the assessee that a partnership firm is a compendious mode to designate the partners, however, under the Income Tax law a firm is treated as a separate assessable entity, which can safely be gathered from a perusal of the definition of "Person" as contemplated in Sec. 2(31)(iv) of the Act. Thus, in the absence of a specific provision that the period of holding of an asset acquired by a continuing partner on the dissolution of a firm is to be reckoned from the date of acquisition of the same by the firm, the aforesaid claim of the assessee seeking relating the period of holding of the property under consideration to 04.05.1984 cannot be accepted. Before parting, we may herein observe that the reliance placed by the ld. A.R on the judgment

of the High Court of Madras in the case of CIT Vs. M.K Chandrakanth & Ors (2002) 258 ITR 14 (Mad) is absolutely misconceived. The case law relied upon by the ld. A.R pertained to A.Y 1978-79, i.e a period prior to A.Y 1986-87. Upto the A.Y 1986-87, Sec. 2(42A), *Explanation 1(b)* r.w Sec. 49(1)(iii)(b) provided that where a capital asset had become a property of the assessee on any distribution of assets on the dissolution of a firm, body of individuals or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, the period for which the asset was held by the previous owner would be included for working out the period of holding of the asset by the assessee. At this stage, we may herein observe that the amendment made available to the statute, vide the Finance Act, 1987, w.e.f 01.04.1988 to Sec. 49(1)(iii)(b), pursuant whereto the period of holding of an asset by an erstwhile partner of a dissolved firm was no more to include the period of holding of such asset by the firm, can be appreciated in the backdrop of a corresponding omission of Sec. 47(ii) from the statute, vide the Finance Act, 1987 w.e.f 01.04.1988. Before the introduction of Sec. 45(4), there was cl. (ii) of s. 47, which provided that the distribution of capital assets on the dissolution of a firm, etc. was not to be regarded as "transfer". It was thus during the subsistence of Sec. 47(ii), as there would be no transfer of an asset on the dissolution of a firm, hence Sec. 2(42A) r.w Sec. 49(1)(iii)(b) contemplated that the period of holding of the asset in the hands of an erstwhile partner of a dissolved firm was to include the period for which the asset was held by the firm prior to dissolution. However, with the striking off of Sec. 47(ii) from the statute by the legislature, and making available Sec. 45(4) on the statute, which contemplates that distribution of assets on dissolution of a firm is to be construed as a 'transfer', the applicability of Sec. 2(42A) r.w Sec. 49(1)(iii)(b) having been rendered as unworkable, was restricted by the legislature till A.Y 1987-88. Thus, to be brief and explicit, with the striking off of Sec. 47(ii) and making available of Sec. 45(4) on the statute, vide the Finance Act, 1987, w.e.f A.Y 1988-89, the working of Sec. 2(42A) r.w Sec. 49(1)(iii)(b) subsequent to A.Y 1987-88 stands jeopardised. We find that our aforesaid view stands fortified by the

judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. A.N Naik Associates (2004) 265 ITR 346 (Bom). The High Court in its aforesaid judgment had observed that the result of the amendment carried out by the Finance Act, 1987 by omitting Sec. 47(ii), was that distribution of capital assets on dissolution of a firm would be regarded as a "transfer".

8. We are of the considered view that in term of our aforesaid observations, as the case of the assessee before us pertains to A.Y 2005-06 and the firm, viz. M/s Printpals stood dissolved on 16.05.2003 on the death of the other partners, thus the judgment of the High Court of Madras in the case of CIT Vs. M.K Chandrakanth & Ors (2002) 258 ITR 14 (Mad) relied upon by the ld. A.R would not be of any assistance in the present case. We may further observe that the reliance placed by the ld. A.R on the judgment of the High Court of Madras in the case of Francis Valla Barayar Vs. CIT, Madras (1960) 40 ITR 426 (Mad) being distinguishable on facts, would also not assist the case of the assessee. Unlike the facts involved in the case before us, the issue before the High Court was as to whether the assessee who had inherited boats from his deceased father would be entitled to depreciation on the same. It was in the backdrop of the said facts, the High Court referring to the definition of 'Written down value' as contemplated in Sec. 10(5)(c) of the Income-tax act, 1922, had concluded that where the assets had been acquired by the assessee by way of gift or inheritance, the W.D.V. in the hands of the assessee would be the lower of the W.D.V in the case of the previous owner or the market value. We are of the considered view that the judgment having been rendered in context of determining the W.D.V of an asset acquired by an assessee, either by gift or inheritance, would in no way be relevant for the case of the assessee before us. As regards the judgment of the High Court of Rangoon in the case of CIT, Burma Vs. Solomon & Sons (1933) 1 ITR 324 (Rangoon), the issue before the High Court was that where a machinery had been acquired by bequest, its original cost to the assessee would be the real value of the machinery at the time when the assessee had acquired it, less the amount of expenditure

necessary for completing the title. We are afraid that the said judgment also having been rendered in context of an issue not relevant to the case of the assessee before us, thus, would not assist its case. The **additional grounds of appeal No. (ii) & (iii)** raised by the assessee vide its application dated 22.02.2013 are dismissed in terms of our aforesaid observations.

7. We shall now advert to the contentions raised by the assessee before us on the basis of the original grounds of appeal. The Ld. A.R. had during the course of hearing of the appeal submitted that ground of appeal No. 4 was not being pressed. We thus dismiss the **Ground of appeal No. 4** as not pressed.

8. We shall now advert to the ground of appeal No. 2 raised by the assessee before us. It is claimed by the assessee that the CIT(A) had upheld the additions made by the A.O without considering the facts of the case and ignoring the various documents produced and explanation offered by the assessee during the course of hearing of the appeal. However, the Ld. A.R had not drawn our attention to any such document which was produced by him before the CIT(A), but had remained omitted to be considered by him while passing the order. Still further, no reference to any such explanation which was furnished by the assessee during the course of the proceedings before the CIT(A), but had remained unaddressed by him was brought to our notice by the Ld. A.R during the course of hearing of the appeal. We thus in terms of our aforesaid observations are constrained to dismiss the **Ground of appeal no. 2.**

9. We shall now take up the contention of the assessee that the CIT(A) had erred in not allowing exemption under Sec. 54EC in respect of LTCG of Rs. 9,00,000/- that had arisen on the sale of the property under consideration, viz. Industrial unit No. 307, 3rd Floor of Wadala Udyog Bhawan, 8, Naigaum Cross Road, Wadala, Bombay. The genesis of the issue under consideration is that the assessee had on the dissolution of the firm, viz. M/s Printpals, which took place on the death of the other partner on

16.05.2003, had taken over the assets (including the aforementioned property which was acquired by the firm on 04.05.1984) and continued the business as a proprietor. The aforesaid assets acquired by the assessee were sold by him, vide agreement for sale dated 04.07.2004. The assessee thereafter made investments in certain specified bonds, viz. REC Bonds and claimed exemption under Sec. 54EC of the Act, as regards the capital gain arising on the sale of the aforesaid assets. The A.O being of the view that since the assessee had held the assets only for a period of 1 year and 2 months, hence the same not being a long term capital asset as defined under Sec. 2(29A) of the Act, did not qualify for exemption under Sec. 54EC of the Act. The A.O on the basis of his aforesaid observations declined the claim of exemption raised by the assessee under Sec. 54EC.

10. The claim of the assessee is that as the property under consideration was held by the firm M/s Printpals (in which the assessee was a partner) since 04.05.1984, therefore the subsequent changes in the constitution of the partnership firm and finally continuing of the business by him as a proprietary concern, in the absence of any transfer of the asset, would in no way affect the period of holding of the asset under consideration. Alternatively, it was averred by the assessee that even if it was assumed that a transfer of the capital asset took place on the dissolution of the firm on 16.05.2003, in that case the capital gain tax liability on such transfer would arise in the hands of the firm, while for the continuing partner, i.e. the assessee would only be liable for payment of capital gain tax to the extent of the difference between the Fair Market Value of the property under Sec. 50C on 16.05.2003 and that on the date of actual sale i.e. 03.07.2004. Per contra, the Ld. D.R. relied on the order of the CIT(A).

11. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We may herein observe, that as held by us hereinabove while disposing off the additional ground of appeal No. 2, that in the absence of a specific provision to the effect that the period of holding of an asset acquired

by a continuing partner on the dissolution of the firm occasioned by the death of a partner, is to be reckoned from the date of acquisition of the said asset by the firm, which as observed by us hereinabove is a separate entity under the Income Tax Act, 1961, the claim of the assessee seeking relating of the period of holding of the property under consideration to 04.05.1984, cannot be accepted. We thus are of the considered view that in terms of our aforesaid observations, the claim of the assessee that the period of holding of the asset for adjudicating his entitlement under Sec. 54EC has to be worked out after considering the period for which the said asset was held by the partnership firm, cannot be accepted. The reliance placed by the Id. A.R on the judgment of the High Court of Guwahati in the case of CIT Vs. Assam Petroleum Industries (P) Ltd. (2003) 262 ITR 587 (Gau), being distinguishable on facts would thus not assist the case of the assessee before us. We find that the High Court in the aforementioned case had observed that where the building owned by the assessee was held for a period of more than thirty six months, then merely for the reason that the same formed part of the 'block of assets' in respect of which depreciation was allowed to the assessee and the capital gain on sale of such depreciable asset was to be assessed as STCG, the said asset, viz. building in the backdrop of its period of holding of more than thirty six months would not lose its color and character as that of being a long term capital asset under Sec. 2(42A) for the purpose of entitlement of the assessee towards exemption under Sec. 54E of the Act. The High Court while concluding as hereinabove, had observed that Sec.54E is an independent provision which is not controlled by Sec. 50 of the Act. We are of the considered view that as in the case of the assessee before us, the property under consideration, viz. Industrial unit No. 307, 3rd Floor of Wadala Udyog Bhawan, 8, Naigaum Cross Road, Wadala, Bombay, was held by the assessee only for a period of 1 year and 2 months, thus the aforesaid judicial pronouncement would not assist the case of the assessee. We shall now advert to the alternative claim of the Id. A.R that in case it was to be held that the takeover of the assets by the assessee on the dissolution of the firm on 16.05.2003 was to be

construed as a transfer, then the capital gain in his hands would be to the extent of difference between the sale consideration of the property on 03.07.2004 and the Fair Market Value of the same on 16.05.2003. We have given a thoughtful consideration to the said claim of the assessee and find substantial force in the same. We are of the considered view that after the dissolution of the firm on 16.05.2003 on the death of one of the two partners, the assessee on the declining by the legal heirs of the deceased partner to step into the shoes of the deceased, had continued the business as a sole proprietor. We are of the view that the continuing of the business by the assessee after the dissolution can safely or rather inescapably be taken as the distribution of the assets to him. Thus, in the backdrop of the aforesaid state of affairs, we are persuaded to subscribe to the claim of the Id. A.R that the 'transfer' of the assets in terms of Sec. 45(4) had occasioned in the hands of the dissolved firm, viz M/s Printpals on 16.05.2003. As the 'Fair Market Value' of the assets is to be deemed to be the full value of consideration received or accrued to the firm, hence the 'Cost of acquisition' of the asset under consideration cannot be taken at a different figure, but as per our considered view, has to be adopted as the 'Fair Market Value' of the same on the date of dissolution and distribution of the assets, i.e 16.05.2003. We thus, in terms of our aforesaid observations direct the A.O to recompute the 'Capital gain' in the hands of the assessee by adopting the 'Fair Market Value' of the property under consideration, viz. Industrial unit No. 307, 3rd Floor of Wadala Udyog Bhawan, 8, Naigaum Cross Road, Wadala, Bombay on 16.05.2003, as the 'Cost of acquisition' in the hands of the assessee. We thus, are of the considered view that though the contentions advanced by the assessee as regards its entitlement towards exemption under Sec. 54EC has to fail, but those advanced in context of quantification of the capital gains in his hands merits acceptance, in terms of our aforesaid observations. The **Ground of appeal No. 3** raised by the assessee is partly allowed.

12. The **Ground of appeal No. 1** and **Grounds of appeal No. 5 & 6** being general in nature are dismissed as not pressed.

13 The appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 30.05.2018

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 30.05.2018
Ps. Rohit

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

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

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

सत्यापित प्रति //True Copy//

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

