IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'SMC' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 3064/Mum/2022 (A.Y. 2010-11)

Parvinchand Narindernath Sehgal 707, 7th Floor, Auto Commerce House, H.G. Road, Opp Kennedy Bridge, Grant Road West Mumbai-400 007. PAN : AAPPS5941M	Vs.	ITO Ward 19(2)(5) Maatru Mandir Room No. 210 Tardeo Road Mumbai-400 007.
(Appellant)		(Respondent)

Assessee by	Ms. Aaarti Vissanji & Aasavari Kadam
Department by	Shri Vaibhav Jain
Date of Hearing	27.03.2023
Date of Pronouncement	24.05.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 16.11.2022 passed by the learned CIT(A), National Faceless Appeal Centre, Delhi and it relates to A.Y. 2010-11. The assessee is aggrieved by the decision of the learned CIT(A) in rejecting the claim for deduction of the value of new asset from short term capital gains computed under section 50 of the I.T. Act.

2. The facts relating to the issue are stated in brief. This is the second round of proceedings. During the year under consideration the assessee sold a business asset for a consideration of Rs. 33 lakhs. Since the stamp duty valuation was Rs. 39.72 lakhs, the assessee adopted the same in terms of sec. 50C of the Act as sale consideration. The assessee computed the short term capital gains of Rs. 8,44,085/- as under in terms of sec.50 of the Act:-

Sale value of shop as per sec.50C	-	39,72,587
Less:- Written down value		28,502
		39,44,085
Less:- New asset acquired during the year		31,00,000
Short term capital Gain		8,44,085

When the concept of "block of assets" for allowing depreciation was introduced w.e.f. 1.4.1988, the provisions of sec.50 of the Act was introduced for dealing with a situation, wherein the sale of assets results in extinguishment of the relevant block and surplus is generated. The said surplus is deemed to be short term capital gain u/s 50 of the Act. The provisions of sec.50 read as under:-

> **"Special provision for computation of capital gains in case of depreciable assets.**
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> **50.** Notwithstanding anything contained in clause (*42A*) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :—
>
> (*1*) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of the assets during the previous year, exceeds the aggregate of the following amounts, namely :—
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> (*i*) expenditure incurred wholly and exclusively in connection with such transfer or transfers;
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> (*ii*) the written down value of the block of assets at the beginning of the previous year; and
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> (*iii*) the actual cost of any asset falling within the block of assets acquired during the previous year,
>
> such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets;
>
> (*2*) where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the

> block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short-term capital assets."

It can be noticed that the actual cost of any asset falling within the block of assets acquired during the year can be deducted against the sale consideration for computing short term capital gain u/s 50 of the Act.

3. We noticed that the assessee has claimed deduction of Rs.31.00 lakhs on the reasoning that he has acquired a shop falling within the same blocm. The controversy is with regard to the above said claim for deduction of Rs.31.00 lakhs towards cost of new asset acquired by the assessee. The facts relating thereto are discussed in brief. The assessee along with his HUF had entered into an agreement for a purchase of a shop for a total consideration of Rs. 1,31,00,000/-. The assessee paid a sum of Rs. 31 lakhs and the remaining amount was paid by his HUF. It is also pertinent to note that the assessee has paid the sum of Rs.31.00 lakhs in the succeeding financial year as his contribution in purchase of shop.

4. In the first round of proceedings, the Assessing Officer noticed that the assessee and his HUF have entered into an agreement with Gorkha Properties and Investment Limited and the said agreement was registered on 20.3.2010. The AO noticed that the said agreement was for allotment of a shop yet to be constructed. Accordingly, the Assessing Officer took the view that the value of "non-existant" property cannot be considered as acquired by the assessee in terms of section 50 of the Act. Accordingly, he disallowed the deduction of Rs.31.00 lakhs claimed by the assessee. The learned CIT(A) also confirmed the same. In the first round, the assessee submitted before the ITAT that the possession of the property has also been received during the year under consideration. The Tribunal also noticed that the learned CIT(A) has not considered the submission of the assessee dated 28.2.2013 and

25.1.2016. Accordingly, the learned CIT(A) restored the matter to the file of the Assessing Officer for examining the issue afresh.

3. In the set aside proceedings the Assessing Officer held that the assessee is not entitled for deduction of Rs. 31 lakhs being the value of building yet to be come into existence. The following observations made by the Assessing Officer are relevant :

> "3.3 During the set aside scrutiny proceedings the Sale Agreement was examined and it is seen that there existed no new asset, only an agreement for ownership of a yet to be constructed shop/building existed. As per the Agreement the Promoters had agreed (page 4 of the Agreement) that they shall construct a building...., and it is also mentioned that the Promoter agrees to merely allot the Allottee(s) the said Unit/Shop "No. 407..... etc. The promoters do not specify the date by which the Unit/Shop would be allotted to the assessee. These facts do not support the claim of the assessee that it had a building in its possession as on 31.3.2010.
>
> 3.4 It is further held that the provisions of section 53A of the Transfer of Property Act do not come in operation as the said provisions are hinged on receiving possession of the property. Therefore, it is clear that a right to own the property in future' does not make the mere right fall in the Block of Assets of 'Buildings'. There was no building with the assessee and **the shop was ultimately constructed and handed over to the assessee only on 01.06.2013** i.e. after more than three years. It is thus held the asset which could fall in the Block of Asset of Building come into existence only on 01.06.2013. As at 31.3.2010, the assessee's Block of Asset of Building had ceased to exist by virtue of the sale of his Gala.
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> 3.5 Further as per the agreement with the Promoter (page 14 para 16) the assessee is free to sell, assign, or part with the rights created in its favour by virtue of the agreement after giving due notice to the Promoter. This also supports the view taken by the AO that what the assessee has acquired is only a right to get a property but it is not the same as getting the property itself. In view of the above the assessee's claim is not tenable."

4. The learned CIT(A) also confirmed the view taken by the Assessing Officer and hence the assessee has filed this appeal.

5. The Ld A.R reiterated contentions that the assessee has acquired the property during the year under consideration. She further submitted that the provisions of sec.50 do not mandate that the assessee should have been

put to use during the year under consideration. Hence the fact that the assessee did not put to use the asset during the year under consideration does not disentitle the assessee from reducing the asset from block of assets. She also relied upon the decision rendered by Mumbai bench of Tribunal in the case of Oceanic Investment Ltd vs. ACIT (57 TTJ 549) in support of above said proposition.

6. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A).

7. We heard the rival contentions and perused the record. We notice that the ITAT has restored the matter in the first round to the file of the assessing officer on the reasoning that the assessee has submitted before the Tribunal that he has obtained possession of the property in the year under consideration. In the set aside proceedings, the above said submission of the assessee was proved to be wrong. Following facts observed by the AO are relevant in this regard:-

(a) The AO has examined the agreement claimed to have been registered 20-03-2010 and noticed that it was only an agreement for sale of a shop "yet to be constructed".

(b) The AO has observed that the shop building came into existence only on 01-06-2013.

(c) The above said facts do not support the case of the assessee that he was in possession of the shop by 31.3.2010.

We notice that the assessee has not controverted the above said factual aspects. When the asset (shop) itself was not in existence before the end of the financial year under consideration, we are unable to understand as to how it would qualify as "acquired during the previous year". Mere entering into sale agreement or payment of advance money for purchase of a shop yet to be constructed, in our view, cannot be considered as "acquisition of asset" within the meaning of sec.50 of the Act. We notice that the Ld CIT(A) has also confirmed the order of the AO on identical reasoning. Since the asset

itself cannot be considered as "acquired", there is no requirement to examine its user. Accordingly, we do not find any infirmity in the decision rendered by Ld CIT(A) on this issue and accordingly uphold the same.

8. In the result, the appeal of the assessee is dismissed.

Pronounced in the open court on 24.5.2023.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(B.R. BASKARAN)
Judicial Member	Accountant Member

Mumbai; Dated : 24/05/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai