

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

**BEFORE SHRI ANIKESH BANERJEE, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 261/Mum/2025
(Assessment Year: 2022-23)**

Samir Narain Bhojwani, 1 st Floor, Samir Complex, St. Andrews Road, Bandra (West), Mumbai-400050. PAN: AABPB9150H	Vs.	DCIT-4(2)(1), Room No. 642, 6 th Floor, Aayakar Bhavan, M.K. Road, New Marine Lines, Mumbai-400020.
Appellant)	:	Respondent)

**I.T.A. No. 1022/Mum/2025
(Assessment Year: 2022-23)**

ACIT-4(2)(1), Room No. 640, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	Samir Narain Bhojwani, 1 st Floor, Samir Complex, St. Andrews Road, Bandra (West), Mumbai-400050. PAN: AABPB9150H
Appellant)	:	Respondent)

Appellant / Assessee by : Shri Yogesh Thar & Chaitanya
Joshi, AR

Revenue / Respondent by : Shri Swapnil Choudhary, Sr. DR

Date of Hearing : 09.06.2025
Date of Pronouncement : 26.06.2025

ORDER

Per Padmavathy S, AM:

These cross appeals by the assessee and the revenue are against the order of the Commissioner of Income Tax (Appeals)/ National Faceless Appeal Centre (NFAC), Delhi (in short "CIT(A)") under section 250 of the Income Tax Act, 1961 (the Act) dated 18.12.2024 for Assessment Year (AY) 2022-23. The assessee and revenue raised the following grounds:

ITA No. 261/Mum/2025 – Assessee

Ground I: Disallowance of Rs 3,72,00,210 under section 40(a)(ia) being 30% of the payment made under Consent Terms on account of alleged non-deduction of tax at source under section 194C of the Act

1.1 On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of the Assessing Officer (AO) in disallowing Rs. 3,72,00,210 under section 40(a)(ia) being 30% of the payment made under Consent Terms on account of alleged non-deduction of tax at source under section 194C of the Act.

1.2 In doing so, the Id. CIT(A), inter-alia, erred in upholding the Id. AO's contention that the payment relates to the contractual obligation allegedly covered u/s. 194C.

1.3 The Appellant prays that the disallowance of Rs 3,72,00,210 under section 40(a)(ia) of the Act be deleted.

Ground II: Gains in respect of long term capital assets, computed under section 50 of the Act, have been charged to tax at normal rates instead of being charged to tax at the rates mentioned in section 112 of the Act

2.1 On the facts and in the circumstances of the case and in law, the AO erred in charging to tax gains in respect of long term capital assets, computed under section 50 of the Act, at the normal rates instead of charging them at the rates mentioned under section 112 of the Act.

2.2 The Appellant prays that the AO be directed to charge capital gains computed under section 50, arising on transfer of long term capital assets, at the rates mentioned in section 112 of the Act instead of charging them at the normal rates as has been done by the AO."

ITA No. 1022/Mum/2025 – Revenue

“1. Whether on the facts in the circumstances of the case the Ld.CIT(A) was justified in allowing the claim of Rs.3,88,56,708/- towards expenses incurred in respect of flats/buildings sold in earlier years, on the ground that these were legitimate business expenses necessary for maintenance and statutory compliance?”

2. Whether on the facts in the circumstances of the case the Ld.CIT(A) was Justified in deleting the addition of Rs.3,88,56,708/- towards expenses incurred in respect of flats/buildings sold in earlier years despite being it capital in nature after completion of project when revenue had already been recognized from the project?”

2. The assessee before us also filed additional ground which reads as under:

“Additional Ground No. III: Allowability of maintenance expenses of Rs. 92.32.199/-

On the facts and in the circumstances of the case and in law, the maintenance expenditure of Rs 92,32,199/- be held to be allowable expenditure u/s 37(1) of the Act and the id. AO be accordingly directed to allow the same”

3. The additional grounds raised are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon’ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds for adjudication.

4. The assessee is an individual having income from Real Estate activities, construction and rendering business. The assessee filed the return of income for AY 2022-23 on 04.11.2022 declaring a total income of Rs. 68,27,62,750/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. The Assessing Officer (AO) concluded the assessment by making a disallowance of Rs. 3,72,00,210/- under section 40(a)(ia) of the Act for non-deduction of tax at source

on payment made to M/s Rewa Infrastructure Pvt. Ltd. The AO also disallowed the expenses of Rs. 3,88,56,708/- being expenses incurred on flats/buildings sold in earlier AY. On further appeal the CIT(A) upheld the disallowance made under section 40(a)(ia) of the Act and deleted the disallowance of expenses. Both the assessee and the revenue are in appeal before the Tribunal against the order of the CIT(A).

Disallowance under section 40(a)(ia) – Ground I (1.1 to 1.3) of assessee's appeal

5. Facts pertaining to the issue under consideration as submitted by the Id AR are extracted hereunder –

“11 The assessee has, in earlier years, in the course of his business as a developer, developed property bearing C.S. No. 713. Plot No. 33, admeasuring 2381.38 sq. mts., situated at Gopaldas Deshmukh Marg, Mumbai (the said property)”. All the flats in the building constructed on the said property have been sold and profits offered for taxation, in the year of sale of the flats, under the head 'Profits and Gains of Business or Profession'. The last of the flats in the building constructed by the assessee on the said property was sold by the assessee in the previous year relevant to the assessment year 2021-22.

The assessee, on 1.12.2003, entered into an agreement titled "Agreement for Co-operation for Development" with Kapil Finances and Investments Private Limited (since renamed as Rewa Infrastructure Private Limited), hereinafter referred to as "Rewa".

Under the terms of the said agreement dated 1.12.2003, Rewa agreed that in consideration for services to be provided by Rewa which included, inter alia, certain payment obligations on the part of Rewa, Rewa would be entitled to 4 flats in a building proposed to be constructed by the assessee on the said property. Under the terms of the said Agreement dated 1.12.2003, the assessee was entitled to dispose of the aforesaid four flats, for and on behalf of Rewa, on the conditions set out in the said Agreement dated 1.12.2003 and for the purpose of effecting sale and transfer Rewa executed in favor of the assessee a Power of Attorney dated 1.12.2003.

The assessee exercised the power vested in him under the said Power of Attorney dated 1.12.2003 and executed on behalf of Rewa, on 1st June, 2005

and 10th August, 2005, 4 Memorandum of Agreed Terms with Jivesh Developers and Properties Private Limited (a company in which assessee along with his family members are shareholders / directors) for sale of the 4 flats on behalf of Rewa to Jivesh Developers and Properties Private Limited (hereinafter for brevity sake referred to as JDPPL). These Memorandum of Agreed Terms were subsequently registered vide a Deed of Confirmation executed by the assessee, in November 2007, on behalf of Rewa. In addition, the assessee also executed, in October 2013, on behalf of Rewa, 4 Deeds of Apartment.

In 2018, Rewa filed a suit in Bombay High Court seeking a declaration that it continues to be the owner of the said flats and praying that the MOATS executed by the assessee be set aside. In the said suit Rewa took out therein a Notice of Motion being Notice of Motion No. 1177 of 2018 inter alia praying that a receiver be appointed and an injunction be granted restraining the assessee and also JDPPL from alienating, creating third party right, disposing, dealing with, encumbering, parting with possession, etc. of the said four flats. The said Notice of Motion No. 1177 was dismissed by an order dated 13.2.2020 passed by the Hon'ble Bombay High Court. Rewa assailed the said Order dated 13.2.2020 by filing an appeal to the Bombay High Court.

These proceedings resulted into Samir being unable to give marketable title of the flats to JDPPL and JDPPL being unable to market the flats at their proper value.

The assessee was advised that the litigation would be a long drawn process and like any other litigation it would be an expensive affair with an uncertain outcome. Also, till such time as litigation attains finality, it would constitute a blot on the title of the said 4 flats.

The assessee and JDPPL, the purchaser of the 4 flats, thought that commercial interest lies in settling the matter amicably. Accordingly, consent terms were entered into and in consideration of a sum of Rs. 30 crore paid by the assessee and JDPPL, Rewa withdrew all the proceedings initiated by it and ratified and confirmed the transactions and documents executed by the assessee on its behalf. The sum of Rs. 30 crore was paid as full settlement of all claims of Rewa. Of this sum of Rs. 30 crore, Rs 15 crore was borne and paid by JDPPL and balance Rs. 15 crore was borne and paid by the assessee. As on date of the consent terms, a sum of Rs. 2,59,99,297 was due and payable by the assessee to Rewa. After adjusting this Rs. 2,59,99,297 from the sum of Rs. 15 crore paid by the assessee to Rewa, the balance Rs. 12,40,00,703 has been debited to Profit & Loss Account and has been claimed as a deduction while computing income chargeable under the head 'Profits & Gains of Business or Profession.'"

6. The AO during the course of assessment called on the assessee to furnish the details pertaining to the amount of Rs. 12,40,00,703/- debited to the P&L A/c as payment as per consent terms. Based on the details furnished by the assessee, the AO held that the payments made are in the nature of contractual payments to the facilitator M/s Rewa Infrastructure Pvt. Ltd. as per the Agreement for Co-operation of Development. Accordingly the AO held that the said payment attracts the provisions of section 194C under which the tax ought to have been deducted. Since the assessee has not deducted the tax at source the AO disallowed 30% of the amount paid being Rs. 3,72,00,210/- under section 40(a)(ia) of the Act. On further appeal the CIT(A) upheld the disallowance made by the AO on the ground that section 194C applies not only to direct payments for services or work but also to the payments that in inextricably linked to the contractor for work or services.

