

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, KOLKATA**

**BEFORE SHRI RAJESH KUMAR, AM  
AND  
SHRI PRADIP KUMAR CHOUBEY, JM**

**ITA No. 1119/KOL/2024  
(Assessment Year: 2016-17)**

**Rai Bhagwan Das Bagla  
Bahadurs Marwari Hindu  
Hospital  
1, R.N. Mukherjee Road, Martin  
Burn House, Kolkata-700001**

**Vs.**

**ITO, Ward-49(3),  
3, Govt. Place (west),  
Kolkata-700001,  
West Bengal**

**(Appellant)**

**(Respondent)**

**PAN No. AACR1297C**

**Assessee by** : Shri Soumitra Choudhary, AR  
**Revenue by** : Shri Prabhakar Prakash Ranjan, DR

**Date of hearing:** 05.12.2024  
**Date of pronouncement :** 19.12.2024

**ORDER**

**Per Rajesh Kumar, AM:**

This is an appeal preferred by the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the "Ld. CIT(A)") dated 30.03.2024 for the AY 2016-17.

02. The ground Nos. 1 to 4, is general in nature and do not require any specific adjudication.
03. The issue raised in ground nos. 5 & 6 is against the order of Id. CIT (A) treating the addition of ₹5,18,74,045/- as short-term capital gain u/s 50 of the Act as against the Long-Term Capital Gain computed by



the Id. AO of ₹5,18,74,045/- from the sale of property u/s 45 of the Act.

04. The facts in brief are that the Id. AO after receiving information from DCIT, Investigation, Circle-1, Kolkata, vide order dated 06.09.2018, in respect of assessee stating that the assessee has sold property at premise no. 128 Mahatma Gandhi Road, Kol-700007 to M/s Pratap Credit Capital Pvt. Ltd. for consideration of ₹4,11,00,000/-, whereas the market value of the property was ₹9,03,42,649/- vide conveyance deed dated 30.07.2015. The assessee has filed return for A.Y. 2016-17 on 29.03.2018, declaring total income of ₹5,32,940/- and disclosed the said transaction of property under the head 'Capital Gain. While valuing the capital gain from the said asset, assessee relied on the valuation report dated 27.03.2018, prepared by the Government approved valuer that assessee has taken the cost of the acquisition of the property as on 01.04.1981 at ₹84,71,600/- (value of land as on 01.04.1981 has been taken at ₹5,00,000/- per Cottah and the building @ ₹200 per sq. ft.). The letter further stated that as per the verification made by the Investigation Wing, the local valuation of the land as on 01.04.1981 was 1,84,320/- per Cottah and the cost of the construction of hundred years old building cannot be taken as the cost of construction of the property as on 01.04.1981/-. Therefore, the assessee has over valued cost of acquisition without any valid basis. It further stated that assessee has declared rental income whereas the same should have been shown as business income and if this is so, the sale of the said assets/ property cannot be assessed as income from capital u/s 45 of the Act. The letter further stated that the assessee has invested the sale of the property in the bank FDR/ which fetched interest of ₹18,14,560/- in F.Y. 2015-16, whereas the



assessee has shown the interest receipt as business income and claimed huge expenses. Apart from this, letter stated that the property in question was rented as per the information filed by the assessee and there were 12 tenants and rent received was ₹2,11,609/-, whereas as per the valuation report and conveyance deed there were only 6 tenants and rent received were ₹32,595/- per month. Thereafter, the case of the assessee was selected for scrutiny after obtaining the approval of the competent authority and statutory notices were duly issued and served upon the assessee. In response to the notice u/s 142(1) of the Act, the assessee furnished the documents including conveyance deed. According to which, the said forth value of the property was ₹4,11,00,000/- [₹3,61,35,000/- for land + ₹49,65,000/- for structure (building) and he assessee determined the Long Term Capital Loss at ₹12,35,377/- as under:-

"Long Term Capital Gain/ (Loss)

1. Sale consideration

₹4,11,00,000/-

Fair Market Value

₹9,03,42,619/

(u/s 50C of the Income-tax Act, 1961 (the Act))

Less: Indexed Cost of acquisition

Cost of acquisition as on 01.04.1981

₹84,71,600 X 1081/100

Rs.9,15,77,996

Long Term Capital Gain

₹12,35,377"

05. Thereafter, the Id. AO mentioned that the case was referred to District Valuation Officer (DVO) on 30.10.2018 for valuation of the property as per proposal of DDIT (Investigation), Kolkata-1, however, till date

i.e.18.12.2018, no reply was received from the DVO, therefore, show cause notice was issued to the assessee on 18.12.2018 that the case was getting time barred on 31.12.2018, which is extracted at page no.4 and 5 of the Id. AO's order and was replied by the assessee. However, the Id. AO was of the view that the assessee has not offered any satisfactory reply in respect value of the property and accordingly, the valuation of land estimated by DDIT, Kolkata, and valuation of building estimated on the basis of reducing method of valuation was done. Therefore, cost of land measuring 9 Cottah 18 sq. ft was taken at Rs. 1,84,420/- per Cottah which comes to ₹16,63,488/- and the cost of acquisition of the building comes to ₹18,95,122/- for the purpose of Long-Term Capital Gain. Thereafter the Id. AO computed the Long-Term Capital Gain of the property at ₹5,18,74,075/-. Thereafter the Id. AO noted that the assessee has offered income from rental of ₹2,11,609/-, whereas according to DDIT, rent received was 32,595/- per month. Therefore, the Id. AO added a sum of ₹1,48,308 (₹148,126 + Rs.182) to the total income of the assessee.

06. In the appellate proceedings, the Id. CIT (A) came to the conclusion that the land and building were part of the block of assets and therefore, the capital gain cannot be computed as Long-Term Capital Gain u/s 45 of the Act and has to be treated as Short Term Capital Gain as the land and building were part of block of assets and the building was subjected to the depreciation and thus treated as business assets by observing and holding as under:-

*"6.5 The appellant considered the rent from the building that comprised the block of assets 'building as business income, and I have confirmed it earlier. The appellant's business income was derived through the utilization of a building, which was both a business asset and depreciable asset. The Income Tax Act makes depreciation mandatory from the assessment year 2002-03, and*

*it must be granted or presumed to have been granted irrespective of what the assessee claims in their profit and loss account. Due to the transfer of the building, the block of assets 'building' no longer existed and the WDV decreased to zero as on 31/03/2016. Thus, the appellant did not claim depreciation for the assessment year under discussion for obvious reasons. Section 50 clarifies the process for dealing with capital gain or loss when transferring capital assets that are considered business assets and have been depreciated.*

*6.6 Section 50 of the Act is applicable to the facts of this case without a doubt. In light of the aforementioned circumstances, the appellant was requested to provide an explanation through notice u/s 250 dated 15.3.2024 to comply on or before 22.3.2024 of why the gain resulting from the transfer of the depreciable capital asset should not be considered as a short-term capital gain in accordance with section 50 of the Act. The appellant responded vaguely by saying 'medical ground' without elaborating on who fell ill and how the alleged illness hindered them from responding to the show cause notice within the time allowed. The appellant didn't ask for an adjournment or more time to submit their reply, suggesting they don't have any explanation to give. No submission was made till passing of this order on 30.3.2024 either.*

*6.7 In this order, it has been mentioned that the appellant transferred depreciable capital assets. But they mistakenly declared the gain as long-term capital gain, disregarding the provisions of section 50 of the Act. The transfer of depreciable assets under the 'building' block of assets resulted in the assets ceasing to exist as of March 31st, 2016 and its WDV being zero as of March 31st, 2016. Provision of section 50 apply to the gain resulting from the transfer of depreciable capital assets. The appellant mistakenly regarded the gain on transfer of depreciable assets as a long-term capital gain, disregarding provision of section 50C. Despite recognizing that the transfer of business assets cannot be counted as capital gain under section 45 of the Act in his order, the AO incorrectly interpreted the gain as long-term capital 50 for the reasons best known to him. gain by not considering section 50 for the reason best known to him.*

*6.8 In light of the previous discussions, I am of the opinion that the gains generated from the transfer of capital assets in the form of a building should be considered as a short-term capital gain under section 50 in the current case. Accordingly, the AO is directed to compute the short-term capital gain on sale of the building in question, which is a depreciable asset, after deducting the opening written down value of the building from the sale consideration as per section 50 of the Act. The cost of acquisition the building in question is no longer relevant due to the resolution of the dispute on capital gains mentioned above."*

07. After hearing the rival contentions and perusing the materials available on record, we find that the assessee is a AOP and running a hospital till 1984 when it is stopped the hospital activity. The assessee



filed its return of income for A.Y. 2016-17, without claiming of depreciation in the year in respect of building as assessee has let out the building and was deriving rental income from the same. The assessee filed its return of income showing income under the head income from house property, which was also accepted in the assessment, meaning thereby that there was no depreciation claimed on the block of assets and also not found in the books of accounts and no depreciation was claimed or allowed in the assessments. The Id. AO computed the Long-Term Capital Gain, however, the valuation report filed by the assessee as on 01.0.1981, has not been accepted qua the building which were constructed in the year 1962. We note that the case was referred to DVO on 30.10.2018, as per the proposal of DDIT (Investigation), Circle-1, Kolkata, thereafter the letter was sent to DVO on 11.12.2018, for earliest disposal of the matter but no reply was received till 18.12.2018. Then a show cause notice was issued to the assessee as to why the valuation proposed by DDIT (Investigation), Circle-1(1), Kolkata, should not be applied to compute the Long Term Capital Gain. It is also stated that as per the information received from the DDIT, Kolkata, Circle 1(1), enquiry made with ADSR office and in this office could not find even one sale transactions on this rate. The Id. AR vehemently submitted before us that reference to DVO u/s 55A has to be on the satisfaction of the Id. AO himself when in his view the value of assets as claimed by the assessee in accordance with the estimate made by the registered valuer is in variance with the fair market value. Therefore, satisfaction of the Id. AO is must and he must form an opinion before making such reference which was not done in the instant case. Therefore, in our opinion the reference at the instance of the Id. DDIT, Circle 1(1), Kolkata is



invalid and is bad in law. The case of the assessee is squarely covered by the decision of *Vivek Bose Vs. Income-tax Officer, Ward -29(4), Kolkata [2014] 42 taxmann.com 35 (Kolkata - Trib.)* and *Commissioner of Income-tax Vs. Umedbhai International P. Ltd. [2014] 45 taxmann.com 306 (Calcutta)* which are discussed hereinafter. In the case of *Vivek Bose Vs. Income-tax Officer, Ward -29(4), Kolkata(supra)* the coordinate bench has held as under:

"8. We have heard the rival submissions and perused the material available on record. Assessee had worked out the indexed cost of acquisition of 12.97 Kattah of land out of total 27.96 Kattach of land sold by him taking Rs.3,50,000/- per Kattah as fair market value as on 1.4.1981. For arriving at this fair market value, assessee had relied on valuation report given by one Shri Mallar Mukherjee, Registered Valuer, copy of which has been placed at pages 34 to 46 of the paper book filed. In his report it has been mentioned by the Registered Valuer that on local enquiry, the price of land in the concerned area, during 1981-1982 was between Rs.3,50,000/- and Rs.4,00,000/- per Kattah. This conclusion appears at page 42 of the paper book. As against this, opinion of the Assessing Officer was that such fair value was very high since assessee was holding the property since 1979. Based on this reasoning he had referred the valuation to the DVO. Copy of the DVO's report is placed at pages 69 to 84 of the paper book. DVO in his report has clearly mentioned that reference to him was made by the Assessing Officer under section 55A of the Act. He determined the value of 12.97 Kattah of land as on 1.4.1981 at Rs.11,90,000/-. At this juncture, a look at section 55A becomes necessary. This is reproduced hereunder :—

