

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SURAT” BENCH, SURAT**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No.1227/Ahd/2016  
(Assessment Year : 2011-12)

M/s. Globe Textiles, Vs. ITO,  
45-46, Hashimi Estate, Ward – 2(1),  
Udhna Main Road, Surat.  
Surat-394 210.

[PAN No. AACFG 2121 J]

(Appellant)

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(Respondent)

**Appellant by :** Mr. Rasesh Shah, A.R.  
**Respondent by :** Ms. Anupama Singla, Sr. D.R

**Date of Hearing** 20/11/2018  
**Date of Pronouncement** 14/12/2018

ORDER

**PER Ms. MADHUMITA ROY - JM:**

The instant appeal filed by the assessee is against the order dated 25.02.2016 passed by the Commissioner of Income Tax (Appeals)-II, Surat arising out of the assessment order dated 28.03.2014 for the Assessment Year 2011-12 passed by the ITO, Ward 2(1), Surat under section 143(3) of the Income Tax Act, 1961 (The Act) with the following grounds:

1. *“On facts and circumstances of the case, the learned CIT(A) has grossly erred in confirming the action of the ld. ITO in not allowing the set off of the brought forward business and depreciation loss against the profit on sale of depreciable assets, which is erroneous and needs to be allowed in the interest of natural justice and equity.*
2. *Without prejudice to the aforesaid ground of appeal no. 1 and without admitting, even otherwise on facts and circumstances of the case, the Id,*

*CIT(A) has grossly erred in confirming the action of the ld. ITO in treating the entire capital gain as short term capital gain without appreciating that for the purpose of computation of capital gain, land and building are two separate and distinct assets and therefore, the capital gain arising from sale of land was required to be considered as long term capital gain and not as short term capital gain and taxed accordingly, which is erroneous and needs to be allowed in the interest of natural justice and equity.*

3. *The appellant craves leave to add, amend, alter, substitute, modify in any or all the above grounds of appeal, if necessary, on the basis of submissions to be made at the time of personal hearing.”*

2. The moot point involved in this particular case as to whether brought forward business and depreciation loss can be set off against the profit on sale of depreciable assets. If yes, then how capital gain arising out of the sale of the business assets being factory land with building is required to be calculated.

3. The assessee being a partnership firm engaged in the business of manufacturing and trading of yarn and grey cloth filed its return of income on 28.09.2011 declaring total income of Rs. Nil for A.Y. 2011-12. Upon scrutiny notice u/s 143(2) was issued on 03.08.2012 followed by a further notice dated 24.12.2013 u/s 142(1) of the Act along with questionnaire upon the assessee.

It appeared from the profit and loss account of the assessee that it has sold fixed assets being Plot No.A/12/21, Udhna Udhyog Nagar, amounting to Rs.1,04,94,105/-; the same being a factory land along with a building the assessee claimed depreciation as also set off of the brought forward business and depreciation losses. The assessee, thereafter, was served with a show-cause notice dated 14.03.2014 as to why the said amount of Rs.1,04,94,105/- should not be treated as short term capital gain for the A.Y. 2011-12 and also why such claim of set off of the carried forwarded business loss of earlier year should not be disallowed u/s 71 & 72 of the Act. The explanation rendered by the

assessee was, however, not found acceptable by the Learned AO. The net profit of the assessee derived after deducting current year business loss and depreciation being Rs.88,78,792/- as shown in P&L account was ultimately added to the total income of the assessee by the Learned AO against which appeal was preferred. The Learned CIT(A) in turn confirmed the same. Hence, the instant appeal.

4. Learned Advocate appearing for the assessee at the time of the hearing of the matter submitted before us that the assessee though was engaged in the business for more than 2 decades started incurring depreciation loss in the initial year 2002-03 and then even business losses from A.Y. 2004-05. Thus, the assessee decided to sell off its business assets being the factory and building thereon. Since the said factory building was a business asset and not an investment, the profit on sale thereof was offered by the assessee as business income and the carried forward unabsorbed depreciation and business loss has been set off against the same. It was further submitted by the Learned AR that the contention of the assessee that since the assets sold are business assets and the brought forward losses are allowed to be set off, was not found acceptable to the Learned AO then, the entire profit under the head 'capital gain' without allowing the set off of brought forward losses, could not have been taxed rather alternatively, the Learned AO should have treated land and building as two separate and distinct assets. Since the land is not a depreciable asset and the same was acquired prior to more than 3 years, the capital gain arising out of sale of such land ought to have been taxed as long term capital gain and not as short term capital gain and thus could have been charged to tax accordingly. The Learned AR further relied upon the judgment passed by the Hon'ble ITAT, Mumbai Bench in the matter of Digital Electronics Ltd.-vs-ACIT (2011) 135 TTJ (Mum) 419 in support of his argument. On the other hand, Learned DR relied upon the orders passed by the authorities below.

5. We have heard the rival contentions made by the parties, perused the relevant materials available on record. We have also gone through the order passed by the authorities below and the submissions made by the assessee. The following working of the profit on sale of the business asset has been made by the assessee in support of his case:

Particulars	Amount (Rs.)
Sale Consideration	1,19,67,000
Less: Brokerage on Sale @ 1%	1,19,670
Net Sale Consideration	1,18,47,330
Less : Cost of acquisition	13,53,225
Net Profit on sale of factory land and building	1,04,94,105
Less: <u>Set off of Losses</u>	
- Current Year Business & Depreciation Loss	16,35,871
- Brought forward Business Loss	88,58,234
Net income	Nil

It appears from the record that the assessee was directed to explain as to why the amount of Rs.1,04,94,105/- should not be treated as short term capital gain for A.Y. 2011-12 and the claim of set off of carried forward business loss and depreciation loss of earlier year should not be disallowed as per provision of Section 71 & 72 of the Act. In reply whereof, the assessee duly explained that even if the gain on sale of business asset is taxable as capital gains, its character remained that of business income inasmuch as the gains arose on transfer of a business asset on which depreciation was allowed. If that be so, then the assessee is entitled for set off of brought forward business and depreciation losses against the said capital gains. However, the said plea of the assessee was not duly considered by the Learned AO in its proper prospective and he then disallowed the entire set off of brought forward and depreciation loss aggregating to Rs.88,77,695/- pertaining to the earlier years against the profit on sale of depreciable asset by treating the same as short term capital gain. Further that on that basis the Learned AO hold that set off of brought forward business and depreciation loss cannot be allowed against short term

capital gain. In appeal, we find no deliberation has been made by the appellate authority on this aspect only on the sole ground that the assessee has not filed the details of the sale deed in the absence of which the basis of the claim made by the assessee could not be ascertained. The judgment relied upon by the assessee on this count passed by the Hon'ble ITAT, Mumbai Bench in the case of **Digital Electronics Ltd.-vs-ACIT (2011) 135 TTJ (Mum) 419** has also been taken care of by us. It is held that the income earned by the assessee in the relevant year on sale of factory building, plant and machinery although not taxable as profit and gains of business or profession' is an income in the nature of business though assessed as capital gain u/s 50 and, therefore, the assessee is entitled to set off of brought forward losses against such capital gains. The same view has also been upheld in another matter by the Apex Court in the case of **CIT-vs-Cocanada Radhaswami Bank Ltd. (1965) 57 ITR 306 (SC)**. Taking into consideration, the case made out by the assessee which is evident on record and also relying upon the ratio settled by the judgment as discussed above, we are of the considered view that the set off of brought forward depreciation and business loss against capital gains is allowable in the present facts and circumstances of the case and the assessee is entitled to such claim.

Now we propose to deal with the mode of calculation of such capital gain out of the sale of business assets comprising of factory premises with land. At the vary on set it has been contended before us by the assessee that the sale deed has duly been submitted before the Learned CIT(A) who might have missed the same while considering the case of the assessee. We find that while computing the capital gain on sale of factory building including land, the Learned ITO has erroneously treated the entire capital gain as short term capital gain. We do not hesitate to observe that the Learned AO failed to consider that land and building are two separate and distinct assets; the capital gain arising from the sale of land ought to have been considered as long term capital gain and not as short term capital gain and taxed accordingly on the sole premises that the land has been acquired by

the assessee for more than 36 months and no depreciation has been claimed by the assessee in respect thereof and thus the deeming provision of Section 50(2) are not applicable in respect of the sale of land. We find a separate working showing the capital gain/profit on sale of factory building as short term capital gain and profit on sale of land as long term capital gain has been submitted by the assessee before us which is also made available to the Learned AR. The same is also evident from the submissions made by the assessee before the Learned CIT(A) recorded in the order impugned before us.

6. In this aspect, the assessee relied upon the judgment passed in the matter of CIT-vs-Citibank N.A. [261 ITR 0570] [Bom.][HC]. In that particular case, the Learned Tribunal held that for the purpose of computation of capital gain land and building are two separate and distinct assets and therefore profits arising from the sale of land was required to be considered as long term capital gain whereas profits arising out of the sale of factory building was required to be considered as short term capital gain. It is Needless to mention that the ratio of the judgment squarely applicable to the instant case taking into consideration the particular facts and circumstances of the matter on record. We, therefore, considering the entire facts of the case, the submissions made by the assessee, the observations made by the authorities below and ultimately the judgments relied upon by the assessee in support of his case are of the opinion that the calculation of capital gain is required to be considered in the light of the observation made hereinabove. The tax on capital gain is thus required to be calculated accordingly by the Learned AO. In that view of the matter, we set aside the order and remit the issue to the file of the Learned AO to calculate the capital gains arising out of transfer of the land including factory building as indicated above and also to allow set off of unobserved depreciation and business loss of the assessee firm against such capital gain. However, we make it clear while making the same the Learned AO should give the reasonable opportunity of hearing to the assessee

and also to consider any evidence which the assessee may choose to rely upon at the time of hearing of the assessment proceedings.

7. In the result, assessee's appeal is allowed for statistical purposes.

**This Order pronounced in Open Court on**

**14/12/2018**

Sd/-  
( AMARJIT SINGH )  
**ACCOUNTANT MEMBER**

Sd/-  
( Ms. MADHUMITA ROY )  
**JUDICIAL MEMBER**

Ahmedabad; Dated 14/12/2018  
*Priti Yadav, Sr.PS*

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad