आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ए" मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND RAJESH KUMAR,(AM)

आयकर अपील सं./I.T.A. No.65/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2012-13)

Income Tax Officer 24(1)(5), Room No.523, Piramal Chambers, Parel, Lalbaug, Mumbai-400012.	**बनाम**/ Vs.	M/s Engineering Equipment, -31, Shree Laxmi Industrial Estate, New Link Road, Andheri (W), Mumbai-400053
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAAFE2008C

अपीलार्थी ओर से / Appellant by:	Shri H M Wanare
प्रत्यर्थी की ओर से/Respondent by	None

सुनवाई की तारीख / Date of Hearing : 18.7.2016

घोषणा की तारीख /Date of Pronouncement :25.7.2016

आदेश / O R D E R

Per RAJESH KUMAR, Accountant Member:

This is an appeal filed by the revenue and is directed against the order of the Ld. CIT(A)-31, Mumbai dt.22.10.2014 pertaining to A.Y. 2012-13. Despite of service of notice, none appeared on behalf of the assessee, therefore, we proceed to decide the appeal ex-parte without presence of assessee on the basis of material available before us and after hearing the ld.DR.

2. Only issue raised in ground Nos.1 and 2 is in respect of wrong direction to AO to allow deduction u/s 54EC of the Income Tax Act, 1961 thereby directing the AO to allow deduction in respect of short capital gain arising on sale of depreciable assessee by the ld. CIT(A) by wrongly relying on the decision in the case of ITO V/s ACE Builders (281 ITR 210) without appreciating the facts in the present case, the facts are different and distinguishable than the case law cited above.

3. The facts in brief are that the assessee, a partnership firm, filed its return of income on 28.7.2012 declaring total income of Rs.22,45,585/-. The return was processed at Centralized Processing Centre vide order u/s 143(1) dated 19.11.2013 assessing total income at Rs.72,29,513/- and by rejecting the deduction claimed of Rs.49,83,928/- under section 54EC of the Act in respect of investment of Rs.50 lakhs in specified bonds of National High Authority of India Ltd. During the year the assessee sold one unit at Chennai which was held for more than 36 months. The assessee made a surplus of Rs.49,83,928/- and accordingly invested Rs.50 lakhs under the provisions of section 50EC in National High Authority of India Ltd bonds of on 20.1.2012 within a period of six months from the date of sale of the said property. The said property was held by the assessee for more than three years which is not disputed but was a depreciable asset. Aggrieved by the order of the AO, the assessee referred an appeal before the ld. CIT(A), who allowed the appeal of the assessee

by directing the AO to allow the deduction u/s 54EC of the Act to the tune of Rs.49,83,928/- by observing and holding as under:

> *"5.5. The claim of deduction u/s 54EC is allowed on transfer of a long term capital asset and it is immaterial whether the corresponding gain is a short term capital gain by virtue of deeming fiction under section 50 of the IT Act. It is material to note that as per the provisions of section 50, only the gains resulting from sale of assets on which depreciation is claimed, are deemed to be short term capital gains. The provision does not stipulate that the asset on the sale of which, the said gains arise will be considered as a 'short term capital asset' (regardless of the period of its holding by the assessee). This view is supported by the decision of jurisdictional High Court of Bombay in the case of ITO Vs ACE Builders reported in 281 ITR 210 and therefore is the law applicable on the issue at hand to the authorities functioning within the territorial jurisdiction under the Hon'ble Court. Thus the issue, which was debatable before the cited decision of the Jurisdictional High Court, now stands clarified and the law as it stands, is against the view taken by the Assessing Officer. In view of these facts, the adjustment by the AO made is beyond the scope of section u/s 143(1). The information in the e-return filed by the appellant nowhere indicates that the fixed asset sold was a short-term asset and therefore the return did not contain data, which could have enabled the Assessing Officer to make adjustment appealed against from the details available on the face of the record. Therefore, on appreciation of the facts of the instant case and the position of law as discussed above, the adjustment made u/s 143(1) vide order dated cannot be upheld. Accordingly, the ground raised by the appellant is allowed."*

4. We have carefully perused the record available before us and heard the ld.DR. we find from the facts before us that the assessee was denied deduction u/s 54EC and now the issue before us is whether the adjustment made during processing of income tax return disallowing the appellant's claim was within the ambit of section 143(1) or not. The scope of adjustment u/s 143(1)(a) has been incorporated in para 2 of the appeal order. We are in agreement with the conclusion drawn by the First

Appellate Authority that as per the provisions of section 143(1)(a)(ii)), the processing should take care of correcting an incorrect claim if such claim is apparent from any information in the return. It, therefore, follows that in the present scenario, if an appellant has filed a return with obvious errors caused by mismatch of the entries in different columns then such errors should not become a reason for absurd adjustment u/s 143(1), particularly when the appellant was given no opportunity to correct such an error since the provisions of section 139(9) are no more valid and the appellant did not get any opportunity to remove defect in the return filed. The ld. CIT(A) further observed that the direction u/s 54EC is allowed on the gain should resulting from transfer of Long Term capital asset and it is immaterial whether the corresponding gain is a short term capital gain by virtue of deeming fiction under section 50 of the Act. As per the provisions of section 50 of the Act only gains resulted from sale of assets on which the depreciation is claimed, is deemed to be short term capital gains and the said provision does not stipulate that the asset on the sale of which, the said gains arise will be considered as a "short term capital assets " regardless of the period of its holding by the assessee. The finding of the ld. CIT(A) of the facts of the case, are fully supported by the decision rendered in the case of ACE Builders (supra) in which the Hon'ble Jurisdictional High Court has held as under :

> *"The assessee fulfilled all the conditions set out in section 54E to avail exemption, but the exemption was sought to be denied in view of fiction created under section 50. The assessee could not be*

denied exemption under section 54E, because, firstly, there is nothing in the section to suggest that the fiction created in section 50 is not only restricted to sections 48 and 49 but also applies to other provisions. On the contrary, section 50 makes it explicitly clear that the deemed fiction created in sub-sections (1) and (2) of section 50 is restricted only to the mode of computation of capital gains contained in sections 48 and 49 and cannot be extended beyond that. Secondly, it is well established in law that a fiction created by the Legislature has to be confined to the purpose for which it is created. Thirdly, section 54E does not make any distinction between depreciable asset and non-depreciable asset and, therefore, the exemption available to the depreciable asset under section 54E cannot be denied by referring to the fiction created under section 50. Section 54E specifically provides that where capital gain arising on transfer of a long-term capital asset is invested or deposited (whole or any part of the net consideration) in the specified assets, the assessee shall not be charged to capital gains. Therefore, the exemption under section 54E could not be denied to the assessee on account of the fiction created in section 50. [Paras 24 and 25]

It is true that section 50 is enacted with the object of denying multiple benefits to the owners of depreciable assets. However, that restriction is limited to the computation of capital gains and not to the exemption provisions. In other words, where depreciation has been availed on long-term capital asset, then the capital gain has to be computed in the manner prescribed under section 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. To put it simply, the benefit of section 54E will be available to the assessee irrespective of the fact that the computation of capital gains is done either under sections 48 and 49 or under section 50. The contention of the revenue that by amendment to section 50, the long-term capital asset had been converted into to short-term capital asset was also without any merit. The legal fiction created by the statute is to deem the capital gain as short-term capital gain and not to deem the asset as short-term capital asset. Therefore, it cannot be said that section 50 converts long-term capital asset into a short-term capital asset. [Para 26]

Therefore, the Tribunal was justified in allowing the benefit of exemption under section 54E to the assessee in respect of the capital gains arising on the transfer of a capital asset on which depreciation had been allowed. [Para 27]

Accordingly, the appeal failed."

The close perusal of the above reveals that the case of the assessee is squarely covered by the ratio laid down by the Jurisdictional High Court in the case of ACE Builder (supra) and therefore, respectfully following the judicial view in the above decision we dismiss the appeal of the Revenue by upholding the order of ld. CIT(A).

5. In the result, the appeal of the revenue stands dismissed.

The above order was pronounced in the open court on 25th July, 2016.

घोषणा खुले न्यायालय में दिनांकः 25th July, 2016 को की गई ।

Sd sd

(JOGINDER SINGH) **(RAJESH KUMAR)**
Judicial Member **Accountant Member**

मुंबई Mumbai: 2th July, 2016.
व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai