

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “G”, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.836/M/2023
Assessment Year: 2014-15**

M/s. Zodiac JRD MKJ Ltd., 910, Parekh Market, 39, JSS Road, Kennedy Bridge, Opera House, Mumbai- 400 004 Maharashtra PAN: AAACZ0459K	Vs.	ACIT, Circle 5(3)(2), Aayakar Bhava, Mumbai – 400 020
(Appellant)		(Respondent)

Present for:

Assessee by : Ms. Drutika Jain, A.R. &
Ms. Priyank Ghia, A.R.

Revenue by : Smt. Sonia Kumar, D.R.

Date of Hearing : 23 . 05 . 2023

Date of Pronouncement : 31 . 05 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The assessee by filing the present appeal, sought to set aside the impugned order dated 31.01.2023 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) qua the assessment year 2014-15 on the grounds inter-alia that :-

“1. The Ld. CIT(A) has erred in in confirming the addition made by the Ld. AO for Rs. 1,00,00,000/- towards the exemption claimed u/s.

54EC of Income Tax Act, 1961 in REC and NHAI bonds, without considering the facts and circumstances of the case. The same be considered & additions be deleted.

2. The Ld. CIT(A) has erred in law & in facts in not considering the provisions of section 54EC and Section 50 of the Income Tax Act, 1961. The same be considered & additions be deleted.

3. The Ld. CIT(A) has erred in not considering the various judicial pronouncements in favour of the assessee for claiming the deduction for investment to be made u/s. 54EC. The same be considered & additions be deleted.

4.a. The Ld. CIT(A) has erred in upholding levy of tax @ 30% on Short Term Capital Gain computed u/s 111A of Income Tax Act, 1961 instead of levying 15% tax rate on the same. Kindly consider the same.

b. The Ld. CIT(A) has erred in confirming that entire Short Term Capital Gain is from sale of premises and accordingly upheld tax rate of 30%. Kindly consider tax rate of 15% for Short Capital Gain computed u/s 111A of INR 5,86,046/- as reported in the ITR.

5. The Ld. CIT(A) has erred in levying interest u/s. 234B and 234C of the Income Tax Act, 1961 without considering the facts and circumstances of the case.

6. The Appellant craves leave to add, alter or delete to the ground of appeal at the time of or before hearing.”

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company is into the business of import-export/manufacturing and trading of diamonds/gems and jewellery. During the year under consideration the assessee claimed deduction to the tune of Rs.1,00,00,000/- under section 54EC of the Income Tax Act, 1961 (for short ‘the Act’). The Assessing Officer (AO) sought explanation of the assessee as to why the deduction claimed under section 54EC should not be disallowed. Declining the contentions raised by the assessee the AO proceeded to disallow the deduction claimed under section 54EC of the Act on the ground that the asset transfer should be long term capital asset whereas in this case the assessee himself

has offered short term capital gains (STCG) on the sale of office premises. The AO also levied tax @ 30% on STCG computed under section 111A of the Act as against 15% tax rate on the same as claimed by the assessee. The AO thereby framed the assessment under section 143(3) of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by partly allowing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Grounds No.1 to 3

5. Undisputedly the assessee has sold one office premises along with free car parking space for a sale consideration of Rs.10,13,44,500/- and thereby earned a profit of Rs.8,48,99,207/- and worked the profit as per provision of the Act as under:

Particulars	Amount (Rs)
<u>Opening WDV as on 01.04.2013</u>	
Office at Panchratna	4,41,013/-
Office at BDB with Car parking	1,33,53,769/-

Factory at Dahisar	1,46,081/-
TOTAL	1,39,46,863/-
<u>Less:</u> Sale of BDB Office & 3 Car Parking	10,13,44,500/-
Capital Gain	(8,73,97,637/-)

6. It is also not in dispute that the assessee in its return of income has sold depreciable assets and offered STCG on the profit earned.

7. In the backdrop of the aforesaid undisputed facts the Ld. A.R. for the assessee contended that the deduction claimed under section 54EC of the Act is admissible to the assessee as the section does not make any distinction between depreciable assets and non depreciable assets and since the capital gain has arisen to the assessee arising out of long term capital assets the assessee is entitled for exemption under section 54EC of the Act and relied upon the decision rendered by the Hon'ble Gujarat High Court in case of Commissioner of Income Tax-I vs. Aditya Medisales Ltd. (2013) 38 taxmann.com 244 (Gujarat) and Hon'ble Bombay High Court in case of Commissioner of Income Tax vs. Ace Builders (P.) Ltd. (2005) 144 Taxman 855 (Bombay).

8. However, on the other hand, the Ld. D.R. for the Revenue contended that when the assessee has himself sold depreciable assets and offered STCG on the profit earned it is not entitled for deduction under section 54EC of the Act and relied upon the order passed by the Ld. CIT(A).

9. Before proceeding further we would extract the provisions contained under section 54EC, for ready perusal, as under:

“(1) Where the capital gain arises from the transfer of a long-term capital asset, being land or building or both, (the capital asset so transferred being hereafter in this section referred to as the original asset) and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—

(a) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under section 45;

Provided that the investment made on or after the 1st day of April, 2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees:

(2) Where the long-term specified asset is transferred or converted (otherwise than by transfer) into money at any time within a period of three years from the date of its acquisition, the amount of capital gains arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such long-term specified asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1) shall be deemed to be the income chargeable under the head "Capital gains" relating to long-term capital asset of the previous year in which the long-term specified asset is transferred or converted (otherwise than by transfer) into money:

Explanation. In a case where the original asset is transferred and the assessee invests the whole or any part of the capital gain received or accrued as a result of transfer of the original asset in any long-term specified asset and such assessee takes any loan or advance on the security of such specified asset, he shall be deemed to have converted (otherwise than by transfer) such specified asset into money on the date on which such loan or advance is taken.

[(3) Where the cost of the long-term specified asset has been taken into account for the purposes of clause (a) or clause (b) of sub-section (1),-

(a) a deduction from the amount of income-tax with reference to such cost shall not be allowed under section 88 for any assessment year ending before the 1st day of April, 2006:

(b) a deduction from the income with reference to such cost shall not be allowed under section 80C for any assessment year beginning on or after the 1st day of April, 2006.]

Explanation-For the purposes of this section,-

(a) "cost", in relation to any long-term specified asset, means the amount invested in such specified asset out of capital gains received or accruing as a result of the transfer of the original asset:

[(b) "long-term specified asset" for making any investment under this section during the period commencing from the 1st day of April, 2006 and ending with the 31st day of March, 2007, means any bond, redeemable after three years and issued on or after the 1st day of April, 2006, but on or before the 31st day of March, 2007,-

(i) by the National Highways Authority of India constituted under section 3 of the National Highways Authority of India Act 1988 (68 of 1988); or

(ii) by the Rural Electrification Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956),

and notified by the Central Government in the Official Gazette for the purposes of this section with such conditions (including the condition for providing a limit on the amount of investment by an assessee in such bond) as it thinks fit:

***Provided** that where any bond has been notified before the 1st day of April, 2007, subject to the conditions specified in the notification, by the Central Government in the Official Gazette under the provisions of clause (b) as they stood immediately before their amendment by the Finance Act, 2007, such bond shall be deemed to be a bond notified under this clause;*

(ba) "long-term specified asset" for making any investment under this section on or after the 1st day of April, 2007 but before the 1st day of April, 2007, means any bond, redeemable after three years and issued on or after the 1st day of April, 2007 by the National Highways Authority of India constituted under section 3 of the National Highways Authority of India Act, 1988 (68 of 1988) or by the Rural Electrification Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956)"

10. It is undisputed fact on record that the assessee has made an agreement with the builder for purchase of office premises at Bharat Diamond Bourse in the year 1992 and since then they were

paying installments duly recorded in the books as an advance. It is also a fact on record that the possession of the said premises and car parking was taken by the assessee on 30.10.2010. It is also an admitted fact on record that the assessee's another office at Panchratna and a factory at Dahisar in addition to the property in question was added to the block of assets. It is also not in dispute that the assessee has invested Rs.50,00,000/- under section 54EC of the Act in NHAI bond on 19.03.2014 and Rs.50,00,000/- in REC bond on 02.04.2014 and claimed the aforesaid exemption under section 54EC of the Act.

11. We have perused the decision rendered by the Hon'ble Gujarat High Court in case of Aditya Medisales Ltd. (supra) and the operative part of which is extracted for ready perusal as under:

“It held that Capital gain arising of long-term capital asset, if invested in specified asset the assessee is not to be charged capital gains and exemption provided under section 54EC cannot be denied to the assessee only on account of the fact that deeming fiction is created under section 50. In other words, legal fiction created under section 50 is though restricted to computation of capital gains, such deeming fiction cannot restrict application of section 54EC which allows exemption of capital gains, if assessee makes investment in the specified asset. Thus the assessee cannot be charged to Capital Gain when Short Term gains of long term capital assets get invested in the areas specified under the law.”

12. We have also perused the decision rendered by the Hon'ble Bombay High Court in case of Ace Builders (P.) Ltd. (supra) and relevant part thereof is extracted for ready perusal as under:

“The assessee fulfilled all the conditions set out in section 54E to avail exemption, but the exemption was sought to be denied in view of fiction created under section 30. The assessee could not be denied exemption under section 54E, because, firstly, there is nothing in the section to suggest that the fiction created in section 50 is not only restricted to sections 48 and 49 but also applies to other provisions. On the contrary, section 50 makes it explicitly clear that the deemed fiction created in sub-sections (1) and (2) of section 50 is restricted only to the

mode of computation of capital gains contained in sections 48 and 49 and cannot be extended beyond that. Secondly, it is well established in law that a fiction created by the Legislature has to be confined to the purpose for which it is created. Thirdly, section 54E does not make any distinction between depreciable asset and non-depreciable asset and, therefore, the exemption available to the depreciable asset under section 54E cannot be denied by referring to the fiction created under section 50. Section 54E specifically provides that where capital gain arising on transfer of a long-term capital asset is invested or deposited (whole or any part of the net consideration) in the specified assets, the assessee shall not be charged to capital gains. Therefore, the exemption under section 54E could not be denied to the assessee on account of the fiction created in section 50.

It is true that section 50 is enacted with the object of denying multiple benefits to the owners of depreciable assets. However, that restriction is limited to the computation of capital gains and not to the exemption provisions. In other words, where depreciation has been availed on long-term capital asset, then the capital gain has to be computed in the manner prescribed under section 30 and the capital gains tax will be charged as if such capital gain has arisen out of a short-term capital asset, but if such capital gain is invested in the manner prescribed in section 54E, then the capital gain shall not be charged under section 45. To put it simply, the benefit of section 54E will be available to the assessee irrespective of the fact that the computation of capital gains is done either under sections 48 and 49 or under section 50. The contention of the revenue that by amendment to section 50, the long-term capital asset had been converted into to short-term capital asset was also without any merit. The legal fiction created by the statute is to deem the capital gain as short-term capital gain and not to deem the asset as short-term capital asset. Therefore, it cannot be said that section 50 converts long-term capital asset into a short-term capital asset.

Therefore, the Tribunal was justified in allowing the benefit of exemption under section 54E to the assessee in respect of the capital gains arising on the transfer of a capital asset on which depreciation had been allowed.”

13. Hon'ble High Court of Bombay has also in case of CIT vs. United Paper Industries (2014) 42 taxmann.com 79 (Bombay) held that deeming fiction of a long term capital gain to be treated as short-term capital gain is restricted only to section 50 and it would have no application to other provisions such as section 54EC.

14. When we examine aforesaid undisputed facts narrated in the preceding para in the light of the decision rendered by the Hon'ble Gujarat High Court in case of Aditya Medisales Ltd. (supra) and Hon'ble Bombay High Court in case of Ace Builders (P.) Ltd. (supra) we are of the considered view that section 54EC of the Act does not make any distinction between depreciable assets and non depreciable assets and as such exemption otherwise available to the assessee under section 54EC of the Act cannot be denied by resorting to the fiction created under section 50 of the Act. Because legal fiction created by the statute under section 50 of the Act is only to deal with capital gain as STCG and not to deem the assets as short term capital assets. Section 50 cannot convert long term capital assets into short term capital assets. So the assessee is entitled for benefit of section 54EC of the Act as it has capital gain arisen out of long term capital assets invested in specified assets and as such the assessee is not liable to be charged capital gains and is entitled for exemption under section 54EC of the Act. We are of the considered view that the Ld. CIT(A) has erred in denying the exemption claimed by the assessee under section 54EC of the Act. The AO is directed to allow the same. Grounds No.1 to 3 are decided in favour of the assessee.

Ground No.4

15. The AO has levied the tax @30% on STCG computed under section 111A of the Act which was also confirmed by the Ld. CIT(A). The Ld. A.R. for the assessee contended that in this case STCG are to be computed @ 15% under section 111A of the Act. The Ld. A.R. for the assessee drew our attention towards

consolidated account statement available at page 19 to 43 of the paper book.

16. However, all these documents relied upon by the assessee have not been examined by the AO as well as the Ld. CIT(A). It is not clear from the record if the funds qua which STCG is to be taxed was an equity or in the mutual fund. To consider the same under section 111A all these documents are required to be examined by the AO. In order to decide the issue once for all we set aside the findings returned by the Ld. CIT(A) and remit this issue back to the AO to decide ground No.4 afresh after providing opportunity of being heard to the assessee.

17. In view of what has been discussed above, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 31.05.2023.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 31.05.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.