आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' B'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

आयकर अपील सं**./ITA No. 295/AHD/2022**

निर्धारण वर्ष/Asstt. Year: 2018-2019

The D.C.I.T, Central Circle-2(1), Ahmedabad.	Vs.	M/s Claris Lifesciences Limited, Claris Corporate HQ, Near Parimal Rly. Crossing, Ellisbridge, Ahmedabad-380006. **PAN: AAACC6366Q**

(Applicant)		(Respondent)

Revenue by	:	Shri Sudhendu Das, CIT.D.R
Assessee by	:	Shri Tushar Hemani, Sr. Advocate with Shri Parimalsinh B. Parmar

सुनवाई की तारीख**/Date of Hearing : 10/01/2024**
घोषणा की तारीख **/Date of Pronouncement: 07/02/2024**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the revenue against the order of the Learned Commissioner of Income Tax (Appeals)-12, Ahmedabad, arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2018-19.

2. The solitary issue raised by the Revenue is that the learned CIT-A erred in allowing the set off of the long-term capital loss against the short-term capital gain arising from the sale of depreciable assets.

3. The facts in brief are that the assessee in the present case is a limited company and engaged in the business of trading pharmaceutical products. The assessee in the year under consideration has sold its shares held in the subsidiary company. The assessee on the sale of shares has incurred long-term capital loss.

3.1 Likewise, the assessee has also sold its plant and machinery being depreciable assets and has earned long-term capital gain of ₹ 8,75,97,511.00 but the same was deemed as short-term capital gain in pursuant to the provisions of section 50 of the Act.

3.2 The assessee subsequently has set off the long-term capital loss on the sale of shares in the return of income against the short-term capital gain on the sale of plant and machineries. However, the AO denied the same i.e. setting off the long-term capital loss on the sale of shares against the short-term capital gain on the sale of plants and machineries. As per the AO, the gain on the sale of plant and machinery is of short-term nature by virtue of the provisions of section 50 of the Act and therefore such gain cannot be set off against the long-term capital loss by virtue of the provisions of subsection (3) to section 70 of the Act. Thus, the AO denied the set off of the loss against the short-term capital gain and determined the income on the sale of plant and machinery accordingly.

4. Aggrieved assessee preferred an appeal to the learned CIT-A who allowed the long-term capital loss against the short-term capital gain by observing as under:

> *5. Ground of appeal 3 in against the AO after holding the capital gains arising out of sale of depreciable asset of Solar Power Plant as short term in nature, denied the set off to*

this income from the Long Term Capital Loss arising out of sale of shares in subsidiary company in view of section 74 of the Act. Aggrieved the appellant raised a separate ground on this issue which is discussed as under:

6.1 On this issue the appellant has relied upon several case laws and the same is analysed as below:

i. ACIT v. Manali Investments (ITAT, Mumbai) [139 TTJ 0411]

Ii. ACIT v. Parrys System Private Limited (Bombay High Court) [384 ITR 0264]

iii. CIT vs. Ace Builders Private Limited (Bombay High Court) [281 ITR 210]

iv. DCIT vs. Himalaya Machineries Private Limited (Gujarat High Court) [88 DTR 0175]

v. CIT vs. Polestar Industries (Gujarat High Court) [221 taxman 0423]

vi CIT vs. Assam Petroleum Industries Private Limited (Gauhati High Court) [262 ITR 0587]

vii Komac Investments & Finance (P.) Ltd. V. ITO (2011) [142 TTJ 0308 (Mumbai]

6.2 Reading of these set of cases show that case laws cited mostly follow the judgement of Bombay HC in the case CIT vs ACE Builders (P.) Ltd.) [2006] 281 ITR 210 (Bombay). In the said case vide its order dated 07/03/2005 it was held that Assessee is entitled to exemption under section 54E in respect of capital gains arising on transfer of a capital asset on which depreciation has been allowed.

Section 54E, read with section 50, of the Income-tax Act, 1961 - Capital gains - Not to be charged in certain cases - Assessment year 1992-93 - Whether legal fiction created in section 50 is to deem capital gain as short-term capital gain and not to deem an asset as short-term capital asset and, therefore, it cannot be said that section 50 converts long-term capital asset into short-term capital asset - Held, yes - Whether section 54E does not make any distinction between depreciable asset and non-depreciable asset and, therefore, exemption available to depreciable asset under section 54E cannot be denied by referring to fiction created under section 50 - Held, yes

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***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-sections (1) and (2) of section 50 is restricted only to the mode of computation of capital gains contained in sections 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 [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 19-7-1969. 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 and 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.*
27. *For all the aforesaid reasons, we concur with the decision of the Gauhati High Court in the case of Assam Petroleum Industries (P.) Ltd. (supra) and hold that the Tribunal was justified in allowing the benefit of exemption under section 54E of the I.T. Act to the assessee in respect of the capital gains arising on the transfer of a capital asset on which depreciation has been allowed.*

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6.2.4 The jurisdictional high court in the case CIT vs. Polestar Industries (Gujarat High Court) [221 taxman 0423] held that:

7. We also notice that while doing so it has concurred with the decision of the Gauhati High Court in the case of CIT v. Assam Petroleum Industries (P.) Ltd. [2003] 262 ITR 587. We are in agreement with both the decisions of the Gauhati High Court as well as the Bombay High Court in holding that capital gain arising of long-term capital asset, if invested in specified asset, the assessee is not to be charged capital gains and exemption provided under Section 54EC of the Act cannot be denied to the assessee only on account of the fact that deeming fiction is created under Section 50 of the Act. In other words, legal fiction created under Section 50 of the Act is though restricted to computation of capital gains, such deeming fiction cannot restrict application of Section 54EC which allows exemption of capital gains, if assessee makes investment in the specified assets. Thus, the assessee cannot be charged to capital gains when short term gains of long terms capital assets get invested in the areas specified under the law.

6.3 In fact the Hon'ble Apex Court has also confirmed that orders of CIT vs. ACE Builders (P) Ltd. CIT vs Polestar Industries and CIT vs. Assam Petroleum Industries (P) Ltd. In the case CIT Panaji vs. S Dempo Company Ltd. [2016] 74 taxmann.com 15(SC) by holding that the Assessee is entitiled to exemption under section 54E in respect of capital gains arising on transfer of a capital asset on which depreciation has been allowed. The head of the order is as under:

Section 54E, read with section 50 of the Income-tax Act, 1961 - Capital gains - Not to be charged in certain cases (Scope of) - Assessment year 1989-90 - Assessee sold its loading platform on which it earned some capital gains - Assessee claimed that it was entitled for exemption under section 54E on said capital gains - Assessing Officer rejected claim for exemption under section 54E on ground that assessee had claimed depreciation on this

asset and, therefore, provisions of section 50 were applicable - Commissioner (Appeals) upheld this view, however Tribunal allowed appeal of assessee holding that assessee shall be entitled for exemption under section 54E - High Court by impugned order dismissed appeal of revenue holding that section 50 creates a deeming fiction only for mode of computation of capital gains under sections 48 and 49 and not for other provisions - Further, it held that section 54E does not make any distinction between depreciable asset and non-depreciable asset and, therefore, exemption available to depreciable asset under section 54E cannot be denied by referring to fiction created under section 50 - Whether High Court was right in holding that exemption under section 54E could not be denied to assessee on account of fiction created in section 50- Held, yes [In favour of assessee]

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6.4 Thus it is clearly seen that issue has been decided in favour of the appellant plea by orders of three High Courts including the jurisdictional High Court and all the three orders are affirmed by the Hon'ble Supreme Court . respectfully, following the same, I also hold that the long-term capital loss arisen out of sale of investment in shares of subsidiary companies as claimed is eligible for set off with the deemed short term capital gains arisen out of sale of depreciable block of asset. Ground of appeal 3 is decided in favour of the appellant and allowed.

6. Being aggrieved by the order of the learned CIT-A, the Revenue is in appeal before us.

7. Both the ld. DR and the AR before us vehemently supported order of the authorities below as favourable to them.

8. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that the plant and machinery sold by the assessee in the year under consideration was acquired in the financial year 2013-14 on which the assessee has been claiming depreciation. Thus, the period of holding of the plant and machinery is more than 36 months and therefore the same are long-term capital assets by virtue of the provisions of section 2(29) r.w.s. 2(42A) of the Act. Since, the impugned plant and machinery was depreciable assets and therefore for the purpose of calculating the capital gain in pursuant to the provisions of section 48 and 49 of the Act on the sale of such depreciable assets, it was to be deemed as short-term capital gain in pursuance to the provisions of section 50 of the Act. The provisions of section 50 of the Act clearly specify that gain shall be deemed as short-term on the sale of depreciable assets irrespective of the period of holding provided under section

2(42A) of the Act. But for the purpose of set off of the long-term capital loss under the provisions of subsection (3) to section 70 of the Act, there is no such restriction that the deemed short-term capital gain on the sale depreciable assets cannot be set off against the long-term capital loss. As such, while setting off the long-term capital loss, the same (gain on depreciable assets) has to be tested based on the period of holding of the assets. Undeniably, the period of holding of the plant and machinery in dispute is more than 36 months, therefore the same has to be treated as long-term capital asset in pursuant to the provisions of section 2(42A) of the Act.

8.1 In similar facts and circumstances, the Hon'ble Courts have also decided such issues in favour of the assessee which have been elaborated in the preceding paragraph as evident from the order of ld. CIT-A. At the time of hearing, the ld. DR has not brought anything on record contrary to the findings of the ld. CIT-A which is based on judicial precedents. Accordingly, we are of the view that there is no infirmity in the order of the ld. CIT-A requiring our interference. Thus, we uphold the finding of the ld. CIT-A. Hence the appeal of the revenue is hereby dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the Court on 07/02/2024 at Ahmedabad.

Sd/-	**Sd/-**
(SIDDHARTHA NAUTIYAL)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 07/02/2024

Manish