7. The Id. AR submitted that the impugned payments are made not as part of the Agreement for Co-operation of Development but as part of a Consent Terms and that on execution of these Consent Terms that the appeal and suit filed by M/s Rewa Infrastructure Pvt. Ltd. against the assessee was withdrawn. Accordingly the Id. AR argued that the payments made by the assessee cannot be considered as contractual payments but are settlement of judgment debt. The Id. AR further submitted that the dispute arose between the assessee and Rewa Infrastructure Pvt Ltd towards the sale consideration of four flats which the assessee has adjusted against the expenses incurred on behalf of M/s Rewa Infrastructure Pvt. Ltd. which were committed under the agreement for co-operation of development. In this regard the Id. AR drew our attention to the expenses incurred by the assessee which are adjusted against the sale consideration of four flats (page 22 of PB) and to the ledger accounts reflect in the amount payable to M/s Rewa Infrastructure Pvt. Ltd. The Id. AR also drew our attention to terms agreed in the Commercial Suit filed before the Hon'ble Bombay

High Court vide order dated 16.12.2021 (page 98 to 100 of PB). The ld. AR also drew our attention to the various terms of the consent agreement whereby the assessee agreed to settle the dispute by payment of Rs. 15 cr. to M/s Rewa Infrastructure Pvt. Ltd. (page 78 to 95 of PB). Therefore the ld. AR submitted that the amount paid by the assessee is purely a settlement of judgment debit and has got no relevance to the contract earlier entered into by the assessee. Accordingly, the ld. AR submitted that the liability to deduct tax at source does not arise, warranting any disallowance under section 40(a)(i) of the Act. The ld. AR in this regard relied on the decision of the Hon'ble Bombay High Court in the case of Sainath Rajkumar Saroadе vs. State of Maharashtra [2021] 131 taxamann.com 332 (Bom.) where it has been held that

“11. We have considered the case law tendered by both the parties, and heard the Learned Counsel appearing for the Petitioners and the Learned Senior Counsel appearing for Respondent Nos. 4 to 7. The issue which arises for our consideration is whether the Respondent Nos. 4 to 7 are entitled to deduct TDS on the "interest" payable under the Recovery Warrant dated 15th October 2018, the Consent Terms and the Order of this Court both dated 4th March 2021?

12. To answer this, we must first look at the relevant provisions of the Income-tax Act, 1961 ("IT Act"). Deduction of tax at source is provided for under sections 192 to 195 and Sections 196A to 196D forming part of Chapter XVII-B of the IT Act. The liability to deduct TDS arises under the IT Act only if the amount due and payable assumes the nature of payment specified under Chapter XVII-B thereof.

13. Even assuming specific cases of payment under Chapter XVII-B of the IT Act are considered, Sections 193 and 194A of the IT Act deals with provisions relating to deduction of tax at source in respect of payment relating to "interest". Section 193 of the IT Act deals with deduction of tax at source from "interest on securities" and section 194A deals with deduction of tax at source from "interest other than interest on securities.

14. It would be convenient at this stage to extract hereunder the relevant portion of section 194A of the IT Act

"194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed [one crore rupees in case of business or fifty lakh rupees in case of profession] during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income-tax under this section.

Explanation. For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

15. The IT Act defines "interest" under section 2(28A) as:

'2. In this Act, unless the context otherwise requires,-

....

(28A) "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.'

16. While analysing the issue of payment of interest as compensation by a builder and consequent deduction of tax at source thereon, the Calcutta High Court in the case of West Bengal Housing Infrastructure Development Corpn. (*supra*), held in paragraph 16, that

"from the definition of interest as occurring in section 2(28A) of the IT Act, it appears that the term "interest" has been made entirely relatable to money borrowed or debt incurred and various gradations of rights and obligations arising from either of the two"

It further held in paragraph 18 that,

"We accordingly are of the view that the payment made by the assessee to the allottee was in terms of the agreement entered between them where the liability of the assessee would arise only if it failed to make the plots available within the stipulated time. Hence, the payment made under the relevant clause was purely contractual and as rightly held by the Tribunal, in the nature of compensation or damages for the loss caused to the allottee in the interregnum for being unable to utilise or possess the flat. The favour of compensation becomes evident from the words used in the particular clause. The expression 'interest' used in clause 7 (reproduced above) may be seen merely as a quantification of the liability of the assessee in terms of the percentage of interest payable by the State Bank of India. Since there is neither any borrowing of money nor incurring of debt on the part of the assessee, in the present factual scenario, interest as defined under section 2 (28A) of the Act can have no application to such payments. Consequently, there was no obligation on the part of the assessee to deduct tax at source and consequently no disallowance could have been made under section 40 (a)(ia) of the Act.

In view of the above, we confirm the decision of the Tribunal dated 2nd December 2015. I.T.A. No. 84 of 2018 is accordingly dismissed."

A Special Leave Petition against the order of the Hon'ble Calcutta High Court was dismissed by the Hon'ble Supreme Court West Bengal Housing Infrastructure Development Corpn. (supra).

17. In the case of Beacon Projects (P.) Ltd. (supra), the Kerala High Court held at paragraphs 11 and 12 that:

"From the principles laid down in the decisions referred to above, it is obvious that section 2(28A) is not attracted to every payment made and that the provision can be attracted only in cases where there is debtor-creditor relationship and that payments are made in discharge of a pre-existing obligation.

In so far as these cases are concerned, facts stated by us itself would show that the purchaser had paid certain amounts to the appellant. At a later point of time, the purchaser opted out of the agreement and the appellant entered into fresh agreements with new buyers for prices that are higher than what was agreed with the purchasers. Out of the receipts from the new buyers, the appellant refunded to the purchasers the amount paid by them and a portion of the excess amount received.

The amount thus refunded to the purchasers represents the consideration the purchasers paid towards the undivided shares in the property agreed to be purchased and also the cost of construction of the apartment, which work was entrusted to the appellant, being the builder. Such a relationship does not spell out a debtor-creditor relationship nor is the payment made by the appellant to the purchaser one in discharge of any pre-existing obligation to be termed as interest as defined in section 2(28A)"

18. It has also been held by the Hon'ble Supreme Court in the case of Ramchandra D Datar (supra) that when the claim is merged in the decree of the court, the claim assumes the character of a judgment debt, which is not liable to deduction of tax at source."

8. The ld. DR on the other hand vehemently argued that the payments made by the assessee has a direct nexus to the contract entered into by the assessee with M/s Rewa Infrastructure Pvt. Ltd. and therefore it cannot be said that the payments are not in the nature of contractual payments. Accordingly, the ld. DR supported the orders of the lower authorities.

9. We heard the parties and perused the material on record. The assessee has entered into an Agreement for Co-operation for Development on 01.12.2003 with Kapil Finance & Investment Pvt. Ltd. which was subsequently renamed as M/s Rewa Infrastructure Pvt. Ltd. Under the terms of agreement M/s Rewa Infrastructure Pvt. Ltd. agree to render certain development services and in consideration for the said services, it was agreed that four flats in the building proposed to be constructed by the assessee would be allotted to M/s Rewa Infrastructure Pvt. Ltd. A Power of Attorney was also executed on 01.12.2003 between the assessee and M/s Rewa Infrastructure Pvt. Ltd. for sale of the four flats. Since M/s Rewa Infrastructure Pvt. Ltd. did not render any service towards construction the assessee himself incurred the expenses as tabulated below and debited the said expenses to the account of the M/s Rewa Infrastructure Pvt. Ltd.

Accounting Year	BMC Premium Rs.	Stamp Duty Rs.	Other Items Rs.	Total Rs.
Before 2003-04			1,40,000	1,40,000
2004-05		5,00,000		5,00,000
2005-06	94,52,000			94,52,000
2006-07	2,96,46,000			2,96,46,000
2007-08				0
2008-09	4,16,30,900			4,16,30,900
2009-10	5,00,46,642	5,00,46,642		10,26,31,803
Total	13,07,75,542	5,30,85,161	1,40,000	18,40,00,703

10. Subsequently the assessee recovered the said amount by selling the flats for a consideration of Rs. 21 cr. to its sister concern M/s Jivesh Developers & Properties Pvt. Ltd. and in the books of account reflected a sum of Rs. 2,59,99,297/- (Rs.21,00,00,000 less Rs.18,40,00,703) as payable to M/s Rewa Infrastructure Pvt. Ltd. Subsequently a suit was filed against the assessee and M/s Jivesh Developers & Properties Pvt. Ltd. by M/s Rewa Infrastructure Pvt. Ltd. disputing the sale consideration of the four flats before the Hon'ble Bombay High Court. The assessee in order to avoid further litigation negotiated to settle and pursuant to the same as per the consent terms filed before the Hon'ble High Court on 16.12.2021 it was agreed that the assessee and M/s Jivesh Developers & Properties Pvt. Ltd. would pay Rs.15 cr. In turn M/s Rewa Infrastructure Pvt. Ltd. agreed to withdraw the suits filed and also to give up all rights in the four flats. Since the said amount was inclusive of the amount payable by the assessee to M/s Rewa Infrastructure Pvt. Ltd. the difference was debited to a P&L A/c during the year under consideration. The contention of the revenue is that the amount debited to the P&L A/c is towards contractual payments and therefore tax should have been deducted at source under section 194C of the Act. The argument of the assessee is that the dispute pertains to the sale of flats and the amount paid is a judgment debt not liable for tax deduction.

In this regard it is relevant to consider the following clauses in the order of the Hon'ble Bombay High Court pursuant to the Commercial Suit filed by M/s Rewa Infrastructure Pvt. Ltd.

“(a) That this Hon'ble Court be pleased to pass a permanent order and injunction restraining Defendant No. 1 from exercising any authority or powers under to the said Power of Attorney being Exhibit "C" to the Plaintiff;

(b) That, pending the hearing and final disposal of the suit, the Court Receiver, High Court, or some other fit or proper person be appointed receiver of the said flats (described in Exhibit "B" to the Plaintiff) with all powers under Order XL Rule 1 of the Code of Civil Procedure 1908;

(c) That, pending the hearing and final disposal of the suit, the Court Receiver, High Court, or some other fit or proper person be appointed receiver of the Power of Attorney (Exhibit "C" to the Plaintiff) with all powers under Order XL Rule 1 of the Code of Civil Procedure 1908.

(d) That, pending the hearing and final disposal of the suit, the Defendants, acting by themselves and/or through their servants, agents or representatives, be restrained by an order and injunction from, in any manner, selling, alienating, transferring, dealing with, disposing of or parting with possession of or encumbering or creating any right, title or interest in favour of anyone else in respect of the said flats (Exhibit "B" to the Plaintiff);”

11. From the perusal of the above it is clear that the interim injunction granted by the Hon'ble High Court is with regard to the sale of four flats carried out by the assessee on behalf of M/s Rewa Infrastructure Pvt. Ltd. to its sister concern. We will now look at the relevant clauses of the consent term as agreed among the parties which resulted in the settlement and withdrawal of suit by M/s Rewa Infrastructure Pvt. Ltd.

“(v) The Plaintiff and Defendant No. 1 herein hereby agree, confirm, and declare the Agreement for Cooperation for Additional Development of the said Property dated 2nd December 2003 stands cancelled.

vi) The Parties withdraw all allegations made in the proceedings filed by the Plaintiff against Defendant No.1 and Defendant No.2 before the Hon'ble Bombay High Court. Save and except the captioned proceedings the Parties confirm that no other proceedings have been filed by the Parties against the other.

“xii) The Plaintiff hereby agrees and confirms that simultaneously on the execution of these Consent Terms, the Plaintiff has executed 4(four) Deeds of Confirmation declaring and confirming that the aforesaid four Memorandum of Agreed Terms, three of them dated 15th June, 2005 and one dated 10 August, 2005 and the four Deeds of Confirmation all dated 28th November, 2007 and the four Deeds of Apartment three dated 19th October, 2013 and one dated 25th November, 2013 all executed by the Plaintiff through Defendant No.1 and Defendant No. 1 and Defendant No.2 in respect of the said Flats are valid, subsisting and binding upon the Plaintiff and they are confirmed by the Plaintiff. The Plaintiff has no right, claim, demand or dispute of whatsoever either against Defendant No.1 or against Defendant No.2 or against the said Flats including the Car Parking Spaces in the said building now known as "33 South" on the said Property in any manner whatsoever. The said 4 (four) Deeds of Confirmation will be registered under Indian Registration Act 1908 at the cost of Defendant No 2.”

12. A plain reading of the above terms makes it clear that amount claimed as deduction is toward M/s Rewa Infrastructure Pvt. Ltd. agreeing to cancel the Agreement for Cooperation for Additional Development, withdraw the suit and to give up the rights and title of the 4 flats. It is also clear that the amount claimed as deduction is as a result of the decree and that any claim towards contractual services as agreed in Agreement for Cooperation for Additional Development gets merged with the Consent Term. In other words, the right of M/s Rewa Infrastructure Pvt. Ltd to make any claim towards the contractual services stands cancelled and only surviving legal document is the consent term as per which the impugned payments are agreed to be made. Accordingly there is merit in the submission that the amount debited to the P&L account is not towards contract charges but a judgment debt as per the consent term. We notice from the above extracted findings of the Hon'ble Bombay High Court in the case of Sainath Rajkuamr Sarode (supra) where the

decision of the Hon'ble Supreme Court has been relied on it has been held that when the claim is merged in the decree of the Court, the claim assumes the character of judgment debt which is not liable to deduction of tax at sources. We in this regard also notice that a similar view has been expressed by the Hon'ble Bombay High Court in the case Madhusudan Shrikrishna vs Emkay Exports ([2010] 188 taxmann 195 (Bombay)). From the perusal of the facts in assessee's case as discussed herein above, in our considered view the ratio laid down by the above judicial precedence is applicable to assessee's case also. Accordingly, we hold that the amount claimed as deduction by the assessee towards payment made as per the mandate of the Hon'ble High Court in the consent term is a judgment debit and therefore the assessee is not liable to deduct tax at source on the said payments under section 194C of the Act. Therefore, the disallowance under section 40(a)(ia) for non-deduction of tax at source does not arise. The AO is directed to delete the disallowance made in this regard.

Gains in respect of long term capital assets, computed under section 50 of the Act – Ground II (2.1 to 2.2)

13. The assessee while filing the return of income has offered income to the tune of Rs. 36,35,98,346/- to tax the gain arising out of the sale of assets forming part of block of assets to be taxed at normal rate of tax. The contention of the assessee before us is that the gain on transfer of assets offered to tax under section 50 of the Act are subject to tax rates mentioned under section 112 of the Act and not the normal rate of tax. The ld. AR submitted that the assessee had submitted the relevant details to substantiate the claim that the flats which are part of the block of assets are long term capital assets (page no. 515, 527 & 541 of PB). The ld. AR further submitted that the period of holding of the asset is to be considered for the purpose of applicability of appropriate tax rate and not the deeming fiction under

section 50 of the Act. In this regard the assessee placed reliance on the decision of the Special Bench in the case of S.K. F. India Ltd. vs. DCIT [2024] 168 taxmann.com 328 (Mum Trib.) (SB)

14. We heard the parties and perused the material on record. We notice that the Special Bench in the above case has considered the issue of applicable tax rate for capital gain arising out of depreciable asset chargeable under section 50 and held that the legal fiction created under section 50 would not convert the short term capital asset into long term capital asset and vice-versa and that the rate of tax should be applied as per the period of holding of the asset. The relevant findings of the Co-ordinate Bench in this regard are extracted as below:

“16. We have heard both the parties and also perused the various judgments relied upon. As noted above, the main issue to be adjudicated by this special bench is, whether the capital gains under section 50, arising out of sale of a long term capital assets is chargeable at the rate applicable to the short term capital gains or the rates applicable to the long term capital gains u/s 112 of the Act. Interestingly, this tribunal in the earlier year in the case of the assessee on same issue has quoted the judgment of Hon'ble Jurisdictional High Court in Ace Builders (P). Ltd (supra), to decide against the assessee. Accordingly, we have to decide this referred question in light of this judgement and other judgments and also the true purport of section 50.

17. Section 50 is a special provision for computation of capital gains in the case of depreciable assets. Section reads as under:-

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 assets during the previous year, exceeds the aggregate of the following amounts, namely:-

(i) expenditure incurred wholly and exclusively in connection

with such transfer or transfers;

- (ii) the written down value of the block of assets at the beginning of the previous year; and*
- (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:]

[Provided that in a case where goodwill of a business or profession forms part of a block of asset for the assessment year beginning on the 1st day of April, 2020 and depreciation thereon has been obtained by the assessee under the Act, the written down value of that block of asset and short-term capital gain, if any, shall be determined in such manner as may be prescribed.]

[Explanation.—For the purposes of this section, reduction of the amount of goodwill of a business or profession, from the block of asset in accordance with sub-item (B) of item (ii) of sub-clause (c) of clause (6) of section 43 shall be deemed to be transfer.]

18. *The said section starts with non-obstante clause, that is, exception has been carved out to section 2(42A) of the Act, which provides definition for a short term capital asset. The said definition reads as under: -*

(42A) "short-term capital asset" means a capital asset held by an assessee for not more than [Thirty Six] months immediately preceding the date of its transfer.

Ergo, if the capital asset which is an asset forming part of the block of asset, in respect of which depreciation has been allowed, then even if it is held for more than 36 months, the conditions of the 36 months will not be applicable and still it will be chargeable as capital gains arising from transfer of a short term capital asset.

19. *The 'long term capital asset' and 'long term capital gain' has been defined in section 2 (29AA) and 29B which reads as under:-*

(29AA). "long term capital asset" means a capital asset which is not a short term capital asset;

(29B). "long term capital gain" means capital gain arising from the transfer of a long term capital asset;

Thus, capital gain arising from transfer of a long term capital asset is taxed as a long term capital gain and long term capital assets means which is held for more than 36 months. So taxability is on transfer of long term capital asset.

20. *Normally capital gain is required to be computed according to the provisions contain in sections 48 & 49 of the Act. But section 50 by deeming fiction amends the mode of computation of capital gain and cost with reference to certain modes of acquisition. Section provides that where the capital asset is forming part of the block of assets in respect on which depreciation has been allowed to the assessee has been transferred, then the provisions of sections 48 (mode of computation) and 49 (cost with reference to certain mode of acquisition) has been modified, that is, the computation of depreciable assets has to be done in the mechanism provided in sub section (1) and (2) of section 50. Since in this case sub section (1) is applicable, which provides that, where the full value of consideration received or accruing as a result of transfer of the assets together with the full value of such consideration received or accruing as a result of transfer from any other capital asset falling within the block of asset during the previous year, which exceeds the aggregate of the following amounts, that is; (i) expenditure incurred wholly and exclusively in connection with such transfer or transfers; (ii) the written down value of the block of assets at the beginning of the previous year; and (iii) the actual cost of any asset falling within the block of assets acquired during the previous year. In other words,*

- (i) Where the consideration received as a result of transfer of an asset falling within the block of asset and such consideration received, exceeds the amount after making the computation provided in clauses (i), (ii) & (iii) of sub-Section 1, then such excess is deemed to be capital gains arising from transfer of short term capital assets.*
- (ii) Where the block of asset cease to exist then the income received or accruing as a result of such transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.*

Thus, in a situation where because of transfer of a depreciable assets forming part of the block of the assets, any gain arising to the assessee shall always be deemed to be the capital gains from the transfer of a short-term capital asset.

21. *Section 50 starts with a non-obstante clause and is a deeming provision which should be strictly limited to the purpose mentioned therein. The exclusion prescribed by the non-obstante clause is limited to the purpose of modification of*

Section 48 & 49 of the Act and such non-obstante clause cannot be applied to any other provisions contained in the Act. Here Section 50, firstly, deems that any capital asset which is held for a long term period, that is, beyond specified time limit as provided in section 2(42A) is transferred, and if there is excess after computation provided in sub clauses (i), (ii) and (iii) of sub section (1), then it is taxed as capital gains arising from transfer of a short term capital asset. Secondly, the deeming provisions has been confined only to the purpose of computation of sections 48 and 49 of the Act and the capital gains then arising is deemed to be from transfer of short term capital assets. The deeming provision does not extend for any other purpose. In other words provisions of section 50 of the Act changes the characteristic of the gain that in some cases a long term to a short term capital gain were assets are held beyond the specific term. However, the section does not change the characteristic of the capital asset held by the assessee, that is, the long term capital asset will remain a long term capital asset for all other purposes, but for the deeming fiction u/s 50 of the Act, capital gains is taxable as if it is gain arising from transfer of a short term capital asset and it does not extend beyond this fiction to convert long term capital asset into short term capital asset for other purposes of the Act.

22. *Section 2(42B) of the Act defines short term capital gains, "a short term capital gains means capital gains arising from transfer of a short term capital asset". Though the gain on transfer of a depreciable asset have been deemed to be in the nature of a short term capital gain in case of transfer, but that does not alter the characteristic of that capital asset, whether 'long term capital asset' or 'short term capital asset' for the purpose of other provisions of the Act. In order to apply Section 50 of the Act, the mode of computation on the transfer of the asset, only sections 48 & 49 has been modified to deem it as transfer of a short term capital asset. Here in this case, the assessee has computed the capital gains in alignment with the provision of section 50 despite holding the asset for a period longer than three years and offered it as STCG. Thus, there are two steps in arriving at the final tax liability; (a) Step 1 - computation of income; and (b) step 2-determining the tax rate. The tax rate of long term capital gain has been defined in Section 112.*

112. (1) Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of,-

- (a) in the case of an individual or a Hindu undivided family, [being a resident,]*
- (i) the amount of income-tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been his total income; and that*

(ii) *the amount of income-tax calculated on such long-term capital gains at the rate of twenty per cent :*

Provided that *where the total income as reduced by such long-term capital gains is below the maximum amount which is not chargeable to income-tax, then, such long-term capital gains shall be reduced by the amount by which the total income as so reduced falls short of the maximum amount which is not chargeable to income-tax and the tax on the balance of such long-term capital gains shall be computed at the rate of twenty per cent;*

(b) *in the case of a ²¹[domestic] company,-*

(i) *the amount of income-tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income; and*

(ii) *the amount of income-tax calculated on such long-term capital gains at the rate of 20 [twenty] per cent :*

The aforesaid section deals with tax rate on long term capital gains which clearly provides that, where the total income of the assessee includes any income arising from transfer of long term capital asset which is chargeable under the head Capital Gain, then tax is to be calculated at the rate of 20%.

23. *Section 112 deals with the rate on which long term capital gain has to be taxed. The pre-requisite for applicability of 20% rate as per Section 112 of the Act for the domestic companies is that firstly, there must be long term capital asset and secondly, income must arise from transfer of long term capital asset. If the long term capital asset has been held for more than 36 months immediately preceding the date of transfer, then transfer of such long term capital asset has to be taxed at the rate of profit under the Act. In the present case it is not in dispute that the asset has been held for more than 36 months prior to its transfer. Hence, both the conditions prescribed in Section 112 of the Act stands satisfied.*

24. *Now various courts have held that the deeming fiction in section 50 has been brought out for differential treatment of depreciable asset which has limited application and is confined for the purpose of mode of computation of capital gains under sections 48 and 49 of the Act. In so far as the judgment of Hon'ble Bombay High Court in the case of Ace Builders, (supra), wherein the Hon'ble High Court in the context of claim of deduction under section 54E of the Act in respect of capital gain arising on transfer of a capital asset on which depreciation has been allowed, which is deemed to be short term capital gains under section 50 of the Act, had made the following observation:-*

"21. On perusal of the aforesaid provisions, it is seen that Section 45 is a charging section and sections 48 and 49 are the machinery sections for computation of capital gains. However, Section 50 carves out an exception in respect of depreciable assets and provides that where depreciation has been claimed and allowed on the asset, then, the computation of capital gain on transfer of such asset under sections 48 and 49 shall be as modified under Section 50. In other words, Section 50 provides a different method for computation of capital gain in the case of capital assets on which depreciation has been allowed.

22. Under the machinery sections the capital gains are computed by deducting from the consideration received on transfer of a capital asset, the cost of acquisition, the cost of improvement and the expenditure incurred in connection with the transfer. The meaning of the expressions 'cost of improvement' and 'cost of acquisition' used in sections 48 and 49 are given in section 55. As the depreciable capital assets have also availed depreciation allowance under section 32, section 50 provides for a special procedure for computation of capital gains in the case of depreciable assets. Section 50(1) deals with the cases where any block of depreciable assets do not cease to exist on account of transfer and Section 50(2) deals with cases where the block of depreciable assets cease to exist in that block on account of transfer during the previous year. In the present case, on transfer of depreciable capital asset the entire block of assets has ceased to exist and, therefore, Section 50(2) is attracted. The effect of Section 50(2) is that where the consideration received on transfer of all the depreciable assets in the block exceeds the written down value of the block, then the excess is taxable as a deemed short term capital gains. In other words, even though the entire block of assets transferred are long term capital assets and the consideration received on such transfer exceeds the written down value, the said excess is liable to be treated as capital gain arising out of a short term capital asset and taxed accordingly.

23. The question required to be considered in the present case is, whether the deeming fiction created under Section 50 is restricted to section 50 only or is it applicable to section 54E of the Income Tax Act as well? In other words, the question is, where the long term capital gain arises on transfer of a depreciable long term capital asset, whether the assessee can be denied exemption under section 54E merely because, section 50 provides that the computation of such capital gains should be done as if arising from the transfer of short term capital asset?

24. Section 54E of the Income Tax Act grants exemption from payment of capital gains tax, where the whole or part of the net consideration received from the transfer of a long term capital asset is invested or deposited in a specified asset within a period of six months after the date of such transfer. In the present case it is not in dispute that the assessee fulfills all the conditions set out in section 54E to

avail exemption, but the exemption is sought to be denied in view of fiction created under section 50.

25. In our opinion, the assessee cannot be denied exemption under section 54E, because, firstly, there is nothing in section 50 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-section (1) & (2) of section 50 is restricted only to the mode of computation of capital gains contained in Section 48 and 49. 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. In this connection, we may refer to the decision of the Apex Court in the case of State Bank of India V/s. D. Hanumantha Rao reported in 1998 (6) S.C.C.183. In that case, the Service Rules framed by the bank provided for granting extension of service to those appointed prior to 19/7/1969. The respondent therein who had joined the bank on 1/7/1972 claimed extension of service because he was deemed to be appointed in the bank with effect from 26/10/1965 for the purpose of seniority, pay and pension on account of his past service in the army as Short Service Commissioned Officer. In that context, the Apex Court has held that the legal fiction created for the limited purpose of seniority, pay and pension cannot be extended for other purposes. Applying the ratio of the said Judgment, we are of the opinion, that the fiction created under section 50 is confined to the computation of capital gains only and cannot be extended beyond that. 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 of the I.T. Act cannot be denied to the assessee on account of the fiction created in section 50.

26. 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 the long term capital asset has availed depreciation, then the capital gain has to be computed in the manner prescribed under Section 50 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 of the Income Tax Act. 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 & 49 or under section 50. The contention of the revenue

that by amendment to section 50 the long term capital asset has been converted into to short term capital asset is also without any merit. As stated hereinabove, 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."

[Emphasis in bold is ours]

25. Thus, sequitur of aforesaid judgment is that the fiction created by the legislature in Section 50 of the Act has to be confined to the purpose for which it is created. Section 50 of the Act was enacted with the object of denying multiple benefits to the owners of a depreciable asset, however, that restriction is limited to the computation of capital gains and not to the exemption provision. If depreciation has been availed on long term capital asset, then, the capital gains has to be computed in the manner prescribed under Section 50 of the Act and the capital gains tax will be charged as if such capital gain is arising out of short term capital asset. In that case, the capital gains was invested in the manner prescribed in Section 54E of the Act wherein exemption is provided on transfer of a long term capital asset then Long term capital gains was subject to deduction. There also, the asset was a depreciable asset, however, while granting exemption under Section 54E of the Act, which is applicable for Long term capital gains, the jurisdictional High Court has held that for the purpose of exemption under Section 54E of the Act, it has to be treated as Long term capital gains.

26. In Para 26 of the aforesaid judgment as highlighted in bold above, Hon'ble High Court specifically rejected the contention of the revenue by amendment section 50 a long term capital asset has been converted into a short term capital asset is without any merit. The legal fiction created is deemed to the capital gain as a short term capital gain and not to deemed that asset as a short term capital asset and therefore cannot be said that section 50 converts the long term capital asset into a short term capital asset. This principle and ratio of the Hon'ble Jurisdictional High Court if is to be followed, then it is clear that the tax rate provided under section 112 which is applicable for a long term capital gains will prevail. Once the Hon'ble High Court has held that section 50 does not convert a 'long term capital asset' to a 'short term capital asset', then the rate of tax is applicable for the transfer of a long term capital asset has to be in accordance with section 112 of the Act. The deeming fiction of section 50 cannot be imported u/s 112 of the Act. Thus, our analysis is in line with the judgement of the Jurisdictional High Court.

27. In another decision the Hon'ble Bombay High Court in the case of Parrys (Eastern) Pvt. Ltd. (supra), wherein following question of law was admitted for consideration of Hon'ble High Court;

1) *Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in law in holding that capital gain arising from transfer of depreciable assets was liable to be set off against brought forward Long Term Capital Loss without appreciating that under section 50 of the Income Tax Act, 1961 such capital gain is treated as Short Term Capital Gain?*

(2) *Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in law in holding that capital gain arising from transfer of depreciable assets was liable to be set off against brought forward Long Term Capital Loss without appreciating that according to Section 74 of the Income Tax Act, 1961 Long Term Capital Loss cannot be set off against the Short Term Capital Gain?.*

The Hon'ble High Court observed and held that-

6. *We find that the issue stands concluded by the decision of this Court in ACE Builders (P.) Ltd's case (supra) in favour of the Respondent-Assessee. Moreover, the impugned order relies upon the order of the Tribunal in Komac Investments & Finance (P.) Ltd's case (supra) to dismiss the Revenue's appeal before it. The deeming fiction under Section 50 is restricted only to the mode of computation of capital gains contained in Sections 48 and 49 of the Act. It does not change the character of the capital gain from that of being a long term capital gain into a short term capital gain for purpose other than Section 50 of the Act. Thus, the respondent - assessee was entitled to claim set off as the amount of Rs. 7.12 Crores arising out of sale of depreciable assets which are admittedly on sale of assets held for a period to which long term capital gain apply. Thus for purposes of Section 74 of the Act, the deemed short term capital gain continues to be long term capital gain. Moreover, it appears that the Revenue has accepted the decision of the Tribunal in Komac Investments and Finance (P.) Ltd.'s case (supra), as our attention has not been drawn to any appeal being filed from that order.*

7. *In view of the above, the questions of law as framed stand concluded against the Revenue-appellant and in favour of Respondent-assessee by the decision of this Court if ACE Builders (P.) Ltd's case (supra). Therefore, no substantial questions of law arise for consideration.*

28. *Thus, in the context of set off against the brought forward of long term capital loss, the Hon'ble High Court held that the deeming fiction under section 50 is restricted only to mode of computation of capital gains contained in sections 48 and 49 of the Act and it does not change character of capital assets from of being a long term capital asset or a short term capital asset for purpose u/s 50 of the Act. Thus, the capital gain arisen in terms of section 50 was allowed to be set off against long*

term capital loss. This judgment again clarifies the interpretation of section 50 and concept of a long term capital asset.

29. Again in another judgment Hon'ble Bombay High Court in Pursarth Trading Co. Pvt Ltd. (supra), the Hon'ble High Court upheld the set off of a long term capital loss against gain arising from the depreciable assets u/s 50 of the Act. This principle was reiterated in Manali Investment (supra), wherein following question of law was admitted for adjudication.

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that the assessee is entitled to set-off under Section 74 in respect of capital gain arising on transfer of capital assets on which depreciation has been allowed in the first year itself and which is deemed as short term capital gain under Section 50 of the Income Tax Act relying upon the judgment of this Court in the case of CIT V/s. Ace Builders (P.) Limited ([\[2005\] 144 Taxman 855/281 ITR 210 \(Bombay\)](#)) even though the said decision was rendered in the context of eligibility of deduction under Section 54E".

The Hon'ble High Court again followed the principle laid in case of Ace Builders Pvt Ltd (supra) and observed and held that under:-

3. On further appeal, the Tribunal by the impugned order has allowed the claim of the respondent - assessee to set-off its long term losses in terms of Section 74 of the Act against the long term capital gains on sale of transformers and meters. This was by following the decision of this Court in the matter of CIT v. Ace Builders (P) Ltd [\[2006\] \[2005\] 144 Taxman 855/281 ITR 210 \(Bombay\)](#)/12[\[2005\] 144 Taxman 855/281 ITR 210 \(Bombay\)](#). In the case of Ace Builders (P) Ltd (supra), this Court held that by virtue of Section 50 of the Act only the capital gains is to be computed in terms thereof and be deemed to be short-term capital gains. However, this deeming fiction is restricted only for the purposes of Section 50 of the Act and the benefit under Section 54E of the Act which is available only to long term capital gains was extended. In this case, the Tribunal held that the position is similar and the benefit of set-off against long term capital loss under Section 74 of the Act is to be allowed. Further, an identical issue with regard to set off against long term capital loss arose in an appeal filed by the Revenue in the matter of CIT V Hathway Investments (P.) Ltd, being Income Tax Appeal (L) No. 405 of 2012. This Court by its order dated 31 January 2013 refused to entertain the appeal filed by the Revenue. The Revenue has not been able to point out any distinguishing features in the present case warranting a departure from the principles laid down by this Court in the matter of Ace Builders (P.) Ltd. (supra) and in our order dated 31st January, 2013 in Income Tax Appeal (L) No.405 of 2012

30. *Similar view has been taken in many other cases by the Hon'ble Bombay High Court, for instance, in the case of United Paper Industries (supra) and Cadbury India Ltd (supra). For sake of repetition we are not reproducing the relevant judgment as in all these judgments, Ace Builders have been followed.*

31. *Now, finally this issue has been set at rest by the Hon'ble Supreme Court in the case of V.S.Dempo Company Ltd. (supra) wherein Hon'ble Supreme Court had the occasion to examine the eligibility of assessee to claim exemption under section 54E of the Act in respect of capital gains arising on transfer of a capital asset on which depreciation has been allowed. The Hon'ble Apex Court reiterated and affirmed the judgment of Hon'ble Bombay High Court in the case of Ace Builders (P.) Ltd. (supra). In the said appeal before Supreme Court, in the income-tax return filed by the respondent/assessee for the A.Y. 1989-90, the assessee had disclosed that it had sold its loading platform M.V. Priyadarshni for a sum of Rs. 1,37,25,000/- on which it had earned some capital gains. On the said capital gains the assessee had also claimed that it was entitled for exemption under Section 54E of the Act. Admittedly, the asset was purchased in the year 1972 and sold sometime in the year 1989. Thus, the asset was almost 17 years old. Going by the definition of long term capital asset contained in Section 2(29B) of the Act, it was admittedly a long- term capital asset. Further the Assessing Officer rejected the claim for exemption under Section 54E of the Act on the ground that the assessee had claimed depreciation on this asset and, therefore, provisions of Section 50 were applicable. Though this was upheld by the CIT (Appeals), the ITAT allowed the appeal of the assessee herein holding that the assessee shall be entitled for exemption under Section 54E of the Act. The Bombay High Court confirmed the view of the CIT (Appeals) and dismissed the appeal of the Revenue. While doing so, the Hon'ble High Court relied upon its own judgment in the case of ACE Builders Pvt. Ltd. (supra). In the words of Hon'ble Supreme Court, "the High Court observed that Section 50 of the Act which is a special provision for computing the capital gains in the case of depreciable assets is not only restricted for the purposes of Section 48 or Section 49 of the Act as specifically stated therein and the said fiction created in sub-section (1) & (2) of Section 50 of the Act has limited application only in the context of mode of computation of capital gains contained in Sections 48 and 49 of the Act and would have nothing to do with the exemption that is provided in a totally different provision i.e. Section 54E of the Act. Section 48 of the Act deals with the mode of computation and Section 49 of the Act relates to cost with reference to certain mode of acquisition." Their Lordships observed that, this aspect has been analysed in the judgment of the Bombay High Court in the case of ACE Builders Pvt. Ltd. (supra), in the following manner:*

"In our opinion, the assessee cannot be denied exemption under Section 54E, because, firstly, there is nothing in Section 50 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-section (1) & (2) of Section 50 is restricted only to the mode of computation of capital gains contained in Section 48 and 49. 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. In this connection, we may refer to the decision of the Apex Court in the case of State Bank of India v. D. Hanumantha Rao reported in 1998 (6) SCC 183. In that case, the Service Rules framed by the bank provided for granting extension of service to those appointed prior to 19.07.1969. The respondent therein who had joined the bank on 1.7.1972 claimed extension of service because he was deemed to be appointed in the bank with effect from 26.10.1965 for the purpose of seniority, pay and pension on account of his past service in the army as Short Service Commissioned Officer. In that context, the Apex Court has held that the legal fiction created for the limited purpose of seniority, pay and pension cannot be extended for other purposes. Applying the ratio of the said judgment, we are of the opinion that the fiction created under Section 50 is confined to the computation of capital gains only and cannot be extended beyond that. Thirdly, Section 54E does not make any distinction between depreciable asset and nondepreciable 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 of the I.T. Act cannot be denied to the assessee on account of the fiction created Section in 50."

32. *Their Lordships dismissing the appeal filed by the Revenue held that, "we are in agreement with the aforesaid view taken by the Bombay High Court." Thus, the judgment of Hon'ble Bombay High Court in the case of ACE Builders Pvt. Ltd. (supra) has been fully approved by the Hon'ble Supreme Court, thereby settling the issue that the fiction created in sub section (1) and sub section (2) of section 50 has limited application only in the context of mode of computation of capital gains contention of sections 48 and 49 of the Act and beyond that nothing should be imported to other sections of the Act.*

33. *Though most of the decisions have been rendered in the context of Section 54E but the principle laid down therein will apply mutatis mutandis on this issue also for the reason that Section 54E provides for exemption from capital gain where the capital gain arises from transfer of "long term capital asset" ----- . Thus, even if u/s.50, long term capital asset is taxed as short term capital gain because of the deeming fiction, but that does not lead to convert long term capital asset into short term capital asset for the purpose of other section. Similarly, u/s.112 uses the word "where the total income of an assessee includes any income, arising from the transfer*

of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of -----. Thus, wherein the statute had used the word "long term capital asset, it has to be given the same meaning as defined in said provision of the Section. Thus, all these judgments of Jurisdictional High Court as well as Hon'ble Supreme Court in the context of Section 54E which is applicable on capital gain arising of long term capital asset will also apply here. Thus, respectfully following the aforesaid judgments, we hold that, 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. This principle of law has been exactly held by the Hon'ble Jurisdictional High Court and approved by the Hon'ble Supreme Court.

34. Now coming to the judgment relied upon by the ld. CIT DR in the case of *Shakti Metal (supra)*, first of all the Hon'ble Kerala High Court had passed the order in the context of asset on which assessee had discontinued the claim of depreciation immediately prior to its sale and re-classified the asset as an investment. The brief facts in that case were, the assessee-firm purchased a flat for business purposes in the financial year ending on 31-3-1974. Since then it was used as the branch office of the assessee and on the capitalised cost of the building the assessee was allowed depreciation until the assessment year 1995-96. However, the assessee discontinued claiming depreciation for the flat for the assessment years 1996-97 and 1997-98. The flat was sold during the assessment year 1998-99 and profit arising on such sale was claimed by the assessee as long-term capital gain. The Assessing Officer, however, held that profit arising on transfer of depreciable asset was assessable as short-term capital gain under section 50. He rejected the assessee's contention that it stopped using the flat for business purposes after the assessment year 1995-96 and thereafter, the flat was treated as an investment and was so shown in the balance sheet. On appeal, the Commissioner (Appeals) concurred with the Assessing Officer. However, on second appeal, the Tribunal, solely relying on the entry in the balance sheet of the assessee wherein the flat was shown as an investment, held that since the item was purchased in 1974, sale of the flat was assessable as long-term capital gain.

35. The Hon'ble High Court after referring the provisions of Section 50 held as under:-

"4. While the contention of the revenue is that the asset in respect of which depreciation has been claimed when sold should always be assessed as short-term capital gains, the contention of the assessee is that unless the asset sold forms part of the block asset in the previous year in which sale took place, it cannot be assessed to short-term capital gains under section 50 of the Act. In our view section 50 has to be understood with reference to the general scheme of assessment on sale of capital assets. The scheme of the Act is to categorize assets between short-term capital assets and long-term capital assets. Section 2(42A) defines short-term capital asset as an

asset held for not more than 36 months. The non obstante clause with which section 50 opens makes it clear that it is an exception to the definition of short-term capital asset which means that even though the duration of holding of an asset is more than the period mentioned in section 2(42A), still the asset referred to therein will be treated as shortterm capital asset. No one can doubt that assets covered by section 50 are depreciable assets forming part of block assets as defined under section 2(11) of the Act. Section 50 has two components, one is as to the nature of treatment of an asset, the profit on sale of which has to be assessed to capital gains. The section mandates that a depreciable asset in respect of which depreciation has been allowed when sold should be assessed to tax as short-term capital asset. The other purpose of section 50 is to provide cost of acquisition and other items of expenditure which are otherwise allowable as deduction in the computation of capital gains and covered by sections 48 and 49 of the Act. Here again section 50 provides an exception for deduction of cost of acquisition and other items of expenditure otherwise allowable in the computation of capital gains under sections 48 and 49 of the Act. In other words, section 50 provides for assessment of a depreciable asset in respect of which depreciation has been allowed as short-term capital gains and the deductions available under sections 48 and 49 should be allowed subject to the provisions provided in sub-sections (1) and (2) of section 50. Section 50A also deals with assessment of depreciable asset that too as short-term capital gains and it actually supplements section 50. In our view, the purpose of section 50A is to enable the assessee to claim deduction of the written down value of the asset in respect of which depreciation was claimed in any year as defined under section 43(6) of the Act towards cost of acquisition within the meaning of sections 48 and 49 of the Act. The condition for computation of short-term capital gains in the way it is stated in section 50A is that assessee should have been allowed depreciation in respect of a depreciable asset sold in any previous year which obvious means that for the purpose of assessment of profit on the sale of a depreciable asset, the assessee need not have claimed depreciation continuously for the entire period up to the date of sale of the asset, in other words, our view, the building which was acquired by the assessee in 1974 and in respect of which depreciation was allowed to it as a business asset for 21 years, that is up to the assessment year 1995-96, still continued to be part of the business asset and depreciable asset, no matter the non-user disentitles the assessee for depreciation for two years prior to the date of sale. We do not know-how a depreciable asset forming part of block of assets within the meaning section 2(11) of the Act can cease to be part of block of assets. The description of the asset by the assessee in the Balance Sheet as an investment asset in our view is meaningless and is only to avoid payment of tax on short-term capital gains on sale of the building. So long as the assessee continued business, the building forming part of the block of assets will retain its character as such, no matter one or two of the assets in one or two years not used for business purposes disentitles the assessee for depreciation for those years. In our view, instead of selling the building, if the assessee started using the building after two years for business purposes the assessee can continue to claim

depreciation based on the written down value available as on the date of ending of the previous year in which depreciation was allowed last. "

36. *The decision of the Hon'ble High Court was confirmed by the Hon'ble Supreme Court in the following manner:-*

2. In our view the High Court justly over-turned the opinion recorded by the Commissioner of Income Tax (Appeals) 11. Aayakar Bhavan North Block, Manachira, Calicut, vide Order dated 23-6-2004 in Appeal NO.ITA57/M/00-01, inter alia, on the following basis-

"In other words, in our view, the building which was acquired by the assessee in 1974 and in respect of which depreciation was allowed to it as a business asset for 21 years, that is upto the assessment year 1995-96, still continued to be part of the business asset and depreciable asset, no matter the non-user disentitles the assessee for depreciation for two years prior to the date of sale. We do not know how a depreciable asset forming part of block of assets within the meaning Section 2(11) of the Act can cease to be part of block of assets. The description of the asset by the assessee in the Balance Sheet as an investment asset in our view is meaningless and is only to avoid payment to tax on short term capital gains on sale of the building. So long as the assessee continued business, the building forming part of the block of assets will retain it's character as such, no matter one of two of the assets in one or two years not used for business purposes disentitles the assessee for depreciation for those years. In our view instead of selling the building, if the assessee started using the building after two years for business purposes the assessee can continue to claim depreciation based on the written down value available as on the date of ending of the previous year in which deprecation was allowed last." (emphasis supplied)

3. The reasoning by the High Court in view of the facts on record commends to us.

4. The High Court has, therefore, rightly restored the findings and addition made in the assessment order. Hence, we find no merits in this appeal and it is dismissed.

37. *The ratio of the aforesaid decision is that once depreciable asset forming part of block of assets within the meaning Section 2(11) of the Act it does not cease to be part of block of assets and description of the asset by the assessee in the balance sheet as an investment is meaningless to avoid payment of tax on short term capital on sale of building. As long as assessee continues business, the building forming part of the block of asset will retain its character, no matter one of the assets in one of the two years has not been used for business purpose this entitles the assessee for depreciation for those years. This view of the Hon'ble Kerala High Court has been*

upheld that instead of selling the building, the assessee starts using the building after two years for business purpose, the assessee can continue to claim the depreciation based on WDV available as on the date of ending the previous year in which depreciation was allowed.

38. Nowhere, in the judgment deals with the situation or question, which is before us in the present reference to this Special Bench. The Hon'ble High Court has only dealt with the controversy raised before it to a limited application u/s.50 / 50A of the Act. It was rendered in view of the background that assessee had reclassified the asset as a non-depreciable asset and held it as such at the time of sale. In contrast, in the present case the asset continued to be depreciable asset and assessee has neither challenged the applicability of Section 50 of the Act nor has it challenged the income determined in accordance with the Section 50. The issue before us is, whether the rate of tax which is to be determined u/s.112 of the Act shall be applicable if asset is a long term capital asset held for more than 36 months and due to deeming fiction, it is treated as short term capital gain for the purpose of Section 50 and such deeming fiction is with regard to applicability of Section 48 & 49. The decision of the Hon'ble Supreme Court cannot be a binding precedent on the issue which was not there at all. It is axiomatic that the decision cannot be relied upon which was not the issue or context in which it was decided and it is only the ratio decidendi, i.e., the principle of law that decides a dispute on a question is a precedence to be followed. In support of this proposition it would be relevant to refer to the following judgments:-

(i) . Hon'ble Bombay High Court in the case of HDFC Bank Ltd. (supra), wherein it has been held as under:

"... One more aspect which needs to be adverted to and that is that a decision would be considered to be a binding precedent only if it deals with or decides an issue which is the subject matter of consideration or decision before a coordinate or subordinate court. It is axiomatic that a decision cannot be relied upon in support of the proposition that it did not decide. (see Mittal Engineering Works P. Ltd. v. Collector of Central Excise [1997] 106 STC 201 (SC) ; (1997) 1 SCC 203. Therefore, it is only the ratio decidendi, i.e., the principle of law that decides the dispute which can be relied upon as precedent and not any obiter dictum or casual observations. (See Girnar Traders v. State of Maharashtra (2007) 7 SCC 555 and Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 127 Comp Cas 97 (SC) ; (2005) 7 SCC 234."

(ii) . Apex Court's decision in the case of Sun Engineering Works (P.) Ltd. (supra) where in it has been held that:

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Court. The

judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their proceedings."

(iii) Apex Court's decision in the case of *Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India* [1971] 3 SCR 9; AIR 1971 SC 530, where in it has been held that:

"It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

39. *One of the arguments also raised by the ld. CIT DR was that, since Section 50 starts with non-obstante clause therefore, other provisions of that will not apply and once the Section itself is treated sale of long term capital asset as short term capital gain, then Section 112 would not apply. As we have already stated that non-obstante clause in Section 50 is only with regard to definition of a short term capital asset, i.e., an asset which is held by the assessee in not more than 36 months, preceding the date of its transfer. Thus, the exclusion prescribed by the non-obstante clause is limited to the purpose of modification of Section 48 & 49. In this regard, the decision of Hon'ble Gujarat High Court in the case of *Amar Jewellers Ltd. v. Asstt. CIT* [2022] 137 taxmann.com 249/444 ITR 97 (Gujarat) would be relevant to quote wherein the scope of non-obstante clause has been discussed.*

"46. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provisions or Act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. (See: Principles of Statutory Interpretation, 9th Edition by Justice G.P. Singh Chapter V, Synopsis IV at pages 318 and 319)

47. Normally the use of the phrase by the Legislature in a statutory provision like notwithstanding anything to the contrary contained in this Act is equivalent to saying that the Act shall be no impediment to the measure [See: Law Lexicon words notwithstanding anything in this Act to the contrary]. Use of such expression is another way of saying that the provision in which the non-obstante

clause occurs usually would prevail over the other provisions in the Act. Thus, the non- obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the non-obstante clause is attached. [See: Bipathumma v. Mariam Bibi 1966 1 MYSLJ 162]

48. A non obstante clause has two parts the non obstante clause and the enacting part. The purpose of enacting a non obstante clause is that in case of a conflict between the two parts, the enacting part will have full sway in spite of the contrary provisions contained in the non obstante clause. Therefore, the object and purpose of the enacting part should be first ascertained and then the assistance of the non obstante clause should be taken to nullify the effect of any contrary provision contained in the clause."

40. Thus, non-obstante clause does not mean to completely supersede any other provisions of the Act. To remove the obstruction which might arise out of the provision of any other law in way of operation of the principle enacting provision to which the non-obstante clause is attached. If the non-obstante clause has been confined to Section 50 dealing with the mode of computation of Section 48 & 49 and that even if the asset appearing in the block of asset on which depreciation has been claimed is more than 36 months, then the gain of transfer of such asset is to be taxed as short term capital gain while computing the income. However, as held by the Hon'ble Jurisdictional High Court in several cases as noted above, Section 50 cannot convert the long term capital asset into a short term capital asset and therefore, the principle laid down by the Hon'ble Jurisdictional High Court in all the above quoted cases acts as a binding precedent.

41. It came to our notice that this Tribunal in the case of Velvet Holdings (P.) Ltd. v. ACIT [IT Appeal No. 6810 (Mum.) of 2008, 26-6-2014] had decided the similar issue, whether the rate of tax should be 20% u/s 112 of the Act which is applicable for long term capital asset on the transfer of asset forming part of block of asset which is taxed as short term capital gain u/s 50. This issue was decided in favour of the assessee following the earlier decision of the Tribunal in the case of Smita Conductors Ltd. , (supra). The ground before the Tribunal was as under:-

"The learned Commissioner of Income-tax (Appeals) has erred in law and in facts in not appreciating that the tax on capital gain ought to have been charged at 20% and not at the normal tax rate."

42. The Tribunal followed the decision of Smita Conductors Ltd., which in turn was based on a judgment of the Hon'ble Bombay High Court in the case of Ace Builders

Pvt. Ltd., This judgment was challenged by the Revenue before the Hon'ble Bombay High Court in ITA No.165 of 2015, judgment and order dated 10th July 2017 observed as under:-

"1. Heard the learned counsel for the appellant and the learned counsel for the respondent. It is fairly conceded that the Tribunal has relied upon the judgment of this court in case of CIT v. ACE Builders Pvt. Ltd, reported in [\[2006\] \[2005\] 144 Taxman 855/281 ITR 210 \(Bombay\)](#). The said judgment has been approved by the Apex Court in the case of CIT. Panji v. VS.Dempo Company Ltd. reported in [\[2016\] 74 taxmann.com 15 \(SC\)](#). As the issue raised in the present appeal is already covered by the above referred judgment, no substantial question of law arises."

43. Ergo, this precise issue decided by the tribunal has been approved by the Hon'ble Bombay High Court following its earlier judgment of Ace Builders Pvt. Ltd . (supra) which in turn has been approved by the Hon'ble Supreme Court in the case of V.S. Dempo Company Ltd. (supra) which we have also analysed in the earlier part of the order. Hence the issue, that the rate of tax of 20% as prescribed u/s 112 of the Act is applicable on the transfer of an asset forming part of block of asset (which was held for more than 36 months) which is deem to be taxed as short term capital gain u/s 50, has been approved by the Hon'ble Jurisdictional High Court.

44. Accordingly, we hold that capital gains arising out of the depreciable asset u/s 50 even though deem to be capital gain arising from transfer of a short term capital asset, that fiction has to be confined only to section 50 and it cannot convert 'short term capital asset' into a 'long term capital asset' and vice versa for the other purpose of the Act, either for set off against a long term capital loss or exemption provision were benefits is given from a long term capital gain on transfer of a long term capital asset or the rate of tax provided u/s 112 of the Act which clearly provides that income arising from transfer of a long term capital asset chargeable under the head capital gains, the amount of income tax calculated on such a long term capital gain shall be the rate of 20%. Thus, even section 50 treats that excess is to be taxed as capital gain arising from transfer of a short term capital asset but the rate of tax has to be applicable in terms of section 112 of the Act, because the treatment of a short term capital asset is only a purpose of section 50 and not otherwise can convert a 'long term capital asset' into a 'short term capital asset' for the purpose of rate of tax or any other provision of the Act. Accordingly, this question is answered in favour of the assessee holding that rate of tax applicable would be in terms of section 112 of the rate of 20% and applicable surcharge.

45. Since, this is the only question referred to the Special Bench by the Hon'ble President, therefore, for the deciding other issues as raised in cross appeals filed by

the assessee as well as the revenue, same shall be fixed before the regular bench to decide.

46. In the result, the question of law referred to the Special Bench is answered in favour of the assessee.”

15. The claim of the assessee that the assets which are part of the block of assets are long term capital asset needs to be factually examined in order to apply the ratio laid down by the Special Bench in assessee's case and for deciding whether rate of tax as contained section 112 of the Act is applicable. We therefore, remit the impugned issue to the AO to examine the claim of the assessee based on evidences as may be required and decide in accordance with law keeping in mind the ratio laid down by the Special Bench. The assessee is directed to submit the relevant details and documents in support of the claim and cooperate with the proceedings. It is ordered accordingly. The ground raised by the assessee in this regard is allowed for statistical purposes.

Allowability of maintenance expenses – Additional Ground

16. During the year under consideration the assessee has disallowed the maintenance expenses to the tune of Rs. 92,32,199/- incurred towards unsold flats while filing the return of income. The Id. AR submitted that the maintenance expenses are incurred on account of certain legal disputes regarding the same and vide note to the computation of income the assessee reserved the right to claim the deduction towards the said expenses. The Id. AR further submitted that in view of the decision of the Co-ordinate Bench in assessee's own case for AY 2018-19 (ITA No. 260/Mum/2025 dated 25.04.2025) the assessee has now raised the additional ground that the impugned expenses are to be allowed as a deduction subject to verification of the AO. In this regard we notice that the Co-ordinate Bench has considered a similar disallowance in assessee's own case (supra) and has remitted

the issue back for factual verification. The relevant observations of the co-ordinate bench in this regard are extracted as under:

“15. We have considered the submission of both sides and perused the material available on record. In the present case, under a Development Agreement dated 10.03.2003 entered into by the assessee with Bombay Slum Redevelopment Corporation Ltd. ("BSRCL"), the assessee constructed a building known as Bay View. The Occupancy Certificate in respect of Wings A and B of the building were received by the assessee on 09.01.2012. Under the terms of the Agreement dated 10.03.2003, 39 flats in the said building were allocated to BSRCL and 48 flats were allocated to the assessee. All the 48 flats were sold by the assessee, and the profit arising on the sale was offered for taxation in the assessment year 2013-14. However, the possession of flats allotted to BSRCL was not handed over to BSRCL due to a dispute between the assessee and BSRCL. As per the assessee, the said dispute was sent for arbitration, and an Arbitral Award was passed on 07.09.2018 by the Ld. Sole Arbitrator. In an appeal filed by the BSRCL against the aforesaid Arbitral Award, the Hon'ble Bombay High Court set aside the Arbitral Award. Aggrieved by the order passed by the Hon'ble Single Judge of the Hon'ble Bombay High Court, the assessee preferred an appeal before the Division Bench of the Hon'ble Bombay High Court, which was pending consideration. As there was no clear direction that BSRCL had to pay the assessee the maintenance expenditure amounting to Rs.1,02,73,260/- incurred by the assessee in respect of flats allotted to BSRCL, the assessee raised an additional plea before the AO for deduction of the expenditure, even though while filing the return of income, the said expenditure was suo motu disallowed by the assessee. As per the assessee, even though certain flats were allotted to BSRCL, the assessee incurred the maintenance expenditure in respect of those flats so that there is no damage to its reputation being a builder. We find that in the note attached to the computation of income, the assessee duly made a declaration regarding the aforesaid facts and also reserved the right to claim this amount as an expenditure at an appropriate time. The assessee further claimed that since the matter is sub judice, the amount, though debited to the Profit & Loss Account, is not claimed as a deduction out of abundant caution.

16. From the perusal of the orders passed by the lower authorities, we find that the AO, at the outset, dismissed the plea of the assessee by placing reliance upon the decision of the Hon'ble Supreme Court in Goetze India Ltd. (supra), without going into the merits of the claim. We further find that the learned CIT(A) has rendered certain findings and also discussed some findings of the AO, as noted in the foregoing paragraph. However, we do not find any such finding being rendered by the AO from the perusal of the assessment order.

Thus, it is evident that, as regards the claim of deduction of maintenance expenditure by the assessee, there is no factual examination by either of the lower authorities. Therefore, we deem it appropriate to restore this issue to the file of the Jurisdictional AO for de novo adjudication as per law after considering the material/evidence placed on record by the assessee. Needless to mention, no order shall be passed without affording reasonable and adequate opportunity of hearing to the assessee. With the above directions, the impugned order on this issue is set aside, and ground no.2 raised in assessee's appeal is allowed for statistical purposes.”

17. From the perusal of the facts pertaining to the year under consideration, we notice that the expenses claimed by the assessee for the year under consideration are identical which fact is supported by the note forming part of the computation for the year under consideration that reads as under:

“8. Under the Development Agreement dated 10th March, 2003 entered into by the assessee with M/s BSRCL, the assessee has constructed a building known as Bay View. Occupancy Certificate in respect of Wings A and B has been received on 9th January, 2012. Under the terms of the agreement dated 10th March, 2003, 39.17 flats in the said building have been allocated to BSRCL and 48.83 flats were allocated to the assessee. The assessee has sold 48 out of his 48.83 flats and the profits arising on sale have been offered for taxation and have been assessed to tax in assessment year 2013-14. The possession of the flats allocated to BSRCL has not been handed over to BSRCL. Disputes which arose between BSRCL and the assessee were arbitrated by Justice Shri Mohit Shah, Ex Chief Justice of the Bombay High Court. BSRCL challenged the said Award. The Hon'ble Bombay High Court set aside the said Award. Aggrieved, assessee preferred an appeal to the Division Bench of the Bombay High Court. As on the date of filing of the return of income, the said appeal has not come up for hearing.

Maintenance charges in respect of flats allocated to BSRCL, under the Development Agreement, aggregating to Rs. 92,32,199 have been incurred and paid by the assessee. This amount of Rs. 92,32,199 is debited to P & L Account However, since the matter is sub-judice, out of abundant caution this amount of Rs. 92,32,199 has not been claimed as a deduction. The assessee reserves the right to claim this amount at an appropriate time.”

18. In view of the above in our considered view the decision of the Co-ordinate Bench in assessee's own case in AY 2018-19 is applicable for the year under

consideration also. Accordingly, we remit the impugned issue back to the AO with similar direction. The additional ground raised by the assessee is allowed for statistical purposes.

ITA No. 1022/Mum/2022- Revenue's Appeal

Disallowance of expenses towards flat/building sold in the earlier year – Ground No.1 & 2

19. During the course of assessment the AO notice that the assessee has claimed certain expenses towards flats in project Versova which have been sold in earlier years. The assessee has submitted before the AO that though the flats in the project has been sold certain expenses towards pending work such as swimming pool, kids play area, etc. had to be carried out in the said projects and accordingly the expenses are claimed. The AO did not accept the submissions of the assessee and disallowed the expenses of Rs. 3,88,56,708/- stating that there is no matching revenue. On further appeal the CIT(A) deleted the disallowance by holding that

“Analysis and Findings:

The principle of matching expenses with revenue is a fundamental concept in accounting. It ensures that expenses are recorded in the same period as the revenue they help to generate. However, in businesses such as real estate development, certain expenses may occur after the revenue has been recognized, especially when projects involve long-term commitments to maintenance and legal compliance.

In this case, the expenses incurred by the Appellant, though related to projects for which revenue was recognized in earlier years, are still legitimate and necessary business expenses. These expenses are incurred to maintain the quality and reputation of the projects and to comply with any legal or regulatory requirements that continue after the sale.

Real estate development is a unique business where obligations often extend beyond the initial sale of flats or buildings. Developers may be required to address maintenance issues, comply with municipal regulations, or handle

litigation related to the sold properties. The expenses incurred by the Appellant, as described, are typical for this industry and arise from obligations that were foreseeable and unavoidable.

Denying these expenses would penalize the Appellant for the very nature of the real estate business, which would be contrary to the principles of fairness and sound business judgment.

The Appellant has consistently followed the project completion method of accounting, which has been accepted in previous assessments. It is a well-established method for recognizing revenue and expenses in real estate projects. Courts have consistently held that once an accounting method is accepted and consistently followed, it should not be disregarded arbitrarily.

The AO's action to disallow these expenses based solely on the absence of current-year revenue contradicts the established practice and the nature of the expenses incurred. The expenses were not capital in nature and were directly related to maintaining past projects.

In CIT v. Bilhari Investment Pvt. Ltd., the Supreme Court upheld the project completion method and recognized that all related expenses must be allowed to ensure accurate profit reporting over the life of the project. Similarly, in CIT v. V.S. Dempo & Co. Pvt. Ltd., the Bombay High Court allowed post-sale expenses as they were necessary to complete the business cycle of real estate projects.

These rulings support the Appellant's case that expenses incurred post-sale, if genuine and necessary, should be allowed as business expenses, even if there is no immediate matching revenue in the same assessment year.

In light of the above analysis, it is evident that the disallowance made by the AO is unjustified.

Therefore, this ground of appeal is allowed, and the disallowance of Rs. 3,88,56,708/- is reversed. The AO is directed to allow these expenses as deductions for the Assessment Year 2022-23."

20. The Id. DR argued that the revenue with respect to the flats have been offered to tax by the assessee in the earlier years and therefore there is no matching revenue towards expenses claimed as deduction during the year under consideration. The Id.

DR further argued that the nature of expenses being swimming pool, kids play area, etc. are capital in nature and cannot be claimed as deduction. The Id. DR also argued that the assessee has been offering income based on Project Completion Method and therefore any expense subsequently incurred cannot be claimed as deduction. It is also submitted by the Id. DR that the assessee submitted no evidence in support of the expenses claimed and also to substantiate that why the same was not claimed during the year when the flats were sold.

21. The Id. AR on the other hand submitted that the AO has not disputed the genuineness of the expenditure and has not questioned whether the expenses are actually incurred. Therefore, the Id. AR argued that the allowability cannot be denied merely for the reason that there is no matching revenue. The Id. AR further submitted that given the nature of business the assessee is engaged in, the assessee is liable to complete the amenities committed to the buyers which expenses would be incurred even after sale. The Id. AR brought to our attention that for AY 2018-19 in assessee's own case the CIT(A) has allowed the similar claim against the disallowance made by the AO and that the revenue has not preferred further appeal against the order of the CIT(A). Accordingly, the Id. AR submitted that revenue's stand on the issue has reached finality and that for the year under consideration a different view cannot be accepted.

22. We heard the parties and perused the material on record. The assessee during the year under consideration has claimed certain expenses which are disallowed by the AO on the ground that these expenses are incurred in connection with a project which was completed in earlier years and that the income arising on sale of flats were also offered to tax in earlier years. The CIT(A) allowed the claim by placing reliance on the decision of the Hon'ble Supreme Court in the case of Bilhari

Investments Pvt. Ltd. (supra) and the decision of the Hon'ble Bombay High Court in the case of V.S. Dempo & Co. Pvt. Ltd. It is an undisputed fact with respect to the impugned expenses that they are incurred for the purpose of business and that the nature of expenses is genuine. We further notice that the assessee has submitted all the details /documentary evidences substantiating the claim of the expense before the AO (page 327 to 486 of paper book) and that the AO has not recorded any negative findings regarding the genuineness of the expenses. The only reason for the AO to deny the deduction is that the expenses incurred do not have matching revenue in the year in which the expenses are claimed as deduction. From the perusal of records, we notice that these expenses are incurred to comply with the requirement of Maharashtra Ownership Flats Act and Real Estate Regulations & Development Act. We further notice that the assessee has carried out some common area/recreational area related repair work as per the commitment made to the flat owners as per the agreement. During the course of hearing the ld. AR brought to our attention that for AY 2018-19 the CIT(A) allowed a similar expenses which was disallowed by the AO and that the revenue has not gone on further appeal against the order of the CIT(A). For the purpose of claiming deduction under section 37(1) the pre-condition is that the expenses should not be capital or personal in nature and that the same should have been incurred wholly and exclusively for the purpose of business. Considering the undisputed fact that the impugned expenses are genuine expense incurred wholly and exclusively for the purpose of business we are of the view that the allowability has to be examined keeping in mind the unique nature of the business of the assessee and cannot be disallowed for the only reason that the income from the flats are offered in earlier years. In assessee's case the commercial expediency warrants incurring certain expenses towards completed projects as committed to the buyers of the flat. In view of this discussion and considering the unique nature of the business of the assessee, we are of the considered view that

there is no infirmity in the findings of the CIT(A) in allowing the impugned expenses. Accordingly, the ground raised by the revenue is dismissed.

23. In result, appeal of the assessee is allowed for statistical purposes and the appeal of the revenue is dismissed.

Order pronounced in the open court on 25-06-2025.

Sd/-
(ANIKESH BANERJEE)
Judicial Member

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

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

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai