

आयकर अपीलीय अधिकरण “A” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 2891/Mum/2018

(निर्धारण वर्ष / Assessment Year 2011-12)

The Joint Commissioner of Income Tax, (OSD), Circle 12 (1)(1), Mumbai	Vs.	American Spring & Pressing Works Pvt. Ltd, Aspee House, Adarsh Housing Society, B.J. Patel Road, Malad (W), Mumbai-400 064
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAACA8979P		

प्रत्याक्षेप सं./ CO No. 141/Mum/2019

(Arising in ITA No. 2891/Mum/2018 for AY 2011-12)

American Spring & Pressing Works Pvt. Ltd, Aspee House, Adarsh Housing Society, B.J. Patel Road, Malad (W), Mumbai-400 064	Vs.	The Joint Commissioner of Income Tax, (OSD), Circle 12 (1)(1), Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Ajay Kumar, CIT DR
प्रत्यर्थी की ओर से / Respondent by	:	Shri B.P. Purohit, AR

सुनवाई की तारीख / Date of hearing:	14-05-2019
घोषणा की तारीख / Date of pronouncement :	21-05-2019



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आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Commissioner of Income Tax (Appeals)-20, Mumbai [in short CIT(A)], in appeal No. CIT(A)-20/ACIT-12(1)(1)/IT-108585/2016-17 dated 15.12.2017. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle 12(1)(1) (in short ACIT/ITO/ AO) for AY 2011-12 vide order dated 30.12.2016 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. At the outset, the learned Counsel for the assessee filed copy of Tribunal's order for AY 2011-12 in ITA No. 2830/Mum/2016 vide order dated 24.05.2017, wherein the Tribunal has quashed the revision order passed by PCIT under section 263 of the Act and quashed the proceedings vide Para 17 in respect of addition made by AO on account of long term capital gain under section 45(2) of the Act by observing as under: -

"17. We find merit in the contentions of the assessee. As observed by Hon'ble jurisdictional Bombay High Court, there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. In the instant case, in our view, the Ld Principal CIT has failed to show that the tax which was lawfully exigible has not been imposed, since we are of the view that there is



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merit in the contention of the assessee that the provisions of sec. 2(47)(v) will not apply to an asset held as “Stock in trade”, since the said provision very clearly states that it would apply only to “Capital assets”, i.e., the asset should have been held as Capital asset. Further it is the submission of the assessee that the possession of the asset has not been given to the developer, which is the main condition for applying the provisions of sec. 2(47)(v) of the Act. We notice that the Ld Principal CIT has failed disprove the said claim of the assessee. Hence, in our view, the AO has taken a possible view in this matter and further the Ld Principal CIT has failed to show that the tax which was lawfully exigible has not been imposed. It cannot also be said that the AO has applied the provisions on an incorrect way or there was incomplete interpretation of the provisions, since the view taken by the AO is a possible view. Hence we are of the view that the Ld Principal CIT has assumed jurisdiction u/s 263 of the Act on this issue without properly complying with the mandate of the section, i.e., he has failed to show that the assessment order was erroneous on this issue causing prejudice to the revenue. Accordingly, we set aside the order passed by Ld. Principal CIT on this issue.”

3. When these facts were confronted to the learned Sr. DR he agreed that the Revenue’s appeal will not survive and CIT(A) appeal has also allowed this issue only on this basis and directed the AO to delete the addition by observing in 5.3.1 as under: -



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“5.3.1 I have considered the contentions of the A.R. Since the order of the Pr. CIT on this issue has been set aside, the addition made pursuant to order of Pr. CIT relating to this issue cannot be sustained. The AO is directed to delete the addition. Therefore, ground of appeal No. 1 & 2 are allowed.”

4. Once, the Tribunal set aside the revision order passed by PCIT under section 263 of the Act in regard to capital gain arising from conversion of fixed assets and set aside revision order passed by PCIT under section 63 of the Act, this issue of the assessment will not survive. Hence, this issue of Revenue's appeal is dismissed.

5. Coming to the issue of CO of the assessee, which is as regards to the order of CIT(A) sustaining the disallowance of deduction under section 35(1)(2) of the Act. The learned Sr. DR stated that the Tribunal has affirmed the order of CIT(A) i.e. Revision order by observing in Para 18 as under: -

“18. With regard to the issue relating to weighted deduction u/s 35(1)(ii) of the Act, we notice that the assessing officer has failed to examine the same at all. Further the Ld Principal CIT has also observed that the weighted deduction is allowed upon compliance of certain conditions, which require examination. Under these set of facts, we are of the view that the Ld Principal CIT was justified in invoking revision provisions on this issue.”



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6. The learned Sr. DR stated that the issue is surviving and CIT(A) has rightly confirmed the same. On the other hand the learned Counsel for the assessee stated on this very issue, that the matter is before Hon'ble Bombay High Court in writ petition No. WP/1951/2013 dated 26.08.2013 whereby the writ petition of the assessee is admitted on the issue of claim of deduction under section 35(1) (2) of the Act. Hence, he requested that this issue can be set aside to the file of the AO, who will take decision after the matter is decided by Hon'ble High Court in the writ petition filed by the assessee. To this proposition, the learned Sr. DR fairly agreed.

7. After hearing both the sides and going through the facts, we restore this issue back to the file of the AO, who will take the decision as per law and also after considering the decision which is to be delivered by Hon'ble Bombay High court on writ petition filed by assessee.

8. In the result, the appeal Revenue is dismissed and that of the CO of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 21.05.2019.

(एन. के. प्रधान/ NK PRADHAN)
(लेखा सदस्य / ACCOUNTANT MEMBER)

(महावीर सिंह /MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 21.05.2019.

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*



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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.

आदेशानुसार/ BY ORDER,

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