"55A : With a view of ascertaining the fair market value of a capital asset for the purposes of this chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer—

(a) In a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of the opinion that the value so claimed is less than its fair market value,

(b) In any other case, if the Assessing Officer is of the opinion-

(i) That the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such amount as may be prescribed in this behalf, or



(ii) That having regard to the nature of the asset and other relevant circumstances, it is necessary so to do."

What is applicable here is clause (a) of the above section. Hence to make a reference under section 55A of the Act, Assessing Officer has to form an opinion that value claimed is less than the fair market value. On the other hand, the opinion of the Assessing Officer here is that the value shown was very high or in other words, more than the fair market value. This being the case we are of the opinion that the reference under section 55A could not have been made. Hon'ble Calcutta High Court in the case of Umedbhai International(P.) Ltd. (supra), in a similar situation, where there was a substitution of the cost as on 1.4.1981, by value based by DVO on a reference under section 55A of the Act, held that such a reference could not be made unless and until the Assessing Officer formed an opinion that value shown by the assessee was less than fair market value. Paras 4 to 8 of the judgment is reproduced hereunder :—

4. The assessee on the basis of registered valuer's report worked out indexed cost as on 1st April, 2002 at Rs.3,06,37,281/-. It was taken opening stock of land in the assessment year under consideration. With the returns the aforesaid valuation report was submitted. However, the AO did not accept valuation and referred the matter to the Departmental Valuer under section 55A of the said Act to determine the fair market value as on 1st April, 1981 and it was done by the Departmental Valuer at Rs.18,73,800. The AO did not accept valuation report submitted by the assessee on the ground that the same was not prepared on the basis of any sale instance. Naturally the AO proceeded on the basis of the valuation of the Departmental Valuer which made a lot of difference in assessing tax liability. Basing Departmental valuation report the AO came to conclusion that the assessee had overstated the value of the opening stock at Rs.2,26,54,893/- and instead of accepting the loss, as shown in the return the AO has determined the net profit of Rs.6,09,025/-. Thus the conclusion arrived at by the AO based on valuation. Therefore, the point raised before the CIT(A) that the valuation was got to be done by the AO without compliance of s. 55A of the IT Act, 1961. According to the assessee reference to the valuation officer is without jurisdiction as per- condition for reference was not satisfied. According to the assessee before making any reference the AO has to form opinion that the value so claimed is less than the fair market value without doing so reference is without jurisdiction. On this limited point the CIT(A) allowed the appeal and held that the reference was not done by the AO in compliance of provisions of sec. 55A of the said Act. The Tribunal also upheld this finding.

5. Reading the aforesaid question we are not concerned with any other portion of the judgment and order of the learned Tribunal.



6. The CIT(A) as well as the learned Tribunal has come to fact finding that the Department has not brought any material on record that AO had formed an opinion having regard to the nature of the assessment and considering the other relevant circumstances for making reference to Departmental Valuation Officer under s. 55A of the said Act. This concurrent fact finding of two authorities are not questioned to be perverse.

7. This Court cannot make any endeavour to make any fact finding nor does it wish to do in absence of plea of perversity. In this case the admitted position is that the assessee submitted valuation made by the registered Valuer. Hence c.I. (a) of the aforesaid section is applicable in this case which is set out hereunder—

"55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this chapter, the (Assessing) Officer may refer the valuation of capital asset to a Valuation Officer-

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the (Assessing) Officer is of the opinion that the value so claimed is less than its fair market value.

(b) In any other case, if the (Assessing) Officer is of the opinion

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such amount as may be prescribed in this behalf, or

(ii) that having regard to the nature of the asset and other relevant circumstances, so to do"

8. Thus it is clear based on the aforesaid concurrent fact findings that the formation of opinion of the AO that the value claimed by the assessee less than its fair market value is sine qua non Reasons recorded after order of reference for valuation of the registered Valuer is not the substitute of pre-decisional formation of opinion.'

We are, therefore, of the opinion that assessee has to succeed in the additional ground. Substitution of cost of acquisition with the value fixed by the DVO, therefore, stands quashed.

9. The only other effective ground taken by the assessee which is in its ground no. 4 is regarding an addition of Rs.20,00,000/- claimed by it as an expenditure while computing the long-term capital gains.

10. Claim of the assessee was that he had paid a sum of Rs.20,00,000/- to one Shri Nikhil Chanda who was a confirming party in the sale. However, Assessing Officer was



not inclined to accept the claim. Assessee's appeal in this regard before the Id. CIT(Appeals) was also not successful. Id. CIT(Appeals) held that the claim of Rs.20,00,000/- was not a genuine.

11. Now before us, Id. AR strongly assailing the order of authorities below submitted that the vendors of the property were assessee and Smt. Nita Bose. According to him, the agreement entered into by the assessee and Smt. Nita Bose with the purchaser M/s. Madgul Services Pvt. Ltd., copy of which was placed at pages 15 to 33 of the paper book, clearly mentioned that Shri Nikhil Chanda was a confirming party. According to him, payment of Rs.20,00,000/- was directly made to Shri Nikhil Chanda and this was evident from page 28 of the paper book. Shri Nikhil Chanda had acknowledged receipt of Rs.20,00,000/-. Therefore, according to him it was a necessary outgo without which the sale would not have taken place. Hence the payment was to be allowed.

12. Per contra, Id. D.R. supported the order of authorities below.

13. We have heard the rival submissions, perused the material available on record and seen the computation of capital gains under section 48 of the Act. Sub-clause (i) of that Section states that expenditure incurred wholly and exclusively in connection with the transfer of capital asset has to be deducted from full value consideration received or accruing. Preamble of the Conveyance Deed executed by the assessee along with Shri Nita Basu reads as under :—

*'THIS INDENTURE made this 15th day of February Two Thousand and Eight BETWEEN (1) (SM.) NITA BASU (also known as NITA BOSE) wife of Shri Pranab Basu and daughter-in-law of Shri Santosh Kumar Bose and (2) VIVEK BOSE son of Shri Parmananda Bose both residing at 3A, Shyam Bose Road, Police Station Chetla, Kolkata-700 027 hereinafter referred to as "the VENDORS" (which expression shall unless excluded by on repugnant to the subject or context be deemed to mean and include their and each of their respective heirs, executors, administrators and legal representatives) of the FIRST PART AND RICKY CHANDRA son of Dhruva Chandra residing at 68A, Peary Mohan Roy Road, Police Station Chetla, Kolkata-700 027 hereinafter referred to as "the CONFIRMING PARTY" (which expressions unless excluded by or repugnant to the subject or context shall be deemed to mean and include his heirs executors, administrators and legal representatives) of the SECOND PART AND MADGUL SERVICES PRIVATE LIMITED, a Company incorporated under the Companies Act, 1956 having its Registered Office at 20, Ballygunge Circular Road, Police Station Ballygunge, Kolkata-700 019 hereinafter referred to as "the PURCHASER" (which expression shall unless excluded by or repugnant to the subject or context be deemed to mean and include its successor or successors-in-office and/or assigns) of the THIRD PART'.*

It is clear that Shri Nikhil Chanda was a confirming party who had nominated the buyers to the vendors. That confirming party had nominated the buyers is also clear



from Clause (K) appearing at pages 19-20 of the paper book, which is reproduced hereunder:—

*"The Confirming Party has nominated to the Vendors, the purchaser herein as being entitled in place and stead of the Confirming Party to complete the purchase of the said premises from the vendors and has agreed to concur and confirm the sale and transfer by the vendors in favour of the purchaser as the nominee of the confirming party. The nomination of the purchaser was accepted by the vendors. The purchaser has paid to the said Smt. Nita Basu directly the balance consideration of Rs.50,00,000.00 receivable by her as aforesaid and has paid to the said Vivek Basu directly the balance consideration of Rs.3,70,00,000.00 receivable by him as aforesaid and has also paid to the confirming party a sum of Rs.30,00,000/- as and by way of reimbursement of the same amount paid by the confirming party to the said Vivek Bose and a further sum of Rs.20,00,000.00 by way of nomination charges of the confirming party in respect of the said premises and the said transaction.*

*In the premises aforesaid, the vendors have contracted with the purchaser for sale and transfer of the said premises free from all encumbrances mortgages charges attachments liens lispendens leases tenancies occupancy rights uses debutters trusts acquisition requisition alignment claims demands and liabilities whatsoever or howsoever by the vendors to the purchaser at or for the consideration of Rs.4,50,00,000.00 (Rupees four crores fifty lacs) only paid to the vendors by the purchaser in the proportion as aforesaid and the confirming party has agreed to concur confirm and assure such sale".*

*That the payment to Shri Nikhil Chanda has directly effected by the purchaser is clear from the receipt memo given at page 28 of the paper book. In such circumstances, we are of the opinion that the payment could only be considered as an expenditure incurred only and exclusively in connection with the transfer of the property. It was an allowable one under section 48(i) of the Act. Such addition therefore stands deleted. Ground No. 4 of the assessee stands allowed.*

*14. In the result, appeal of the assessee is allowed.*

08. Similarly, Hon'ble Calcutta High Court in the case of *Umedbhai International Pvt. Ltd. (supra)* is held as under:-

*"2. We have gone through the judgment and order of the Commissioner of Income-tax (Appeals) and also the judgment and order impugned before us. While reading the same we are of the view that in this matter no question of law is involved far less substantial one for the following reasons as stated hereunder.*



3. The assessee is a trading company. On September 15, 1977 it purchased an old rice mill with land appurtenant thereto at a consideration of Rs. 2,35,000. As the assessee-company could not run the rice mill it during the relevant previous year converted the entire land of rice mill into its stock-in-trade and started selling the said stock-in-trade in part by part. The total land holding so converted, was 8.25 acres. The assessee-company got the property valued by registered valuer on April 18, 2002 to determine the fair market value as on April 1, 1981 and it was valued at Rs. 71,91,850.

4. The assessee on the basis of the registered valuer's report worked out the indexed cost as on April 1, 2002 at Rs. 3,06,37,281. It was taken as the opening stock of land in the assessment year under consideration. With the returns the aforesaid valuation report was submitted. However, the Assessing Officer did not accept valuation and referred the matter to the Departmental Valuer under section 55A of the said Act to determine the fair market value as on April 1, 1981 and it was done by the Departmental Valuer at Rs. 18,73,800. The Assessing Officer did not accept the valuation report submitted by the assessee on the ground that the same was not prepared on the basis of any sale instance. Naturally the Assessing Officer proceeded on the basis of the valuation of the Departmental Valuer which made a lot of difference in assessing tax liability. Basing on the Departmental valuation report the Assessing Officer came to conclusion that the assessee had overstated the value of the opening stock at Rs. 2,26,54,893 and instead of accepting the loss, as shown in the return the Assessing Officer has determined the net profit of Rs. 6,09,025. Thus the conclusion was arrived at by the Assessing Officer was based on valuation. Therefore, the point raised before the Commissioner of Income-tax (Appeals) that the valuation was got to be done by the Assessing Officer without compliance with section 55A of the Income-tax Act, 1961. According to the assessee reference to the valuation officer is without jurisdiction as per condition for reference was not satisfied. According to the assessee before making any reference the Assessing Officer has to form opinion that the value so claimed is less than the fair market value without doing so reference is without jurisdiction. On this limited point the Commissioner of Income-tax (Appeals) allowed the appeal and held that the reference was not done by the Assessing Officer in compliance with the provisions of section 55A of the said Act. The Tribunal also upheld this finding.

5. Reading the aforesaid question we are not concerned with any other portion of the judgment and order of the learned Tribunal.

6. The Commissioner of Income-tax (Appeals) as well as the learned Tribunal has come to fact findings that the Department has not brought any material on record that the Assessing Officer had formed an opinion having regard to the nature of the assessment and considering the other relevant circumstances for making reference to the Departmental Valuation Officer under section 55A of the said Act. This concurrent fact findings of two authorities are not questioned to be perverse.

7. This court cannot make any endeavour to make any fact finding nor does it wish to do in the absence of plea of perversity. In this case the admitted position is that the assessee submitted valuation made by the registered valuer. Hence clause (a) of the aforesaid section is applicable in this case which is set out hereunder :



"55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer —

(a) *in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of the opinion that the value so claimed is less than its fair market value.*

(b) *in any other case, if the Assessing Officer is of the opinion*

(i) *that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf, or*

(ii) *that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do"*

8. Thus it is clear based on the aforesaid concurrent fact findings that the formation of opinion of the Assessing Officer that the value claimed by the assessee less than its fair market value is *sine qua non*. Reasons recorded after order of reference for valuation of the registered valuer is not the substitute of pre-decisional formation of opinion.

9. Therefore, the learned Tribunal has correctly held accepting the decision of the first appellate authority that on the facts and circumstances of the case there is no applicability of clause (b) of section 55A which is meant for other purpose. Both the authorities have considered the well settled principles of law regarding the applicability of section 55A and various judgments of the court on this issue have been considered. We have no doubt those judgments have been appropriately applied. When the law is settled and also the provisions of the aforesaid section 55A are clear we do not think that any point of law needs to be decided in this case.

10. Hence, we are not inclined to admit the appeal. Accordingly, the same is dismissed."

09. Considering the facts and the rival contentions in the light of the ratio laid down above , we are of the view that the Id. AO has not formed any opinion that the fair market value of the asset is in variance with the value disclosed by the assessee and merely referred the matter to DVO u/s 55A of the Act for valuation at the instance of DDIT which is wrong and against the provisions of section 55A.



010. We also note that the Id. CIT (A) has treated the gain as Short-Term Capital Gain u/s 50, though the property was sold with existing tenants and was assessed towards rental receipt as income from house property. In our opinion, the section 50 of the Act is not applicable in the instant case as the hospital was closed in 1984, and there was no block of assets but a house property with tenants. The case of the assessee find force from the decision of *M/s Nutech Engineering Technologies' Ltd. Vs DCIT ITA No.3347/Mum/2018 A.Y.2014-15* the co-ordinate bench has held as under:-

*"6. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee has claimed depreciation on the property sold as Lunkard Sky Max of 17 units in AYs 2010-11 and 2011-12. But from AY 2012-13 i.e. Financial Year 2011-12 out of 17 units 7 units were given on rent and accordingly rental income was shown as income from house property and no depreciation was claimed on this property. As argued by the learned Counsel for the assessee that once the property let out it loses its character as a business asset and no depreciation was allowable on it. This fact has not been denied by the Revenue. We noted that this issue has been decided by Co-ordinate Bench of Mumbai in the case of M/s Prabodh Investment & Trading Company Pvt. Ltd. vs. ITO in ITA NO. 6557/Mum/2008, wherein it is held as under:*

*" 7. The next contention of the assessee is the one based on the order of the Cochin Bench of the Tribunal cited supra. In that case the assessee stopped claiming depreciation on the flat from the assessment year 1995-96 onwards on the ground that it was no more used for the purpose of the business. In the books of account the flat was shown as an investment from 01.04.1995. In the previous year relevant to the assessment year 1998-99, the flat was sold and the surplus was declared as long term capital gains. The income tax authorities held that the capital gains should be assessed as short term capital gains on the footing that the flat might have been used for business purposes even in the assessment years 1996-97 and 1997-98. On further appeal to the Tribunal, it was held that the flat ceased to be a business asset or depreciable asset on and with effect from 01.04.1995 and its character during the accounting year ended on 31.03.1998 was that of a long term capital asset and, therefore, the capital gains should be computed as long term capital gains. In this order the provisions of section 50A were referred to. This section makes special provision for cost of acquisition in the case of depreciable asset. It says that where the capital asset is one in respect of which depreciation was allowed in any previous year; the provisions of sections 48 and 49 shall apply subject to the modification that the written down value of the asset, as adjusted, shall be taken as the cost of acquisition. Relying on this provision the Tribunal held that*



*but for the difference in the cost of acquisition, a past claim of depreciation does not change the character of the asset as such. This order of the Tribunal supports the assessee's case before us. In the present case also the assessee had stopped claiming depreciation in the income tax return for the assessment years 1992-93 and 1993-94. It had claimed depreciation in respect of the flat only in the assessment years 1990-91 and 1991-92. For the assessment year 1994-95 and all subsequent years the assessee had made a Note in its accounts filed with the returns clarifying that no depreciation was provided in respect of the flat as the same was not used during the year for the purpose of the business. From the assessment year 1994-95 up to the assessment year 2004-05, the flat was classified in the Balance Sheet as a fixed asset and shown at cost less depreciation. These facts are recorded in paragraph 8 of the assessment order. In the assessment years 2000-01 and 2001-02, the flat had been let out and the rental income was shown under the head "Income from house property". It would thus appear that after the assessment year 1993-94 no depreciation was provided even in the books of account and no depreciation had been claimed or allowed in the return or in the assessments. In this factual situation the order of the Cochin Bench of the Tribunal cited supra is applicable, in which it was held that if no depreciation had been claimed or allowed in respect of the asset, even though for an earlier period depreciation was claimed and allowed, from the year in which the depreciation claimed was discontinued, the asset would cease to be a business or depreciable asset and if the asset had been acquired beyond the period of thirty six months from the date of sale, it would be a case of long term capital gains. In our humble understanding, the ratio of the order appears to be that the asset had ceased to be a business asset and had become an investment."*

*7. Once, this is a fact that the moment assessee stopped claiming depreciation in respect of property and let out the same for rent, it ceases to be a business asset and thus, the profit or gain arising out of sale of property is to be considered as long-term capital gain after indexation. We direct the Assessing Officer accordingly.*

*8. In the result, the appeal of assessee is allowed."*

011. Accordingly, we reverse the finding of Id. CIT (A) that the asset is part of block assets and liable to be assessed u/s 50 of the Act as Short-Term Capital Gain. Consequently, the order of Id. CIT(A) is set aside and AO is directed to delete the addition. The ground no. 5 & 6 are allowed.

012. The issue raised in Ground no.7 is against the order of Id. AO, treating the income from fixed deposits as of ₹18,40,560/- as income from other sources instead of business income shown by the assessee.



013. After hearing the rival contentions and perusing the materials available record, we find that the Id. CIT (A) has also restored the issued to the file of the AO by directing the AO to allow the business expenses claimed by the assessee in the return of income after doing necessary verification and thus, allowed the ground for statistical purposes. We restore this issue to the file of the Id. AO to decide the same with same direction. The ground no. 7 is allowed for statistical purposes.

014. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 19.12.2024.

Sd/-  
(PRADIP KUMAR CHOUBEY)  
(JUDICIAL MEMBER)

Sd/-  
(RAJESH KUMAR)  
(ACCOUNTANT MEMBER)

Kolkata, Dated: 19.12.2024

*Sudip Sarkar, Sr.PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Kolkata